

E. T. O.
BOARD
OF
REVIEW

INDEX-DIGEST
AND
SUPPLEMENT

VOLS. 1-34

KP
7665
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RTO
India

DIGEST OF OPINIONS
of the
**BRANCH OFFICE OF THE JUDGE
ADVOCATE GENERAL**
with the
EUROPEAN THEATER OF OPERATIONS
U. S. ARMY

Section numbers correspond to those of
Dig. Op. JAG, 1912-40 and Bull. JAG

VOLUME II

Issued by
Branch Office of the Judge Advocate General
with the
European Theater of Operations, U. S. Army
APO 887

438 (AW 80) Dealing in Captured or Abandoned Property:

Accused officer was found guilty of the following violations: (a) AW 96: (i) False testimony before a general court-martia; (ii) false statement under oath to Inspector General; and (b) AW 80: wrongfully disposing of described captured money by sending it to his wife. HELD: LEGALLY SUFFICIENT. (1) Testimony at Former Trial: "Although the court reporter testified that the testimony of accused at the former trial was under oath, there is no direct evidence that the oath was administered by a person having authority to do so. It may be presumed, however, in the absence of a showing to the contrary, that the requirements of AW 19 were obeyed." (2) Former Record in Toto: Assuming that the defense counsel sufficiently objected to a partial reading of the former record of trial, "no error resulted from the overruling of the objection. When the entire record is available to both prosecution and defense, as appears here, the better rule seems to be that it is a matter for the discretion of the court whether only the relevant, material portions * * * should be introduced, leaving it to the other side to use the remainder * * *." No substantial injury resulted. (3) Captured Enemy Property—AW 80: These allegations substantially followed the form in MCM, 1928. The AW 80 offense was sufficiently alleged and proved. "Although this article appeared in the military code for the first time in the Revision of 1916, it was based upon a Civil War statute * * *. Like AW 79, this article is in accordance with the principle of the law of modern war and of notions that enemy property captured in war becomes the property of the government or power by whose forces it is taken, and not the property of the individuals who take it. Private persons may not capture enemy property for their own benefit. * * * The provisions of AW 80 are not discussed in the MCM, 1928, but in the 1921 edition a useful discussion is found. Therein it is pointed out that this article is broader than AW 79 in that AW 80 protects abandoned as well as captured property and private as well as public captured or abandoned property." Regarding captured or abandoned property, it states: "This portion of the article addresses itself to several specific acts of wrongful dealings and looks especially to cases where, instead of appropriating the property to his own use in kind, the accused in any other way deals with it to advantage. The article prohibits receipt as well as disposition of captured or abandoned property by barter, gift, pledge, lease or loan. It lies against the destruction or abandonment of such property if any of these acts are done in the receipt or expectation of profit, benefit, or advantage to the actor or to any other person directly or indirectly connected with himself. The expectation of profit need not be founded on contract; it is enough if the prohibited act be done for the purpose, or in the hope, of benefit or advantage, pecuniary or otherwise" (MCM, 1921, par. 430, p. 387). The elements of proof are stated as follows:

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"(a) That the accused has disposed of, dealt in, received, etc., certain public or private captured or abandoned property. (b) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself." (4) Former Jeopardy: In the earlier trial, this same accused was charged with an offense relating to 41,815 francs. "The offenses charged in the present case are obviously separate and distinct offenses" (17,000 francs and 13,750 francs, respectively. There was no double jeopardy. (CM ETO 9573 Konick 1945)

(1) Proof

441 (AW 83) Willful or Negligent Loss, Damage, or Wrongful Disposition
of Military Property:

(1) Proof:

Cross References: 451(50) 2926 Norman (Govt vehicle damaged by
striking stone wall)
454(105) 5026 Kirchner (Unlocked jeep; stolen on
a Paris street)
451(9) 7000 Skinner (Park unlighted vehicle on
tram tracks; value)
454(18a) 5032 Brown (Wheel and tire; value; not
alleged to be property of
the US--hence only lesser
offense in violation of AW 84)
452(21) 9421 Steele (Charge under AW 83; AW 94
guilt proved)

Not Digested:

1953 Lewis (wr. suffer vehicle to be damaged)
8457 Porter (cause jeep to be damaged)

(1) Proof: Two accused, a driver and his companion, were found guilty of wrongfully using and damaging an army ambulance, in violation of AW 83. HELD: LEGALLY SUFFICIENT. AW 83 provides in part: "Any person subject to military law who * * * through neglect, suffers to be * * * damaged, * * * any military property belonging to the United States shall * * * suffer such punishment as a court-martial may direct." Neglect is defined as follows: "To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty or act." (Bouvier's Law Dictionary, Unabridged, Rawle's Third Revision, Vol.2, p.2312.) In the instant case, both accused were properly found to be guilty. (CM ETO 393 Caton and Fikes 1944) (See sec.451(50), ETO 393, herein, for further digest of this case.)

AW 83

MILITARY PROPERTY--WILLFUL OR NEGLIGENT LOSS, DAMAGE
OR WRONGFUL DISPOSITION

431(1)

WASTE OR UNLAWFUL DISPOSITION OF MILITARY
PROPERTY ISSUED TO SOLDIERS

AW 84

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442 (AW 84) Waste or Unlawful Disposition of Military Property
Issued to Soldiers

7269 Van Houten (Not digested--dispose of two carbines)

Cross References: 399 8713 Porter & Carter (Pen. Conf.--govt
property)
399 8714 Rolley (Pen. Conf.--wrongfully dispose
govt property)
454(18a) 5032 Brown (lesser to AW 83, where charged
AW 83 offense did not contain
allegation that property was
that of the U.S.)
454(18a) 9987 Pipes (lesser to AW 96 black market)

AW 84

WASTE OR UNLAWFUL DISPOSITION OF MILITARY
PROPERTY ISSUED TO SOLDIERS

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(1) Proof

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443 (AW 85) Drunk on Duty:Not Digested:

3302 Pyle Jr. 2d Lt
 3304 DeMott, 2d Lt
 3714 Whalen, Capt
 3725 Cox, Lt
 4619 Traub, Lt
 4808 Jackson (official courier officer)
 5767 Palmer (convoy officer)
 970 McCartney

Cross References: 433(2) 3301 Stohlmann
 453(10) 3966 Buck
 453(1) 4184 Heil
 453(18) 7246 Walker

(1) Proof: Accused, an assistant division finance officer, had gone to another station for the purpose of learning certain new financial procedure. He was found guilty of being drunk while on duty at that station as assistant division finance officer, in violation of AW 85. HELD: LEGALLY SUFFICIENT. "The issue of drunkenness was one of fact for the sole determination of the court * * *." Accused was on a duty status at the time of his offense. (MCM, 1928, par.145, p.160) (CM ETO 1065 Stratton 1943)

Accused officer was found guilty of being drunk while on duty as battalion communications officer, in violation of AW 85. HELD: LEGALLY SUFFICIENT. "The issue of drunkenness was one of fact for the sole determination of the court." It was undisputed that accused was on a duty status when the offense was committed. (MCM, 1928, par.145, pp.159,160) (CM ETO 1267 Bailes 1944)

During the morning of 15 July, accused transportation officer was on duty at a United Kingdom dock. Although assigned to assist a captain in unloading berths one and two, he actually worked under the direction of a major. The work of unloading continued until 9:00 p.m. in the evening. Late that morning, after consultation with another major who had arrived at the dock, the major who was accused's superior informed him that he was released from his work at noon, but that he should report to the second major "after 1 o'clock". Accused reported to the second major at about 3 p.m. in a drunken condition. He was found guilty of being drunk on duty, in violation of AW 85. HELD: LEGALLY SUFFICIENT. It would appear that accused became drunk between noon and 3 p.m. His release from work at noon was not such action by his superior officer as to transfer him to an "off duty" status. Rather, "it was only an

443(1)(1) Proof

administrative direction whereby he was transferred from one work detail, viz: unloading operations at the pier to some other type or kind of work within the section which was to be designated and defined by" the second major. Accused was in an "on duty" status during the interval. (CM ETO 3577 Teufel 1944)

Accused officer, an assistant surgeon in charge of a rear element of a unit which was engaged in combat with the enemy, was found guilty of being drunk while on duty in violation of AW 85. He was sentenced to dismissal and five years confinement. HELD: LEGALLY SUFFICIENT. The evidence established that accused was engaged in the performance of his military duties at an aid station as an assistant surgeon and while thus engaged, he became intoxicated to such a degree as to impair the rational and full exercise of his mental and physical faculties. "There is, therefore, adequate proof of the two elements of the offense, namely, that accused was on a certain duty, and that he was found drunk while on duty. * * * The court could take judicial notice that the offense was committed in time of war. While it was not necessary in this AW 85 charge to allege that the offense was committed while the unit was engaged in combat, this constituted an element of aggravation. (CM ETO 4339 Kizinski 1944)

Accused officer was found guilty of a violation of AW 85, in that he was found drunk while on duty as pilot of an aircraft. HELD: LEGALLY SUFFICIENT. "Accused, on the evidence, was certainly not grossly drunk, perhaps at the time he was 'found' he was not even very drunk. But it is clear that he was not in that full possession of his faculties which is required of every officer on duty, particularly of a pilot who is responsible for the lives of the crew aboard and the monetary investment involved in an airplane. As to the question of whether accused was on duty, an essential element in this particular offense, there was no direct evidence. But here the accused himself, at the time he was found in this condition, was attempting to obtain clearance and to take off in an Army plane for his home station. It is impossible to conceive an occasion when an Army Air Force pilot could fly an Army plane and not be on a duty status at least with respect to the safety and proper handling of the plane. In accused's drunken condition, and his attempt to take off in an Army plane while in such condition, is found an inherent violation of that particular duty status. It was incumbent on the prosecution to show no more." (CM ETO 5010 Glover 1944)

Accused officer was held to be guilty of a violation of AW 85, in that he was found drunk while on duty as Liason Officer at a Headquarters. HELD: LEGALLY SUFFICIENT. "Under AW 85, it is necessary that accused be found drunk while actually on duty, meaning, of course, military duty, but every duty which an officer or soldier is legally required, by a superior military

(1) Proof

443(1)

authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty. 'Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article' (MCM, 1928, par.145, pp.159-160). There is substantial evidence that accused, while on duty as liaison officer * * * was sufficiently intoxicated to impair sensibly his physical and mental faculties." (CM ETO 5453 Day 1944)

Accused officer was found guilty of two specifications charging him with being drunk on duty, in violation of AW 85. HELD: LEGALLY SUFFICIENT. (1) Drunkenness; Proof: "On the direct examination of the squadron executive officer, witness was asked to describe the degree of accused's drunkenness with respect to accused's ability to perform his duties as commanding officer." "The testimony called for by the questions and contained in the answers thereto related primarily to the degree of accused's drunkenness. Certainly this was a legitimate field of inquiry, as the prosecution had the burden of proving that accused's intoxication was 'sufficient sensibly to impair the rational and full exercise of the mental and physical faculties' at the times in question * * *. If accused were incapable of properly performing his duties as squadron commander, such fact certainly was probative of impairment of 'the rational and full exercise of his mental and physical faculties'. The reasons which render admissible opinion testimony of nonexpert witnesses as to the factum of drunkenness apply with equal force to their testimony as to the degree of drunkenness. In each case the witness 'gives a composite statement or shorthand rendering of collective facts', which facts he cannot adequately reproduce, describe and detail to the jury or court-martial * * *. It does not appear improper for the prosecution to direct the witnesses' attention specifically to the question of accused's ability to perform his duties as commanding officer as one means of delimiting their testimony as to the degree of drunkenness." (MCM, 1928, par.145, p.160; par.112b, p.111). (2) Questions put to one witness, drawing the "conclusion by this witness that the men were disgusted", were proper. This did not call for hearsay. (3) The mental capacity of accused was sufficiently shown. (4) The evidence supported the findings of guilt. (5) A letter attached to the record "represents that accused, due to circumstances beyond his control, was afforded insufficient opportunity for proper preparation of his defense" in a number of respects: (a) It was stated that defense counsel had no civilian law experience. "Whatever legitimate objections accused might have had * * * were waived by his statement at the trial that he desired to be defended by 'Regularly appointed defense counsel'." The record fails to show that this counsel was not alert. (b) Although it was further stated that accused was informed that specially requested counsel for him were declared to be unavailable the day before trial, and that he had inadequate time to prepare. The facts show that the regularly appointed defense counsel contacted accused five days before trial, "and the fact that he chose not to avail himself of the opportunity cannot help him." (c) It was stated that the investigating officer completed his

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investigation without contacting certain witnesses named by accused. "Such objection is without merit in view of the established rule that the investigation required by AW 70 is an administrative proceeding intended primarily for the benefit of the appointing and referring authority. Irregularities therein neither affect the jurisdiction of the court nor do they ordinarily prejudice the rights of accused * * *." (CM ETO 6684 Murtaugh 1945)

Accused officer was found guilty of being found drunk while on duty about 24 December, in violation of AW 55. HELD: LEGALLY SUFFICIENT. (1) Evidence: Accused's battalion had been engaged in combat with the enemy from 17 December 1944; had withdrawn on 23 December to F**, Belgium, to reorganize and re-equip. "The Board of Review will take judicial notice of the fact that in this territory at this time the Germans were engaged in their mid-December offensive. Accused was commander of Company **. He had not been relieved from this duty and was acting in this capacity on Christmas Eve at the time he became intoxicated." The fact, that he had permission "to attend midnight mass immediately prior to the period when his intoxication became manifest, did not relieve him from his duty status." (2) Intoxication: Whether accused "was naturally hypersensitive to alcohol or whether his extreme intoxication was induced by battle fatigue were matters wholly outside of the scope of inquiry by the court on the issue of accused's drunkenness." (CM ETO 9423 Carr 1945)

(2) Maximum Punishment

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(2) Maximum Punishment:

"A sentence of dismissal is mandatory upon the conviction of an officer of being drunk on duty in time of war in violation of AW 85."
(CM ETO 1065 Stratton 1943)

AW 85 ...

DRUNK ON DUTY

443(2)

(2) Maximum Punishment

(1) Sleeping on Post444(1)444 (AW 86) Misbehavior of Sentinel:

Cross References: 385 4986 Rubino (AW 28-58 case; comment on lax guard)

Sleeping on Post(1) In General:Not Digested3634 Pritchard3984 Davis

Cross References: 444(3) 4443 Dick (Alternative pleading; sleep on:
post; leave post)
399 980 Coughlin (Pen. conf.; sleep on post)

Accused was charged with a violation of AW 86 in that, being on guard and posted as a sentinel, he was found sleeping on his post. The court found him to be guilty. The reviewing authority approved only so much of the findings "as involved finding /him/ * * * guilty of being found asleep while on duty as a sentinel in violation of AW 96 * * *." HELD: LEGALLY INSUFFICIENT TO SUPPORT THE FINDINGS AS MODIFIED. The Reviewing Authority's modification resulted because of testimony that, when accused was found asleep by the officer of the day, he was 20 to 25 yards off his post (an airplane guard). "Accused's offense was leaving his post and he should have been so charged. Having abandoned his post, he was no longer on duty as a sentinel. The offense attempted to be carved out and approved was not a lesser included offense. Even if the precedent CM 236351, Ambutivicz, is sound law, it is not analogous to the instant case, for it is an offense for any member of the guard to become drunk, but it is not for a sentinel to sleep except when he is on post or other specific duty. (See Dig. Op. JAG, 1912-40, p.308-9)." (CM FTO 5248 Kay 1945)

Accused was found guilty of sleeping on his post, in violation of AW 86. HELD: LEGALLY SUFFICIENT. The word "found," which appeared before the word "sleeping" in the specification as drawn, was excepted by the court. There was no evidence that anyone actually saw the accused asleep on his post. However, the following circumstances were shown: accused failed to challenge the officer of the day, and failed to respond to forceful pounding on a door, although the limits of the post were sufficiently narrow to enable an alert sentinel to hear such activity. When the officer of the day first observed accused, the latter was just arising from a prone position, his eyes were red and frowsy, and he was unable to speak coherently. Accused's

444(1)(1) Sleeping on Post

rifle was standing against a wall. Accused admitted that he had been sleeping prior to the time the officer of the day inspected the post. The circumstances were sufficiently strong to justify approval of the finding that accused was sleeping on his post. The word "found" was excepted from the specification because there was no proof that anyone actually saw, or found, accused sleeping. Although the expression "found sleeping on his post" is used in both AW 86 and in the form of specification thereunder provided in Appendix 4 of the Manual for Courts-Martial, it is plain that the offense denounced is the act of sleeping on post rather than apprehension in the act. The exception of the word "found" from the specification is therefore immaterial. (CM ETO 5531 Davis 1945)

(3) Leaving Post Before Being Relieved444(3)(3) Leaving Post Before Being Relieved:Cross References: 444(1) 5848 Kay

(3) Proof: Accused was found guilty of, having been on guard and posted as sentinel, he is charged with leaving his post before he was regularly relieved, in violation of AW 86. HELD: LEGALLY SUFFICIENT. "Although the manner in which accused assumed guard duty was somewhat informal and not in accordance with the usual United States Army practice, nevertheless the evidence shows that it entirely conformed with the British regulations by virtue of which the guard system for that post was admittedly maintained and operated. He violated his duty by leaving his post before he was regularly relieved." (MCM, 1928, par.146, p.160) (CM ETO 1161 Waters 1944)

Accused member of a permanent guard was to go on guard duty at 6 p.m. He reported to the sergeant of the guard at 5:50 p.m., telling him that he was going out to his post. He left the post at 7:15 p.m. He was found guilty of leaving his post before being regularly relieved, in violation of AW 86. HELD: LEGALLY SUFFICIENT. "The fact that the sentinel was not posted in the regular way is not a defense." (MCM, 1928, par.146a, p.160) Although there was no direct proof that accused actually arrived at his post, circumstantial evidence in this regard was sufficient. The sergeant testified that accused had told him at 5:50 p.m. that he was going to his post. (MCM, 1928, par.112, p.111) "The evidence adduced by the prosecution was clearly sufficient to shift the burden of explanation to the accused. * * * He made no attempt to discharge it." (CM ETO 2131 Maguire 1944)

Accused was found guilty of a violation of AW 86 in that, being on guard and posted as a sentinel, he did leave his post before he was regularly relieved. HELD: LEGALLY SUFFICIENT. Accused was absent from his post between 2:30 and 6 a.m. He testified that, awakened prior to going on guard, he had gone back to sleep and had never assumed the post; "that he did not start off with the guard from the guardhouse and that he was never actually posted as a sentinel. An element of the offense charged is 'That the accused was posted as a sentinel, as alleged' (MCM, 1928, par.146c, p.161). The prosecution offered * * * direct testimony of the corporal of the guard, of the driver of the truck which carried out the relief guard and picked up those relieved, and also of the sentry on the post who was on the earlier tour and who was to be relieved by accused, that accused was taken to his post * * *, that he dismounted from the truck, received from the sentry being relieved the latter's ammunition clip, and that the sentry thus relieved got on the truck and rode back. There was substantial evidence that accused was actually posted." The court's finding of his guilt will not be disturbed. (CM ETO 3664 Reason 1944)

444(3)(3) Leaving Post Before Being Relieved

Accused was found guilty of two specifications in violation of AW 86. The first alleged that, being on guard and posted as a sentinel, he did leave his post before he was regularly relieved. The second alleged that, being on guard and posted as a sentinel, he was found sleeping under a haystack about thirty feet from his post on the same occasion. HELD: LEGALLY INSUFFICIENT ONLY TO SUPPORT THE FINDING OF GUILT ON THE SECOND SPECIFICATION. (1) First Specification: "The fact that the sentinel was not posted in the regular way is not a defense * * *. The evidence without contradiction shows that at 0200 * * * accused assumed sentry duty at his designated post and that at some time before 0300 he left his post before he was regularly relieved. His guilt, as alleged, was clearly shown by the evidence." (ETO 2131 Maguire).

(2) Second Specification--Sleeping on Post: "Once a sentinel leaves his post before he is regularly relieved, the offense is complete and it is immaterial whether he then sleeps in his tent or barracks, or even under a haystack, as in this instance. Unless accused was on his post, it was improper to charge him with 'sleeping under a haystack, about thirty (30) feet from his post' under AW 86, since such conduct is not prohibited by any language in the article. Neither could accused properly be charged with or found guilty of such conduct in violation of AW 96" (MCM, 1928, sec.27, p.17), because "the conduct alleged was not wrongful in itself, but merely followed the offense of leaving his post before he was regularly relieved, already charged under Specification 1." "The pleader was evidently in doubt as to whether accused, on the facts, should be charged with leaving his post or with being found sleeping on his post and thus in effect, pleaded the offenses in the alternative, anticipating that one of the Specifications could be supported by the evidence." The record insufficiently supports the finding of guilt on the second specification. (3) Time of Trial: Although trial was three days after service of the charges, accused stated that he had no objection. It does not appear that any of his substantial rights were injured. (4) Court Membership: The record fails to show the presence or absence of either the assistant trial judge advocate or the assistant defense counsel. "Their absence, however, 'in no wise affected the validity of the proceedings or rights of the accused'". (CM ETO 4443 Dick 1944)

Accused was found guilty of a violation of AW 86 in that he, "being on guard and posted as a sentinel * * * did leave his post before he was regularly relieved". HELD: LEGALLY SUFFICIENT ONLY TO SUPPORT A FINDING OF GUILT IN VIOLATION OF AW 96, TO WIT: THAT ACCUSED, BEING ON GUARD AT THE TIME AND PLACE ALLEGED, DID LEAVE HIS POST BEFORE HE WAS REGULARLY RELIEVED.

(1) Definition of Sentinel: In the light of the phraseology of AW 86 and quoted authorities, it is manifest that "a sentinel is a soldier of the guard who is actively on watch for danger and thus in a position to give immediate notice thereof. * * * Official permission to a soldier on guard duty to sleep is inconsistent with his status as a sentinel. One of his paramount duties is to remain awake. The essence of his status is alertness."

(2) Evidence: The evidence shows that accused and two other soldiers "were initially on guard and posted as members of an outpost * * *. The evidence, furthermore, shows without contradiction that sometime before 2100 hours on the evening in question * * *, accused as well as the other two guards,

(3) Leaving Post Before Being Relieved

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left the post and its vicinity before being properly relieved. The record affords no clue, however, as to whether accused at the time of his departure was actively on watch, leaving the other two in reserve, so to speak, in accordance with the usual procedure, or was himself in reserve, subject to being summoned by the sentinel who was then actively on watch. The Board of Review cannot assume, in the absence of evidence to that effect, that accused was the guard actively on watch at the time of his departure, rather than in the reserve position. The vital question, therefore, arises whether the evidence warranted the court in finding that at the time accused left the area he was posted as a sentinel, within the meaning of "AW 86, "Unless and until accused was on his tour of active watch and not in the reserve position * * *, he was not posted as a sentinel. The record does not indicate that he was posted as a sentinel when the sergeant of the guard posted him and the other two soldiers at the outpost. The determination of who would assume the active, watchful duties of sentinel at first and in turn thereafter and of the duration of the respective tours of active watch duty was specifically left to the three. The duty which characterized accused's status while in reserve was to be available if needed to assist the sentinel; this was not the duty of a sentinel. Until accused's turn to watch came, he was not posted as a sentinel within the meaning of AW 86 and hence there was a failure of proof as to so much of the Specification as alleged that he was posted as a sentinel. (Note that, "had the evidence shown that the three guards were simultaneously posted as sentinels on the same post, each being under the continuous duty of remaining alert and on watch, it would support a conviction of accused under AW 86." (3) AW 96: However, accused was still guilty of an offense in violation of AW 96. It was "established that 'being on guard' and posted as a member of an outpost, he did 'leave his post before he was regularly relieved'. " This was "a disorder and neglect to the prejudice of good order and military discipline. * * * When another offense is necessarily included in the phraseology of a specification under a certain article of war, the record of trial may properly be held legally sufficient to support so much of the findings of guilty as involves guilt of the other offense." The pleading of a wrong article of war and specification "does not preclude a holding that the record proves accused guilty of an offense in violation of another article of war (CM ETO 2005, Wilkins and Williams ***). It is elementary that the designation of a wrong article of war is not ordinarily material provided the offense alleged and proved is one denounced by the articles of war and of which courts-martial have jurisdiction." (Discuss relation of this offense to AW 75.)

(4) Time of Trial: No prejudice resulted because trial herein was held the day charges were served. In open court, it was stated that accused had sufficient time to prepare his defense. (5) Maximum Punishment: "The offense of leaving post or outpost by a guard, not posted as a sentinel, before being properly relieved, is not included in the Table of Maximum Punishments * * *. The most closely related offense included therein is absence without leave from guard, in violation of AW 61. However, the limitations upon punishments for absence without leave from (among other places) guard in violation of that article are not now operative * * *. The only limitation on the maximum permissible punishment is that the death penalty may not be imposed inasmuch as the offense involves a violation of the 96th Article of War (AW 43 * * *)." (CM ETO 5255 Duncan 1944).

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Accused was found guilty of a violation of AW 86 in that, being on guard and posted as a sentinel at a road block in the vicinity of * * *, Luxembourg, on or about 29 September 1944, he did leave his post before he was regularly relieved. HELD: LEGALLY SUFFICIENT ONLY FOR LESSER OFFENSE IN VIOLATION OF AW 96. "Competent uncontradicted evidence shows that accused and 4 other soldiers, comprising a tank crew, were detailed as members of an outpost guard on the date and at the place alleged. At approximately 0930 hours 29 September 1944 accused left his place of duty before he was regularly relieved and remained away all that day and until about 0930 hours, 30 September 1944. At the time of his absence the record shows that accused was not on post or actively on watch but was a member of the tank crew on duty as a road block and restricted to an area between his tank and the neighboring tank about 150 yards distant. * * *. A sentinel is a soldier of the guard who is actively on watch and thus in a position to give immediate notice of any imminent danger. Unless and until accused was on his tour of duty of active watch in contrast with his position in reserve status as above indicated, he was not posted as a sentinel within the meaning of AW 86 * * *. The status of accused was considerably different from that of a member of an interior guard inasmuch as the tank crew herein was in a front line position ready for combat, if the enemy appeared. While on the outpost the men made a determination among themselves as to who would alternately assume the duty of the active watch. Accused testified that he 'took the first guard' and this evidence is not contradicted. His status was thus in reserve and to be available to assist the members of his crew, if needed. Although accused was not on active watch duty he had no permission or authority to leave the guard area. Such conduct on his part, under the circumstances of the case, manifestly constitutes a violation of AW 96, and is a serious military offense - a disorder and neglect to the prejudice of good order and military discipline * * *. The designation of a wrong AW is not ordinarily material in military law provided the offense alleged and proved is one denounced by the AWs and of which courts-martial have jurisdiction."

(2) Punishment: "The limitations upon punishments for absence without leave from guard (among other places) in violation of that article are not now operative * * *. The only limitation on the maximum permissible punishment is that the death penalty may not be imposed inasmuch as the offense involves a violation of" AW 96. (3) Pre-trial Practice: In view of the full circumstances herein (detailed) and the failure of accused to object, no prejudice resulted from trial one day after service of the charges. (CM PTO 5466 Strickland 1945)

Accused was found guilty of a violation of AW 86 in that, being on guard and posted as a sentinel at * * *, Germany, he left his post before he was regularly relieved. HELD: LEGALLY SUFFICIENT. (1) Evidence: Accused was clearly posted as a sentinel at the outpost within the meaning of "AW 86, along with the other soldier, "and the evidence sufficiently shows that both were under the continuous duty of remaining alert and on watch. * * *. The matters contained in the unsworn statement of accused to the effect that his

(3) Leaving Post Before Being Relieved444(3)

company commander had given him an alternative order, to go back to the outpost or be tried by a general court-martial, were irrelevant under the present charges, for the offense of leaving post had been completed prior to the giving of such order. (2) Place of Offense: "Although there is no direct evidence that the offense occurred at * * *, Germany, as alleged * * *, the geographical location is not of the essence of this offense, and such failure of proof did not" amount to prejudice. (CM ETO 9144 Warren 1945)

444(3)

(4) Finding of Offense Not Included444(4-5)(5) Drunk on Post(4) Finding of Offense Not Included:Cross References: 444(1) 5848 Kay(5) Drunk on Post:

Accused was found guilty of a violation of AW 86 in that, being on guard and posted as a sentinel, he was found drunk upon his post. HELD: LEGALLY SUFFICIENT. (1) Evidence: "It was clearly shown * * * that accused was posted at 1800 hours on 6 December 1944 on post number 5 where his tour of duty was to continue until 2200 hours, that at 2200 hours a first search of this post failed to disclose his presence and his successor on guard was then posted. At 2330 hours he was at length found in a drunken stupor in a truck on the post. Fifteen minutes later he was still in an unconscious condition. In view of the advanced degree of his drunkenness, it is a reasonable inference that he became drunk before his tour of duty ended and that it was for this reason that he was not performing his duties at 2200 hours. That he was found in an unusual place on his post in an unconscious state shortly thereafter, is substantial evidence from which the court could infer that his condition had continued for the elapsed time in the same place. It is a further significant circumstance that accused's rifle was found near the truck soon after 2200 hours. The question was purely one of fact for the court * * *." Distinguish CM 236351, Ambutavicz, 22 B.R. 385 (143), II Bull. JAG 309. "It is clear that the offense denounced by the Article of War is the condition of drunkenness on post rather than apprehension in that condition * * *".
(CM FTO 7925 Butler 1945)

AW 86

MISBEHAVIOR OF SENTINEL

444(4-5)

447 (AW 89) Good Order to be Maintained and Wrongs Redressed:

Cross References: 454(13) 2608 Hughes (Attempt to create a riot; urge soldiers to disobey--same as inciting a riot--AW 96)
 454(27) 3992 McKinnon (Language to promote racial discord--AW 96)
 454(20a) 5741 Kennedy (Breach peace; analogy; maximum punishment)
 433(2) 5445 Dann (Destruction of enemy property)
 450(1) 5764 Lilly (1st Ind--committing riot; murder)

On a public thoroughfare of a town, these accused negroes wrongfully, unlawfully and riotously assembled to disturb the peace. Having assembled, they assaulted four military policemen by menacing them and throwing bottles, rocks and bricks at them, and actually striking two of them. In so doing, they wrongfully and unlawfully, by force and violence, resisted the lawful arrest of two of their number by the military policemen. Joint charges were preferred against four negroes. All were found guilty of specifications in violation of AW 89, AW 93 and AW 96. HELD: LEGALLY SUFFICIENT ONLY AS TO THREE OF THE ACCUSED.

(1) Facts: (a) Joint Participation: The evidence was insufficient to establish the guilt of one of the accused. Rather, it appeared that he was a mere spectator. As to the other three accused, it appears that each one committed "one or more acts of violence upon the persons of the four policemen, although a degree of uncertainty does exist as to exact identity of the perpetrator of a particular act. In determining the legal responsibility of the three accused, uncertainty in the evidence in that respect is immaterial, and unimportant in the face of the uncontradicted fact that they as members of an unlawful assemblage, committed acts of violence directed at the policemen. There was substantial evidence from which to infer that each of the three accused possessed the specific intent to do bodily harm to the policemen. * * * Under the Articles of War all participants are principals. * * * Whether it was the three accused who actually committed the batteries is unimportant; they were active members of a riotous mob, some members of which did inflict the injuries." (b) The three accused were properly convicted of assault in violation of AW 93. (c) They were properly convicted of violating AW 89. They "were members of an unlawful assemblage of colored soldiers and * * * they themselves, as well as their confederates, committed acts of violence upon and towards the policemen while the latter were in the performance of their lawful duties." It may not be soundly argued that an offense in violation of AW 89 may only be committed by troops when in quarters, garrison, camp or on the march, and that riotous conduct on a public street is not an offense thereunder. A careful study of the legislative history of AW 89 requires the conclusion that "the 'riot' condemned by the article may be committed at places other than 'quarters, garrison, camp and on the march'". It is clear that the three accused participated in a "riot" as defined at common law. It need not be decided whether the phrase "any kind of deprecation or riot" in AW 89 is of more general import than the common law definition. (54 C.J., sec.3, p.830, sec.5, p.831, sec.6, p.832, sec.15, p.834; MCM, 1928, par.147c, p.162.) (d) The three accused were

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also properly found guilty of resisting arrest in violation of AW 96. The military policemen were acting within the scope of their duty when they attempted to arrest these accused. The latter were not in proper uniform. They resisted violently. "As a general rule any person who interferes with or obstructs an officer in the performance of his duties is guilty of the offense charged ***."

(2) Procedure and Rulings: (a) Challenge of President: The president of the court-martial had been accused's temporary commanding officer at the time of the alleged incidents. He was challenged for cause on this ground. The challenge was properly overruled, even though it is not good policy to place an accused's commanding officer on the court-martial which tries him. The instant officer was neither accuser nor a witness for the prosecution. No bias on his part appeared. (Note: When a challenger still has a remaining peremptory challenge, it is probable that no prejudice will result from an earlier improper denial of a challenge for cause. However, this rule could not apply herein, because the defense used its peremptory challenge.) (b) Challenge of Law Member: The law member of this court-martial was challenged on the ground that he was not a member of the JAGD despite the fact that such officers were allegedly available. "The question as to whether an officer of The Judge Advocate General's Department was available to the Commanding General * * * for the designation as law member of the court which tried accused was a matter for his exclusive determination * * *. The provision of AW 8 * * * is not a mandatory direction to the convening authority, but vests in him discretion in the determination of the availability of a judge advocate." His determination "was conclusive and was not subject to review by the court on a challenge for cause and cannot be re-examined by the Board of Review." (c) Seating: On motion of the prosecution, the court required that the four accused be segregated from negro spectators in the courtroom, and that they be seated near their counsel. This was proper. "This was a matter peculiarly within the power and discretion of the court. * * * Its action in that regard is not subject to review in absence of conduct violative of law or which is so arbitrary as to prejudice the rights of accused." (d) Map: In the absence of defense objection, no prejudice resulted when a map was introduced without evidence of authentication as to its accuracy and applicability. (MCM, 1928, par.118b, p.122.) (e) Local effect: Non-prejudicial error resulted when, without proper preliminary questioning, a witness was asked what effect the disturbance had on local citizens. (f) Typewritten statements signed by each accused, and from which the names of his co-accused had been deleted, were properly admitted. Although qualified as confessions, they actually amounted only to admissions because they did not contain acknowledgments of guilt. Hence they were admissible without preliminary proof. "The precautionary action of the trial judge advocate in deleting the names of co-accused from each statement before reading same to the court is approved." (CM ETO 804 Ogletree, et al 1943)

Fourteen named accused were jointly charged with, and were variously and partially found guilty of, the following offenses (a) Wrongfully, unlawfully and riotously, and in a violent and tumultuous manner, assembling to,

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and disturbing the peace of a described locality in disregard of lawful authority and their superior officers, during which disturbance they shot two named noncommissioned military police officers and shot at other unnamed persons--in violation of AW 89; (b) Assaulting two named noncommissioned military police officers, with intent to commit the felony of murder, by willfully and feloniously shooting them with dangerous weapons, to wit, rifles, carbines and Tommy Guns--in violation of AW 93; (c) Wrongfully and unlawfully seizing arms and ammunition, and intentionally, recklessly and unlawfully firing them at various people; also making inflammatory statements in the presence of other soldiers--in violation of AW 96; and (d) Voluntarily joining in a mutiny against lawful military authority and, with intent to usurp, subvert and over-ride that authority for the time being, wrongfully and unlawfully seizing arms and ammunition, bearing arms, and making inflammatory statements in disregard of lawful orders of their superior officers, thereby usurping, subverting and over-riding for the time being lawful military authority--in violation of AW 66. HELD: LEGALLY SUFFICIENT IN PART; LEGALLY INSUFFICIENT IN PART.

(A) Commit a riot in violation of AW 89: It is now established that this "offense may be committed by military personnel at places other than 'quarters, garrison, camp and on the march'; that a person who is present at a riotous and tumultous assembly where his presence is intentional and who encourages the rioters in the furtherance of the enterprise either by overt acts or exhortations or remarks may be prima-facie inferred to be a participant; that a by-stander, spectator or observer cannot be held as a participant; that all participants are responsible as principals; that the offense may be committed by three or more persons and that the substance of the offense is the disturbance of the public peace to the terror of the people." Adequate evidence supported the finding that ten of the accused committed a riot in violation of AW 89. The Board of Review "will not re-examine the evidence to test its credibility or weight. An 'accused' cannot have both a trial by a jury and a re-trial by an appellate court."

(B) Assault with Intent to Commit a Felony, in violation of AW 93: Ten named accused were found guilty of assault with intent to commit murder by shooting, in violation of AW 93. The evidence failed to disclose the identity of the exact accused who fired the shots at the two noncommissioned military policemen. However, the ten accused had returned to their camp for the express of arming themselves. Thereafter, they proceeded in a body to the public square of the town in which their offenses occurred. Without warning, fire was opened on the policemen. In the circumstances, "the act of one or more of the group was the act of all, and all are chargeable as principals in the commission of the crime." The evidence supported the court's conclusion that each of the ten had knowledge of the purpose of arming themselves and returning to town. While specific individual intent was not proved, "the surrounding facts and circumstances afford substantial legal basis for imputing to each * * * the specific intent of the particular accused who shot" the policemen. There was a preconcert and a joint design.

(C) Joining in a Mutiny, in violation of AW 66: The company of which accused were members had originally been restricted and passes denied. Thereafter, no officer attempted to supervise or control the actions of the men. Nonetheless, accused went to town; became involved in a quarrel; returned to camp

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and got arms; returned to town. The specification, alleging that they had joined in a mutiny in violation of AW 66, was premised solely on the fact that they had originally left camp without passes and while they were restricted. For the purposes of this opinion, it is assumed that accused participated in a meeting before they left. However, "the violation of or disobedience to orders unaccompanied with the intent to overthrow or neutralize military authority is not mutiny * * *." Mutiny requires the additional factor of intent to overthrow or neutralize the commander's authority. It is not decided herein that "mutiny against the authority of commanding officers cannot exist out of their presence." Neither is it concluded "that a confederated design to violate commands or orders may not constitute a mutiny against authority of superior officers, under circumstances and conditions other than those disclosed by" this record. Rather, it is here decided that in the instant case there was a failure "to prove the vital element of * * * 'joining in a mutiny' * * * (with) the intent to over-ride, subvert or neutralize" the authority of the camp commander. The accused were guilty of a military offense, but they were not guilty of "joining in a mutiny".

(D) Wrongful Seizure; Reckless Discharge of Firearms, in violation of AW 96: Since accused had originally been issued the firearms which they used, and were authorized to retain them, there was a failure of proof that they seized them. Nonetheless, the proof did show their wrongful and unlawful possession of the arms, because they were not authorized to take them to town. As to the balance of the specification, there was adequate evidentiary support of the findings of their guilt.

(E) Points of Law; (a) The instant offenses, separately charged under Articles of War 66, 93 and 96, "are separate offenses and not multiple charges although growing out of the same incident." (b) "A pass is not a license to join an organized mob determined upon mischief and disorder." (c) "While circumstantial evidence alone will sustain the finding of guilty * * *, proof of mere opportunity to commit a crime is not sufficient to establish guilt * * *. Unless there is substantial evidence of facts which excludes any fair and rational hypothesis except that of guilt, or where all of the evidence is as consistent with innocence as with guilt, a finding of guilty cannot be sustained." (MCM, 1928, par.78, p.63.) (d) Statements of different accused were admitted in evidence with the caution that each would apply only to the signer individually, and was not to be considered as evidence against any of the others. The caution was proper. The court could adequately observe the injunction, because the statements were few in number. (2 Wharton's Cr. Ev., sec.722, p.1213-14, and sec.728, p.1223.) (d) Self-serving statements were introduced by the defense without objection. Since the error was self-invited, it could not have been prejudicial. (e) Impeachment: "Upon cross-examination of * * * a witness for the prosecution, his prior written statement made to the investigating officer was presented to him. After he admitted its authenticity it was read to the court. It contained some assertions in conflict with his evidence on direct examination." Inasmuch as the witness "affirmed the making of the statement it was proper to place it in evidence and read it to the court. There was no necessity of

laying foundation for its admission nor for proving it by other testimony (3 Wharton's Crim. Ev., 11th Ed., sec.1359, p.2243). However, it was admissible for the purpose only of impeaching * * * credibility and was not substantive evidence of the truth of the matter therein stated * * *. Cautionary instructions to this effect should have been given to the court, but in this instance the absence was not prejudicial to rights of accused." (CM ETO 1052 Geddies, et al 1944)

Seven negroes entered a public place just after its 10 p.m. closing time. When they were refused service, they commenced a disorderly riot and deprecation which lasted for a half hour. They chased paratroopers out. They assaulted other customers. They broke furniture. They subsequently resisted arrest by the military police. They were now jointly charged, and most of them found guilty of, (a) committing a riot and deprecation in violation of AW 89, (b) assault with intent to do bodily harm on named persons by menacing and striking them on the head and other parts of their bodies with dangerous things, to wit: beer mugs, glasses, bottles and knives, in violation of AW 93, and (c) wrongfully and unlawfully resisting, by force and violence, their lawful arrest, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) All the findings of guilt were adequately supported by the evidence. As to the offenses under AW 89, "the uncontradicted evidence shows that a casual assemblage of colored American soldiers, spontaneously motivated by wholly unprovoked hallucinations of racial discrimination in a British "pub", precipitated a tumultuous disturbance by flinging glassware and other movables, including a knife; assisting one another in a demonstration against the proprietress, employees and customers and - later - civilian and military police, opposing them in an effort to restore peace and order; and actually executing their design in a violent and turbulent manner, to the terror of a considerable number of people. This was a riot in clear violation of Article of War 89. (2) In regard to the finding of guilt on the charge of the resistance to lawful arrest in violation of AW 96, no statutory maximum punishment for this offense is fixed. But the Table of Maximum Punishments (MCM, 1928, par.104c, pp.97-101) "prescribes one year as the maximum punishment for the closely related offenses of assaulting a noncommissioned officer in the execution of his office, and likewise for assaulting a sentinel in the execution of his duty." (3) Confinement herein should be in a disciplinary barracks and not in a penitentiary. (AW 42) (CM FTO 1284 Davis, et al 1944)

(1) Murder in General450(1)

(Note: The murder and rape cases have been segregated hereunder. Murder cases are found under subsections 1, 2 and 3. Rape cases follow under subsection 4.)

450 (AW 92) Murder; RapeMurderNot Digestad:

1161	<u>Waters</u>
3180	<u>Porter</u> (Self defense)
3585	<u>Pygate</u> (shot another soldier; death by musketry)
3678	<u>Carter</u> (lesser offense, manslaughter)
4020	<u>Hernandez</u>
4042	<u>Rosinski</u> (lesser offense, manslaughter)
5137	<u>Raldwin</u>
5157	<u>Guerra</u> (see 450(1)--5156 <u>Clark</u> for companion case on similar facts)
5451	<u>Twiggs</u>
5745	<u>Allen</u>
6159	<u>Lewis</u> (death by musketry)
6231	<u>Sistrohk</u>
6682	<u>Frazier</u>
7315	<u>Williams</u>
8166	<u>Williams</u>
8630	<u>Williams</u>
9291	<u>Clay</u> (self defense)
9396	<u>Elgin</u> (self defense)
9422	<u>Norris</u> (drinking)
10338	<u>Lamb</u>
10740	<u>Rollins</u>

AW 92

MURDER; RAPE

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450(1)(1) Murder in General450 (AW 92) Murder; Rape

Cross References: 450(4) 969 Davis
 450(4) 5584 Yancy (with rape)

(1) In General: Accused was standing guard. Feeling that he should have been relieved earlier, he requested relief from the Officer of the Day. He stated that he would not stand his post any longer. He refused to come to attention when instructed to do so by the officer. He was holding his rifle improperly. The officer told him to give up his rifle, and ordered that he be placed under arrest. Accused refused to give his rifle to either the Corporal or the Sergeant of the Guard. Instead, he lifted the rifle, and halted both of those non-commissioned officers. The Officer of the Day then attempted to relieve him of the rifle. Accused's shot and killed him. He was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. The evidence supported the finding of accused's guilt. It is reasonable to presume that accused recognized deceased as the Officer of the Day, because he requested relief from his guard duties from him. In defense accused argued that the officer's order to him that he give up his gun was illegal because he had not been properly relieved as a guard at that time; that he was therefore entitled to take the officer's life in order to prevent him from carrying out his purpose. On the other hand, accused also stated that he would have complied with deceased's order had he known he was officer of the day. (CM ETO 255 Cobb 1943)

450(1)(1) Murder in General

Accused became involved in a brawl with deceased on a public street at night. Deceased stabbed him, and accused retired to examine his wound. Thereafter he returned, and fatally stabbed deceased with a knife. He was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (A) Degrees: While it is clear that accused killed deceased, it must be determined whether his offense was murder or merely manslaughter. There are two methods of applying the applicable doctrine of the "cooling time" rule: "(a) The 'reasonable time' rule: if there is a sufficient period of time between the provocation and the killing for the accused to 'cool his passions' the killing will be attributed to malice and will be murder, and the determination of this reasonable time is governed by the standard of an ordinary reasonable person. (b) The 'dependent on circumstances' rule: 'cooling time' is to be determined by the circumstances and conditions of each case whereby the question of malice is determined not by the standard of a 'reasonable man', but by the standard of the accused, thereby allowing consideration of the accused's individual temperament and of all of the circumstances involved in the killing." In the instant case, the entire fracas must have taken place within a period of 25 minutes, and accused must have been away from his victim at least five minutes before he returned from examining his wounds to kill him. There is "not only substantial evidence * * * to support the finding that sufficient time elapsed between the cessation of accused's initial conflict with deceased and the stabbing of deceased to enable accused to cool his anger and passion, but also to prove affirmatively that accused acted with malice aforethought and deliberately planned the stabbing of deceased."

(B) The Sentence: (But see CM ETO 709 Lakas, 450(4)). Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged. The sentence should have been limited to death, because punishment under AW 92 is specifically limited by the terms of the Article. The parts of the sentence "forfeiting all pay and allowances due or to become due to the accused and of dishonorable discharge, is surplusage and void and should not be confirmed." "The sentence, however, is not void in toto but is valid as to that part thereof extending to the death sentence. The sentence is therefore separable and the void part thereof must be disregarded."

(C) Points of Law: (a) Confession: On two separate occasions, accused made statements to the investigating officer. They were taken down by a reporter in question-and-answer form. Accused was warned of his rights under AW 24 on the first occasion. The court permitted the question-and-answer transcripts to be introduced in evidence as admissions against interest. (i) The statements actually amounted to confessions, because, although separately made in response to a number of questions, their sum total was confession of guilt. However, the provisions of AW 24 were explained to accused. There is an absence of any evidence to show that they were obtained as a result of either hope or fear. Rather, the investigating officer asserted that they were given voluntarily. In the circumstances, they were properly admitted in evidence. (ii) Although accused did not sign either of the transcripts, the investigating officer testified that they were "the exact questions and answers I asked * * *." This was a sufficient authentication. (b) A post-mortem report

(1) Murder in General

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of deceased's death was properly admitted as an exhibit, after the doctor who made the post-mortem examination testified that it was true and correct, and prepared on the day of the post-mortem--two days after the homicide. As stated in Wigmore, Code of Evidence, Rule 93, p. 144, "a past recollection recorded may be used, subject to the precautions for securing the adequacy of the recollection and the accuracy and the identity of the memorandum, as follows: Art. 1. The memorandum must have been made when the matter was fairly fresh in the recollection; but the time depends upon the circumstances of each case * * *. Art. 2. The witness must be able to say that he believed the memorandum correct at that time, either (1) by now remembering that belief * * *. Art. 3. The witness must be qualified by personal observation on the matter recorded * * *." (c) Interpreter: One foreign witness testified through interpreters. Only the substance of his testimony, in the third person appears. "The fact that an interpreter uses the third person and states the substance of the witness's answers rather than translating them literally does not necessarily prejudice the rights of the accused * * *, although the better and recommended practice is for counsel to use the second person instead of the third person in addressing a witness." Accused did not object to the practice used herein. Nor does any prejudice appear. (d) A court-member's name was mis-spelled in the record of trial. This was an obvious typographical error. No prejudice resulted. (CM ETO 292 Mickles 1943)

Accused was a guard at the entry gate of a camp. A bus, carrying soldiers returning from pass, arrived. Deceased, extremely drunk, was a passenger. He was escorted from the bus by two other soldiers, who had their arms around him. The returning soldiers were somewhat profane about having to show their passes. There was some question as to whether accused told deceased to "halt". In any event, he fired his rifle at him twice from a distance of two or three yards. The shots killed deceased. One of them, passing through his body, struck a soldier who was supporting him. Accused was found guilty of the murder of deceased in violation of AW 92, and guilty of assault with a dangerous weapon, to wit, a rifle, upon the second soldier, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (A) The evidence: (a) AW 92: Accused argued that he told accused to halt three times, and that he was obeying orders to examine passes. Assuming that he had received orders to examine the passes, yet there was substantial evidence both that he did not give deceased timely warning and that he recognized the latter's drunken condition. Even assuming that he thrice told deceased to halt, yet the court could have concluded that accused used more violence than necessary. There was no mutual combat between accused and deceased. The evidence failed to disclose such provocation or disturbance as would have displaced the accused's powers of reasoning, judgment and discretion with anger, passion, fright or other mental and emotional derangement--which would have reduced the homicide from murder to manslaughter. Rules: Malice aforethought or premeditation ordinarily do not exist in the human mental processes with anger, passion or fright, and it is the presence of malice aforethought which steps up a homicide from manslaughter to murder." It is stated in 1 Wharton's Criminal Law, sec.426, p.647; "More anger, in and of itself, is not sufficient, but must be of such a character as to prevent

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the individual from cool reflection and the control of his actions. Such passion must be produced by due and adequate provocation, and be such that would cause an ordinary man to act upon the impulse of the moment, engendered by such passion and without due reflection and the formation of a determined purpose." It is also provided in 1 Wharton, Criminal Law (12th Ed.), sec. 426, p.655; "Mere use of deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does cause death, the law presumes malice from the act." "Well grounded belief of danger may reduce a homicide from murder to manslaughter, 'but, in order to accomplish this, the fear must be such as a reasonable man would entertain under the circumstances of the homicide. Mere fear, apprehension or belief, though honestly entertained, when not justifiable, must be present, active and imminent to constitute a reasonable belief of danger.'" (1 Wharton's Criminal Law, sec.426, p.655.) (b) AW 93: The assault in violation of AW 93 on the second soldier through whom one of accused's bullets passed was also sufficiently established. This offense required proof of specific intent beyond a reasonable doubt. Implied intent would have been insufficient. "However, specific intent may be inferred from surrounding facts and circumstances, and such inferences constitute factual proof." While accused may not have intended to hit the second soldier, "an accused committing an offense of this nature need not have intended to do only the precise thing which actually followed his assault. * * * The intent on accused's part to inflict bodily harm on deceased, exhibited by accused's deliberate, malicious killing of deceased included within its scope the intent to do bodily harm to any person who was or came within the range of the bullets fired by accused at deceased. Accused displayed 'a reckless disregard for the safety of others'. Such conduct supplies the proof that accused intended to inflict bodily harm on" the second soldier.

(B) Service: Service of the charge sheet on accused was not shown. (AW 70). However, the defense neither moved for a continuance of trial or mentioned the omission. "The record of trial was examined and initialed by defense counsel pursuant to par.45b, MCM, 1928. The failure to serve copy of the charges did not impinge upon the jurisdiction of the Court, as it is not 'an essential proceeding'". No prejudice resulted. (AW 37).

(C) Sentence: Accused was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for his natural life. In view of the fact that he was found guilty of violating AW 93, as well as AW 92, there is legal basis for sustaining that portion of the sentence which adjudges total forfeiture. (CM ETO 422 Green 1943)

Accused was an escapee from confinement. About to depart with a pistol which he had wrongfully taken, he was confronted by a sentry on duty. From a distance of only four to six feet, he fired a number of shots into the sentry's body--first in the back. The sentry died. Accused was found guilty both of murder in violation of AW 92, and of escape from confinement in violation of AW 69. HELD: LEGALLY SUFFICIENT. (1) The evidence adequately established accused's guilt of both charges. (2) Points of Law: (a) Description of accused: In various papers attached to the record, accused's first and middle name

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were described as "Harold Alvin", "Harold A", "Harold Adolphus", and "Harry Adolphus". Despite these irregularities, however, accused's identity was positive. No prejudice resulted. (b) Guilty plea: Accused pleaded guilty to the charge of escape from confinement. Although it does not appear that the effect of this plea had been explained to him, "it is presumed that defense counsel performed their duty and that accused knew the effect of such a plea." (MCM, 1928, par.45b, p.35) (c) Report of Loss: It is doubtful whether a certain letter and its indorsement, constituting a report of loss of the pistol, should have been admitted in evidence. However, no prejudice resulted. All the facts contained therein were otherwise shown in the record. (d) Photographs were introduced in evidence. Although they were identified by a witness other than the photographer himself, the former was obviously familiar with the situs of which they had been taken. This was sufficient identification. (e) Surgeon's report: A surgeon's written and signed history of deceased's injuries was improperly admitted in evidence. Because the contents thereof were elsewhere adequately proved, no prejudice resulted. (f) Impeachment: After his own witness had apparently surprised him, the trial judge advocate called the witness's attention to his previous contradictory written statement. He then introduced that written statement, although the witness claimed that it had been made under compulsion. He did not at any time assert that he had been surprised or entrapped by the witness's testimony. Despite this failure, however, it is concluded that the prior statement was admissible. The trial judge advocate was obviously surprised. The statement could be used only for the purpose of inducing the witness "'to refresh his memory and move him to speak the truth by probing his conscience'. It was not original substantive evidence in aid of the establishment of prosecution's case against accused. * * * For the latter purpose it was hearsay and inadmissible * * *." (Rules: "That surprise or entrapment of counsel, forms an exception to the rule which prohibits the impeachment of one's own witness is acknowledged by practically all authorities. * * * There must be actual, not feigned surprise. Counsel must have an honest belief as to what the testimony of the witness will be. The fact that he has been informed that a witness will testify to certain matters is no basis for claim of surprise by the failure of the witness to do so. * * * 'A party cannot claim to be surprised by the testimony of a witness when he has failed to make inquiry as to what the testimony will be before calling the witness to the stand'" "In the instant case the trial judge advocate had before him the statement of the witness * * * made * * * to officers of the Provost Marshal General's Department upon which he was entitled to rely * * *. The statement was made during an official investigation by proper officers. * * * He was not required to express his surprise in formal language * * *. It is manifest that the trial judge advocate was caught off his guard, and that his surprise was in good faith and not feigned." (g) A confession was properly admitted, although not actually written by accused. He signed it. (h) Rulings: The president, rather than the law member, ruled on a number of interlocutory questions. This was improper, but it was not prejudicial. (CM ETO 438 Smith 1943)

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Accused loaded his rifle, and went looking for whiskey. He entered the officers' quarters. While in his victim's room, he was startled--possibly by the falling of the clothes-closet door. He turned, and fired in the direction of the interruption. He killed an officer. He was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Evidence: Accused was guilty of murder, rather than merely of manslaughter. He was a soldier, and was familiar with the use of a rifle. "He knew that the use of the rifle would 'probably cause the death of or grievous bodily harm to * * *' someone. (MCM, 1928, sec.148, p.163) He had committed the offense of housebreaking with the intent to commit a further offense, the larceny of whiskey. Like the burglar, who is surprised while at work and fires his pistol in the dark to aid his escape and kills an inmate of the house, it is murder." (2) The soundness of accused's defense of alibi was a question of fact for the court. (3) Investigation: During the investigation of this case pursuant to AW 70, accused's request to have his counsel present was denied--the investigating officer explaining that the investigation was not a judicial proceeding and that accused's rights would not be impaired. This action was correct. (4) Confession: Admittedly, "a confession made to a military superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the confession is made by an enlisted man." (MCM, 1928, par. 114a, p.116.) While accused may have been threatened five days prior to the time when he made his written confession, at that latter time there were apparently no threats, and accused's rights were sufficiently explained to him. The confession was sufficiently voluntary, and its admission was proper. (CM ETO 559 Monsalve 1943)

Accused and deceased had engaged in a lengthy dice game. The game was recessed for about two hours, during which time the soldiers consumed a substantial amount of intoxicating beverages at a neighboring public house. They subsequently resumed their dice game, but differences arose between them regarding a certain bet. Deceased possessed himself of five shillings claimed by accused. The game ceased, but accused persistently demanded the money from deceased. The latter ignored them, and left the room. During his absence, accused obtained a fellow-soldier's rifle and loaded it with a live cartridge which had come into his possession. He then sat with the gun on his knees, and awaited deceased's return. Deceased returned, with his hands in his pockets and unarmed. When he was within seven or eight feet of accused, the latter discharged the rifle directly at him--inflicting a mortal wound. After the shooting, accused kicked deceased as he lay helpless on the floor; applied obscene and profane epithets to him, and attempted to re-load the rifle for the announced intention of finishing deceased off. He was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. The evidence adequately supported the finding of accused's guilt in violation of AW 92. (1) Points of Law: (a) Exhibits: Certain exhibits were admitted on behalf of the prosecution, after the trial judge advocate stated that their admission

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had been stipulated to. Although the defense's assent was not shown, no prejudice resulted. The record carries the implication that the defense had no objection. (MCM, 1928, par.124b, p.136) Another exhibit used by the court was marked for identification, but was not marked as an exhibit. The court considered that exhibit as an exhibit, despite its improper marking. No prejudice resulted. (b) Res gestae: Error, but no prejudice, resulted when a witness was permitted to testify that a third party had told him deceased was shot. This was not part of the res gestae. (c) Impeachment: No error resulted when defense counsel was permitted to impeach some of prosecution's witnesses with their former written statements. He identified those statements as to time, place, and to whom made. He gave the witnesses the opportunity to affirm, deny or explain them. However, it was an undue restriction not to have permitted the witnesses to read their statements. (d) Refresh Memory: When some of his witnesses unexpectedly gave testimony at variance with their former statements, the trial judge advocate was properly permitted to "refresh their memory" by calling attention to their former statements--after which they corrected the statements which they had made on the witness stand. (3 Wharton's Criminal Evidence, sec.1392, p.2278.) It was also proper to permit the autopsy surgeon to refresh his memory from his autopsy report. Although the original thereof was not introduced in evidence, a copy appears in the investigator's report. This purports to have been signed by the witness. (e) Confession: Accused first made an oral confession, and then subsequently made a written confession. A witness first testified to the contents of the oral confession, after which the written confession was introduced. Defense made no objection, thereby waiving the irregularity. (MCM, 1928, par.116a) While the oral confession was not "best evidence", the "best evidence rule will not be enforced unless the party, against whom the oral evidence is offered, interposes timely objection thereto and requires that the written document be produced." (f) A bullet was properly admitted in evidence, after having been properly identified. (g) An exhibit was improperly withdrawn, despite a stipulation. It was not "bulky". (MCM, 1928, App. 6, p.269) (g) Sanity: Applying the definition of sanity found in MCM, 1928, par.78a, p.63, which definition follows the rule approved by the United States Supreme Court, it must be concluded that accused was sane both at the time of the homicide and at the time of the trial. His demeanor and mental processes at the time of trial were self-revealing as to the status of his mental health, and bespoke ability to defend himself. Defense disclaimed that he was insane. The question was primarily of fact for the trial court. (CM ETO 739 Maxwell 1943)

Accused's companion told him he was going to rob a taxi driver. Accused, from a position outside the cab, subsequently heard noises inside it. Accused thereafter returned to the cab, at which time he made no effort to prevent his companion from accomplishing his purpose. The cab driver was killed. Accused helped dispose of his body. Deceased's bloodstained jacket was left in the cab. Cloth fibres similar to the fibres of that jacket were found beneath accused's finger nails. Accused was held to be guilty of murder

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in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Aid and abet: The court properly concluded that accused aided and abetted his companion in the commission of the felony of robbery. The evidence was therefore legally sufficient to support the finding that he was guilty of the resulting murder. The distinction between aiding and abetting has been abolished. "Mere presence during the commission of an offense by another, without more, does not constitute one an aider and abettor." But "if the proof shows that a person was present at the commission of the crime without disapproving or opposing it, the jury may consider this conduct in connection with other circumstances, and thereby conclude that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting the same." (2) Malice aforethought may exist where an act is unpremeditated. "It may also exist in the intent to commit a felony (MCM, 1928, par.148a, pp.163-164). An intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out that purpose." (3) Inconsistent Findings: Although the court found accused guilty of murder, it found him not guilty of the robbery. However, this inconsistency was not fatal. "The better rule on principle and authority is that inconsistent verdicts of guilty and not guilty in the same criminal proceeding do not vitiate the former." (CM ETO 1453 Fowler 1944)

"Robbery inherently involves the element of violence upon the person and it is a probable, natural and reasonable consequence of an attempt to commit a robbery that a human life will be destroyed * * *." (CM ETO 1621 Leatherberry 1944)

While in town, accused did some drinking. He subsequently got into trouble when he urinated on the street. On his return to camp, he worried about the incident, and became afraid of his first sergeant. The first sergeant ordered him to go to bed, and then went to bed himself. Accused returned to his bunk, smoked a cigarette, prepared for bed, left for a moment, returned, fumbled with his musette bag. He finally went over to the bunk of the first sergeant where the latter was asleep, and shot him with a carbine. The first sergeant died. Accused was found guilty of murder, in violation of AW 92, and was sentenced to be shot to death with musketry. HELD: LEGALLY SUFFICIENT. (1) "The evidence fully justifies the conclusion that while smoking his cigarette accused determined to kill deceased and that he obtained the lethal bullet from his musette bag. His actions therefore revealed a cold, deliberate purpose in the absence of any adequate provocation whatsoever, either to kill deceased or to inflict upon him grievous bodily harm, 'some excessive bodily injury which may naturally result in death.'" The question, of whether accused was too intoxicated to have entertained the requisite intent to kill, was one of fact for the sole determination of the court. (2) The sentence was proper. (CM ETO 1901 Miranda 1944)

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After verbally abusing their victim, two accused--with three others-- participated in a brutal assault upon him. They first knocked him down, and then tightened his necktie about his neck. They left him on a public road in an unconscious condition, where he could have been hit by passing traffic. he died of strngulation. The two accused were found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Evidence: The evidence supported the court's finding of murder. "The motive of the attack, the purpose of the assault and the nature of the death producing act, constitute intrinsic proof" that accused acted with malice aforethought. (2) Aid and abet: The record fails to show which of the five assailants tightened the victim's necktie about his throat. However, since both accused were active participants in the assault which resulted in the homicide, "they were legally responsible not only for the individual acts committed by each, but also for the acts of each and every participant in the illegal and wholly inexcusable attack * * *." The distinctions between principals, aiders and abettors have been abolished by Federal statute (35 Stat. 1152; 18 USCA sec. 550). "In the administration of military justice the distinction between principals, aiders and abettors and accessories is not recognized." (CM ETO 1922 Forester 1944)

While he was at a railroad station, deceased, an American sailor opprobriously told accused to board a train. Accused did so. While on that standing train, he learned that his comrade had been hit by another sailor. Accused immediately jumped off the train and approached deceased. He asked him why he hit his comrade. Deceased responded, by attempting to strike accused with his torch. The latter dodged the blow, and immediately jumped at deceased with a little potato knife which he held in his hand. Deceased backed across the platform. Accused followed, and struck him in the chest with his knife after he had retreated to the base of some stairs. The victim died. Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. Accused was not acting in self defense. He was properly found to be guilty of murder, rather than of the lesser offense of manslaughter. The words directed to accused by deceased before the former boarded the train were insufficient provocation. After accused left the train, he sought out deceased rather than the other American sailor. He made no effort to retreat when deceased struck at him. Rather, he produced a knife. His deadly use of that knife was intentional, deliberate and cold-blooded. There was no mitigating or excusing circumstances. The requisite element of malice could be inferred. This conclusion is strengthened by accused's actions after he again boarded the train. (Rules: "It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. * * * In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional; or deliberate * * *." (29 C.J., sec.74, pp.1099-1101.) "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought.

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The intent to kill being formed suddenly under the influence of violent passion or emotion which, for the time being, overwhelm the reason of the accused. It is * * * the uncontrollable passion, aroused by adequate provocation, which for the time being renders the accused incapable of reasoning and unable to control his actions." (1 Wharton's Criminal Law, sec.423, pp.640-2).

"Mere anger, in and of itself, is not sufficient, but must be of such a character as to prevent the individual from cool reflection and a control of his action." (sec.426, p.659, *ibid*) "Malice is not an ingredient of manslaughter. Malice being present, passion and anger, whatever their extent or degree, will not serve to reduce an unlawful killing to voluntary manslaughter." (*ibid.*, sec.426, p.650)) (CM ETO 1941 Battles 1944)

Deceased had been drinking, and had become acquainted with deceased panderer. With the latter as an intermediary, he arranged to have sexual intercourse with a girl. He paid the girl one pound, and took her to an air-raid shelter. Just as he was getting on top of the girl, deceased came to the shelter and stated that the police were coming. Although accused could not see any policemen, the girl refused to continue with the intercourse. Accused demanded his money back. During the ensuing argument, some of the coins dropped to the ground. When the girl stooped to recover them, accused produced a knife. Deceased struck him in the face. Accused retaliated by inflicting seventeen knife wounds on him. The panderer died. Accused was found guilty of murder in violation of AW 92, and was sentenced to death. HELD: LEGALLY SUFFICIENT. "The fact that deceased might have been a moral degenerate or even that he was a menace to the social well-being of his community is no legal justification for his death under the circumstances revealed by the record." The corpus delicti was adequately proved, after which accused's confession, sufficiently shown to have been voluntary, was admitted. The killing was established. Likewise the fact that this killing amounted to murder was established. To reduce the offense to manslaughter it would have been necessary that accused had both uncontrollable passion and adequate provocation. "Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been an adequate provocation." (1 Wharton's Criminal Law, sec.426, pp.655-656.) The court was justified in concluding "that accused commenced and persisted in his attack upon deceased not only with the purpose of inflicting great bodily harm upon him, but with the specific intent to kill him. There is no evidence in the record * * * that he was seized with uncontrollable passion or fear, or that he lost control of himself after deceased struck him or that he was intoxicated to a degree that he had no control of his mental faculties. Anger alone will not reduce the crime of murder to manslaughter." The question of whether accused's intoxication was such as to prevent his entertaining the intent requisite to constitute murder was for the trial court's determination. (CM ETO 2007 Harris, Jr. 1944)

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Accused, angered at Appleby as a result of a recent altercation with him during which he twice struck accused with his fists, deliberately struck Appleby from behind on the side of the head with a beer bottle. The force of the blow was sufficient to break the bottle, render the victim "dizzy", and force him from the doorway of the public house, where the fracas occurred, into the road. Accused then struck an innocent bystander in the neck with the broken bottle, as a result of which the bystander died three days later. Accused was found guilty of murder in violation of AW 92, and guilty of assault with intent to do bodily harm in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Fragments of beer bottle glass, picked up outside the public house about half an hour after the incident--and the only glass found in the area--were properly admitted in evidence with the qualification that "whether or not they are to be accepted as pieces of the bottle which was used is for the Court as finders of the facts to determine." (2) Murder: "Whether or not accused's intent to kill was formed suddenly, under the influence of an uncontrollable passion or emotion aroused by adequate provocation, whether or not a sufficient 'cooling period' had elapsed or the passion or emotion, if any, to abate, or whether the formation of the intent was the result of mere anger, were questions of fact * * *." Accused was properly found to be guilty of the murder of the bystander. (3) Assault: "The court was fully warranted in inferring the existence of a specific intent on accused's part to do bodily harm to Appleby concurrent with the unjustified assault upon him. Although accused testified that he 'was going to hit him first before he got' accused, the evidence that Appleby, unarmed and preceding accused on the way out of the public house, was struck from the rear by accused, whom he could not see, fully warranted the court's conclusion that accused was not acting in self defense." (CM ETO 3042 Guy, Jr. 1944)

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Photographs of deceased were properly admitted in evidence. It was shown that they were true and correct pictures of him, taken at the time of the autopsy, and that they truthfully and accurately portrayed the condition of his body at that time. "Accurate photographs of the deceased are universally admitted in evidence in trials involving homicide upon proper identification." (2) Refresh Memory: The use by a witness of a true and correct copy of the autopsy protocol, prepared by him and another, to refresh his memory when testifying as to the extent of deceased's injuries, was proper. (3) The lethal weapon was properly introduced in evidence, after being duly connected with the offense (a club or stick of wood, a large splinter and two small splinters of wood. "A lethal weapon found near the scene of the crime is admissible in evidence provided there is proof connecting accused with it." Nothing appears to show that either this club or the splinters had been altered or changed. (4) Accused's identity was sufficiently established (discuss at length). (CM ETO 3200 Price 1944)

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(CM ETO 3200 Price 1944--1st Inc) "On the day of the offense accused had completed 20 combat missions and had indicated his willingness to complete another tour before his return on furlough. He had previously been convicted by summary court for absence without leave for 14 hours but his prior record is bereft of any indications of a vicious or criminal character. Though the offense of which he stands convicted cannot be minimized, the record indicates the attack was likely the result of over-indulgence in intoxicants which in turn might have been induced by the accumulated nervous tension resultant on 20 combat missions. Since the accused does not appear to be inherently vicious and in view of his prior commendable combat service and the attendant circumstances of the homicide, I recommend for your consideration the reduction of the period of his confinement." (life).

Although the evidence was circumstantial, it was established that accused, who had been drinking and was in a public house, became angered at deceased because of his noise and because of the further fact that he had spoken to and was answered by his "girl" in an unknown tongue. Accused forced him outside the public house; stabbed him with a dagger which had a blade more than three inches long. He then returned to the public house throwing the knife in the garden after presumably removing blood from it. Deceased died. Accused was found guilty of murder in violation of AW 92; of absence without leave in violation of AW 61; and of carrying a concealed and illegal weapon with a blade length greater than three inches, contrary to a standing order, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Time of Trial: "Immediately following the arraignment the defense moved for a continuance 'on the grounds that it has not had time to properly prepare its case. The case has been in its hands less than twenty-four hours.' The prosecution stated that the charges were served on accused * * * /five days prior to the convening of the court, as confirmed by the charge sheet/, that defense counsel examined the file 'about four days ago' and that trial on" the date set was a military necessity. No abuse of judicial discretion resulted, when the motion for continuance was denied. (2) Impeachment; Prior Statement: Objection by the prosecution to the admission of a certified true copy of a prior statement of a prosecution witness, offered by the defense on cross-examination to impeach that witness, was properly denied because it was not shown that the original had been either lost or destroyed. (3) A "dying declaration" of deceased was properly admitted as such, since it appeared "that at the time of his declarations a mortal wound had been inflicted * * *, that he was thus in extremis, that he was under a belief that his immediate death was certain and that his statement naming the person who caused his condition was one of fact and not a mere opinion or conclusion." (Note that it was the duty of the court to determine, as a preliminary issue, whether the statement was a dying declaration.) (4) Prior admission: The court properly admitted accused's prior sworn statement, "in view of its character as an admission rather than a

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confession and in the absence of any showing that it was procured by means of such character as to cause accused to make a false statement." (5) Standing Order: Although it was hearsay to permit the company commander to testify orally regarding the standing order which prohibited the carrying of weapons of any kind on leave, furlough or pass with blades over three inches long, defense failed to object. Moreover, "relevant standing orders are in fact contained in directives issued by Headquarters, European Theater of Operations, of which the Board of Review may take judicial notice." Accused was also charged with notice of them. (Cir 34, Hq ETOUSA, 28 Mar 1944, par.5j). (6) The absence without leave was adequately proved. (7) The murder was adequately established. (CM ETO 3649 Mitchell 1944).

(CM ETO 3649 Mitchell 1944--1st Ind). It was improper for the president of the court to be designated in the special order appointing the court.

Accused had been drinking during the afternoon. After he went on duty as a radio operator during the evening, deceased took a bottle of intoxicating liquor from accused's possession. After deceased refused to return it, accused announced that he was going after the liquor. He approached deceased with his carbine, and threatened to kill him. Almost immediately thereafter, he fired. Deceased died a few minutes later. Accused was found guilty of murder in violation of AW 92, and was sentenced to death. HELD: LEGALLY SUFFICIENT. (1) Evidence: The evidence supported the conviction. It plainly indicated "that accused, angered by the fact that deceased had his bottle, deliberately and without the slightest excuse shot him in cold blood". Although accused had been drinking during the afternoon, in the absence of substantial, competent evidence that he was intoxicated at the time of the shooting, the findings of the court were supported. Additionally, after the shooting he stated that he "was certainly in a fix now". This demonstrated that he fully realized the seriousness of his act and predicament. Accused was not acting in self-defense. It was a question of fact whether the shooting was accidental. (2) Earlier Threat: Several months prior to the offense, accused had threatened to "get even" with deceased, because the latter had refused him a pass. Moreover, because of deceased's fault, accused's ration card had been late in reaching him while he was on pass-- after which accused had remarked that his outfit would soon be going into combat and that "things would be different". "The admissibility of the foregoing evidence, * * *, and the remoteness, relevancy, weight and credibility thereof were matters for the determination of the court." In any event, no prejudice resulted because accused's guilt was independently and adequately established. (CM ETO 3932 Kluxdal 1944).

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Near midnight and while armed with a lethal weapon, accused sought admission to a French home. He accompanied his demands with loud knocks on the door and cries for "Mademoiselle". Admission having been denied, he fired a shot through the door and attempted to break it with the butt of his gun. In defense of his womenfolk, the householder held the door from the inside by pressing against it. Accused then fired a second shot through the door. With it, he killed the householder and wounded his wife. He then entered the house, went after a young daughter inside, tore a wrap from her (she was clad in nightclothing), pursued both mother and daughter when they sought refuge in an adjacent home. He manaced the occupants of this second home with his gun; directed the mother to a bed; attempted to "force her". She resisted. Accused's penis was exposed and erect, and the mother grasped it to protect herself. Accused had an emission. During the struggle, he raised her dress and pointed his gun at her, although he did not actually succeed in having sexual intercourse. Accused was found guilty of murder in violation of AW 92, of housebreaking with intent to rape in violation of AW 93, and of assault upon one of the women in violation of AW 93 by willfully and feloniously grasping her, pointing a rifle at her, and attempting to have sexual intercourse with her. He was sentenced to death. HELD: LEGALLY SUFFICIENT. (1) Identity: Uncontradicted inculpatory facts from a matrix of evidence which beyond reasonable doubt inculpated accused. This case "is illustrative of the strength of so-called circumstantial evidence when properly connected and presented to the court. It possesses inherent trustworthiness and reliability which is even more convincing than personal identification by witnesses * * *. Particularly is this true where the witnesses are not familiar with negro characteristics and faces, as in this case." (2) Murder: When accused fired his shot through the door, he knew or should have known that some person was on the opposite side of the door barring his entrance. His was an act which intrinsically carried its own proof of malice aforethought. Moreover, accused was perpetrating both the felonies of burglary and housebreaking at the time of the shooting. (3) Housebreaking: Substantial evidence showed accused's guilt of unlawfully breaking into the house with intent to rape the daughter. (4) Assault with intent to commit rape on the mother was also shown. "The fact that the man abandoned his attack before accomplishment of his purpose as a result of his victim's successful defense of her virtue does not affect his guilt." (CM FTO 4292 Hendricks 1944)

Accused Davis and Potts went to a French civilian home looking for a girl. They succeeded in getting the wife of the householder on top of a bed, with her thighs exposed. When one had mounted her while the other held her, the husband answered her screams and interrupted their plans. Thus thwarted, they left. But on their way out, accused Davis fired a shot and killed the wife. In joint and common charges, both were found guilty of murder in violation of AW 92, and of assault with intent to rape in violation of AW 93. HELD: LEGALLY SUFFICIENT IN PART ONLY. (1) Joint Trial:

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Accused interposed a "motion to sever". No abuse of judicial discretion resulted from the denial of the motion. "The testimony of each accused disclosed his presence with the victim at the time and place of the alleged assault with intent to commit rape, but was in denial of the commission of such assault. At the time of the shooting by accused Davis, which caused the victim's death, his testimony, and that of accused Potts, showed that the latter was not then present." However, testimony from another witness was to the effect that he was present. (2) "Character" of Victim: Prosecution witnesses testified that the victim was happily married, a good mother, of good character, and did not engage in "affairs" with other men. "No attack on the woman's character had been made by the defense nor did the defense object to the testimony. The admission of this evidence was clearly erroneous (CM 240788, Bull JAG, Mar 1944, sec.395(8), pp.95-96)." However, no pre-judice resulted because guilt was adequately proved. (3) "Pre-trial statements by accused" which amounted to confessions were properly admitted after it had been shown that AW 24 rights had been protected. (4) The assault to rape was sufficiently proved. The doctrine of aiding and abetting comes into play. The distinction between the two has been abolished. (5) The shooting occurred after completion of the joint felonious assault and the abandonment thereof. "There was no evidence of a joint purpose by the two accused to shoot in order to affect their escape, or for any other purpose following the abandonment of the original venture. No participation therein on the part of Potts was shown. The evidence was insufficient to support his conviction on the murder charge. (CM ETO 4294 Davis et al 1944)

Accused was found guilty of murder in violation of AW 92, and of assault with intent to do bodily harm by shooting at another person with a dangerous weapon, to wit: a pistol, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "In the instant case, the evidence shows that following a fist fight, accused obtained his pistol, and while pointing it at * * * chased him some distance. During this pursuit the victim repeatedly shouted to accused to put his gun down. Sergeant * * * also attempted to disarm him. Accused deliberately fired two shots at * * *, the second of which caused his death. The evidence further shows that, after the fight and before the shooting occurred, some short time elapsed. There was at least a brief cooling period. During this interval accused had an opportunity to deliberate upon his actions and to plan a method of reprisal and revenge. The evidence fairly indicates that a malicious and felonious intent to murder existed at the moment accused fired his weapon at deceased, who was unarmed and unprotected. Such provocation as may have resulted from the sudden quarrel and personal affray, was legally inadequate -- certainly as far as the record disclosed -- to either justify the murder or to reduce the offense to manslaughter (CM ETO 292 Mickles; CM ETO 422 Green)."

(CM ETO 4497 DeKeyser 1944)

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Two prisoners of war (deceased), dressed in German uniforms and unarmed, were being taken back to a prisoner-of-war receiving station in a truck by four soldiers (including the accused). The prisoners were seated on the hood of the truck, facing forward, each with one hand to his head, and the other hand grasping the hood. The escort had apparent difficulty in finding the station where they intended to leave the prisoners. Two officers heard one of them remark that, unless they found it soon, they would have to shoot the prisoners. When the truck had proceeded another 25-35 yards, shots were fired and the prisoners were killed. Accused admittedly killed them. In defense, accused claimed that S**, also an occupant of the truck, heard one of the prisoners exclaim, "This is a good place to jump off!" "Immediately he gave the warning, 'You better watch them they're going to jump'. Simultaneously with S***'s warning, the prisoner on the right withdrew his hand from his head and attempted to move from his seat on the truck. It was then accused fired upon the prisoners." Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY INSUFFICIENT. (1) Evidence Rulings: In view of the fact that the Board of Review has concluded that the record is legally insufficient to support the findings of guilt, "the prosecution will be given the full benefit of the questioned testimony and it will be treated." (2) Prisoners of War: The deceased "were entitled to all of the rights and prerogatives of and protection due prisoners of war. Likewise there were imposed upon them certain duties and obligations." (Cite 2 Wharton's International Law; Geneva Convention of 1929 (signed July 29, 1929); TM 27-251, Treaties Governing Land Warfare, 7 January 1944, p.151; FM 27-10, Rules of Land Warfare, 1 October 1940.) "The provisions of the Geneva Convention with respect to prisoners of war should be read in the light of prior official pronouncements of the U.S. and its civil and military authorities on their status." "Intrinsic in the instant case is the question whether a prisoner of war may be summarily shot while he is attempting to escape." Accused's defense "was based on the premise that he killed them in the performance of his duty to prevent their escape and therefore the homicides were legally justified." In its findings of guilty, the court evidently concluded "that no factual or legal necessity existed which compelled accused to use extreme force and violence to prevent their escape; that the deaths of the two prisoners were motivated by the desire of accused's group to be rid of the burden of their care and custody and that consequently the killing was with malice aforethought so as to constitute the crime of murder."

"The vital question in the case revolves about the sufficiency of the evidence to prove that accused at the time he shot the two prisoners of war possessed the necessary malice. Two guiding premises on which the discussion herein must rest are: (a) "The two deceased were not criminals, but were prisoners of war and were entitled to be accorded the treatment provided by the rules of international law and relevant provisions of the Geneva Convention." (b) "The accused was a soldier of the Army of the United States and with three other soldiers had received the custody of the two prisoners and thereby there was imposed upon him (and the other soldiers) the serious responsibility of retaining the custody of the prisoners until they were delivered to proper military authorities. Incidental to this general obligation was the specific duty to prevent the prisoners from escaping."

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"While the burden of establishing that the homicide was justifiable is upon the accused unless the evidence of the prosecution itself establishes this fact, that burden is sustained when, as a result of the whole evidence, a reasonable doubt has been created in the minds of the court as to whether or not the homicide was justifiable. If, from a consideration of the whole evidence, the court entertains a reasonable doubt upon that question, the doubt is to be determined, like all other doubts in the case, in favor of the accused * * *."

"Under the established principles of international law and the declarations of the Geneva Convention * * *, accused, as one of the captors of the prisoners of war was authorized to use such force as was found necessary to prevent their escape, 'and for this purpose violence resulting in the fugitive prisoner's death may be applied, if less severe measures prove inadequate'." "Proof that accused killed the two prisoners by use of a firearm immediately created the presumption that the homicide was with malice aforethought and hence murder. However, it was a rebuttable presumption which could be overcome by proof that the prisoners were killed in the course of the attempt to escape or that the killing was, under the circumstances, reasonably deemed necessary by him in order to prevent their escape * * *. The burden was on the prosecution to establish beyond a reasonable doubt the fact that the prisoners did not attempt to escape or, failing in that proof, that accused used more than necessary force to prevent the escape." (1) Attempt to Escape: The officers did not see whether or not the prisoners made a move to escape. This is not the equivalent of a statement that the prisoners did not make any such move. Therefore, the only remaining evidence is that they attempted to escape. "This situation presents not a conflict in the evidence * * * but a question of law for the determination of an appellate tribunal". (2) Unnecessary Force: Rules applicable to civilian law may be applied in determining whether an excessive amount of force was used to prevent the prisoners' escape. This is ordinarily a question of fact. "However, when the facts are undisputed and the only reasonable and logical inference therefrom is that reasonable grounds existed for accused to believe that it was necessary to kill or seriously wound a prisoner to prevent his escape, and the proof is clear and uncontradicted that accused acted on such belief, the issue becomes one of law, and its sufficiency as a defense may be considered by the appellate tribunal upon examination of the record * * *." Here, the convoy line in which accused's truck was located "was not engaged in combat but its forward movement was halted by enemy machine gun or anti-tank fire. The atmosphere of battle environed accused. The fact that he was one of the custodians of prisoners of war is indicative of the conditions under which he operated. Cries of warning * * * would have been an idle gesture", because of language difficulties. "It certainly cannot be the law that * * * it was the duty of accused to allow the prisoners, before he took action, the advantage of dismounting from the truck. Placed as accused was at that time he cannot be held to the same standard of prudence as might be suggested upon a calm judicial review of his conduct. He is entitled to be judged upon the facts and circumstances as they existed * * *. The law does not require him 'to weight with scrupulous nicety the amount of force necessary' to prevent the escape; 'the exercise of a reasonable discretion is all that is required'."

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"Prosecution's evidence * * * denied that immediately preceding the actual shooting a member of accused's group, other than accused, uttered threats against the lives of the prisoners is not of sufficient probative force to create an issue of fact for the court and upon which to base the finding of guilty. At most it is but a scintilla of evidence"--which is sufficient to support a finding.

"Under the generally recognized rule denying substantive evidentiary value to impeaching admissions of former inconsistent extra-judicial statements of a witness not a party to the action", a certain pretrial statement of one of the witnesses "can have no evidentiary weight and must be entirely disregarded." "The question whether accused might be held guilty of the crime of voluntary manslaughter cannot arise in this case for the reason that the evidence shows that the homicide was justifiable. * * * Under such circumstances the exculpation of accused from the guilt of the greater offense (murder) also relieved him from liability for any lesser included offense (manslaughter). (CM ETO 4581 Ross 1945)

"After he was beaten by deceased accused heard his adversary outside, threatening to beat his brains out. Accused loaded his gun, left the tent and saw and recognized deceased who was standing near his own tent. He walked toward the victim and shot him at a distance of about ten yards. He admitted that he did not know whether deceased was then armed or coming toward him, and that the victim was at the time, 'too far off' to harm him. He also admitted that deceased did not say anything to him or threaten him in any way as accused drew near." Deceased died. Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The self-defense question was one of fact for the court, and its determination against accused was fully supported. (2) Degree of Killing: Accused was properly found to be guilty of murder as distinguished from manslaughter. There are two methods of applying the doctrine of "cooling time": "(a) The 'reasonable time' rule: If there is a sufficient period of time between the provocation and the killing for the accused to 'cool his passions' the killing will be attributed to malice and will be murder, and the determination of this reasonable time is governed by the standard of an ordinary reasonable person. (b) The 'dependent on circumstances' rule: 'Cooling time' is to be determined by the circumstances and conditions of each case, whereby the question of malice is determined not by the standard of a 'reasonable man' but by the standard of the accused, thereby allowing consideration of the accused's individual temperament and of all of the circumstances involved in the killing." Without deciding which doctrine should be applied herein, and assuming that accused would have been justified in killing at the time deceased initially beat him, yet it must be concluded that there was no justification for accused to subsequently kill him as he did. "Accused deliberately and vindictively planned to secure his revenge upon deceased with a ruthless disregard of the consequences." Sufficient time elapsed between the initial conflict and the shooting to enable accused to cool his temper and passion." Also, the necessary malice aforethought appeared. (CM ETO 4640 Gibbs 1944)

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Accused soldier killed a non-commissioned officer when the latter attempted to quell a disorder between accused and another, and to arrest accused. He was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Specification: "Accused was charged with murder in the common law or common form of specification, modeled upon Form 86, App.4, MCM, 1928, p.249. This is the only form of murder specification suggested in the Manual and is in customary use in the administration of military justice. The Manual defines the crime of murder in Par.148a, p.162, as 'the unlawful killing of a human being with malice aforethought' and states that 'malice aforethought may exist when the act is unpremeditated' and may mean, among others, the following state of mind preceding or coexisting with the act by which death is caused: 'An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace. * * * provided the offender has notice that the person killed is such officer or other person so employed' (par.148a, p.164)." Immediately following this statement is the discussion entitled Proof, the second part of which provides: '(b) that such killing was with malice aforethought'. It is clear from the foregoing that the provision in the Manual that the facts stated in the specification and those reasonably implied therefrom should include all the elements of the offense sought to be charged (Par. 29, p.18), was followed in the instant case. The element under discussion is nothing more or less than malice aforethought and was specifically charged herein. The form to be taken by the proof of that element necessarily depended upon the facts of the case. The defense was clearly put upon notice under the Specification herein that all competent, material, relevant evidence tending to prove malice aforethought, as defined in the Manual, would be admissible in evidence. The fact that the proof took the form of evidence showing that accused deliberately opposed force to a non-commissioned officer in the execution of his duty imposed by Article of War 68 to part and quell the quarrel and disorder between accused and * * * and to arrest accused, did not prejudice any of accused's rights, under the foregoing authorities." (CM ETO 4949 Robbins, Jr., 1945)

Accused, charged in conjunction with another, was found guilty of the rape and murder of a girl under the age of sixteen years, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Aid and Abet: "The distinctions between principals, aiders and abettors have been abolished by Federal statute. * * * The distinction is also not recognized in the administration of military justice." (18 USC 550; 35 Stat 1152; Winthrop, Reprint, 1920, p.108). "'Rape is the unlawful carnal knowledge of a woman by force and without her consent' (MCM, 1928, par.149b, p.165). That accused committed this offense on * * * is amply proven, not only by his two sworn statements but by the physical facts found during the investigation. The injuries apparent in and on the body, the condition of the clothing, the comparison of the hairs and the presence of accused in the vicinity where and at the approximate time that the crime occurred, compellingly indicate that accused

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had 'unlawful carnal knowledge' of the girl, a minor, 'by force and without her consent'. Outside of the written and verbal confession of accused, the evidence substantially indicates that rape, a felony, was committed by accused, during or shortly after the accomplishment of which act, the victim died of strangulation through manual pressure on her throat to stifle her outcries. The accused, if not a principal in the act, was at least an active aider and abettor and under both Federal and military law, equally guilty of her murder." (CM ETO 5156 Clark 1944) (See CM ETO 5157 Guerra for companion case herein.)

Accused was found guilty of the rape and murder of a 7-year old girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The Evidence: (a) Photographs of the scene of the offense and of the deceased were properly admitted in evidence, after proper foundation. (b) Clothing of both deceased and accused were properly admitted. "In view of all the evidence both the 'chain of possession' of these garments and the identification thereof were properly established * * *." (c) Pre-trial statements of accused were correctly admitted. Assuming that they contained a confession, the corpus delicti was sufficiently established. Objection was additionally made to one of the pre-trial statements on the ground that it "'wasn't voluntarily given', that when accused was interviewed the hour was late, that accused was probably asleep, and also that his state of mind was such that he was not responsible for what he said at the time * * *. Accused himself testified that during the evening of 26 September /when the statement was made/, he recalled as much of the incident at * * * as he did on the day of the trial". The question of admissibility was one of fact for the trial court. (3) Intoxication of accused at the time of his offense and the effect thereof upon the general criminal intent involved were issues of fact. (4) Mental Capacity: "It is noted that the various witnesses for the prosecution and defense who testified with respect to accused's mental condition, testified with reference to his appreciation of the difference between right and wrong but did not testify specifically with respect to his ability to adhere to the right * * *. The court did not treat the question of accused's sanity as an interlocutory matter and made no specific finding with respect thereto. * * * The determination of the question of accused's sanity was within the peculiar province of the court, and it was its duty to resolve any and all conflicts in the evidence * * *. It was the opinion of all witnesses who testified with reference to accused's mental condition that he was a constitutional psychopath, and even the defense witnesses testified that he was not psychotic." By its findings of guilt--hence the conclusion that accused was sane both at the time of the offense and at the time of trial, was sufficiently supported. (Follow CM ETO 4219 Price 1944.) (CM ETO 5747 Harrison, Jr. 1945)

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Nine "Accused joined in a tumultuous disturbance of the peace, acting with the common intent of avenging themselves of the supposed injustice committed on them by the military police, and in a violent execution of their malevolent purpose, fired a volley of shots into a public house, directly causing the death of three persons." Accused were jointly charged with the three murders in violation of AW 92; with engaging in a disorderly and riotous assembly of soldiers in violation of AW 96; and with short periods of AWOL. Eight of their number were found guilty of murder. All were found guilty of the other two offenses. HELD: LEGALLY SUFFICIENT. (1) Common Trial: "Accused were tried together without express consent and without objection on their behalf." The charges were joint under AW 92 and AW 96. The total circumstances were the same. Hence, "the consent of each accused to be tried together was unnecessary. Had a motion for severance been made, the granting of the same would have been within the sound judicial discretion of the court. In view of the nature of the charges and the conduct of the trial there would have been no abuse * * * had the court denied the motion * * *." (2) The AWOLs were charged to have occurred from about 2130 hours to about 2200 hours, 5 October 1944. The court found the AWOLs to have been from about 1900 hours to about 2100 hours of that date. No fatal variance resulted. The court did not change the date of the offense but merely the period. "The use of the word 'about' * * * put accused on notice that times other than the exact hours alleged might be proved. The variance did not increase the amount of punishment. No AW 37 prejudice resulted. The AWOLs were proved. (3) Murder: The court properly found eight of the accused to be guilty of murder. "Angered by the interference of the military police with the pursuit of their pleasure, they conceived and agreed upon a murderous plan to wreak joint vengeance upon them or their kind." They secured carbines and ammunition; returned to the town where their offenses subsequently occurred. The killing of the soldier victim was cold-blooded. That of the two civilians was the result "of the manifest disregard of human life by those accused who together fired an entire volley into the 'pub' which they knew was occupied." The fact that they did not intend to kill the civilians is immaterial. (4) Disorderly and Riotous Assembly: Accuseds' over-all conduct was disorderly. They violently and tumultuously disturbed the peace, to the terror of the people in the bar where the occurrence took place. The AW 96 offense charged against them was proved (CM ETO 895). (5) No multiplication of charges resulted herein. (CM ETO 5764 Lilly 1945)

(1st Ind; CM ETO 5764 Lilly 1945: As to the riot, "accused might more appropriately have been charged with the very serious offense of committing a riot in violation of AW 89, which offense was clearly established * * *. The grave danger to the public peace and safety ensuing upon the concerted joining in a tumultuous disturbance by a group of persons in a violent and turbulent manner, which is the essence of that offense, is unhappily illustrated in this case. The fact that they were also charged with and proved and found guilty of the resulting murders does not make the committing of the riot less serious.")

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Accused was found guilty of the murder of D***, in violation of AW 92. He was also found guilty of assault with intent to do bodily harm by shooting S*** in the body with a dangerous weapon, to wit, a rifle, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The finding of murder was sufficiently supported. The question of intoxication was for the court below (discuss effect of intoxication on requisite intent at length). (2) AW 93; Assault: The AW 93 specification charged an assault upon ***"with intent to do him bodily harm by shooting him in the body, with a dangerous weapon, to wit, a rifle. The evidence shows * * * that the bullet from accused's carbine which killed D*** passed through his skull and lodged in the right shoulder of S***. The victim of this assault was a bystander or spectator", some distance from D***. "The bullet was evidently deflected when it passed through deceased's skull in the direction of S***." The finding of guilty in violation of AW 93 was sufficiently supported. (CM ETO 6229 Creech 1945)

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The evidence sufficiently supported the finding of guilt (detail). (2) The specification employed "does not follow the model form * * * set forth in the Manual in that it omits the word 'unlawfully' and also alleges that accused killed deceased 'with intent' rather than 'with premeditation'. However, the specification here employed alleges that the act was done 'feloniously' and this word sufficiently alleges the unlawful character of the act * * *. Also where, as here, it is alleged that the act of accused was done 'with malice aforethought' it is not necessary to allege, in addition, that it was done 'with premeditation' * * *. Thus, the specifications sufficiently alleges the crime of murder." (CM ETO 6262 Wesley 1945)

Accused were found guilty of murder in violation of AW 92, and of various assaults with a dangerous weapon, with intent to do bodily harm, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Defense attempted to set up the defense that, because of accuseds' drunkenness, they could not have entertained the necessary premeditation or intent to kill. Their motions in this regard were properly overruled. The MCM "provides that 'Voluntary drunkenness' * * * is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense' (MCM, 1928, par.126a, p.136). Intent being a necessary element of the offense of murder, the proof thereof may be established 'either by independent evidence * * * or by inference from the act itself' * * *. Furthermore, in law, the element of malice is supplied by the mere commission of the act of homicide * * *. Although the evidence shows that accused had been drinking on the evening in question the proof fails to

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rebut the evidence of malice as established by the prosecution. The accused recognized various objects in the room where the homicides occurred. They articulated, and fired accurately, et. (2) Joint Charges: Accused T*** killed B***. Both accused shot T**, who died soon thereafter. "The charge that each accused 'in conjunction with' the other did 'with malice aforethought, deliberately kill' T*** is therefore properly sustained, as each participated in his murder * * *." (CM ETO 6265 Thurman 1945)

Accused was found guilty of murdering a girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. Sanity; Drunkenness: "During the trial the court adjourned for a period of more than a month to permit a properly constituted medical board to examine and report on the mental condition of accused at the time of the offense and at the time of the trial. The board concluded he was sane and responsible for his acts at both times. Although the board did not know the exact quantity of liquor accused had consumed on the evening of and prior to the offense, they knew it was considerable and they had information as to his physical condition when apprehended. The only testimony that might be regarded as tending to suggest mental incapacity at the time of the offense was Captain ***'s opinion that a person could consume enough intoxicating liquor to relieve him of responsibility for his actions; and Captain ***'s opinion that, three hours after the offense, accused was in such an alcoholic stupor as to indicate that his sense of responsibility was affected during the previous thirty minutes. Although the evidence shows that accused had been drinking heavily a short time prior to the offense, his studied persistence in reentering the building where he committed the offense, and his prompt, spirited, and almost successful attempted escape, manifest purpose, coordination and an awareness, for the time being, of the situation then existing, adequately to support an inference of intent and concomitant responsibility. The court's determination, in this regard, is therefore final. (CM ETO 3812, Harshner)." (CM ETO 6380 Himmelmann 1945)

Accused were jointly charged, tried and found guilty of violations of AW 92, in that they murdered a man and raped a woman. HELD: LEGALLY SUFFICIENT. (1) Pleading: "Accused were found guilty of murder and rape, each offense being alleged to have been committed jointly and in pursuance of a common intent. This form of pleading is entirely proper. Where accused act as participants in a joint venture and in concert, each is chargeable as a principal regardless of the extent of his participation, and their joinder in a specification of this kind is proper." "It is immaterial which of the participants actually committed the death * * * or the intercourse in the case of rape." (2) Res Gestae: The statement and exclamation of deceased were made so soon after he was wounded and under such circumstances that they were clearly admissible as part of the res gestae. (3) The confessions of accused were properly admitted, despite the fact that accused were taken to the scene

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of the crime. "Although in some cases the fact that an accused is taken to the scene of the crime in the custody of police officers might serve as one of the aggravating factors causing a court to hold a confession involuntary, obtaining information from accused at such place is not per se objectionable * * *. The controlling question is whether the confession in its whole was voluntary." The court decided this question against accused. (4) Limitation of use of confessions: "There remains the question whether the court was properly warned not to accept or consider the confession of each accused as against the others * * *." A consideration of the record (detailed) permits the assumption "that the confessions were admitted with full understanding of their proper application and that the court in reaching its findings as to each accused did so without reliance upon matters referred to in the confessions of his fellows and not admitted in his own. There was no prejudice therefore to any of the accused individually or to all of them collectively. (5) The evidence of the rape adequately supported this finding of guilty. (6) The evidence of murder likewise sufficiently supported this conviction, although there were no eye witnesses to the killing nor any admissible confession or admission of guilt in this respect by any of the accused. However, the circumstantial evidence was sufficient to support the finding. The evidential facts (detailed) taken together give rise to the "unescapable inference that accused were observed by the deceased in the abduction of his daughter, and that one of them deliberately and cold-bloodedly stabbed him with the intent and purpose of killing or disabling him so as to facilitate the execution of their jointly conceived plan of raping" the girl. (CM ETO 7518 Bailey et al 1945)

Accused was found guilty of murdering a sergeant (by shooting), in violation of AW 92. The approving authority reduced the life sentence to ten years. HELD: LEGALLY SUFFICIENT. (1) "The evidence proved beyond all doubt that accused knew at the time he entered the barber shop, armed with a rifle and carrying ammunition, that the barrack room was occupied by his fellow soldiers and that with few exceptions they were in bed and many of them were asleep. Regardless of his purpose or motive, he intentionally fired his rifle into the room. Three of the shots were aimed in the direction of and among the men and one of them killed N***. No excuse or provocation existed. Under these circumstances he is conclusively charged with the knowledge that his indiscriminate shooting into the room of sleeping men would 'probably cause the death of, or grievous bodily harm to' one or more of them. The fact that he may not have intended such result offers no palliation or excuse. From this state of the evidence the court was fully justified in inferring that he acted with malice aforethought." (2) The sanity question was resolved against accused. "There is substantial evidence that accused's intoxication at the time of the shooting was not of such severity as to deprive him of his powers of deliberation * * *." (3) Likewise, the issue of accidental discharge of the weapon was one for the court. "Except for the discharge of the first shot (which undoubtedly entered the ceiling above the cubicle), accused offered no

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explanation. He asserted he had 'passed out'. The fact that the rifle was thereafter fired three times belies this assertion." (4) "The action of the approving authority in reducing the period of confinement from life to ten years, while unusual, is nevertheless legal." (CM ETO 7815 Gutierrez 1945)

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The evidence sufficiently supported the finding of guilt. (2) Photographs: "The court admitted photographs of the body as discovered at the site of the homicide and of the re-enactment of the crime by the accused and W***. The defense did not object. As to the former, there was no prejudicial inflammatory effect * * *. Concerning photographs of reenactments of crimes and accidents to show a version thereof disputed by the opposing party, the authorities are in conflict as to admissibility * * *. Where such photographs are faithful reproductions of uncontradicted testimony, as in this case, they are clearly admissible." (3) "Evidence of accused's previous convictions by court-martial, and of the opinion of a psychiatrist that accused might have killed people before, were elicited by the defense * * *. They constitute a part of the insanity defense, and the error, if any, under such circumstances was self-invited and nonprejudicial * * *." (3) Sanity: "Moral insanity and irresistible impulses disconnected from true insanity, are invalid as defenses * * *. There is competent evidence that accused was sane, and that he could adhere with difficulty to the right. His ability so to adhere, according to that testimony, was impaired because he had no moral restraint. A powerful restraint to crime, other than moral, is fear of punishment. Those sane persons whose will power is weakened to the extent of being without conscience, constitute the class who need the latter restraint most. To fail to punish a murderer, whom the court's findings place among that malevolent group who find it hard to do right, is to encourage and not to deter crime." The evidence herein sufficiently supported the trial conclusion that accused was sane. (CM ETO 9424 Smith, Jr 1945)

Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Unsworn Child Witness: After preliminary questioning re his understanding of an oath and the consequences of lying, an 8-year old witness was "allowed to testify with the express consent of defense counsel and without being sworn. This procedure was clearly error but as his story was simply corroborative of that of his mother and the other evidence is clear and compelling as to the guilt of accused, it is not believed that accused was seriously prejudiced thereby. Punishment was not increased by the erroneous testimony for a sentence of death or life imprisonment is mandatory on conviction of murder and accused was given the lesser sentence." (2) "Self-defense is raised by accused in his unsworn statement. His account of the events * * * is not at all convincing, when it is considered that he was armed, deceased was not, and there was a door through which he could have retreated. An eyewitness testified deceased was not making any movement in the direction of counsel at the time the shot was fired." The question of self-defense was one of fact for the court below. (CM ETO 9410 Loran 1945)

AW 92

MURDER; RAPE

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(2) Murder; Finding of Offense Included

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(2) Finding of Offense Included:Cross References: 451(50) 6015 McDowell

A civilian was killed during a brawl at a public house in which the two accused were participants. After a joint trial for murder in violation of AW 92, they were found guilty of the lesser offense of manslaughter, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Joint offense: "It was not necessary for the prosecution to prove specifically which of the accused struck the fatal blow. The evidence beyond a reasonable doubt excludes the possibility of any person or persons other than the accused participating in the fight with the deceased at the time and place fixed definitely by the evidence. Likewise any other cause or causes of death except blows inflicted by accused are excluded from consideration." In the circumstances, both accused were common and joint participants in the assault and battery upon deceased, and are equally responsible for his death. (2) Confessions: It was shown that at the time accused made their confessions, they received proper and timely warning of their rights, and did not confess either under compulsion or offers of leniency. After the necessary foundations had been laid, the confessions were introduced in evidence. The use of the confessions was proper, despite the fact that a superior officer had previously told accused that "it would ease their minds if they told what they knew about the case", and "that it might be best for them to get it off their minds". These "were but 'casual remarks or indefinite expressions' and as such cannot 'be regarded as having inspired hope or fear'". (MCM, 1928, sec.114a, p.116)
(CM ETO 72 Jacobs 1942)

While highly intoxicated, accused went to the home of a 48-year old deaf and dumb woman. After he offered her silver coins, she agreed to have sexual intercourse with him. This intercourse was in progress, when the bed broke. The woman uttered weird and unintelligible sounds. Accused reacted by attempting to silence her. Using both hands, he grasped her by the throat. A struggle ensued. The woman finally ceased to breathe. Accused was found guilty of murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT ONLY FOR THE LESSER OFFENSE OF MANSLAUGHTER, IN VIOLATION OF AW 93. (1) Homicide during Fornication: "An unintended homicide, committed by one who at the time is engaged in the commission of some other felony is murder both at common law and under the statutes * * *." "Fornication committed in private and not openly is not an offense, except where it is punishable as such by statute." "Fornication, under the United States Criminal Code is but a misdemeanor (U.S. Criminal Code, sec.318; 18 U.S.C., 518; U.S. Criminal Code, sec.355; 35 Stat. 1152; 18 U.S.C. 541). The accused, and deceased were guilty of fornication, i.e., sexual intercourse between two unmarried persons. (2 Wharton's Criminal Law (12th Ed.) sec.2104, p.2413). It therefore follows

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that the killing of deceased by accused as an incident to the commission of * * * fornication (a misdemeanor) does not for that reason become murder. * * * Undoubtedly the Court in finding accused guilty of murder was greatly influenced by the fact that accused strangled deceased while they were engaged in sexual intercourse. However, as has been demonstrated such fact can have no legal force in determining whether the homicide was murder. The fact that they were engaged in such act when the homicide occurred is, however, relevant and material evidence." (2) In order to have been guilty of murder, accused must, beyond a reasonable doubt, have acted with malice aforethought, i.e. "that accused's state of mind preceding or at the time of the killing was such as to show an intention to kill deceased or inflict grievous bodily harm upon her; or that he was conscious of the fact that his acts would cause deceased's death or inflict grievous bodily harm upon her." There was a complete failure to show any malice whatever. "The conclusion appears to be irrefutable that accused was seized with surprise and fright and lost all powers of deliberation and reason. His judgment was unseated. He acted under the impulse of passion accentuated by his intoxication. Provocation existed, not in its usual formal design of an opponent threatening bodily harm to an accused but in a set of circumstances which operated as powerfully and directly upon deceased's mental processes as would have occurred had deceased seized a revolver and pressed it to accused's head." These physiological and psychological factors cannot be ignored. (3) Reasonable doubt: "If there is a reasonable doubt as to the guilt of an accused of a higher or lesser crime the Court should convict him of the lesser. * * *. If the evidence is as consistent with the guilt of a lesser crime as it is with the guilt of a higher, the conviction should be of the lesser. * * *. Where, as in this case, malice must be inferred (if it exists at all) from all the circumstances of the homicide, the admission of the homicide by the accused must be considered in connection with any mitigating or exculpatory statements made by him in connection therewith." The proof herein was sufficient only for conviction of accused of the lesser offense of manslaughter, in violation of AW 93.

(CM ETO 82 McKenzie 1942)

Deceased stranger approached accused on a public street near midnight, and assumed the role of a panderer. After he had secured accused's consent to go with him to a girl, the two walked up the street together. Suddenly, the panderer pulled open the fly of accused's trousers and "grabbed" the latter's private parts. Accused immediately took an open knife from his pocket, and struck deceased on the throat with it. The victim died. Charged with murder in violation of AW 92, accused was found guilty of the lesser included offense of manslaughter in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Evidence: "The characteristic element of voluntary manslaughter is that it is committed upon a sudden heat of passion, aroused by due provocation, and without malice. The passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent thought and reflection, and formation of a deliberate purpose. The theory of the law is that malice and passion of this degree cannot coexist in the mind at the same time * * *." (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.645-47).

(2) Murder; Finding of Offense Included

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Deceased's act, without warning and under the circumstances related by accused, was one of extreme provocation. It could properly have aroused indignation, wrath and anger. The court was justified in inferring "that when accused struck the fatal blow he was acting under such violent anger and wrath as to displace his powers of judgment and deliberation and that his mental and emotional condition was resultant upon provocation for which deceased was entirely responsible." However, it is to be noted that "the fact that deceased might have been a moral degenerate or that even he was a menace to the well-being of his community is no legal justification for his death under the circumstances revealed by the record. 'A murder is not excusable merely because the person murdered is a bad man.' (Underhill's Criminal Evidence, 4th Ed., sec.562, p.1111)." (2) Points of Law: (a) Deceased's last words, that someone had struck him--spoken as he fell to the ground--wer admissible as part of the res gestae. (b) Although the transcript fails to show that the defense waived its cross-examination of one witness, it may be assumed that there was such a waiver because defense counsel examined and initialed the record at the time of its authentication. (c) Accused statements that certain of the exhibits belonged to him were admissible as admissions against interest, without proof of their voluntary nature. (d) After proof of its voluntary nature and the corpus delicti, accused's confession was properly admitted in evidence. (e) No prejudice resulted when a witness was shown his prior statement for the purpose of refreshing his memory, although the defense was not previously shown the statement. No demand for its inspection was made. (f) A third party's statement--that accused.told him that he had just cut another's throat--was admissible. (g) Although error may have resulted when witnesses were permitted to testify that deceased had acted as a panderer to them over a long previous period, this error was self-invited, and was in favor of accused. (h) A sketch of the situs of the crime, was erroneously admitted in evidence without proof of its authorship or authenticity. However, no objection was made. No prejudice resulted. (AW 37) (i) The Law Member named by the order appointing the court-martial did not participate in the trial because he had been transferred from the command. This was not fatal. The appointing order did not specifically require his presence. "Under such circumstances the President * * * properly exercised the function of the Law Member. (MCM, par.38c, p.28; MCM, par.51c, p.39). However, when a Law Member is transferred from the command, he should be replaced as soon as possible." (j) The motion for a finding of not guilty was properly denied because assuming that the evidence may have been insufficient for a finding of murder, it was still sufficient for a finding of guilt of the lesser included offense of manslaughter. "The court was fully warranted in denying the motion and in reserving consideration of the question raised by the motion until making its ultimate findings." (CM ETO.506 Bryson 1943)

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While accused and his victim were both under the influence of liquor, they entered into a fight. When accused realized that he was being bested, he pulled his knife and started cutting. The victim was killed. Accused explained that he had been attempting to escape. Charged with murder in violation of AW 92, accused was found guilty of the lesser included offense of manslaughter in violation of AW 93. HELD: LEGALLY SUFFICIENT. "'Absence of design to effect death or grievous bodily harm, the homicide is voluntary manslaughter, and not murder, although the act was unlawful and malicious. * * *.' 'Assault upon accused, actual or attempted, by the person killed, an attempt to commit serious personal injury, or equivalent circumstances, (is) necessary to reduce a homicide to voluntary manslaughter * * *.'" (1 Wharton's Criminal Law, 12th Ed., sec.426, pp.649-651.) The court apparently believed that accused had not intended to kill his victim. But it properly rejected his claim that the homicide was justified because of the necessity of protecting himself and his property. "'A slight assault does not justify killing with a deadly weapon' (1 Wharton's Criminal Law, sec.426, p.651.)" (CM ETO 835 Davis 1943)

Accused was originally tried on charges of murder in violation of AW 92, and of desertion by shirking important service in violation of AW 58. He was found guilty of manslaughter in violation of AW 93, and of absence without leave in violation of AW 61. He was sentenced to 20 years confinement. The reviewing authority disapproved, and sent the matter back for re-trial. At the second trial, the original charges were the same. Likewise, the findings of guilt for the lesser offenses were also the same. Sentence, however, was only for 8 years. HELD: LEGALLY SUFFICIENT. (1) The Re-trial: In view of the results of the first trial, accused "could not legally have been found guilty of either murder or desertion in violation of Articles of War 92 or 58 at the rehearing. The procedure in referring the original charges back for rehearing was in conflict with provisions in MCM, 1928, par.89, stating that 'Upon such rehearing the accused shall not be tried for any offense for which he was found not guilty by the first court.' However, this language is modified by further language in the first paragraph: 'Where the accused is convicted at the first trial of a lesser included offense only, a rehearing of the offense originally charged cannot properly be ordered; although even if convicted of the offense originally charged on such improperly ordered rehearing such conviction may be valid as far as concerns a conviction of such lesser included offense.'" The latter language, as well as two Board of Review holdings, overrules CM 145606 (1921) cited in Dig Op JAG 1912-1940, sec.405(6), p.260. "This opinion is strengthened by the fact that this modifying language is not contained in the Manual for Courts-Martial, 1921. Also, as the sentence imposed on accused at the rehearing was substantially less than that imposed at the first trial no substantial right of the accused was thereby injuriously affected." (2) Court at situs of offense: "The practice of 'viewing the premises' by a military court is authorized procedure (AW 31). However, the practice of receiving testimony and examining witnesses at a 'view of

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the premises' is almost universally condemned and usually is reversible error * * *. A 'view of the premises' properly conducted and not coupled with the examination of witnesses may, in many instances, be extremely helpful and in-formatory to the court. When, in addition, the court either permits or directs an examination of a witness at the scene of the event, it is indulging in a highly dangerous practice, which is not approved or commended. In the instant case, the record affirmatively shows the presence of accused and his counsel at the 'view of the premises'. During the examination of the witnesses at the scene of the alleged offense, no objection was offered * * *." Excluding all evidence taken there, ample evidence still remained to support the find-ings. No prejudice occurred. (CM ETO 3162 Hughes 1944)

Accused was charged with the murder of his victim in violation of AW 92, by striking him with a dangerous weapon or other instrument. He was found guilty of "willfully, feloniously and unlawfully killing him" by striking him on the head with his fist, in violation of AW 93. His sentence included confinement for five years. HELD: LEGALLY SUFFICIENT TO SUPPORT CONFINEMENT FOR THREE YEARS ONLY. While the findings herein do not follow usual legal phraseology, it is apparent that the court intended to find accused guilty only of manslaughter. The evidence merely showed that accused struck the victim with his fist. "Death unintentionally happening from a mere assault is manslaughter * * *. Manslaughter is a lesser included offense in the charge of murder * * *, and is either voluntary or involuntary. It is vol-untary manslaughter when the act causing death is committed in the heat of sudden passion caused by provocation. Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony nor likely to endanger life * * *. The assault by accused with his fist was an unlawful act not amounting to a felony nor likely to endanger life and is plainly within the definition of involuntary manslaughter." (2) An immaterial variance resulted when accused was found to have used his fist, rather than a weapon or other instrument as charged. (3) The maximum punishment for involuntary manslaughter is three years. The 5-year sentence herein must accordingly be reduced. (CM ETO 3614 Davis 1944)

At a time when he had been drinking, accused fired shots into deceased officer's tent, and killed him. While he knew what he was doing, it appeared that his irrational and uncontrolled conduct was provoked by deceased who, without any encouragement, had committed sodomy per os with accused after arousing the latter from his foxhole. Accused was charged with murder in violation of AW 92. He was found guilty of manslaughter, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Victim as moral degenerate: "The fact that deceased might have been a moral degenerate or even that he was a menace to the social well-being of his community is no legal justification for his

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death under the circumstances * * *. 'A murder is not excusable merely because the person murdered is a bad man.' The finding of manslaughter was supported. (2) Confession: Error but no prejudice resulted when the law member refused to permit the prosecution to introduce a statement made by accused to Inspector General officers on the sole ground that accused "could not have had mental comprehension sufficient to understand the situation" within 45 minutes to an hour after the incident occurred. "A confession should not be rejected merely because it was made under great excitement or mental distress, or fear." 'It has been held that evidence tending to establish that a confessor was in an hysterical condition and therefore not in full possession of his faculties at the time he confessed his guilt, does not affect the admissibility of the confession, but bears on the weight and effect to be given the confession.'" (Wharton's Criminal Evidence, 11th Ed, sec.613, p.1029; sec.639, p.1057) (CM ETO 3639 McAbee 1944)

After shooting and killing another soldier with a pistol, accused was found guilty of murder in violation of AW 92. HELD: LEGALLY SUFFICIENT ONLY TO SUPPORT A VOLUNTARY MANSLAUGHTER IN VIOLATION OF AW 93. SENTENCE REDUCED FROM LIFE TO CONFINEMENT FOR 10 YEARS. (1) Evidence: Accused and deceased had been drinking and gambling together. "All witnesses who saw them after their return to the warehouse and in the early stages of the dice game are unanimous in declaring both of them intoxicated to the extent that their physical and mental powers and faculties were clouded and impaired and that they were in a maudlin condition." There was no eyewitness to the actual shooting. Rather, the circumstances appear from accused's extra-judicial statement that the two were arguing while shooting dice; that the victim got mad; took after accused and threatened to kill him if he caught him; that accused ran to some sliding doors where he turned around and shot deceased; that he fired only once, after which he put the gun in some outside bushes. "Considering his extreme intoxication, with resultant unbalanced physical and mental powers, it is almost impossible to conceive accused at the time he discharged the revolver as a cold-blooded killer. Rather a fair and just conclusion is that he acted in a frantic, hysterical and wholly erratic manner under the heat of passion and fear and that no deliberation or premeditation were involved in his mental process." While "this determination alone will not serve to reduce the homicide from murder to manslaughter", yet further evidence--that deceased jumped at and threatened him, together with a prior threat of deceased to "cut up" accused; and the fact that deceased had "always been a fighting man"--supplied the necessary element of provocation. (2) Confession: "At the time accused's statement * * * was admitted in evidence the prosecution had not made proof of the corpus delicti." A witness's oblique statements as to "the man that got killed" did not constitute such proof. However, it was proper for the prosecution to supply--as it did--the preliminary proof necessary for the admission of the statement before it closed its case in chief. Any irregularities in order of proof were thereby cured. (CM ETO 3957 Barnécle 1944)

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During a fight with deceased, accused was severely beaten. After the fight, deceased kicked accused from behind as he was entering his tent, and commented, "I will teach you to draw a knife on me." Deceased left. When he was 150-200 feet away, accused fired two shots. Deceased was killed. Charged with murder in violation of AW 92, accused was found guilty of manslaughter in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the court's finding that accused was guilty of manslaughter. (2) The statement of deceased to accused, "I'll teach you to draw a knife on me" was admissible as part of the res gestae. (3) General Reputation: A defense witness testified that "he had known accused for 'something over a year', that he had never before been brought to the witness's attention for trouble of any kind and that he would give him a character rating of very good." Accused elected to remain silent. In rebuttal, the first sergeant of accused's company "testified that in the organization accused had a reputation of using a knife in a fight. The defense objection to this testimony was overruled. Cross-examined, the witness knew of no instance in which accused had used a knife in a fight. His statement was solely on the basis of accused's general reputation." "The action of the court in overruling the defense objection to the testimony regarding accused's reputation in using a knife in a fight was proper, since the defense had already opened the door to such evidence by showing the good character of accused * * *. This situation presents one of the exceptions to the fundamental rule that the prosecution may not evidence the doing of the act of which accused stands charged by showing his bad moral character or former misdeeds as a basis for an inference of guilt." (MCM, 1928, par.112b, p.112; 1 Wharton Crim Ev, 12th Ed, sec.330, p.456; CM ETO 24, White.) (CM ETO 4043 Collins 1944)

Accused was charged with the murder of a girl, with whom he had just engaged in sexual intercourse in an English air raid shelter, in violation of AW 92. He was found guilty of voluntary manslaughter, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Evidence: "The determination of the factual question whether accused's wrongful act of holding his hand over deceased's mouth and possibly against her nostrils for five minutes during and after which period she lay motionless, was the cause of the asphyxia that led to her death, immediately or mediately, following an epileptic or other seizure, induced by the excitement, blows or obstruction of breathing or whether death was the result of an independent cause unaided by accused's act, was peculiarly within the province of the court." "The court was warranted in concluding that accused acted in the heat of sudden uncontrollable passion caused by adequate provocation and that his act was the proximate cause of" the girl's death. "According to his statement, accused, who had never had a venereal disease and had imbibed heavily of beer, engaged in sexual intercourse with the girl relying upon her assurance that she was not diseased. About two minutes after completing the intercourse the girl indicated to him in a taunting manner that she was infected with a venereal disease. Thereupon accused 'got hot', his 'blood boiled' and he struck the

450(2)(2) Murder; Finding of Offense Included

girl on the face, causing her to scream and her head to hit the floor. She screamed again; 'Everything seemed to go blank. I was afraid the scream would attract someone'. He then put his hand over her mouth, as indicated, and exerted pressure thereon. 'I was mad and frightened'. This provocation was more than mere words. It was a deliberate misrepresentation made by the girl in order to secure sexual intercourse with one who would not have engaged in the act had he known the truth. Accused was suddenly outraged at having been duped into this loathsome situation. * * * The findings of guilty of voluntary manslaughter were fully warranted."

(2) Accused's prior statement, admitting facts which connected him with the girl's death, was properly admitted as an admission against interest. It contained no statement that he killed the girl. Moreover, he stated therein that he did not know that an American soldier was suspected, etc. It was admissible without proof of an AW 24 warning of rights. "The fact that the admission was obtained after a false or misleading statement by the person to whom it was made does not bar its admissibility in evidence. * * * The court was justified in believing that the means by which the statement was procured were not of such character that they may have caused accused to make a false statement. The admission is thoroughly consistent in all its details with the other evidence in the case and there is no apparent reason to believe that it was not true." (CM ETO 4945 Montoya 1945)

At a time when he was exceedingly drunk, accused shot and killed another soldier toward whom he had no apparent animosity. Charged with murder in violation of AW 92, he was found guilty of "feloniously and unlawfully" killing deceased in violation of AW 93. HELD: LEGALLY SUFFICIENT.

(1) Findings: "The proper allegation for voluntary manslaughter contains also the word 'willfully' (See MCM, 1928, Form 88, App.4, p.249). The sentence of ten years' confinement imposed by the court indicates that it intended to find accused guilty of voluntary manslaughter, as such period is the maximum authorized for that offense (MCM, 1928, par.104c, p.99)." "It is the general rule that it is not necessary to charge that an offense was committed willfully, unless the statute defining the same makes willfulness an element thereof * * *. And while it is the general rule that the term 'willfully' cannot be omitted from an indictment when the term is part of the statutory definition of the offense, where the facts alleged necessarily import willfulness, failure to use the word is not fatal to the indictment * * *. Words which import an exercise of the will, such as 'feloniously' and 'unlawfully', will supply the place of the word 'willfully' in an indictment * * *. Under state statutes the word 'feloniously' alone is regarded as sufficient to express a felonious intent and must generally be employed * * *. In accordance with the foregoing authorities, the Board of Review is of the opinion that the findings of the court, especially when considered in connection with its sentence, sufficiently describe the offense of voluntary manslaughter and that no substantial right of accused has been injuriously prejudiced by the omission therefrom of the word 'willfully'." (2) The drunkenness of the accused at the time of the offense was a trial court question. (CM ETO 4993 Key 1944)

(2) Murder; Finding of Offense Included

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Accused was charged with a violation of AW 92, in that, with malice aforethought, he willfully, deliberately, feloniously and unlawfully drove a jeep at an excessive speed, with complete disregard for probable consequences, on a public place in traffic, and did thereby strike and kill two pedestrians. He was also charged with the wrongful taking and use of the jeep, in violation of AW 96. He was found guilty of manslaughter in violation of AW 93, and of the AW 96 specification. HELD: LEGALLY INSUFFICIENT RE THE MANSLAUGHTER FINDING. (1) Circumstantial Evidence: "Although it is generally recognized that a conviction may be supported by circumstantial evidence alone (CM ETO 3200 Price; 2686 Brinson and Smith), 'circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt' (* * * II Bull. JAG, sec.453, p.238). A conviction upon circumstantial evidence is not to be sustained unless the circumstances are inconsistent with innocence." (2) Evidence: "There is no direct evidence of accused's participation in any of the acts alleged * * *." The testimony of a medical officer "most convincingly indicates that accused, because of drunkenness that reduced him to a rare and astonishing state of inebriety by 2000 hours on 15 September 1944 (date of offenses charged), was then physically incapable of either operating or taking a motor vehicle as alleged. That he was at that time 'paralyzed drunk' was made impressively manifest by the alcoholic content of his blood as revealed by test thereof taken just before midnight on 15 September and which warranted the witness' descriptive hyperbole that he then was 'dead, but breathing'. How the 'dead' drunk accused came to be lying, unscratched and unhurt, beside the ditched government jeep is a matter of conjecture." Hence there is no adequate evidence that accused operated the vehicle or took the vehicle, as alleged. (CM ETO 6397 Butler 1945)

Accused was found guilty for murder, in violation of AW 92. HELD: LEGALLY SUFFICIENT ONLY for voluntary manslaughter, in violation of AW 93. "There is a complete absence of motive in this case. Accused's prior statement that he would defend himself, and his subsequent statement in justification, were not malicious. The prosecution's only evidence of murder is the firing of a shot from a deadly weapon which caused death. Dependent solely on this fact is the essential element of malice. Accused's testimony explaining the shooting is not contradicted in any manner, but on the contrary, is corroborated in the essentials of his remonstrances, his retreat, and the abuse, the threats and the possession of a deadly weapon by his adversary. Much of the corroboration is in the prosecution's testimony. Killing in the heat of passion and commission of the lesser crime of manslaughter are not inconsistent with the theory of self-defense * * *. Imperfect self-defense, or shooting unnecessarily in danger but without malice, is manslaughter. Imminent danger and resultant fright of an accused are clearly sufficient to reduce murder to manslaughter, in the same manner as is rage or any other violent emotion * * *. 'Apparent imminent danger of personal violence is adequate provocation' * * *, although this may be otherwise if the danger ceased before the accused acted * * *. Due to the absence of degrees

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of murder in military law, and the intensified passions of soldiers at was in an active theater, the Board of Review should in murder cases require strict and full proof of malice. Particularly is this true in this case where all members of the court have recommended reduction of the sentence to within the maximum limits of voluntary manslaughter, and the reviewing authority apparently not cognizant of his powers has made the same recommendation. The defense having shown an assault and full proof of adequate provocation and passion, corroborated in important part by prosecution and other evidence, and the prosecution having shown originally only the firing of a shot and not having gone forward with the proof, the Board of Review is of the opinion that as a matter of law there is no substantial proof of malice. The presumption of malice inferred from the use of a deadly weapon is certainly not a conclusive presumption, and is clearly and completely rebutted here. The offense is * * * manslaughter." (CM ETO 6074 Howard 1945)

(1st Ind CM ETO 6074 Howard 1945: "As reviewing authority you had the power to make the reduction in the sentence which you recommended, /life to lesser confinement/ despite the fact that accused was convicted of a violation of the 92nd Article of War * * *. The provision of the 92nd Article of War as to the sentence is binding upon a court but does not limit the powers of the reviewing or confirming authority.

(3) Punishment450(3)(3) PunishmentCross Reference: 450(4) 709 Lakas

Article of War 92 is mandatory in its requirement that a violator thereof shall suffer death or life imprisonment as a court-martial may direct. Although not specifically mentioned, "it is unthinkable that penitentiary confinement for life should be imposed without permanently separating the convicted accused from the service." A dishonorable discharge may accompany a sentence of life imprisonment under AW 92. However, dishonorable discharge will not be implied merely because there is a sentence to life imprisonment. It must be express. (ICM, 1928, par.103, p.92) On the other hand, a court cannot impose total forfeiture of pay and allowances upon an accused who has been convicted under AW 92. Such pay and allowances are the property of the accused. Article of War 92 does not provide for confiscation of property. Nor may such confiscation be implied. (Note, however, that from the date of the sentence the accused is no longer in a pay status.) (CM ETO 268 Ricks 1943)

AW 92

MURDER; RAPE

450(3)

(4) Rape; Proof in General450(4)(4) Rape; Proof in General:Not Digested:

90 <u>Edmonds</u>	6224 <u>Kinney, et al</u>
397 <u>Shaffer</u>	6228 <u>Agee, et al</u>
774 <u>Cooper</u>	6545 <u>Jett</u>
832 <u>Waite</u>	6685 <u>Burton</u> (low intelligence)
1069 <u>Bell</u>	7252 <u>Pearson, et al</u>
1402 <u>Willison</u>	7373 <u>Johnson</u>
1743 <u>Penson</u>	7500 <u>Metcalf</u>
1886 <u>Simmons</u>	7977 <u>Inmon</u>
1899 <u>Hicks</u>	8166 <u>Williams</u> (in junction with murder)
2063 <u>Johnsen</u>	
2203 <u>Bolds</u>	9461 <u>Bryant</u>
2472 <u>Blevins, Jr.</u>	10079 <u>Martinez</u>
2686 <u>Brinson</u>	10098 <u>Mooney</u> (German victim)
2695 <u>White, Jr.</u>	10644 <u>Clontz</u> (German victim)
3141 <u>Whitfield</u>	10715 <u>Goynes</u> (German victim)
3253 <u>Bowman, et al</u>	11188 <u>Parker</u>
3375 <u>Tarpley</u>	11267 <u>Fedico</u>
3469 <u>Green</u>	11376 <u>Longie</u> (German victim)
3470 <u>Harris</u>	
3499 <u>Bender</u>	
3553 <u>McDonald</u> (alibi-identity)	
3691 <u>Houston</u>	
3709 <u>Martin</u>	
3726 <u>Thomas</u>	
3858 <u>Jordan</u> (joint)	
3910 <u>Hartsell</u>	
3969 <u>Hamilton</u>	
4017 <u>Pennyfeather</u>	
4143 <u>Blake, et al</u>	
4172 <u>Davis, et al</u> (7 accused)	
4234 <u>Lasker</u> (aid & abet; keep 3d pty away; common trial)	
4309 <u>McCann</u>	
4661 <u>Ducote</u>	
5009 <u>Sledge, et al</u>	
5017 <u>Lewis</u>	
5052 <u>Malley</u> (1 lt)	
5157 <u>Guerra</u> (see 450(1); 5156 Clark companien)	
5170 <u>Rudesal</u> (aid & abet)	
5363 <u>Skinner</u> (prior violence)	
5561 <u>Holden, et al</u> (aid & abet)	
5641 <u>Houston</u>	
5869 <u>Williams</u> (penetration proof)	
5870 <u>Schexnyder</u> (cont. to resist; armed soldiers)	

AW 92

MURDER; RAPE

450(4)

(4) Rape; Proof in General

450(4)

(4) Rape; Proof in General:

Cross References:

375(1)	2203	<u>Bolds</u>	(Challenges; voir dire of court)
399	2103	<u>Kern;</u>	2472 <u>Bleving, Jr.</u> (Penitentiary confinement)
450(1)	5156	<u>Clark</u>	(In conjunction with murder)
450(1)	5747	<u>Harrison, Jr.</u>	(In conjunction with murder)
423(1)	8163	<u>Davison</u>	
450(1)	7518	<u>Bailey</u>	(In conjunction with murder)
454(56b)	10501	<u>Liner</u>	(With fraternization)

450(4)(4) Rape; Proof in General

Using great force and violence, accused had sexual intercourse with a girl against her will. He was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) It was adequately proved that accused accomplished his act of intercourse with his victim without her consent and with great force and violence. Penetration was sufficiently established by (a) accused's admission of an act of intercourse, and (b) a doctor's testimony that the victim's hymen had been recently ruptured. (2) Points of Law:

(a) View of Premises: After a recess, the court reconvened at the situs of the offense. In the presence of the accused and upon questioning by court members, the victim repeated various incidents and pointed out where they had occurred. Serious error, but no prejudice, resulted from this practice. The girl's testimony was repetitive of her previous testimony. Eliminating her testimony at the situs of the offense, there was still adequate evidence to convict accused. "The practice of 'viewing the premises' by a military court is authorized procedure (AW 31). However, the practice of receiving testimony and examining witnesses at a 'view of the premises' is almost universally condemned and usually is reversible error * * *. When * * * the court either permits or directs an examination of a witness at the scene of the event, it is indulging in a highly dangerous practice, which is not approved or commended." (b) Map: Error resulted when the victim was permitted to use a map or sketch which had not previously been authenticated, and was not actually introduced in evidence. However, this error was self-invited by the defense, and could not have been prejudicial. (c) Soil: Specimens of soil which had been examined by a detective were introduced in evidence without being identified. Their admission was by stipulation. The absence of proof went only to weight and credibility. (d) The victim's mother testified that, when her daughter reached home on the night of the assault, she stated, "I have been knocked down by a black man". This "was admissible for the purpose of confirming the victim's testimony and not as proof that a crime was committed. It serves to rebut the inference of consent that might be drawn from her silence. The nature of her complaint may be shown although it involves particulars to some extent * * *." The victim's mother was also properly permitted to testify that, since the assault, her daughter was very high strung. This corroborated the girl's testimony, and showed the probability that a rape had been committed. (e) Non-prejudicial error resulted when the defense was denied the right to ask the victim, on cross-examination, why she did not make an outcry or knock on a door after the offense had occurred. (f) Statements made by accused prior to trial included denials of the offense. Hence, they were not confessions. They were admissible as admissions against interest, without proof of their voluntary character. (MCM, 1928, par.114g, p.117.) (CM ETO 611 Porter 1943)

(4) Rape; Proof in General

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Accused was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Points of Law: (a) Res Gestae: (i) Without objection, two witnesses who talked to the victim in the presence of the accused shortly after the offense testified that she stated: "He has done everything to me. He has had a knife to my throat." This was admissible as part of the res gestae. The victim's statements were spontaneous expressions of a state of mind caused by the commission of the offense alleged. (ii) As distinguished from res gestae testimony, there is also another rule applicable in rape cases, i.e. "The weight of authority is that one to whom a complaint has been made may testify as to the making of the complaint by the prosecutrix, her physical condition and appearance, and the state of her clothing at that time. Testimony by the witness concerning the details of the outrage as stated by the prosecutrix are, however, inadmissible." (2) Sentence: In addition to finding accused guilty of violating AW 92, the same court also found him guilty of a further charge of assault with intent to do bodily harm with a dangerous weapon, in violation of AW 93. The maximum punishment for this latter offense could have been dishonorable discharge, total forfeitures and confinement at hard labor for five years. The court sentenced accused to be dishonorably discharged, to suffer total forfeitures, and to be confined at hard labor for life. But the reviewing authority disapproved the finding of guilt in violation of AW 93, but permitted the sentence to stand. A sentence imposed for a violation of AW 92 may include dishonorable discharge and total forfeitures, in addition to life imprisonment. (Note: that it is settled that a dishonorable discharge may legally be included with life imprisonment for a violation of AW 92, provided the dishonorable discharge is expressly included in the sentence. But it may not be implied.) (Dissenting opinion herein.) (CM ETO 709 Lakas 1943)

After he had followed two girls, accused negro ordered them to accompany him. When one girl refused to do so, he shot her twice and killed her. The other girl then complied with his wishes, and went into a field with him. After he threatened to kill her, she submitted to two acts of sexual intercourse with him. Four hours later, he freed her. He was found guilty of the murder of the first girl and the rape of the second girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Evidence: The murder was amply proved. Accused's "actions show a cold, deliberate purpose either to kill" his victim, or at least inflict on her "some excessive bodily injury which may naturally result in death." Questions concerning accused's "intoxication", as well as the possibility of his victim's accidental death, were of fact for the court to decide. The rape was also adequately proved. Accused's intercourse with his victim was forced. "Any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. Such being the facts rape was committed." (Wharton's Criminal Law, 12th Ed., sec. 701, pp.942, 944.) (2) Points of Law: (a) Res Gestae: One witness testified that the rape victim's condition when she arrived at a hospital several hours later was distressed and hysterical. A constable testified that the girl informed him she

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had been raped twice by a colored soldier. This testimony was proper. However, it was improper to permit another witness to testify that the girl told him that, after firing two shots at her companion, accused marched her off to some haystacks with a rifle pointing in her ribs. But because the victim herself testified in this regard, no prejudice resulted. It is the rule that, even though not necessarily part of the res gestae, "in cases involving the offense of rape the weight of authority is that one to whom a complaint is made may testify as to the making of the complaint by the prosecutrix, her physical condition and appearance, and the state of her clothing at the time. Testimony by the witness concerning the details of the outrage as stated by the prosecutrix are, however, inadmissible * * *." (b) Accused's statement to an officer, as well as his personal letter to the rape victim, were properly admitted in evidence. No coercion was used against him. It appeared that his rights under AW 24 had been explained to him before he signed the statement. (c) The pre-trial investigation of this case pursuant to AW 70 was adequate. Although argued that it was in the nature of an inquisition, the evidence showed it to have been fair and impartial. Moreover, it is today the rule that the requirements of AW 70 concerning investigation of charges "are not jurisdictional". (CM 229477, Floyd) (Distinguish Dig. Op. JAG, 1912-1940, sec.428(1), p.292; CM 161728, 1924.) (d) Testimony that accused had acted extremely nervous and agitated when he claimed his rifle at a company inspection subsequent to the offense was admissible. This called for "the result of ordinary visual observation and did not require expert knowledge." (e) Testimony was admissible to show that, on the first day of trial, the rape victim's condition was still critical, that large doses of hypnotics were being administered her, and that she was excitable and more than ordinarily emotional. These factors corroborated her testimony, and indicated the probability that a rape had been committed. (f) No prejudice resulted when the President of the court-martial instructed the press that there should be no reference to color in the reporting of this trial of a colored accused. (CM ETO 969 Davis 1943)

Accused seized a 17-year old girl near a park. He exhibited either a knife or a razor. She tried to escape, but he prevented her from doing so. He threatened to kill her. She submitted to sexual intercourse with him, only after his violent threats. He was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Evidence: "The facts that violence was used and that the victim did not consent were most convincingly established by the evidence." (2) The court improperly admitted evidence that accused had previously solicited another girl. This was immaterial. However, no prejudice resulted. (3) Error, but no prejudice, resulted when a witness's reputation for truth and veracity was permitted to be impeached. The witness's testimony had been impeached. "Under certain circumstances it has been held that the introduction of character testimony to support the character of an unimpeached witness is reversible error even in the absence of an objection by the defense." But here, accused's guilt was convincingly established. (CM ETO 1069 Bell 1943)

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Two accused were jointly charged with, and found guilty of, the rape of a 17-year old girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Evidence: The prosecution sufficiently proved that the rape of the girl by each of the accused was accomplished with force, and over her resistance. "Only when she realized that further resistance was of no avail did she cease, and this occurred after both accused had raped her and one of the accused was about to repeat the act of intercourse." (2) Identity: Accused were sufficiently identified as the perpetrators of the crime by circumstantial evidence. This evidence, "coupled with the prompt apprehension of both accused in the near vicinity and the discovery by the police of no other soldiers in the search instituted immediately after the crime had been committed substantiate all that the accused admitted in their statements. It is elementary that identity may be proved by circumstantial as well as by direct evidence." (3) Confessions: Confessions made by each of accused after the common design had been accomplished, and not in furtherance of escape, were properly admitted after the corpus delicti had been established. The trial judge advocate warned the court that a statement made by one accused could not be considered as evidence against his co-accused. (MCM, 1928, par.114c, p.117) (CM ETO 1202 Ramsey and Edwards 1944)

In both cases of rape, and assault with intent to commit rape, the following evidence is admissible: (a) Testimony of the victim that accused was trying to have intercourse with her; (b) testimony that the victim made prompt complaint; and (c) testimony concerning her physical condition, and the condition of her underclothing. (CM ETO 1883 Shields 1944)

Accused negro was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Identity: Although accused's victim testified that she could not see his face because it was dark, she did identify her assailant as being colored. Likewise, a constable who was at the scene of the crime did not see his face, and lost sight of accused when he broke away and ran. But when apprehended, accused was caught running at a point 200 or 300 yards away. His coat was unbuttoned. His clothing bore blood and seminal stains. He corroborated most of the details of the crime personally. His victim's hymen had been ruptured. "These circumstances considered in connection with the fact that he was taken in the proximity of the crime support the presumption that the black American soldier found at the scene of the crime and who broke away from the police officer, and the accused who was captured a short distance away from the locus with his clothes unfastened and while running, were one and the same person." (2) Disrobing: Accused was required to disrobe before the court, and then to dress himself in the clothing which had been taken from his person on the night of the crime. "While such practice is susceptible of abuse and should be adopted only in cases of extreme necessity, accused's constituted privilege under the Fifth Amendment of the Federal Constitution not to give evidence against himself was not infringed by such procedure." (MCM, 1928, par.122b) (CM ETO 2002 Bellot 1944)

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Accused was found guilty of rape, in violation of AW 92. HELD: LEGALLY INSUFFICIENT. Extra-judicial Statements: During its presentation of the case against accused, the prosecution stated that it had no intention to offer his prior extra-judicial statement. Nor did it offer the same. However, when accused took the stand on his own behalf the prosecution used several incriminating admissions contained in that extra-judicial statement on cross-examination, despite defense's objection. It did so without countering accused's testimony, which had indicated that the statement had been obtained by improper influence. In using the statement for this purpose of impeachment, no error would have resulted if it had only been an admission against interest (discuss). However, it cannot be ascertained whether the statement was such an admission or was a confession, since it does not appear in its entirety in the record. "Allowing full value to all that appears in the record * * * and likewise giving due consideration to omissions of necessary evidence with respect to accused's statement, the Board of Review has no alternative except to assume that the statement was in legal effect a confession of the crime of rape or of a lesser included offense and that it was secured through improper influences." The trial judge advocate should have secured from the court "permission to reserve further cross-examination of accused until evidence had been presented that satisfied the court that the statement was either (1) an admission against interest or (2) that it was a free and voluntary statement by accused if it were a confession of guilt. Accused then could have been recalled to the witness stand * * *. It must * * * be borne in mind that if the statement were a confession, before the trial judge advocate could use it for any purposes, the court should allow the defense the opportunity of showing that it was not freely and voluntarily made." It is declared to be the rule that the prosecution, for purposes of impeachment, may not cross-examine an accused, who has voluntarily become a witness on his own behalf, as to contradictory declarations made by him, which are extracted from a prior extra-judicial statement, amounting to a confession of guilt, without first showing that the extra-judicial statement was voluntary. "A rule which permits the use of confessions for the purpose of impeachment of an accused without first showing its voluntary nature would defeat and nullify the rule prohibiting its use as original evidence without similar preliminary proof. Prejudice resulted from the above error. In rape cases, a reviewing authority "will closely scrutinize the testimony upon which the conviction was obtained, and if it appears contradictory on material issues, incredible," unsubstantial, a court will reverse a conviction. Here, the testimony of the victim contained certain inconsistencies and improbabilities which affect its intrinsic truthfulness and reliability, and in crucial parts it possesses but tenuous quality. In some details, it is also contradicted. The competent evidence herein "is not of that robust and convincing quality or quantity which standing alone would prove beyond reasonable doubt that accused was guilty. It was in aid and support of this evidence that the prosecution on cross-examination of accused erroneously injected into the case the inculpatory portions of accused's extra-judicial statement." The conviction must be reserved. (CM ETO 2625 Pridgen 1944)

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Accused were convicted of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. Error resulted when the court refused to admit in evidence the prior written inconsistent statement of the victim given to defense counsel, wherein she said she "gave in" to accused and that one of them asked for a "little sugar." She testified that she made the statement, and identified her signature thereon. But she also further testified that the statement was untrue, that she "never gave into" either accused "for one minute", and explained in detail why she made the statement. "As the girl freely admitted making the inconsistent statement and its contents, nothing would be gained by the defense if it was admitted in evidence." No prejudice resulted. (CM ETO 3197 Colson 1944)

"The failure of the victim of a rapist to make immediate complaint of the crime to the person upon whom it may be expected she would bestow her confidence, affects the credibility of her testimony." (CM ETO 3718 Steele 1944)

Three accused were charged with the rape of two women in violation of AW 92; and with a violation of AW 96 in that, acting jointly and in pursuance of a common intent to rape, they had wrongfully and unlawfully, each in turn, threatened and held two men at the point of a gun. All were found guilty of the AW 96 charge. Two were found guilty of the AW 92 rape charge, but one (accused Wilson) was acquitted thereof. Wilson was sentenced to confinement for 20 years. The other two accused were sentenced to death. HELD: LEGALLY SUFFICIENT. (1) Procedure; Common Trial: Accused were tried at a common trial, on the joint and several charges against them. While they did not severally and expressly consent thereto, each was given a separate peremptory challenge. "Ergo, the consent of each accused herein to be tried together was unnecessary." (CM ETO 3147 Gayles, et al). (2) The identity of each accused was sufficiently established. Although Anderson claimed not to have had intercourse, he could still be held as an aider and abettor. The distinction between a principal and an aider and abettor has been abolished. "Mere presence during the commission of an offense by another, without more, does not constitute one an aider and abettor (CM ETO 804, Ogletree). But "if the proof shows that a person was present at the commission of a crime without disapproving or opposint it, the jury may consider this conduct in connection with other circumstances, and thereby conclude that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting the same." "An accused may be charged with and found guilty of the crime of rape although he did not actually have intercourse with the victim if the evidence establishes that he was present at and aided and abetted the ravisher in the accomplishment of the act of intercourse." Accused Anderson solicited the intercourse of one of the women, forced her into a bedroom at the point of a gun where accused Sanders had intercourse with her in Anderson't presence. He could therefore be found guilty of

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raping her. (3) The Rape: While there may not have been actual resistance at the time of the consummation of the rapes, the victims were forced into the bedroom where the intercourse occurred at the point of a gun, and were held under cover of firearms. One shot was actually fired, although not at them. The evidence is convincing that the three acted in unison, with a common intent and common purpose to rape the two women. (4) The AW 96 Charge: The Board of Review will exercise its appellate power to construe and interpret specifications (CM ETO 1249 Marchetti; 2608 Hughes). In doing so, it is plain "that the pleader intended to charge each of the accused as aider and abettor in the commission of the substantive crimes of rape charged in" the AW 92 charge. "Thus construed, the specification clearly stated facts constituting the offense of aiding and abetting the commission of the crime of rape. Inasmuch as all distinctions between principals and aiders and abettors have been abolished * * *, the charge should have been laid under" AW 92. However, no prejudice resulted from its placement as a violation of AW 96. While Wilson may have remained outside the bedroom, he held other people from entering the room at the point of his gun during the entire orgy. He effected terrorization and complete control of the group outside, thereby preventing them from aiding the victims. "His guilt as an aider and abettor is complete and the finding of his guilt is supported." (5) Punishment: Wilson was given 20 years' confinement for his guilt of the AW 96 offense. The sentence is legal. "The Table of Maximum Punishments does not prescribe any limit * * * for the crime of aiding and abetting the commission of the crime of rape. The nearest related offense is the crime of rape itself, for which a life sentence is one of the alternative mandatory punishments." While Wilson was acquitted of rape, his "aiding and abetting" was a distinct offense. "While death is a legal punishment for rape it is not legal punishment for the separate offense of 'aiding and abetting' the commission thereof because Congress has not specifically authorized it * * *. The sentence, however, may include confinement for life or any period less than life." As an aider or abettor is a principal under Fed Crim C., Sec. 332, he may be confined in a penitentiary. (CM ETO 3740 Sanders et al 1944)

Accused was found guilty of the rape of one girl in England in violation of AW 92, and of assault with intent to rape another girl in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The evidence sufficiently supported the trial court's conclusion that accused was the perpetrator of the offenses against the two victims (discuss at length). This conclusion remains despite his positive denial thereof and his testimony, supported to some degree by other witnesses, that he was at his station or at least returning to it, at the time the offenses were committed. (2) Identity: No error resulted when a local English police officer was permitted to testify that, a week after the offense, one victim identified accused at an identification parade, or of the other victim's statement (on the stand) that she also had identified

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the accused at that same earlier identification parade. This question raises a problem of first issue in the PTO. 70 ALR 910 contains an exhaustive study of the admissibility of extra-judicial identification of a defendant in a criminal case, and points out: "In recent years * * *, the tendency has been towards the admission of such testimony, both as substantive and corroborative evidence, so that now there exists a fairly balanced weight of authority on the question, with a slight preponderance of jurisdictions favoring admission". State v. Frost, 105 Conn 326; 135 Atl 446, quoted in 70 ALR pp.911-912 is expressive of the opinion of this Board of Review (quoted). "Not only do reason and logic support the rule permitting the admission of such evidence, but also practical necessity dictates its use. This is particularly true under the circumstances so frequently revealed in records of trial coming before the Board of Review where the issue of the identification of accused is sharply contested. The evidence in support of identification of accused as the malefactor is in the majority of instances dependent upon the testimony of civilian witnesses who are nationals of the country in which the Army of the United States is engaged. These witnesses in a great number of instances are unfamiliar with the English language and must give their testimony through interpreters. They also experience difficulty in distinguishing the physiognomy of the American soldier--both white and colored--after the lapse of time between the incident giving rise to the charge and the date of trial. Under these circumstances evidence of their identification of accused within a few hours or days after the incident is perhaps the most satisfactory evidence available. While the argument of necessity cannot be used to support the admissibility of evidence which by a fixed and undisputed rule of law is not admissible, it is a relevant and highly important factor when a forum upon appellate judicial review is required to elect between two conflicting rules of law, each of which is supported by respectable authority." (But see later case of CM ETO 6554 Hill 1945 (450(4) herein) re identification parade.) (CM ETO 3837 Smith, BW 1944) (Also see ETO 7209 Williams (450(4) herein.)

After one of accused fired a sub-machine gun bullet through a door, to wound a 33-year old woman inside, the two accused herein forcibly entered her room. They placed her on the bed, and held a gun at her face and breast. She screamed for help, but they put their hands over her mouth. They then held her down on the bed, and each in turn had sexual intercourse with her against her will. Despite her wounded leg, she resisted as she could--with the result, according to her, that "they did not arrive at what they wanted to do". Accused were found guilty of, acting jointly and in pursuance of a common intent, (a) rape in violation of AW 92; (b) assault with intent to do the victim and another person violent harm by shooting with a dangerous weapon, in violation of AW 93; and (c) burglarious entry into their dwelling house with intent to commit rape therein. HELD: LEGALLY SUFFICIENT. (1) Identity: "On several occasions during the trial both accused were directed by the trial judge advocate, the law member, or the president to arise after witnesses were asked if they could identify them. This was improper, even though it did "not violate the prohibition of the 5th Amendment to the

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Federal Constitution against compelling one to give evidence against himself." However, no prejudice resulted because accused were both adequately identified by independent evidence. (2) Dog Tags: It was proper to require accused to show their dog-tags, in order that their army serial numbers (the last four digits) could be compared with digits on helmet liners and the charge sheet. The charge sheet is the basic instrument in the trial before a general court-martial. "Had the identification tags of each accused been removed from his possession prior to trial by proper authority, kept in the possession of such authority, produced at the trial and properly identified * * *, they could have been admitted in evidence * * *. The error, if any, in reading the number from the identification tags personally worn by each accused at the trial, was not such as injuriously to affect his substantial rights." (3) A helmet and two helmet liners were properly introduced in evidence, after proper identification. Likewise, 22 cartridge cases found outside the bedroom door and nine "slugs" were properly introduced. A sub-machine gun was properly admitted, because in his voluntary statement one of the accused "admitted having a sub-machine gun in his possession at the farmhouse, and stated that he believed its number was 742540, the actual number of the gun. As later shown herein, the questions as to which accused fired the machine-gun bullets through the door, and which of the two sub-machine guns was then used, are immaterial with reference to the guilt of either accused * * *." Various other miscellaneous items (discussed) were also properly admitted in evidence after due identification. (4) The drunkenness of accused was a fact question for the court below. (5) Penetration; Joint Venture: "The possibility that only one of accused actually accomplished penetration is immaterial. * * * Both accused were engaged in a wrongful joint venture to secure sexual intercourse by any means whatsoever. It is abundantly evident that they aided and abetted each other * * *, and that one accused, if not both, were successful * * *. One who aids and abets the commission of rape by another person is chargeable as a principal whether or not the aider or abettor engages in sexual intercourse with the victim * * *." (CM ETO 3859 Watson et al 1944)

Accused negroes were found guilty of the rape of a French girl, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) The extra-judicial statements of each of the accused * * * were obviously not confessions but were admissions against interest. In them each accused admitted his acts of intercourse with the girl but asserted that they were favors conferred upon him by her freely and voluntarily. Therefore, there was no admission of legal guilt of the crimes charged * * *." (2) The evidence supported the findings of guilt. The accused menaced the girl with their firearms and by threats compelled her to enter a field where the sexual orgy occurred. One kept his rifle at his side while he performed the act. The girl's earlier companion was kept under guard. Her clothes were torn from her body. One accused put his bayonet at her head or throat; finally stuck it in the ground

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near her head as he had intercourse with her. There is evidence that the girl screamed when one accused first made his intentions evident. Although the girl may not have forcibly resisted, "such non-inculpatory evidence is but one small facet of the complete evidentiary matrix, which cogently reveals that the woman had been reduced to a state of submission by accused's threatening and menacing use of firearms and other lethal weapons. "Under such influence she * * * submitted to intercourse * * *." This was rape. (CM ETO 3933 Ferguson et al 1944).

Accused knocked on the door of a French apartment, calling "Police". The occupants opened the door, and accused entered uninvited. He subsequently sat down at a table, and asked for something to drink. After having some cider, he fell asleep. Upon awakening, he succeeded in forcing the husband and wife (the occupants) to an upstairs room. In doing so, he made threats with his bayonet both against the husband and wife and also a boarder--pricking the husband with the point of his bayonet. Once in the upstairs room, he made husband and wife lie down--putting his bayonet across the wife's throat and using "force". Whenever the husband moved, he seized his bayonet. He proceeded to have sexual intercourse with the already-pregnant wife. Although accused claimed that the intercourse was voluntary on her part, both husband and wife testified that she resisted without screaming; that she struggled but was overpowered; that she was "terrorized by fright". Accused was found guilty of (a) rape in violation of AW 92; (b) assault with a dangerous weapon against the husband in violation of AW 93; and (c) assault by threatening the boarder with a dangerous weapon in violation of AW 93. Accused was sentenced to death. HELD: LEGALLY SUFFICIENT. (1) Evidence: Both sexual intercourse and penetration were proved beyond dispute. The question of whether the victim consented was one of fact for the court. (2) Sanity: At the close of accused's testimony, defense counsel requested that the court recommend, prior to making its findings, that accused be examined by medical authorities. Action on the motion was deferred. After the case was argued, at the close of trial, defense counsel requested that, should accused be found guilty, the court recommend that such a hearing be held before execution of the sentence. The law member ruled that the court would consider the question when it considered the verdict. "Although it was the duty of the court to determine the issue of insanity in all its aspects it was not required to make this determination as an interlocutory question and upon express findings. Determination of the issue as an interlocutory question was discretionary (par 75a, MCM). It is clear that if no express findings had been made upon the issue or upon its special elements, the findings of guilty would have sufficed to cover the issue of insanity and all its elements (CM 157854, Ireland; CM 205621, Curtis; CM 211836) (CM 225837), Gray)." In view of the above authority, "the court's action in denying the motion by the defense was not error and the findings of guilty conclusively reflected the determination of the court with respect to the question of insanity." (CM ETO 4194 Scott 1944)

Two of the three accused herein each succeeded in forcibly raping a girl. The third aided in keeping that girl in the back seat of a jeep while they kidnapped her, and while she was being transported to the site of the first attack upon her. He continued to act as her jailer after the jeep had been stopped, and the other two prepared to commit the rapes. After those first two had completed acts of intercourse with her, the third made an effort to do the same. He lay on her body, but she either prevented his penetration of her person or he was physically unable to enter. All three were found guilty of rape in violation of AW 92. The first two were sentenced to death. The third was sentenced to life imprisonment. HELD: LEGALLY SUFFICIENT. The evidence supported the convictions of the first two accused. As to the third, this accused obviously gave direct and efficient assistance to the first two in raping the girl. "The distinction between principals and aiders and abettors has been abolished by Federal statute * * * (Sec 332, Federal Criminal Code, 18 USCA 550; 35 Stat 1152)." The distinction is also not recognized in the administration of military justice. All were principals. (Winthrop's Military Law & Precedents-Reprint, p 168). (CM ETO 4444 Hudson et al 1944)

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Four accused were tried at a common trial on identical but separate charges of violations of AW 92 in that he did, in conjunction with the other three, rape a woman. Each was found guilty. Accused were also found guilty of housebreaking, in violation of AW 93. HELD: LEGALLY SUFFICIENT.

(1) The Evidence: It appeared that the 31-year old female victim, if not a professional prostitute, was at least "a woman of easy virtue who sold the favors of her body for trifles." She had just completed sexual intercourse with a white soldier, as other white soldiers awaited their turn at her door. She indicated that she was through for the night. The white men evidently acquiesced. A group of colored soldiers then arrived, and forced her body despite her violent resistance. Two apparently had sexual intercourse with her, and two others had acts of sodomy per os with her. The fracas was interrupted by the arrival of a Naval Shore Patrol. (2) Accused identities were sufficiently established. While the prosecution had to prove their identity beyond a reasonable doubt, and while the victim was somewhat uncertain as to who had sexual intercourse with her, and who practiced sodomy, she did sufficiently and positively identify all four accused. Moreover, the Naval Patrol apprehended the four in the act, and thereafter kept them separate during the arrest. (3) The victim's standard of personal morals is irrelevant and immaterial. "A prostitute has the right to preserve the sanctity of her person when she so elects." (4) Each and all of the accused engaged in a common and joint enterprise of securing sexual gratification on the victim's body. While it was not positively established which two had sexual intercourse with her, each was charged with rape "in conjunction" with the other three. The distinction between principals and aiders and abettors has been abolished. All four were guilty of rape. (5) Common Trial: While accused did not object to a common trial, they did not affirmatively assent to it. "However, the

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right of each accused to a separate peremptory challenge was particularly recognized and preserved. There were no motions for severance of the trial. The accused might with legal propriety have been charged jointly with the rape * * * instead of severally and separately. Under such joint charge the granting of severance of trials would have been for the decision of the court * * *. Because of this situation the Board of Review concludes that no prejudice to the substantial rights of the accused accrued because they were tried together." (ETO 3147, Gayles; 3740 Sanders) (6) The house-breaking charge was adequately proved. (CM ETO 4589 Powell et al 1944)

With other refugees, a 22-year old unmarried civilian woman was living at a farmhouse. Accused mulatto and several other negroes visited that farmhouse several times during the afternoon and early evening. At about midnight, accused and an unidentified negro returned again. Despite her protests and resistance, they dragged the woman to a nearby field where they succeeded in having sexual intercourse with her. Both were armed. Some of the victim's underclothing was found in the field the next day. The victim positively and directly identified accused out of a group of eleven at an identification parade the next day, and also at the time of trial. Accused was found guilty of rape in violation of AW 92. HELD: LEGALLY SUFFICIENT. The testimony of the victim was corroborated by her complaint to a friend the morning following the offense, that she had been raped by the "mulatto" whom they had seen the previous day. After the law member ruled that this testimony was admissible as a part of the res gestae, a court member objected and the court was closed. The court then concluded that the testimony was admissible. (a) Law Member: Since the objection to the above testimony went to the admissibility of evidence, the law member's ruling thereon was conclusive and binding upon the court. "The announcement of the president adopting the ruling as that of the court was wholly unnecessary. It was not open to objection by the court membership and the closing of the court for deliberation on the ruling and the vote of the court thereon added nothing to its legality. The ruling remained that of the law member." (AW 31; MCM, 1928, par 51, pp 39,40.) (b) Res Gestae: Since several hours had elapsed between the time of the offense and the subsequent relation of the occurrence by the victim to the witness, it was not a part of the res gestae. "The witness's recital of the victim's complaint to her was admissible, however, for the purpose of corroborating the victim's testimony as to the rape." (CM ETO 4608 Murray 1944)

Accused Teton and Farrell were separately charged but jointly tried on a charge of rape in violation of AW 92. They were both found guilty. HELD: LEGALLY SUFFICIENT. "The fact that only Farrell actually accomplished penetration is immaterial. It was clearly established by the evidence that both accused were engaged in a wrongful joint venture that evening to secure sexual intercourse by any means whatsoever. It is abundantly evident that Teton aided and abetted Farrell in the latter's accomplishment of pene-

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tration, and that accused were interrupted solely by the arrival of Reeves. One who aids and abets the commission of rape by another person is chargeable as a principal whether or not the aider or abettor engaged in sexual intercourse with the victim." (CM ETO 4775 Teton et al 1944)

Accused Rape was found guilty of rape in violation of AW 92. Accused H** was found guilty of wrongfully and feloniously aiding and abetting Rape "by acting as a lookout." Both were sentenced to life confinement. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings of guilt re both accused. (2) Aid & Abet; Punishment: "In view of the abolition of the distinction between principals and aiders and abettors provided in the Federal Statute * * *, the legal effect of a Specification under AW 92 alleging the accused to be an aider and abettor of the crime of rape is exactly the same as that of a specification alleging the accused to be the principal in the offense. Either form may be used in the factual situation present in this case, and a finding of guilty of either specification is a finding of guilty of rape within the meaning of AW 92 * * *. In either case therefore, punishment must be either life imprisonment or death since the Article makes one or the other of these two punishments mandatory. In the Lasker and Harrell case /CM ETO 4234/ a life sentence was upheld on the ground that 'The measure of punishment for aiding and abetting the commission of the crime of rape, determined by analogy and not made mandatory by any Article of War, is any punishment excepting death which the court-martial may direct'. The result thus reached was proper, but the quoted reasoning given in support thereof is erroneous, and * * * is now disapproved. In CM ETO 3740, Sanders et al, relied on by the Board of Review in the Lasker & Harrell case * * *, the facts are distinguishable from both the Lasker and the present case. In the Sanders case one of the accused was charged both as an aider and abettor to the rape under AW 96 and as the principal thereof under AW 92. He was acquitted of the latter charge and convicted of the former. A sentence of confinement for 20 years was upheld on the ground that, in view of the peculiar circumstances of the case involving an actual acquittal of the crime of rape, the offense of aiding and abetting charged under AW 96 was a distinct and separate crime. Hence it was held that appropriate punishment thereof must be determined by analogy to the closely related offense of rape and was not controlled by the mandatory provision of AW 92. Obviously this line of reasoning has no application to either the present case or the Lasker & Harrell case. (CM ETO 5068 Rape, et al 1945)

(1st Ind., CM ETO 5068 Rape et al 1945) "It appears that some reduction in the sentence of H*** is appropriate. There is no indication that the crime was planned before arrival at the scene. Rape was the active party, the only one who had intercourse with the woman, and there is no indication that H** intended to even had there been opportunity. The latter acted as a lock-out, watching for the return of the woman's companion and warning of the approach of the truck. He did not threaten

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or hold at bay potential rescuers, as frequently has happened in similar cases. There is a very definite difference in the culpability of the two accused. It is suggested that H**'s period of confinement be reduced so as not to exceed 20 years."

"Accused were charged with and found guilty of raping each of * * * four women while 'acting jointly and in pursuance of a common intent'. When Lucienne and Mireille were actually attacked, the two accused were in separate but adjoining bedrooms. They also separated Germaine and Christiane after their arrival in the quarry but there was no evidence as to the distance between the couples. The fact that accused separated to commit the final indignity upon their respective victims is immaterial. The evidence clearly showed that on each night in question, accused went on a joint venture to secure sexual intercourse by any means whatsoever. It is abundantly evident that they aided and abetted each other * * *" as well. (Note that other offenses in this case are placed under proper sections elsewhere.) (CM ETO 5362 Cooper et al, 1944)

After his nocturnal activities in conjunction with one Skinner, accused was found guilty of the rape of Marie and of the murder of Auguste, in violation of AW 92. He was also found guilty of violations of AW 93, to wit: assault with dangerous weapon (rifle) on Auguste II; a similar assault on Xavier; and lastly, assault with intent to do bodily harm upon Renee by hitting her on the head and face with his fists and helmet. HELD: LEGALLY SUFFICIENT. (1) The identity of accused was sufficiently established. (2) Rape: Accused succeeded in having sexual intercourse with Marie in an orchard, after he had threatened her with a knife and after she had been physically beaten. Although she may have submitted at the time, "she had been reduced to a state of unwilling submission through fear of death or great bodily injury at the hands of accused and his companion". This was forcible rape. (3) The murder of Auguste was also sufficiently established. Prior to the rape, and as Hebert and Auguste were hastening to the aid of the two women being molested by accused, he fired four shots from a distance of seven or eight meters. Auguste was killed. (4) The assaults with intent to do bodily harm with a dangerous weapon upon Auguste II and Xavier were also adequately established. This shooting occurred at the same time as the murder of Auguste. The court could infer "from the evidence of the shooting that accused intended to inflict bodily harm upon" Xavier. "The court was equally justified in inferring an intent to inflict bodily harm upon" Auguste II "from the evidence that accused fired in his direction as Madame Hebert entered the door of the Mace house. Even if the court believed accused intended to shoot only Madame Hebert and wounded *** by mistake it properly found accused guilty * * *. The court was warranted in believing that accused acted in reckless disregard of the safety of others when he shot at Madame Hebert when she was near the door of Mace's house and in doing so wounded * * *." (5) The assault with intent to do bodily harm upon Renee

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was established. That attack was utterly without justification in its brutality. (6) A photograph was properly admitted in evidence after proper identification. (Note that ruling on its admission should have been made by Law Member rather than by the court in closed session.) (7) "Res Gestae": Non-prejudicial error resulted when evidence was excluded re what Marie had told another following the rape. "Details such as the identity of her assailant might properly have been introduced in evidence for the purpose of corroborating Marie's testimony as to the rape * * *." However, this error was in accused's favor. (8) Confession: "There appears to be no reason why the court might not regard the statement of accused to the members of the mental board * * * as to his actions at the time in question, including his rape of the 'younger woman', as a voluntary confession. The fact that he was not warned as to his rights under AW 24 did not ipso facto render the confession involuntary (ETO 2926). Its voluntariness was a question of fact (ETO 1606), and as bearing on this was the fact that the defense offered the copy of the report in evidence. In the absence of evidence indicating involuntariness, the findings of the court will not be disturbed upon appellate review (ETO 2343). The fact that the report contained such confession and also an account of accused's background, including his civilian criminal record cannot, under the circumstances, be regarded as having injuriously affected his substantial rights. The defense obviously introduced the whole report for the purpose of supporting the conclusion therein that accused was insecure, immature and emotionally unstable. Any error was self-invited and, in view of other clear evidence, nonprejudicial. Oral testimony re accused's prior inculpatory statements was introduced, despite objection that the statements had been reduced to writing, and were therefore the best evidence. It is held in this theater "that the best evidence rule excludes oral testimony of an accused's extra-judicial confession where the confession had been reduced to writing and the writing was not accounted for by the prosecution * * *. The Board also held * * * that a failure to object to such oral evidence constituted a waiver. * * * But it does not appear herein that accused's inculpatory statements * * * amounted to a confession. They constituted admissions of facts which connected accused with the crimes charged, but did not admit guilt of all necessary elements of any crime charged, nor did they amount to an acknowledgment of guilt. They were thus in law admissions against interest and not a confession * * * Admissions are not within the * * * exception to the rule admitting primary evidence of statements notwithstanding the fact of their contemporaneous reduction to writing, and the general rule is that the best evidence rule has no application to them. * * * The rule has generally been applied to render competent as primary evidence in a criminal case a party's admission, even though they tend to prove the contents of a writing * * *. Even in the case of admissions made by a witness at a former trial, it has been held that proof thereof by testimony of the stenographer who took the testimony or by testimony of some other person who heard the admissions is the proper mode of proof and is preferable to an unauthenticated record of the whole of the former trial * * *. And it is the general rule that it is not incumbent upon the party seeking to show an admission to introduce in evidence the entire writing in which it is contained * * *. In view of the foregoing * * *",

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the instant admissions against interest "were properly admitted in evidence herein." (CM ETO 5584 Yancy 1945)

After separate arraignment but common trial, both accused herein were found guilty of the rape of a 31-year old schoolteacher, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Victim Did Not Testify: "The statements of accused in this case assume unusual probative importance, not only because the establishment of accused's identity as the criminals depends entirely upon them, but also because of the failure of the victim to testify at the trial results in an absence of of any independent direct evidence to prove the penetration and the lack of consent essential to a conviction of rape. On this point, it may be set at the outset that the victim's failure to testify does not in itself operate to invalidate the proceedings so long as the case is proved by other competent evidence. It is sometimes impossible, because of death or other reasons, for the victim to testify and this of course does not mean that the trial may not proceed (see CM ETO 5747 Harrison Jr). The Trial Judge Advocate may prove his case through such witnesses as he desires to use (See 3 Wharton's Criminal Evidence (11th Ed., 1935), sec. 1102, p. 1933). Assuming that accused would have ground for complaint had Miss M**'s absence resulted from bad faith on the part of the prosecution, there is no showing that such was the case here. Defense counsel made what appears to be an informal request that the trial be 'held up' until she could appear, but there is no indication that he desired her as a witness for the defense and his request appears to be more or less in the nature of a protest against her non-appearance as a witness for the prosecution. Under the circumstances, it is not considered that any prejudice resulted * * *." (2) Accused's statements amounted, "in legal effect to confessions of guilt. Hence, there had to be independent evidence of the corpus delicti; a voluntary confession, "and, if the trial is a joint or common one, that the confession be used as evidence only against the particular accused who made it." These requirements were met. As to the voluntary nature of the confessions, "defense counsel, after cross examination on the issue, expressly stated that he had no objection to their admission and it may be assumed, therefore, that he decided against the advisability of having accused testify for the limited purpose of showing them to be involuntary as he had originally requested. The court extended to accused the right to testify 'at the proper time', and hence, in the absence of a renewal by defense counsel of his request, it cannot be said that they were denied opportunity to offer evidence on the matter. There is ample competent evidence in the record to justify the Law Member's conclusion that the statements were voluntary * * *." (3) Statements Against Co-Accused: "Since each accused fully admits all the elements of rape, the question whether the confessions were limited in application to the accused making them is of no great importance." Each is essentially a recapitulation of the others. "In any event, the court was properly warned on the point and may be assumed to have considered the statements in a properly limited manner."

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(4) The evidence, including the confessions, was adequate to establish the rape. (5) A letter from a psychiatrist who examined the victim was read to the court at the request of defense counsel, for the apparent purpose that the victim did not want the accused to be hanged. Despite the hearsay contents as to much of this letter, no prejudice to accused resulted. (CM. ETO 5805 Lewis et al 1945)

Separately charged but tried at a common trial, both accused herein were found guilty of rape in violation of AW 92. Additionally, accused Douglas was found guilty of assault with a dangerous thing by striking another over the head with a piece of wood, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Evidence: The findings of guilt, both as to the rape and the assault, were supported. (2) Common Trial: "Despite the absence of specific provision on the subjection in the Manual for Courts-Martial, it has long been held that separately charged offenders, simultaneously and severally committing offenses of the same character in the same place, provable by the same witnesses, may be tried together at one time by the same court-martial where such trial is directed by the appointing authority and no objection is made by any accused * * *. In the instant case, although objection was interposed by accused, the circumstances are such that a common trial was entirely appropriate, the offenses being virtually identical and having been committed at the same time and place and proved by the same witness. Hence, if the granting or denial of a motion for severance in this kind of situation is within the court's discretion, there can be no doubt that the motion was properly denied and that no prejudice resulted to either accused, their rights having been fully protected in every way." "With respect to the joint trial of persons jointly charged, the Manual for Courts-Martial specifically provides that the disposition of a motion for severance and that the denial of a motion therefor could become prejudicial error only if it was arbitrary and constituted an abuse of the court's discretion, thereby injuriously affecting the substantial rights of accused." (MCM, 1928, par 71b, p 55). "No similar provision exists in the Manual with reference to the common trial of persons separately charged, however, and it is therefore necessary to examine the rules applicable thereto generally recognized in the trial of criminal cases in the district courts of the United States." In U.S. v Glass, 30 Fed.Supp.397 (1939), it is stated: 'The consolidation of causes for trial before a single jury under the Federal Judicial Code rests in the discretion of the trial court, subject to the restriction that a consolidation for trial should not be ordered where it would result in prejudice to the defendant or prevent him from obtaining a fair trial.'" It is considered by the Board of Review that the rule set forth * * * may be applied with equal effect in a court-martial proceeding, such rule, as indicated by the court, existing independently of any specific statutory authority." "Accordingly, it is held that where, as in the present case, the appointing authority has directed a so-called 'common trial' of two or more accused, separately charged with offenses of the same character committed at the same time and place and provable by the same evidence, the denial or granting of a motion for severance by one or more of such accused is within the sound judicial discretion of the court, whose ruling

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will not be disturbed unless it is shown that it injuriously affected the substantial rights of the accused." (3) Impeachment of Accused: "Attempts were made by the prosecution to impeach both accused upon cross-examination by a showing of previous inconsistent statements made by them on various occasions." (a) Accused Douglas: Proof of his inconsistent statements was by oral testimony, despite the fact that they were contained in a written statement. "This is not the proper way to prove the contents of a written document, but in the absence of objection * * *, the requirements of the best evidence rule may be regarded as waived." (b) Accused Dear: Proof of his inconsistent statements was first by oral testimony and later a carbon copy. "Having previously expressly consented to proof by oral testimony of the conversations on which the statement was based", no prejudice could have resulted by receipt of the copy, "even assuming that no sufficient showing as to the unavailability of the original was made." (CM ETO 6148 Dear, et al 1945)

The three accused herein were charged with rapes in violation of AW 92. They were also charged with housebreaking and burglary on two different dates--with intent to rape--, in violation of AW 93. They were found guilty in varying degrees. HELD: LEGALLY SUFFICIENT. (1) Multiplicity: Defense moved to strike the AW 93 charge and specifications "on the ground that the charges so drawn represent an unnecessary multiplication of charges." (These specifications charged housebreaking and burglary by all accused on the nights of 12 and 26 July 1944 respectively. The specifications were companion to the rape specifications, which charged joint rapes on those same dates.) The motion was properly overruled. (2) Admissions; Codefendants: "The general rule is that admissions of a codefendant engaged with others in a joint unlawful enterprise, made after the termination of the enterprise and in the absence of the defendant, are not admissible against the latter as substantive evidence to prove his guilt * * *. Well recognized exceptions * * * are, however, that such admissions are admissible (1) where they are so connected with the commission of the crime as to be part of the res gestae of the transaction * * * and (2) (more in the nature of a non-application than an exception) where they are made in the presence of the defendant * * *. Where the codefendant's admission is, even tacitly, assented to by the defendant, it becomes in reality the admission by silence, assent or adoption of the defendant and assumes a primary character as such." (3) It has been held in ETO 804, Ogletree, et al, "that proof of mere presence of an accused at the time and scene of a crime is not alone sufficiently inculpatory to support a finding of guilty as to such accused (as an aider and abettor or otherwise)." (CM ETO 6193 Parrott, et al 1945)

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(4) Rape; Proof in General

Accused was found guilty of rape in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Identity: The identity of accused as the offender was established by the victim and her mother, "both of whom, as the evidence demonstrates, had previously seen accused at their home two days before. The evidence of identification by these same witnesses at the guardhouse line-up was improperly admitted (CM 270871, IV Bull. JAG 4), but in view of the other competent and compelling evidence of identification, no prejudice" resulted. (2) CONSENT TO RAPE: PENETRATION: The evidence indicates that the victim did not consent to intercourse with accused. As to penetration, "the evidence, possibly because of the victim's apparent unfamiliarity with the nomenclature of the sexual organs or possibly because of ineffective interpreting, is not as clear as might be desired. Her testimony and that of the doctor leave no doubt that penetration of her vagina was effected, but there is no direct evidence that such penetration was accomplished by accused's penis. However, the girl testified that 'he deeply penetrated into my vagina', 'he penetrated me', and 'I felt something inside of me'. This evidence, when combined with her testimony that accused had immediately before proposed 'zig-zig' to her and upon her rejection of the proposal, put her on the bed and got on top of her while his companion held her arms, is sufficient, in the complete absence of any evidence to the contrary, to raise a fair inference that the penetration was accomplished in the normal way * * *." (CM ETO 6554 Hill 1945)

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Accused was found guilty of rape, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Accused's Identity was sufficiently established. "There is no requirement in the law that * * * an accused * * * be identified as the culprit either as one of a group or in any other particular way. All that is required is that there be substantial evidence of his identity." (2) Continuances: Defense received one continuance to interview further witnesses; was denied a further continuance despite the fact that it still wanted to interview two more witnesses, one of whom was an AwOL, but the other of whom was apparently available. No prejudice resulted from the denial, since the record indicates that they would have added nothing to the defense. (Note that denial of the continuance should have been by the law member rather than the president. (3) This case was referred to trial By the Adjutant General by command of the commanding general. That officer thereafter sat as a member and president of the court. "His act in referring the case for trial was purely administrative and in the absence of challenge and of indication of injury * * *, this irregularity may be regarded as harmless." (4) Court Member as "Witness": A medical officer on the court described "for the record the scar on the victim's thumb * * *." This was merely "in the nature of assistance to the reporter. The member was not sworn as a witness and did not purport to testify. He was therefore not disqualified from sitting further on the court under AW 8, as a 'witness for the prosecution'." (5) Stipulation: "Accused by his affirmative action in agreeing to /a/ stipulation waived his constitutional right to be confronted by this witness * * *." (CM ETO 8451 Skipper 1945).

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(4) Rape; Proof in General450(4)

Accused was found guilty of rape of a German woman in violation of AW 92; and of housebreaking, sodomy and assault with intent both to do bodily harm and to rape, with a dangerous weapon, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Accused was sufficiently identified as the perpetrator of the offenses in Germany in the nighttime on 14 March 1945. (2) The offenses: The first AW 93 specification "alleges burglary by breaking and entering the dwelling of Frau *** 'with intent to commit the felonies of rape and assault with intent to do bodily harm with a dangerous weapon therein'". Burglary is defined as the 'breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. The term 'felony' includes, among other offenses so designated at common law * * * rape, sodomy' * * *. Assault with intent to do bodily harm with a dangerous weapon has been declared to be a felony by statute (AW 42, sec. 276, 18 USCA, 455). The proof herein shows that, after breaking and entering the house of Frau * * *, accused assaulted this German woman by pointing his gun at her as alleged. Later he raped the woman. The establishment of the latter fact shows conclusively accused's intent in breaking and entering into the house. He was therefore properly found guilty * * *. Concerning Specification 2, the evidence establishes that accused grabbed the woman by the arm, struck her on the face and mouth, and pointed his rifle at her. His speech and actions indicate that his manner was 'threatening and demanding', as charged. The evidence thus supports the court's finding that accused committed an assault and battery in violation of" AW 93. The rape and sodomy charges were sufficiently supported by this German woman's direct testimony and by circumstantial evidence which afforded sufficient corroboration thereof (detail). (3) Drunkenness: "Although the evidence shows that accused was under the influence of alcohol during the evening in question, the facts disclose that he was capable of walking, of handling the woman, and of physically accomplishing all the facts involved in the offenses as shown. He was able to walk down the road with the woman after breaking into her house. He talked with her and called her comrade. He was able to find his way to his quarters and to direct the woman there with him. He sufficiently remembered enough of what happened * * * to return to the scene of the assault and struggle the next morning to recover his lost clothing and equipment. All of these facts indicate that accused was not so intoxicated as not to know what he was doing. * * * Voluntary drunkenness does not constitute an excuse for the crime of rape nor destroy the responsibility of the accused for his misconduct * * *. Although it was stipulated that * * * three medical officers would testify that they made a diagnosis of acute alcoholism and pathological intoxication and that they were of the opinion that at the time of the commission of the offenses accused's mental state was such that he was unable to differentiate between right and wrong, to adhere to the right and to appreciate the consequences of his acts, it has been held that notwithstanding the opinion of psychiatrists, which it was proper for the court to consider, it was the duty of the court to consider the facts in evidence in the light of its own knowledge of human motives and behavior under certain conditions and to find upon all the evidence that at the time of the offense accused was capable of dis-

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tinguishing right from wrong and of adhering to the right (CM NATO 2047, III Bull. JAG 228). Such a finding was inherent in the findings of the court in this case and accused was guilty as charged." (CM ETO 0611 Prairiechief 1945).

Accused was found guilty of the offenses of rape in violation of AW 92; of two specifications of housebreaking in violation of AW 93; and of assault by wrongfully pointing a gun, and menacing and threatening his victim with it, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the respective findings of guilty. (2) Line-up Identification: The rape victim testified "that she 'recognized' accused on two occasions soon after the offense. He was then in custody. Following the liberal and majority rule advocated by Wigmore, this Board of Review has held evidence of extrajudicial identification of persons in custody properly admissible, even though the testimony thereof was given by a person other than the identifying party * * *. Since that decision, the Board of Review, sitting in Washington, held in a manslaughter case, that where the only evidence of the accused's identity was that of third persons to the effect that the victim identified accused by word and gesture at the stockade as his assailant, such evidence was legally insufficient to support a conviction (CM 270371, IV Bull. JAG 4). The stated ground for that decision was that such statements were hearsay, and the cited authority was *McCarthy v. United States* (C.C.A. 6th 1928), 25 F (2nd) 298. The latter case involved a hearsay accusation but not necessarily identification (Cf. *U.S. v. Fox* (C.C.A. 2nd 1938) 97 F (2nd) 913). The Washington decision should not be construed as an authority to prohibit testimony by the witness testifying in court that he had previously identified the accused in confinement or arrest, for hearsay is not then involved * * *. The most recent holding on these points was by the Board of Review sitting in the ETO. It was held in a rape case that testimony of third parties as to the accused, by statements and gestures at a police line parade, was not prejudicial error where both such identifying parties positively identified the accused at the trial (CM ETO 6554, Hill). In the instant case, the victim/ * * * did not say that she pointed out the accused or made any statements to him. She testified only that she 'recognized' him, obviously when his features were fresh in her memory. The small minority, which hold to the extremely narrow rule that an identifying witness at a trial may not give testimony as to his statements and acts at an extrajudicial identification, admit testimony of prior recognition * * *. Her evidence of prior recognition was therefore properly admitted in evidence." (CM ETO 7209 Williams 1945)

Accused was found guilty of the rape of a French civilian, in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Three Acts Rather Than One: "Prosecution's evidence and also the testimony of the defendant proved that at the time and place alleged three separate and distinct acts of intercourse occurred between

(4) Rape; Proof in General

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accused and" his victim, rather than one as alleged. "Therefore, the findings of accused's guilt will depend upon the evidence relevant to and surrounding the first act of intercourse." (2) The evidence supported the finding of guilt. (CM ETO 7078 Jones 1945)

Both accused herein were found guilty of the rape of a German girl in violation of AW 92; and of wrongfully fraternizing with German civilians on the same occasion, in violation of AW 96. HELD: LEGALLY SUFFICIENT.

(1) Enemy National: "The fact that the victim was an enemy national may properly be taken into consideration in weighing the reliability and truthfulness of her testimony." (2) Evidence: The evidence supported the conviction. "Although accused conducted themselves in a friendly manner during the early part of the evening, they later became boisterous and antagonistic. Both men were armed. Berger; at least, angrily took hold of the girl while in the air raid shelter, telling her that she should sleep with him, and Bamford pointed out to her the treatment which French girls had received at the hands of German officers. She testified that she was forced to the first floor at the point of a gun and was told that her resistance would be useless. According to her testimony, she was prevented from leaving the bedroom by the physical restraint of Berger and by the presence of Bamford in the hall. She stated that she offered only slight resistance to Berger's initial advances because she was in 'terrible fear' and because she felt that resistance would be useless and might cause the accused to harm her. She also testified that during the acts of intercourse she tried to resist and did so until her strength was gone. Her testimony with respect to the surrounding circumstances was corroborated by that of other witnesses. "The evidence indicates that Bamford was less aggressive * * *. However, the court could properly find that his acts, like those of Berger, constituted rape * * * and in any event there was evidence from which the court could find that Bamford aided and abetted Berger in accomplishing the rape committed by the latter. This being true, he could be found guilty as a principal * * *. Whether the accused were too drunk to be responsible for their acts was also a question of fact for the court * * *." "The record of trial clearly supports the court's findings that both accused also were guilty of wrongfully fraternizing with German civilians, as alleged. (CM ETO 9083 Berger et al 1945)

Accused was found guilty of rape, in violation of AW 92. HELD. LEGALLY SUFFICIENT. Accused's identity was sufficiently established. The evidence to the effect that three witnesses had failed at an earlier identification parade to identify accused as the assailant "was entirely adduced by the defense on cross-examination. Since no identifications were made, the testimony of the third party witnesses in this constituted a mere description of physical acts and accordingly is not open to objection on the ground of hearsay discussed in CM 270871,

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IV Bull. JAG 4. As for Y * * * 's testimony on the point, it clearly involved no hearsay * * *. Likewise, the testimony relative to A * * * 's conversation with accused in the line-up at F * * * was free from objection on this score, being offered and received not for the purpose of showing that A * * * identified accused on that occasion, but rather for the purpose of showing the physical act of conversation between them, thus supporting A * * * 's direct testimony that he recognized accused by his voice. That this was the basis on which the evidence was received is shown by the court's action in granting a motion by defense to strike the witness R * * * 's testimony that A * * * on this occasion identified accused as the assailant." (CM ETO 9246 Jacob 1945)

(5) Rape; Guilty of Lesser Offense450(5)(5) Rape; Guilty of Lesser Offense:

Cross References: 405 4616 Molier (assault with intent to rape;
confirming authority.)
454(56a)4119 Willis (lesser offense--intercourse
with unmarried female;
fornication.)

AW 92

MURDER; RAPE

450(5)

(01) Arson

451(01)

451 (A.W. 93) Various Crimes:

(01) Arson: Three accused engaged in a wrongful joint venture, bent upon obtaining liquor and women by the use of such means, criminal or otherwise, as might appear to them necessary or desirable. During the course of their activities, assaults with dangerous weapons were committed, and a house was burned down. Accused were charged separately, but tried at a common trial, upon identical specifications alleging violations of AW 93, to wit: assault with intent to do bodily harm by shooting with a dangerous weapon; and arson. They were found guilty, and each was sentenced to 20-years confinement. HELD: LEGALLY SUFFICIENT. (1) Procedure: (a) The common trial was proper. It was directed by the appointing authority. No objection was made by any of the accused. They were charged with simultaneously and severally committing offenses of the same character at the same time and places, provable by the same witnesses. (ETO 3147). (b) Trial on the same date as the charges were served resulted in no prejudice, insofar as the record of trial shows. Accused expressly stated that they had no objection. (c) Challenges: The trial judge advocate failed to specifically advise each accused of his rights to challenge members of the court or to make sure that each was satisfied with the membership thereof. "Although such failure was not fatal * * *, it was an irregularity which should be avoided. Particularly is this true where several accused are tried together but not jointly, in which case each has a right to one peremptory challenge and should be so advised." (1st Ind) (c) Presence of Accused: Upon reconvening, the record fails to note whether accused were then present. However, it affirmatively appears that they were at that portion of the trial when their personal data was read. (ETO 2473) (2) The assaults with intent to do bodily harm were shown not only by proof of actual shooting but also by proof of threats. The evidence showed a wrongful joint venture. "It was not necessary to prove that each accused physically committed the assaults charged, as all were engaged in the wrongful activity. Each was responsible not only for his own illegal acts but also for all illegal acts committed by either of the two other accused in pursuance of the common purpose of forcing the victims to accommodate them." (ETO 2297, 3499) "The evidence, moreover, supports the conclusion that such accused as did not actually commit the assaults aided and abetted the actual assailants in their commission thereof." (ETO 1453, 3740) (3) Arson: Each accused was charged with willfully, maliciously, unlawfully and feloniously burning or aiding and abetting the burning of a dwelling house and cafe. (a) Error but no prejudice resulted from this alternative pleading. (MCM, 1928, par 29d, p 19; AW 37) "Distinctions between principals, aiders and abettors have been abolished by Federal statute (Fed Crim C. sec 332, 18 USCA 550, 1453). Consequently, assuming that the alleged burning constituted the offense of arson * * *, aiding and abetting such burning would not constitute an additional offense, but rather an alternative description or evidentiary elaboration of the manner of commission of the same offense * * * and the prohibition would be inapplicable." The instant specification adequately charged

the single offense of arson, and apprised accused thereof. (b) Common law arson under AW 93 is to be distinguished from statutory arson under AW 96 (Fed Crim C. secs 285,286, 18 USCA 464,465; MCM 1928, par 152c, p 191). Common law arson was alleged herein. "The burning must be malicious, that is, there must be an intent to burn the dwelling house or outhouse * * *, and, as in other cases, the intent may be inferred from the surrounding facts, such as the conditions of the act, threats or quarrels, or other criminal activity * * *. Circumstantial evidence of the criminal design will sustain a conviction * * *. A person who commits arson as to one thing is generally guilty of arson as to every other thing which takes fire and burns as the natural and probable consequence of his wrongful act". And a building, at common law, "to constitute a dwelling house, need not be used exclusively for that purpose. If one part is used as a habitation, it gives the character of a dwelling house to the entire building, if there is an internal communication between the two." Accused were guilty of arson herein. "The principles of responsibility of participants in a wrongful joint venture apply * * *. Moreover the law of aiders and abettors applies to the crime of arson the same as to other crimes." (4) Punishment: The maximum punishment for arson in violation of AW 93 includes confinement at hard labor for 20 years. The maximum period of confinement for assault with a dangerous weapon is five years for each offense. The place of confinement as a U.S. Disciplinary Barracks is authorized. (CM ETO 3475 Blackwell 1944)

VARIOUS CRIMES

AW 93

(2) Assault with Intent to Commit a Felony:

451(2)

(2) Assault with Intent to Commit a Felony; Proof:

Not Digested:

Intent to Murder

225 Gates
 2321 Moody
 3583 Odom (reduced to
 manslaughter)
 4020 Hernandez
 4269 Lovelace
 5137 Baldwin
 9235 Simmons
 5879 Martinez
 8801 McLaughlin

Intent to Rob

5741 Kennedy, et al

Intent, Sodomy

2134 Smiley, Jr.
 4012 O'Connell
 7202 Hewitt

Intent to Rape

489 Rhinehart
 595 Sipes
 1044 Dungan
 1073 Sanders
 1262 Moulton
 1644 Allen
 1873 Brown
 1954 Lovato
 2414 Mason
 2422 Morin
 2500 Bush
 2652 Jackson
 2782 Jones
 2843 Pesavento
 2966 Fomby
 3093 Romero
 3162 Boyd, Jr.
 3255 Dove
 3309 Tapp (alibi)
 3416 Conyer Jr.
 3469 Green
 3510 Furlong
 3644 Nelson (minor)
 3749 Ward
 3750 Bell
 38183 Galloway
 3860 Johnson
 3876 Linnstaedt, Jr.
 3884 Craig
 3897 Dixon
 3919 White
 4056 Brown
 4143 Blake, et al
 4203 Barker (aid)
 4250 Booker
 4253 Barker
 4266 Guest

4280 Dennis
 4287 Allen
 4428 Ross
 4012 Porter
 5464 Hendry
 10097 Rosas
 10098 Mooney

451(2)

(2) Assault with Intent to Commit a Felony:

(2) Assault with Intent to Commit a Felony:451(2)365(9) 5458 Bennett (intent, sodomy)

Cross References:

405(1) 4616 Molier (lesser offense)419(2) 4303 Houston (intent to murder; hand axe)428(4a) 882 Biordi-White (joint proceedings; rape; specifications)428(5) 503 Richmond (no undue multiplication of charges)447 1052 Geddies450(1) 4292 Hendricks (intent to rape)4294 Davis (with murder)5765 Mack (intent to rape)450(4) 3837 Smith (intent to rape)450(5) 1600 Asher (rape)451(32) 4071 Marks (aid and abet)454(13)10967 Harris (assault to rape, may be committed upon minor female)454(56b)11978 Bromley (with fraternization; inconsistent)

AW 93

VARIOUS CRIMES

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(2) Assault with Intent to Commit a Felony:

(2) Assault with Intent to Commit a Felony: Proof:

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Intent to Rape: After first striking her male companion, accused had a girl enter his truck on a pretext. During a forced ride in that truck with him, he endeavored to have intercourse with her at least five times. Unsuccessful, he then forced her into a field with a pistol, and again attempted to have sexual intercourse with her against her will. He was found guilty of assault with intent to commit the felony of rape, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The evidence sufficiently supported the conviction. " * * * The law presumes that a person who voluntarily did an act intended to do that which he did and intended the natural and probable consequences of doing it, unless the circumstances raise a reasonable doubt as to what his intentions were. * * * However, since intention is a fact which cannot be positively known to other persons, no one can testify directly concerning it and the matter must be an inference which the jury must find from the established facts. * * * " (1Wharton's Cr. Ev., sec. 79, p.96) (2) Specification: The specification alleged a single assault against the girl. The proof showed a number of assaults. "A motion by the defense to require the prosecution to elect the act upon which it seeks to rely for conviction would have been proper * * *. No such motion was made. The Court, therefore, should treat the first act as to which the prosecution introduced evidence as the act upon which it elects to rely." (CM ETO 492 Lewis 1943)

Intent to Murder: After obtaining a motor-ride with his victim, accused first threatened to cut his "head off", and then immediately attacked him with a knife in a vicious and an unprovoked manner. He was found guilty of assault with intent to commit murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's specific felonious intent was adequately proved. (CM ETO 531 McLurkin 1943)

Intent to Murder: Accused stabbed a constable with a knife. He was found guilty of assault with intent to commit murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's use of a knife to inflict a serious injury on his victim, his threat to the effect that he would kill him if he followed him around, and his subsequent statement to two girls that he was "going to kill this god-dam guy" fully warranted the court's conclusion that accused entertained the requisite intent to commit murder. (CM ETO 533 Brown 1943)

Intent to Rape: Accused forced a girl down under him on the seat of a car. He struck her face when she struggled with him. He asked her

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to lift her skirt. He held her by the throat, and threatened to kill her if she screamed. He was found guilty of assault with intent to commit rape, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's intent to have carnal knowledge of his victim against her consent may be inferred from her testimony. She had no doubt of his intentions, as evidence "by his whole attitude". Her testimony in this respect was admissible. "Although her statement was a conclusion she was testifying as to facts which could not be clearly or adequately reproduced and described to the court. * * * Accused was in a position to effect his intent had he not been defeated by her resistance and fear that help for his victim would arrive. His later desistance, evidently induced by her kicks and screams, of course, is no defense." (MCM, 1928, par. 1491, p. 179) (CM ETO 996 Burkhart 1943)

Intent to Murder: After a card game argument, accused engaged in a mutual fight with his victim. The fight was broken up by another. As ordered, accused left the room. But he returned shortly, armed with a carbine. When he was refused admission to the victim's sleeping quarters, he kicked the door open. When the victim saw that accused was armed, he commenced to defend himself--first throwing a chair at accused, and later flailing at him with a bed. Accused dropped the carbine, but picked it up and fired it twice through the door into the victim's room. He missed him. Accused was found guilty of assault with intent to murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. The "physical facts compel but one reasonable conclusion and that is that accused directed his fire * * * with intent to kill" his victim. "The fact that its consummation was impossible because he failed to deflect the angle of his aim * * * is wholly immaterial on this issue." "Accused acted deliberately and violently in the commission of the overt act of the assault. He possessed the present ability to take (his victim's life. There is evidence of express malice in addition to the implications of malice, which arose out of his acts." (CM ETO 1289 Merriweather 1944)

Intent to Murder: Accused threatened to kill his victim. An hour or two later, upon arriving at his company's bivouac area, he procured a United States Army pistol, .45 calibre, deliberately sought and found his intended victim and, at a distance of not more than a few feet, discharged it at the latter's chest. He wounded the victim so seriously that it is probable that he may die within a year. He was found guilty of assault with intent to commit murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "There were no circumstances present which would either justify, excuse or alleviate the offense. The intent to murder was proved * * *." (CM ETO 1535 Cooper 1944)

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Intent to Rape: Accused was found guilty of assault with intent to rape, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's sole defense was a weak alibi. The prosecutrix testified convincingly concerning the assault with intent to commit rape. "Competent evidence of her condition and utterances immediately subsequent to the alleged attack; strongly corroborated her direct testimony that it actually occurred." "Although no other witness saw accused at or near the scene of the crime charged, the prosecutrix's identification of him as her assailant was definite and convincing." (CM ETO 1673 Denny 1944)

Intent to Murder: Two white soldiers were occupants of a 12-seat compartment on an English train. Accused two negro soldiers, with from six to eighteen other negroes, entered the compartment. After feigning dissatisfaction with the white soldiers' answers to their questions, the negroes commenced to strike them with their fists. They used profane language, and made threats. They prevented the white soldiers from getting off the train at the next stop. After the train had subsequently attained considerable speed, the negroes physically ejected them through a side door. The white soldiers were found by a train crew, lying on adjacent tracks where they would have been killed by an on-coming express had they not been removed to safety. Each of accused was charged separately, but, after their consent in open court, they were tried together. They were found guilty of assault with intent to commit murder on each of the victims, in violation of AW 93. HELD: LEGALLY SUFFICIENT. The deliberate, premeditated eviction of the victims from a fast-moving train was an act which inherently possesses the elements of criminality necessary to sustain the charge of assault with intent to commit murder. Death or most serious bodily injuries were most certain results.

(A) Joint Participations: Although only one of the accused was actually shown to have pushed the victim off the train, but were shown to have active and violently participated in the unprovoked and inexcusable assaults. It was not necessary to prove that each accused pushed the victims from the moving train. "All that was required was proof that the two white soldiers were forcibly ejected from the train by some of the members of the group of colored soldiers which attacked them and that the two accused at that time and place were engaged with the group in the attack. The accused were responsible not only for their own illegal acts but also for all illegal acts committed by other assailants in pursuance of the common purpose of molesting and inflicting bodily harm upon the two white men."

(B) Intent: It was not necessary for the prosecution to prove that accused contemplated that the victims should be pushed from the train, "as such acts were natural and probable consequences of the vicious and wholly indefensible assault in which the two accused actively participated." While only one of the accused may have pushed the victims from the train, both actively participated in the immediately preceding attack upon them, and each participated in or was cognizant of the previous discussion which contemplated the eviction. While the separate charges required the prosecution to prove that each accused at the time of the assault entertained the specific intent to kill the victims, this requirement was sufficiently met. "The conduct of each accused immediately prior to the overt acts coupled with knowledge of the conversa-

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tion on the subject is evidence of preconcert and joint design.* * *

(C) Accused as Witnesses for Prosecution: Each accused was called to the stand as a witness for the prosecution, and was informed that he could decline to answer incriminating questions. Each accused replied that he had no objection to testifying under oath, and thereafter testified on behalf of the prosecution. Each later repeated the substance of his testimony as a sworn witness on his own behalf. (a) Privileges and Immunities Clause, 5th Amendment, U.S. Constitution: While it has been held in the federal courts that the Fifth Amendment does not require a jury in trials by military courts and military commissions, it has also been held "that the due process and double jeopardy clauses of the Amendment apply to a defendant in criminal proceedings in a Federal military court. Considering the fact that the 'non-self incrimination' clause is intermediate to the 'double jeopardy' and 'due process' clauses* * *, it is logical to conclude that the privilege of 'non-self-incrimination' is also applicable to an accused on trial before a Federal military court. It is manifest, however, that the Supreme Court has not specifically decided the point and that it remains an 'open question', but the tendency of judicial thought is to apply the three enumerated guaranties of the Fifth Amendment directly to an accused on trial in Federal military courts." (b) Relationship of AW 24: The word "witness" as used in AW 24 also includes an accused. The Article is the statutory equivalent of the Fifth Amendment in regard to non-self-incrimination. Therefore, rights and immunities under AW 24 of an accused on trial before a Federal military court "are identical with rights and immunities of a defendant on trial before a Federal civil court." (c) Violation of Accused's Rights under AW 24: The guaranty against self-incrimination prohibits the prosecution from calling an accused to the stand as a witness in his behalf in open court and before the jury. The trial judge advocate seriously erred when he called these accused to the stand as his witnesses. "He placed them in the position of being compelled to testify for fear of adverse inferences if they refused the demands. Their appearances on the witness stand were in no sense voluntary. Voluntary action presupposes freedom of choice. The voir dire examinations * * * could not neutralize or remove the prejudicial effect. * * * The examinations came after the trial judge advocate had violated their rights by his demand that they appear as witnesses. It was the demand which inflicted the injury." Acquiescence did not excuse this violation of AW 24. (d) Effect of the Above Error: Despite the seriousness of the error just discussed, the effect was not prejudicial. It was vitiated by subsequent events, and by the conduct of each accused, during the subsequent course of the trial. Their guilt was established beyond all doubt, independently of their own testimony either on behalf of the prosecution or on their own behalf. Had each, when he subsequently took the stand on his own behalf, either attempted to explain or mitigate his forced inculpatory testimony as prosecution's witness, the earlier error would have been highly prejudicial. Here, -however, each "confirmed his former testimony and testified to facts which were highly inculpatory--facts when considered individually * * * are equivalent to a confession in open court." Additionally, extrajudicial statements of each accused had been properly admitted prior to when they testified as prosecution's witnesses.

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(D) As Witness against Co-accused: "Each accused, being separately charged for the same crimes, was a competent witness for the prosecution against his co-accused." "A violation of the non-self-incrimination provision of the Amendment and the statute did not disqualify the accused whose rights were affected, as a witness against the other accused against whom the witness testified." (Distinguish joint indictments and trials. Federal Act Mar. 16, 1878; 20 Stat. 30; 28 USCA sec. 632.) (CM ETO 2297 Johnson, et al 1944)

Intent to Rape: Accused knocked a woman off her bicycle, and lay on top of her. He struck her violently when she attempted to free herself, and strangled her cries. He verbally expressed his desire to have sexual intercourse with her, and threatened to kill her if she did not comply. He attempted to disrobe her, and succeeded in pulling down her underclothing. He desisted only when third parties approached. He was found guilty of assault with intent to commit rape, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (CM ETO 2500 Bush 1944.)

Intent to Murder: Accused had drunk a considerable quantity of beer, when an air-raid alert sounded. He was ordered to man some guns by his commanding officer, and complied. After the alert, he returned and sought out that superior officer. He carried his loaded M1 rifle. The officer ordered him to put down the rifle. Instead accused, telling the officer that he had been unfair, raised the rifle and pointed it at the latter's stomach at a distance of about six inches. The officer stepped toward him, and accused pulled the trigger. However, the rifle did not fire because the bolt was not "all the way home". Nonetheless, the primer cap of the cartridge was dented by the percussion of the firing pin upon it. Accused was found guilty of assault with intent to murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Had the bolt of accused's rifle been in position for firing, as accused evidently believed it to be, death or serious bodily harm to the officer would have been the inevitable result. The evidence indicated beyond a reasonable doubt that accused intended to murder the officer at the time of the assault, and negated the possibility of reasonable provocation. Whether accused's intoxication was sufficient to have destroyed his mental capacity to entertain the specific intent to commit murder was a question of fact for the court. (CM ETO 2672 Brooks 1944)

Intent to Murder: Accused fired upon four white soldiers in a truck. He was found guilty of assault with intent to commit murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "Accused intended to frighten at least one of the occupants of the truck by deliberately and knowingly using a lethal weapon in a highly dangerous, abandoned and reckless manner. * * * Such action indicated 'a heart reckless of social duty', 'reckless disregard of human life' and knowledge that the act would probably cause death or grievous bodily harm. 'accompanied by indifference whether death or grievous bodily harm is

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caused or (possibly) by a wish that it may not be caused' on accused part, and as such is punishable to the same extent as if it were accompanied by a specific intent to murder." "A specific intent on accused's part to take the life of one or more of the occupants at the time he fired the rifle at the truck was justified in view of the nature of the weapon, the manner in which accused used it and the probable and natural disastrous result of the act. There is present substantial evidence of malice, premeditation and deliberation * * *. Absent the fact of death, accused's guilt of the crime of an assault with intent to commit murder is an automatic legal sequence." (CM ETO 2899 Reeves 1944)

Intent to Rape: Accused was found guilty of assault with intent to rape (20 year sentence authorized) and assault with intent to do bodily harm (5 year sentence authorized), in violation of AW 93. Both offenses arose out of the same set of facts. He was sentenced to penitentiary confinement for twenty years. HELD: LEGALLY SUFFICIENT. "The sentence to confinement for twenty years is authorized as punishment for the act of accused in its most important aspect, to wit, assault with intent to commit rape." (CM ETO 3255 Dove 1944)

Intent to Rape: Accused was found guilty of assault with intent to rape, in violation of AW 93 (he pleaded guilty to a lesser offense under AW 96). HELD: LEGALLY SUFFICIENT. (1) The evidence showed that accused dragged his girl victim off a road to a nearby spot; that she struggled to get away, and did escape once; that accused caught her and dragged her back; that she screamed, and that he choked her and was in fact on top of her when assistance arrived; that, when apprehended, accused's trousers were entirely unbuttoned. From this evidence, the inference is inescapable that accused intended to have sexual intercourse with the girl; "that she did not consent but resisted, and that he intended to overcome her resistance and to accomplish his purpose by the use of force. In seeking the motive of human conduct, the court is not limited to the direct evidence. Inferences and deductions may be drawn from human conduct when they flow naturally from the facts proved * * *. This inference of accused's intent, furthermore, is justified in part, at least, by accused's plea of guilty of indecent abuse and maltreatment of this child is violation of AW 96." (2) Intoxication, to such a degree as to render accused unable to know what he was doing, does not appear as a matter of law. He had faculties enough to try to escape and to attempt to hide. (3) Confinement for twenty years is authorized. (CM ETO 3280 Boyce 1944)

Intent to Murder: Accused had been apprehended by members of the military police, accompanied by British constables. Reaching the steps of the jail, he attempted to flee. One of the military police fired at him. Accused fired back with a small calibre pistol, but did not hit anyone.

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He then escaped, but was apprehended shortly thereafter. He claimed that he had been prodded by the police. His body showed a bruise from a blunt object. The testimony failed to show whether he had specifically aimed at anyone. He was found guilty of assault with intent to murder, in violation of AW 93; and of carrying a concealed weapon (sec II Cir 35, ETO, 29 March 1944), in violation of AW 96. HELD: LEGALLY SUFFICIENT. Although the military policeman fired first, "accused's firing involved the requisite malice aforethought to establish the intent charged." It may logically be inferred "that accused, while making his escape, shot at the military policeman who was then firing at him in an attempt to prevent his escape, rather than that he merely fired nervously and at random * * *." The fact that he may previously have been prodded by the police might have been considered in some degree regarding extenuation, although the 20-year sentence would indicate otherwise. (CM ETO 3911 Jackson 1944)

Intent to Murder (reduced to Manslaughter): Accused merchant seaman was charged with assault with intent to murder in violation of AW 93, by shooting another with a pistol; with disrespect to his superior officer (the Third Officer on his boat) in violation of AW 96; and with offering violence against that same Third Officer, in violation of AW 96. On motion of the defense counsel, made at the beginning of the trial, the President and Law Member ruled "that the charge under the 96th Article of War will be withdrawn when there is a charge under the 93rd Article of War as serious as it is". Accused was found guilty of the "lesser" offense of assault with intent to commit manslaughter, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Jurisdiction: Accused merchant seaman was a deck engineer in the service of the U.S. Merchant Marine, signed on a steamship owned by the War Shipping Administration, operated by a private steamship company, and allocated to the U.S. Army under whose authority it also would be while it was in the United Kingdom port where the charged offense occurred. Accused was subject to trial by Army court-martial. (2) The evidence supported the court's finding of guilt. Accused was apparently very intoxicated prior to and at the time he shot his roommate. No real motive appears. "The offense undoubtedly was committed as the culmination of anger aroused by his prior arguments with the ships' guards, accentuated by the liquor. Whether his grievances were real or fancied, they could not justify his action. His conduct was deliberate and his speech was clear and coherent. The intent alleged is properly inferable from the circumstances. * * * It was within the province of the court to weigh the evidence and their finding evinces their belief that accused was greatly provoked as the result of which, under the influence of liquor, without premeditation, he shot * * * with the intent to kill. The trial court was also charged with the sole determination of the question of fact whether accused was too drunk to entertain the required intent to commit the offense charged * * *." (3) Motion to Strike: "The president, who was also the law member, of the court erroneously granted the defense motion to strike"

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the AW 96 charge and its specifications. "Both specifications and the charge were proper and complete and comprised offenses separate and distinct from " the offense charged under AW 93. "The court was without right to withdraw this charge and its specifications, such act being solely within the province of the reviewing authority." However, no prejudice to accused resulted from this improper action. (CM ETO 4059 Bosnich 1944)

Intent to Rape: Accused was found guilty of assaulting a girl with intent to rape her, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) "The Court before which accused was arraigned and tried was appointed by the CG, SBS, CZ, ETO on 19 July 1944. SBS was dissolved and UKBS, CZ, ETO succeeded to its command at 0001 hours 1 September 1944 (GO 42, 31 August 1944, CZ, ETO). The accused was tried on 1 September 1944. Upon authority of CM ETO 4054 Carey et al and CM ETO 3921 Byers the function and jurisdiction of the court is sustained." (2) Evidence: " Three prosecution witnesses were allowed to testify without objection to the good character of the victim * * *. Under certain circumstances it has been held that the introduction of character testimony to support the character of an unimpeached witness is reversible error even in the absence of an objection * * *. However", in the instant case, the evidence of accused's guilt was so convincing that no AW 37 prejudice resulted. (CM ETO 4122 Blevins 1944)

Intent to Rape: Accused was found guilty of a violation of AW 93, in that he committed an assault upon a girl with intent to rape, by willfully and feloniously grabbing her around the waist and forcing her to the ground. HELD: LEGALLY INSUFFICIENT. A combination of contradictions, inconsistencies, omissions and discrepancies in the testimony of the prosecutrix and other witnesses for the prosecution are of particular significance in view of the nature of the offense charged. "It is the duty of the Board of Review to scrutinize such evidence carefully, not for the purpose of weighing it but to determine its substantiality, especially in connection with other errors and irregularities noted, in deciding whether or not the record affirmatively shows that the latter injuriously affected the substantial rights of the accused." "Because of the errors noted committed during the trial proceedings and the inherent weakness of the evidence of accused's guilt", it must be concluded "that the substantial rights of the accused were injuriously affected and that the findings of guilty should be vacated." (Detail evidence at length.) (CM ETO 4155 Broadus 1945)

Intent to Rape: The two accused herein were found guilty of assault with intent to rape two separate girls in violation of AW 93. They were also found guilty of being drunk and disorderly in uniform, and of the violation of a standing order in leaving their bivouac area without proper authority, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The AW 96 specifications were sufficiently proved. (2) The assaults with intent to rape were also sufficiently--though weakly--proved. It appeared that the two accused, while drunk, visited a Dutch home at night, where a family of parents and nine children resided. After various pretenses re going

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to get food from their own mess, and after exhibition of their guns, they succeeded in taking two of the daughters, aged 16 and 18, along with them --supposedly back to their mess to get that food. En route, one accused tried to get the girl he was with to lie down with him in a meadow. Although he placed his hands on her and attempted to push her down, only one of her knees actually touched the ground. She fled. The other girl (Nelly) was taken by the other accused (Phillip) to his tent. While he placed his hands on her and pushed her down so that she lay on her elbows, she never completely lay on her back. He held his hands over her mouth. But she too was able to get away. Neither girl was pursued. In the case of the first accused (Green), "the details of the actual assault committed in the meadow present a highly questionable basis for the inference that accused intended then and there to employ ultimate force if necessary to achieve his purpose. In Phillips' case, Nelly's evidence presents a stronger foundation for such an inference, in that the assault she described was definitely aggravated by elements of indecency." (discussed in detail.) "In neither case was the violence more than negligible and neither girl suffered any physical injury. Accused moreover manifested dispositions of persuade and bargain, which, though not wholly inconsistent with an intent to use ultimate force if other measures failed, certainly casts some doubt as to their immediate intention of doing so. But when considered in connection with accuseds' conduct in exploiting their status as liberators to coerce the unwilling girls to leave their home at one o'clock in the morning, under circumstances disclosed by the testimony of four members of the family, the slight violence employed in the assaults might reasonably be construed as motivated and accompanied by a more sinister purpose than mere unconscionable inducement to reluctant consent. With such additional and highly significant evidence to support the inference of concomitant intent, the court's findings of guilty of assault with intent to commit rape may not legally be disturbed on appellate review (ETO 1953 Lewis)."
(CM ETO 4386 Green et al 1944)

(1st Ind CM ETO 4386 Green et al 1944) "As to the intent required in this crime, there seems to be a misunderstanding - a belief that all that is necessary to make out the crime is a desire for sexual intercourse accompanied by an assault. This view fails to distinguish other cases which are sometimes described as forceable fondling or indecent assault, which are preliminary to and with the hope of securing voluntary intercourse." (See MCM, 1928, p 179, for necessary intent.) "The conduct of these two soldiers in invading the Dutch home was disgraceful to American arms. They could well have been charged with kidnaping the two girls. But the assaults were not brutal, were not persisted in and do not convince me that they intended to overcome any resistance by the force necessary. The girls were not physically injured. They were man handled but neither was forced to a complete prone position. But escaped and were not pursued. Both they and their parents have requested leniency. It is evident that, after one girl fled, they could have accomplished rape of the other, had that been their intention."
Suggested: That by supplementary action only so much of the finding

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re assault with intent to rape be approved as involves aggravated assault in the manner alleged, which offense will support confinement for five years. (Note that the two other offenses of which accused were found to be guilty will support confinement for one year) (See AW 50 $\frac{1}{2}$ for further digest of this indorsement.)

Intent to Rape: Accused was found guilty of assault with intent to commit rape. The assault was brutal, and the record contains no extenuating circumstances. "Since he is convicted of a felony which involves moral turpitude, it is recommended that the place of confinement be changed from" the U.S. Disciplinary Barracks to the U. S. Penitentiary. "This change should be accomplished by signed supplementary action." (1st Ind. CM ETO 9888 Baxter 1945)

(3) Assault and Battery; Finding of Offense Included451(3)(3) Finding of Offense Included:Cross References: 451(2) 4059 Bosnich

Assault to Murder: After he had about four beers but was still sober, accused became involved in an argument with his victim. During an ensuing fight, he cut the latter with a knife. Charged with assault to commit murder in violation of AW 93, he was found guilty of the lesser offense of assault with intent to commit voluntary manslaughter, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's assault was entirely unprovoked. He struck the first blow, and later cut his victim with a knife. "The injuries inflicted were of such a nature that death or serious bodily injury could easily have resulted "but they happened to be fortunately placed so that he wasn't so seriously injured.'" The requisite intent to kill was established. Had the victim died, accused could properly have been charged with at least voluntary manslaughter. (CM ETO 1725 Warner 1944)

Intent to Rape: Accused was charged with assault to rape, in violation of AW 93. By exceptions and substitutions, he was found guilty of a different offense, namely, assault with intent to do bodily harm. HELD: LEGALLY INSUFFICIENT. Assault with intent to do bodily harm is not a lesser offense to assault with intent to rape, "Accused having been charged with an assault involving a specific intent cannot legally be found guilty of an assault requiring an entirely different intent (1) Wharton's Criminal Law, 12th Ed., sec. 841-842, pp 1128-1135). * * * (Winthrop, Reprint, 1920, p. 383) "It therefore follows that accused herein cannot properly be found guilty of an assault with intent to do bodily harm - an offense distinctly different from that charged. The Specification, in describing the assault with intent to rape, alleges that he struck her 'on the face with his hand'. Since the evidence conclusively shows that accused struck the girl a severe blow in the face with his fist, an assault and battery is clearly established and such offense is included in the allegation of the Specification * * *." (2) The sentence must be reduced to confinement at hard labor for six months and forfeitures of two-thirds per month for a like period, for the lesser offense of assault and battery in violation of AW 96. (CM ETO 6288 Falise 1945)

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(3) Assault and Battery; Finding of Offense Included:

Intent, Sodomy: Accused was found guilty of assault with intent to commit sodomy on a prisoner of war, in violation of AW 96, by striking and kicking the prisoner on the head and buttocks with his fists and feet. HELD: LEGALLY SUFFICIENT ONLY FOR ASSAULT AND BATTERY IN VIOLATION OF AW 96. SENTENCE REDUCED TO SIX MONTHS. (1) Confession: "Accused testified that he was informed it would be 'more easy' on him if he confessed. Even if full credence is not given to this statement, the testimony of accused's commanding officer, to whom the confession was made, shows that although he advised accused of his rights under AW 24 prior to taking the confession, he simultaneously told him that it would be 'better for all concerned if he was guilty to tell me so there'. It is true that this statement did not offer a clear-cut hope of benefit * * *." However, "the accused, who was nervous during the questioning, was shown to have a mental age of seven. The person to whom the confession was made was his commanding officer. The warning given him prior to the questioning was ambiguous and contained a statement susceptible of being interpreted, at least by a person of accused's low intelligence, as a promise of leniency if he would confess his guilt. In view of accused's testimony that he did not understand the meaning of the word sodomy, some question also exists whether he realized the full impact of his confession elicited as it was by a 'double-barrelled' question involving both beating and sodomy." It is concluded that the confession was involuntary, and was erroneously admitted in evidence. (MCM, 1928, par 114a, p 116). (2) Other Evidence: Other than the confession, the only evidence of the assault to commit sodomy came from the victim, a German prisoner of war. "Because of his status as such and also because he had previously been badly treated by his guards, it is not improper to view his testimony with a certain amount of skepticism. The weight to which his testimony is entitled is further diminished by the consideration that accused's version of the incident, as corroborated * * *, is an entirely plausible one and is fully as credible * * *. The fact that the neuropsychiatric examination of accused revealed no evidence of pathological sexuality is a further circumstance tending to weaken the testimony of the victim and to buttress that of accused. * * * The legal evidence of record is not of such quantity and quality as practically to compel in the minds of honest and reasonable men the finding that * * *" accused was guilty of more than assault and battery in violation of AW 96--a lesser offense to that charged. (CM ETO 9064 Simms 1945)

(4) Assault and Battery; Finding of Offense Not Included 451(4)

(4) Finding of Offense Not Included:

Intent to Rape: Among other things, accused was charged with assault with intent to commit rape on a girl, in violation of AW 93. Among other things, he was found guilty of the "lesser" offense of assault with intent to do bodily harm. HELD: LEGALLY INSUFFICIENT.
Lesser Offenses: " Assault with intent to do bodily harm is not a lesser included offense in a specification alleging assault with intent to commit rape (Cf: CMC, 1928, par 148b, p 165; 31 CJ sec 522, p 868; State v McDonough, 104 Iowa 6, 73 NW 357, Winthrop's Military Law and Precedents - Reprint - p 689). Accused, having been charged with an assault involving one specific intent could not properly be found guilty of an assault requiring an entirely different one (1 Wharton's Criminal Law, 12th Ed, sec 841-842, pp 128-134). * * * It follows, therefore, that the record of trial as to that specification * * * is legally sufficient to support only so much of the findings of guilty of the lesser included offense of assault and battery in violation of AW 96." (CM ETO 4825 Gray 1944)

Intent to Rape: Accused was charged with a violation of AW 93 in that he had, with intent to rape, assaulted * * * by willfully and feloniously striking her in the face with his fist, cutting her on the hand with a bayonet, and throwing her forcibly upon a bed. He was found guilty of the "lesser" offense of committing an assault upon the girl, with intent to do her bodily harm, by willfully and feloniously striking her. He was sentenced to imprisonment for one year. HELD: LEGALLY SUFFICIENT ONLY FOR GUILT UNDER AW 96 FOR ASSAULT AND BATTERY. AND TO SUPPORT A SENTENCE OF CONFINEMENT FOR SIX MONTHS WITH 2/3rd FORFEITURES. "The court's findings exclude not only the specific intent set forth in the Specification, viz., to rape, but also the evidentiary allegation as to the manner of the commission of the battery involved in the offense charged, and by substitution undertakes to convict the accused of assault and battery with intent to do bodily harm, committed in a different manner by 'striking' * * *. The variance * * * as to the manner in which the battery was committed is not fatal. The facts so found constituted the lesser offense of assault and battery * * *. However, the court was not authorized by exception and substitution to find accused guilty of intent to do bodily harm in connection with his commission of the assault and battery in question." Accused was therefore guilty only of assault and battery, in violation of AW 96. Accordingly, punishment must be reduced as above noted. (CM ETO 6227 White 1945)

451(4) (4) Assault and Battery; Finding of Offense Not Included

(5) Assault and Battery; Variance, Charge & Finding 451(5)

(5) Variance, Charge & Finding:

Intent to Rob: In conjunction with another, accused was charged with assaulting a third party with an iron pipe with intent to commit robbery, in violation of AW 93. He was found guilty. HELD: LEGALLY SUFFICIENT. Although the proof showed that the other party involved in the robbery actually struck the blow, this variance was not fatal. By preconcert design, both had determined to commit the robbery. Both were principals. (CM ETO 942 Shooten and Currin 1943)

451(5)

(5) Assault and Battery; Variance, Charge & Finding:

(6) Assault With Intent to do Bodily Harm; Proof:451(6)Assault With Intent to do Bodily Harm(6) Proof:Not Digested:

763 Morley
 1585 Houseworth (biting)
 2782 Jones (stone)
 3912 Lane (cutting)
 3919 White
 7202 Hewitt

Cross References:

447 804 Ogletree (joint offenses)
 450(1) 6265 Thurman (with murder)
 450(4) 5584 Yancy (with murder-rape)
 451(2) 3255 Dove (with assault to rape; sentence in most
 important aspect,
 451(3) 6288 Falise (not lesser to assault to rape)
 451(4) 4825 Gray (not lesser to assault to rape; but assault
 and battery in violation of AW 96.)
 6227 White (not lesser to assault to rape)
 451(32) 3707 Manning (by threatening and shooting)
 4071 Marks, et al (striking and kicking body; evidence
 sufficient only for lesser of AW 96 assault
 and battery)

451(6)

(6) Assault With Intent to do Bodily Harm; Proof:

Accused officer took a British girl to a park. After sitting on a park bench for some time, he took her handbag, emptied it, and accused her of stealing 25 pounds from him. He then started to strike her. The girl made outcry. Accused was found guilty of assaulting the girl with intent to do her bodily harm, in violation of AW 93; and of being disorderly in a public place while in uniform, in violation of AW 95. HELD: LEGALLY SUFFICIENT. (1) Assault: Although alleged that accused kicked the girl in the back, physical examination revealed no injuries to her back but did disclose injury to her thighs. The girl testified that he kicked her. The court was justified in concluding that accused kicked her in the thighs. "This variance between proof and allegation was immaterial, as accused was not misled thereby. The force, violence and means employed in the attack, together with the nature and character of the injuries sustained * * * made it clear that the assault was committed with intent to do her bodily harm." (2) Disorderly in Uniform: AW 95: Accused's attack upon the girl was conspicuously disorderly. "It was unbecoming an officer and a gentleman. It is difficult to imagine any justification, other than self-defense, for such an attack and the infliction of such injuries. If accused was actually the victim of larceny by this woman, he had her identity card, and proper redress was available in orderly fashion. * * * It was not improper to charge the same offense under two Articles of War when one is based on the civil aspect of the offense and the other on its military aspect." An AW 95 offense was proven. (CM ETO 4606 Geckler 1944)

Among other things, accused were found guilty of committing described assaults with intent to do bodily harm with their fists. HELD: LEGALLY INSUFFICIENT for more than AW 96 assault and battery. "Except for the nosebleed suffered by G * * *, the record does not show that the blows caused any injuries. None of the victims was knocked down. The record is entirely silent on the force with which the blows were struck. It must be concluded that the evidence proved only assault and battery on each of the persons named * * * and was insufficient to prove that any of the assaults was committed with the requisite specific intent to do bodily harm. A nosebleed of unknown severity, without more, is insufficient to prove that the blow or blows with the fist that caused it were struck with such force as to justify the inference that they were struck with intent to do bodily harm * * *." (CM ETO 8189 Ritts 1945)

(6) Assault With Intent to do Bodily Harm; Proof:

451(6)

Accused had been drinking in a public place. Thereafter, he argued with a waitress about either service or payment, and tossed saucers in her direction. She retaliated by throwing water at him, throwing his hat on the floor, and advancing toward him with a pail. He grasped the pail, and slapped her on the face twice. He was found guilty of assault with intent to do bodily harm, in violation of AW 93. HELD: LEGALLY SUFFICIENT ONLY FOR THE LESSER OFFENSE OF ASSAULT AND BATTERY IN VIOLATION OF AW 96. Accused could not rely on his plea of self defense, because he provoked the waitress and did not withdraw from the conflict. However, he was not unusually violent toward the waitress, nor did he have an unreasonable advantage over her. He caused her no injury. There was only a mild battery upon her person. No intent on his part to do her bodily harm was shown. (CM ETO 1177 Combess 1944) (Mimeographed full opinion mailed.)

Suddenly and without provocation, accused struck his victim on the face with his fist and knocked him down. The latter's lip was cut. Accused was found guilty of assault with intent to do bodily harm, in violation of AW 93. HELD: LEGALLY SUFFICIENT ONLY FOR THE LESSER OFFENSE OF ASSAULT AND BATTERY IN VIOLATION OF AW 96. Accused struck but a single blow, and did not use an extraordinary amount of violence. There were no circumstances attending the battery from which the necessary specific intent to do bodily harm may be inferred. The injury inflicted upon the victim was not serious. At most, there was merely a simple assault and battery, in violation of AW 96. (CM ETO 1690 Armijo 1944)

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Accused was found guilty of assault with intent to do bodily harm on his victim by attempting to run him down with a motor vehicle, in violation of AW 93. HELD: LEGALLY SUFFICIENT. The evidence sustained the finding of guilt. "The punishment for assault with intent to do bodily harm is dishonorable discharge, total forfeitures and confinement at hard labor for one year. Although a motor vehicle may become a 'dangerous weapon or thing', the present specification did not allege that the vehicle herein was used as such. Hence, neither 18 USCA 455, nor District of Columbia Code secs. 22-502 or 22-503 apply. (CM ETO 2157 Cheek 1944)

451(6)

(6) Assault With Intent to do Bodily Harm, Proof:

(9) Assault With Intent to do Bodily Harm; Dangerous Weapon: 451(9)

Assault With Intent to do Bodily Harm; Dangerous Weapon:

(9) Proof in General:

Not Digested:

139 <u>McDaniels</u>	3858 <u>Jordan</u>	10098 <u>Mooney</u>
216 <u>Schifano</u>	3870 <u>Smith</u> (brick)	
866 <u>O'Connell</u>	4127 <u>Daniels</u>	
1737 <u>Mosser</u>	4203 <u>Barker</u> (aid)	
1982 <u>Tankard</u>	4269 <u>Lovelace</u>	
2158 <u>Huckabay</u>	4332 <u>Sutton</u>	
2414 <u>Mason</u>	4825 <u>Gray</u>	
2707 <u>Womack</u>	5879 <u>Martinez</u> (rifle)	
2723 <u>Copprue</u>	6224 <u>Kinney</u> (carbine)	
2744 <u>Henry</u>	6428 <u>Bostic</u> (identify; pistol)	
3494 <u>Martinez</u>		
3553 <u>McDougal</u> (identity; alibi)	9291 <u>Clay</u> (self defense)	

Cross References:

399	2707 <u>Womack</u> and 2744 <u>Henry</u> (Penitentiary Confinement)
419(2)	4303 <u>Houston</u> (sub-machine gun)
	5633 <u>Gibson</u> (with AWOL, etc; iron bar)
423(1)	8163 <u>Davison</u> (lesser; simple assault)
447	804 <u>Ogletree</u> (with AW 93 and 96; attack military police)
450(1)	422 <u>Green</u> (with murder)
	3042 <u>Guy</u> (with murder)
	4497 <u>DeKeyser</u> (with murder)
	6229 <u>Creech</u> (with murder; bystander)
	6265 <u>Thurman</u> (with murder)
450(4)	3859 <u>Watson</u> (with rape)
	4194 <u>Scott</u> (with rape)
	5584 <u>Yancy</u> (with murder-rape)
451(2)	3255 <u>Dove</u> (with assault to rape; punishment)
451(01)	3475 <u>Blackwell</u> (with arson)
451(6)	2157 <u>Cheek</u> (motor vehicle as dangerous weapon)
453(10)	7585 <u>Manning</u> (point gun at man; intent; drunk; AW 95)
454(8)	5420 <u>Smith</u> (no intent; lesser offense)
450(4)	9611 <u>Prairiechief</u> (with other offenses)

451(9)

(9) Assault With Intent to do Bodily Harm; Dangerous Weapon:

(9) Assault With Intent to do Bodily Harm; Dangerous Weapon: 451(9)

While accosting his intended victim, accused obtained the latter's pistol. It was loaded with a clip containing eight rounds. Accused pressed the barrel of the pistol against the side of its owner, and pulled the trigger three times. The gun failed to fire. Accused was found guilty of assault with intent to do bodily harm with a dangerous weapon, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Although the gun did not fire when accused pressed the trigger, he was a soldier serving in a war combat zone, and "the trial court had a right to assume that he knew what would be the usual and ordinary results of such action and that he intended such results to occur." (CM ETO 1526 Houseworth 1944)

Accused was engaging in a free-for-all fight in a hall, and was swinging an iron bar. His victim stepped into the hall, and was struck by the pipe. Accused was found guilty of assault with intent to do bodily harm with a dangerous weapon, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Although there was evidence to indicate that the blow imposed upon the victim was accidental and that he was not a participant in the fight, the finding of accused's guilt was still sufficiently supported. These factors made no difference. Further, the iron bar was used in such manner as to constitute it a dangerous weapon. Serious bodily harm was likely to result. (CM ETO 2569 Davis 1944)

Accused had a girl in a field. He struck her on the back of the head with the butt of his revolver. When she screamed for help, some soldiers approached. One fired a shot. Accused fired several shots. He was found guilty of violations of AW 93, to wit: assault with a dangerous weapon by striking the girl on the head, and willfully and feloniously shooting at one of the soldiers. HELD: LEGALLY SUFFICIENT. "The allegations * * * constitute an assault with intent to do bodily harm with a dangerous weapon under AW 93 and were fully supported by the prosecution's evidence * * *. 'Weapons * * * are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm' * * *. A pistol used as a billy or club is a dangerous weapon * * *." The firing of the pistol at the soldier was likewise an assault. "It was not necessary * * * 'that any battery ensues', that the intended victim be struck by the bullet." The necessary intent was inferable from the circumstances. Even though the soldier had already fired a shot at accused, yet accused was in the position of a fugitive from justice. He had committed a felony and had resisted arrest. He was armed, and prepared to resist. (CM ETO 3366 Kennedy 1944)

451(9)

(9) Assault With Intent to do Bodily Harm; Dangerous Weapon:

Accused was found guilty of a violation of AW 93 in that, with intent to do bodily harm, he assaulted a civilian by shooting at him with a dangerous weapon, to wit, a carbine. HELD: LEGALLY SUFFICIENT. "An abundance of competent uncontradicted evidence indicates that accused was in an advanced state of drunkenness at the time he committed the assault." While intent is not a necessary element in certain offenses (Winthrop specifically cites "assault" as an offense in which "no peculiar intent" is required -- "thus, the drunkenness of accused was no defense to his assault"), accused was charged with assault "with intent to do * * * bodily harm" in violation in violation of AW 93. "An element of this offense is a specific intent * * * to do bodily harm * * *. Voluntary drunkenness is a defense and 'may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense * * *. While the testimony tends to show that accused was so drunk as to render it extremely unlikely that he could have been capable of intending to do * * * bodily harm at the time he fired, the bulk of the evidence on this point actually pertains to a period of time from half an hour to three hours subsequent. He was indeed undoubtedly heavily intoxicated at the time of the assault but he pointed his gun at * * *, advanced as the latter retreated and fired when * * * ran manifesting, for the time being, a malign continuity of purpose on which the court obviously based its inference of intent. Whether he was too drunk to entertain a specific intent was, under the circumstances, a question for the court's determination (BULL. JAG, Vol II, No 11, Nov 1943, Dec 451(10), p 427; CM NATO 774 (1943))." (CM ETO 3812 Harshner 1944)

Accused and another were charged with a violation of AW 93 in that, acting jointly and in pursuance of a common intent, they did, with intent to do bodily harm, commit an assault upon two soldiers by stabbing and cutting them with dangerous weapons, to wit: knives. A nolle prosequi in favor of the coaccused was entered by the prosecution, after which the specification was amended in an attempt to state a single charge against accused. He was found guilty. HELD: LEGALLY SUFFICIENT. (1) Prior Trial: Accused was previously tried on the same charge and specification, but the reviewing authority disapproved the sentence therein because of a question whether the court was legally constituted. A rehearing before another court was ordered. "Examination of the record shows that no member of the second court was a member of the first court. The second trial was properly had (MCM, 1928, par 89, p 80; AW 50½). Testimony of the two victims and a medical witness, given at the first trial, was properly received in evidence at the second trial since it was stipulated that two of these witnesses were out of the United Kingdom situs of trial and the third was more than 100 miles from the place of the second trial (MCM, 1928, par 117b, p 121). This testimony established the corpus delicti of the offense charged and also proved the identity of accused as one of the guilty parties. In addition the prosecution proved a confession by accused of his guilt. The

(9) Assault With Intent to do Bodily Harm; Dangerous Weapon:

451(9)

conduct thus alleged and proved" was a violation of AW 93. (2) Nolle Prosequi of a Joint Accused: "After the arraignment of accused", the charge against co-accused was nolle-prosequed. "The prosecution then attempted to amend the specification on which this accused was, arraigned so as to show that this accused acted 'in conjunction' rather than 'jointly' with another. The amendment so effected failed to accomplish the purpose in that it also alleges that accused and * * * were 'acting jointly and in pursuance of a common intent'. The net result was that this accused was tried singly on a specification which alleged him to have been a joint offender. This was not prejudicial for a joint offender may be tried singly (MCM, 1928, par 71b, p 55)." (CM ETO 3927 Fleming 1944)

Accused officer was found guilty of violations of AW 93, in that (a) he committed an assault with intent to do bodily harm by shooting a corporal in the hand with a rifle, and (b) he committed an assault with intent to do bodily harm by threatening a sergeant with a dangerous weapon, to wit, a carbine rifle. Second, he was found guilty of being drunk and disorderly in uniform in violation of AW 95. Third, he was found guilty of a violation of AW 83 in that, through neglect, he suffered a jeep of value more than \$50 to be damaged "by allowing the vehicle to be parked on or immediately adjacent to street railway tracks, with inadequate space for passage of the street railway cars." HELD: LEGALLY SUFFICIENT. (1) Assaults: In the assault against the sergeant, accused pointed his loaded carbine at him, threatening to shoot him unless he kept away. "Thus an overt act coincided with an expressed intent and a present ability to do great bodily harm. When a menacing gesture with a dangerous weapon accompanies a demand which accused has no legal right to make, the assault is complete (CM ETO 3255, Dove). (b) In the assault of the corporal, "substantial evidence shows that accused fired as S** approached, after pointing his carbine at S** and telling the latter to leave him alone. A sane person is presumed to have intended the natural and probable consequences of his acts - and malice is presumed from the use of a deadly weapon * * *. Whether he was too drunk to entertain the specific intent * * *" was a question for the court's determination. (2) The Drunkenness and Disorder of accused in a cafe and in the adjacent public street was shown. "The offense, involving the unbridled terrorizing of enlisted men and foreign civilians by an armed and drunken American officer, was justifiably regarded as a violation of AW 95 * * *. (3) AW 83: "The showing that accused parked his unlighted jeep on the tram tracks supports the conclusion of culpable negligence upon which the findings of guilty of" the AW 83 charged offense may be sustained. "The evidence establishes government ownership and, although neither model, make nor condition (other than usability) of the vehicle were shown, and no competent testimony was adduced to establish its value, judicial notice of Army price lists precludes the possibility that it was less than \$50.00 * * *." (CM ETO 7000 Skinner 1945)

451(9)

(9) Assault With Intent to do Bodily Harm:Dangerous Weapon:

Accused was separately charged and found guilty of a violation of AW 93, in that, with intent to do bodily harm, he assaulted C * * * by wrongfully holding a dangerous weapon, to wit, a knife, against the throat of C * * *, thereby placing him in fear. HELD: LEGALLY SUFFICIENT. (1) "The fact that the assault had changing aspects such as the physical struggle, the actual stabbing, the change in the position of the knife to one of close proximity to the throat, the change in the person of the assailant or the guard, does not alter the fact that it was one continuing assault." (2) Unsworn witness: The unsworn testimony of a 12-year old child "was received by the court without objection by the defense. The defense did not expressly waive its right to object to this testimony. The admission of the testimony * * * was clearly erroneous." However, no prejudice resulted because, "entirely disregarding all of the girl's testimony, there still remains compelling evidence to support the court's findings of guilty." (3) Variance: "Proof that the knife was held by A * * * rather than by accused, as alleged in the Spec., was not a fatal variance. " An indictment may charge a defendant with being a principal in the commission of an offense, and conviction will follow if the evidence sufficiently shows that he was merely present, aiding and abetting." (Wharton, Crim Ev., 11th Ed., 1935, sec. 1032, p. 1814.) (CM ETO 6522 Caldwell 1945)

(12) Assault With Dangerous Weapon; Bodily Harm
Variance451(12)(12) Variance, Charge and Finding:

Accused was charged with assault with intent to do bodily harm by striking another in the stomach with a dangerous weapon, to wit, a knife, in violation of A. 93. He was found guilty of assault with intent to do bodily harm with a dangerous weapon by threatening his victim with a knife, in violation of A. 93. HELD: LEGALLY SUFFICIENT. The phrase "by threatening him" is merely descriptive of the manner in which the alleged assault was committed, and is surplusage in character. "A knife is a dangerous weapon if used or attempted to be used in such a manner that it would be likely to produce death or great bodily harm." Whether accused so used his knife in the present case was a question of fact for the court. (CI ETO 764 Copeland, Ruggles 1944)

AW 93

VARIOUS CRIMES

451(12)

(12) Assault With Dangerous Weapon; Bodily Harm
Variance:

(14) Burglary

451(14)

Not Digested:3947 Whitehead4233 Washington6523 Knapp

Cross References: 450(4) 3859 Watson
 450(4) 6193 Parrott (Multiplicity; housebreak-
 ing; rape)
 451(32) 4300 Kendrick (Housebreaking a lesser
 offense)

(14) Specifications:

Accused was found guilty of feloniously and burglariously breaking into a dwelling house at night-time with intent to commit the felonies of rape, robbery and murder, in violation of AW 93. HELD: LEGALLY SUFFICIENT. It was not objectionable for the single specification herein to allege the intent to commit three felonies. The possible failure of the prosecution to prove accused's intent to commit robbery was not fatal. It was sufficient for the prosecution to prove intent to commit rape or murder. (CM ETO 78 Watts 1942)

Charged separately but tried at a common trial, two accused were found guilty of absences without leave in violation of AW 61; and feloniously and burglariously breaking and entering a private house with intent to commit robbery therein, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The specification herein failed to follow the usual form in its allegation of "burglary", in that it omitted the words "in the night time". However, the day and place was stated. The additional "inclusion of the word 'burglariously', with its special connotation, together with the other allegations * * *, were sufficiently detailed in nature as to enable each accused adequately to prepare his defense and to obviate any risk of double jeopardy." Accused was not misled. He did not object. The evidence clearly showed the offense to have been committed at night. No AW 37 prejudice resulted. (2) Both accused were engaged in a wrongful joint and illegal act. "Each was responsible, not only for his own act, but also the illegal act committed by his partner in pursuance of the common purpose of forcing the victims to accommodate them." (ETO 3475). It was immaterial whether the intended felony was actually committed or even attempted. (CM ETO 3754 Gillenwaters 1944)

451(14a)(14a) Burglary Proof(14a) Proof:

One evening, a civilian heard footsteps downstairs in his home, and subsequently heard a door close. The next morning, he discovered that some of his clothing was missing. The clothing was later found in the possession of accused, and he admitted that he had obtained it from accused's home. He was found guilty of burglary, in violation of AW 93. HELD: LEGALLY SUFFICIENT. It was necessary for accused to have opened a door of the home, in order to reach the clothing therein. The closing of the door was heard. The record of trial is legally sufficient to sustain the finding that accused did burglariously break and enter the private dwelling in the night-time, with intent to commit larceny. (CM ETO 1737 Mosser 1944)

Accused were found guilty of, while acting jointly and in pursuance of a common intent, feloniously and burglariously breaking and entering a dwelling house at night with intent to commit larceny therein. HELD: LEGALLY SUFFICIENT. The intent to commit larceny was sufficiently evidenced by the fact that they took and carried away money, a radio, a watch, and spirits or wine. (ETO 3754) (CM ETO 3775 Moore 1944)

VARIOUS CRIMES

AW 93

(16) Embezzlement

451(16)

Not Digested:

1991 Pierson
2535 Utermoehlen
2776 Kuest
4854 Williams

Cross References: 395(47) 5855 Herholtz (court membership)
399 2535 Utermoehlen (penitentiary
confinement)
415 8164 Brunner
416(9) 6195 Odhner (PX funds)
438(9) 1991 Pierson (pleading; amendment;
variance)

451(16)(16) Embezzlement(16) Specifications:

Accused was found guilty* of feloniously embezzling by fraudulently converting to his own use the sum of £304.13,8 (\$1229.40) during a described period--the funds having been received by him in his capacity as non-commissioned officer in charge of a Post Exchange--in violation of AW 93. HELD: LEGALLY SUFFICIENT. The specification failed to allege either the ownership of the money involved, or the name of the person who entrusted it to accused. "However, an allegation as to ownership of property in an indictment for embezzlement would not appear to be essential when the indictment contains allegations in sufficient detail to enable accused to prepare his defense and to avoid the risk of being charged with the same offense at a later date." The instant specification set forth the place where the offense was committed, the dates concerned, and the amount involved. Likewise, it stated the capacity in which accused received the money alleged to have been embezzled. "The 'facts alleged therein and reasonably implied therefrom' constituted an offense despite the absence of an allegation as to ownership and a more detailed description of the manner in which the money was entrusted to him." No prejudice resulted. (CM ETO 850 Elkins 1943)

(17) Embezzlement451(17)(17) Proof in General:

It was established that, shortly after a woman loaned him a ring, accused pawned it. He was found guilty of embezzlement, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (MCM. 1928, par 149g, p. 172 (CM ETO 885 Van Horn 1943))

Accused warrant officer and personnel adjutant was found guilty of embezzlement, by fraudulently converting to his own use described amounts of money which had been intrusted to him, in violation of AW 93. He was sentenced to "dismissal" and to confinement. HELD: LEGALLY SUFFICIENT.

(A) The Offense of Embezzlement: Article of War 93 provides: "Any person subject to military law who commits * * * embezzlement * * * shall be punished as a court-martial may direct." "Embezzlement is not an offense at the Common Law; it is solely of statutory origin and existence (2 Wharton's Crim. Law 12th Ed., sec. 1253, p. 1574 * * *). In denouncing the crime of 'embezzlement' when committed by persons subject to military law, Congress did not define the offense, but simply denounced a crime by that name. When Congress uses words in a statute which have acquired a well understood meaning, it is presumed they were used in that sense unless the contrary appears." At the time AW 93 was adopted, while there was no Federal Penal Code section of general application defining embezzlement, Congress had enacted a District of Columbia statute (Act Mar 3, 1901, 31 Stat. 1325 ch 854, sec. 834; Act Mar 3, 1913, 37 Stat. 727, ch 107, sec 851a) which provided as follows: "If any agent * * * of a private person * * * shall wrongfully convert to his own use * * * anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer or that of any other person, * * * he shall be guilty of embezzlement * * *." The term "embezzlement" had also received numerous judicial interpretations prior to that time. It is entirely proper to assume that Congress adopted the term's well-defined juridical meaning when it enacted AW 93. Nonetheless, it must be remembered that where a person, subject to military jurisdiction, is charged with 'embezzlement' denominated by the 93rd Article of War, * * * he is not charged with nor is he tried for an offense under the District of Columbia Code or any other statute of Congress." (a) Unlawful conversion; explanation: There is a well established presumption that a steward of property of others has unlawfully converted it to his own use if he cannot or does not account for it or deliver it when accounting or delivery is required by the owners or others possessing authority to demand same. The burden is then on the steward to go forward with the proof of legitimate expenditure or less of same. The explanatory evidence when balanced against proof of possession by the steward and failure to account or deliver the property on demand, creates

451(17)(17) Embezzlement

an issue of fact for final resolution by the court. Failing to make an explanation, a conviction of guilt may rest upon the facts of possession, absence of accounting or delivery and the presumption arising from same."

(b) Custody, Care and Control: "The old doctrine that when a person holds the 'custody' only of property as distinguished from 'possession' of it, his wrongful and unauthorized conversion of it constitutes the crime of larceny and not embezzlement has been modified in the Congressional definition of the crime of 'embezzlement' as denounced by the 93rd Article of War. Under the current doctrine proof that accused has converted property under his care and control obviates the necessity of determining whether he had possession or merely custody." (c) Return of property: "The fact that an accused, who has converted property entrusted to his care, intended to return the property or even has made complete restitution of same, is no defense."

(B) Evidence Fulings: (a) Certain statements made by accused are not considered by the Board of Review herein, because it appears that they were made in an atmosphere of compulsion and pressure. (b) The prosecution introduced evidence that accused had arranged the repayment of some of the funds. There is a possibility that this evidence could have been considered "as an admission by accused that he did in fact receive the various funds and acknowledged his responsibility for same. Upon such hypothesis the evidence of repayment was certainly admissible as admission of conduct." It is to be noted, however, that this type of evidence is ordinarily introduced by the defense in regard to the question of accused's fraudulent intent, or in mitigation of punishment. (c) "Accused's answers to questions propounded by an officer of the Inspector General's Department were simple admissions against interest and not confessions, and their admissibility is manifest." (d) The probative value of accused's unsworn statement was exclusively for the court's determination. Accused did not deny his misuse of the funds. Rather, he attempted to explain that he was a victim of circumstances which made it necessary for him to convert the property of others to his own use.

(C) Dismissal of Warrant Officer; Confinement: Since a Warrant Officer is not a commissioned officer, he should not have been dismissed the service. Rather he should have been dishonorably discharged. However, the two terms are essentially equivalent as applied to a Warrant Officer. He was properly sentenced to confinement for five years. Inasmuch as he was not an enlisted man, the Table of Maximum Punishments did not apply to him. (CM ETO 1302 Splain 1944.)

A third party placed his property in the care and control of accused for a specific purpose. The latter converted it to his own use and benefit. He was found guilty of embezzlement, in violation of AW 93. HELD: LEGALLY SUFFICIENT. The offense of embezzlement was fully proved. Intention to make restitution is no defense. (CM ETO 1588 Moseff 1944)

(17) Embezzlement451(17)

An officer in charge of trust funds who fails to account for them on proper demand cannot complain if the natural presumption that he embezzled them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting. (CM ETO 2766 Jared 1944)

Accused company mail orderly was found guilty of various embezzlement offenses in violation of AW 93, and of various improprieties regarding handling of mail in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) AW 93 Embezzlement: The six specifications of this charge allege "the giving to accused of six items of money to be used by him for a specific purpose for the benefit of the six soldiers who gave him the money. Accused appropriated the money to his own use and benefit. This was embezzlement in each instance, in violation of AW 93 * * *." (2) AW 96 Mail Improprieties: Accused was company mail orderly. The first four specifications of the AW 96 charge against him charged him "with unlawfully detaining, secreting and failing to deliver First Class letters which had come through the mails of the U.S. Post Office Department and were entrusted to him for the purpose of making delivery, and in Specification 5 * * * with having unlawfully detained, secreted and retained a stamped letter received by him for the purpose of depositing it in the U.S. mails * * *. The conduct so alleged and proved was prejudicial to good order and military discipline, in violation of AW 96." (Discuss CM ETO 3507 Goldstein 1944.) "Accused in the present case did not work in the army post office. He was a member of another unit, for which unit he was mail orderly. However, his duties and responsibilities were fixed and established by the Army, which controls and operates the army post office." His duties are duly set forth and outlined. The analogy in the Goldstein case is applicable here. Likewise, the analogy in regard to the maximum penalty discussed therein also applies here (5 years for each violation of sec 317, Title 18, USC-- five offenses alleged herein under AW 96 would support a 25-year sentence in a place other than a penitentiary.) (CM ETO 3379 Gross 1944)

Accused officer collected money for officers' cleaning bills, and had the duty of paying the cleaner with it. He commingled these funds with his own; kept no accurate records; finally had a large shortage. He was charged with the felonious embezzlement of the cleaner's funds in violation of AW 93; recharged with the same felonious embezzlement and also filing a false official report in violation of AW 95. He was found guilty as charged. The confirming authority reduced the guilt on the second charge to a violation of AW 96, excepting the words "with intent to deceive" from one of its specifications. HELD: LEGALLY SUFFICIENT. (1) Ownership: A mistake was made when the felonious embezzlement specifications alleged the missing money to have been the property of the cleaners. "The money did not become the property of the cleaners and the laundry until paid by accused to them. However, the

451(17)(17) Embezzlement

gist of embezzlement is the breach of trust * * *." The transaction was clearly stated. Accused could not have been misled to his prejudice.

(2) Multiplication: By finding accused guilty of violation of AW 93, and then additionally finding him guilty in violation of AW 95, "the court has decided only that the evidence was sufficient also to show him guilty of the additional offense of 'conduct unbecoming an officer and a gentleman.'" (3) The lesser offense: Although the phrase "with intent to deceive" was excepted from the specification charging accused with filing a false official affidavit, enough remained in the finding to show him guilty of making such report "as true when he did not know it to be true." "Such finding at least convicts him of neglect in handling the money of his brother officers with apparent reckless disregard for their rights to an accounting from him of his use thereof. The specification remaining states an offense in violation of AW 96." (CM ETO 3454 Thurber Jr 1944)

(27) Forgery451(27)(27) Forgery; Proof in General:Not Digested:2444 Warner (check)2962 McBee (False indorsement on checks; intent to defraud)Cross References: 399 2535 Utermoehlen (penitentiary confinement)

Accused forged an officer's name as indorser to a check drawn on an American bank. He cashed the check at a Northern Ireland bank. He was found guilty of forgery, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Substantial evidence justified the court in inferring that accused intended to defraud the Northern Ireland bank. The fact that the officer "might not have been exposed to a financial loss because of the forgery of his name as an indorser is not material * * *. It is sufficient that the presence of his purported signatures on the checks might expose him to an action of assumpsit or to a suit for damages for deceit." (CM ETO 2216 Gallagher 1944)

Accused was found guilty of forgery, in that he had placed the names of fictitious officer-indorsers on bad checks; in violation of AW 93. HELD: LEGALLY SUFFICIENT. "Notwithstanding the evidence that the names were fictitious was slight, it was sufficient to shift the burden of going forward to accused." (CM ETO 2273 Sherman 1944)

It is immaterial whether or not an accused's signatures are simulated or resemble the genuine signature intended. It is sufficient to prove that the signatures are not those of the intended signatory, and that accused did in fact affix another's signature to the documents in question. (CM ETO 2535 Utermoehlen 1944)

AW 93

VARIOUS CRIMES

451(27)

(27) Forgery

(32) Housebreaking451(32)(32) Housebreaking; Proof in General:Not Digested:

78 Watts
 1603 Haggard
 1638 LaBorde (stable)
 3677 Bussard
 4222 Politi
 4825 Gray
 4915 Magee (also see AW 61)
 5012 Porter
 5170 Rudesal
 5362 Cooper (also 450(4); intent to search & trespass)
 5608 Gehm (with indecent assault)
 5879 Martinez
 6685 Burton (low mentality)
 7202 Hewitt
 10098 Mooney

Cross References: 399 2302 Hopkins (penitentiary confinement)
 450(1) 4292 Hendricks
 450(4) 3859 Watson (with rape)
 4589 Powell, et al
 6193 Parrott (burglary also; multiplicity)
 7209 Williams (also rape and assault)
 450(9611 Prairiechief (with other offenses)

AW 93

VARIOUS CRIMES

451(32)

(32) Housebreaking:

(32) Housebreaking451(32)

When he was apprehended at about 4:30 p.m., petrol coupons were found in accused's possession. These petrol coupons had been removed from an envelope in a desk in a shop a quarter of a mile away. The next morning, the empty envelope was found in its usual place in the desk drawer. Accused claimed that he had found the coupons in an envelope by the gate to the shop. There was no evidence to show that accused had actually entered the shop. Nonetheless, he was found guilty of housebreaking, in that he had unlawfully entered the shop with intent to commit the criminal offense of larceny therein in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's explanation of his possession of the property was a question of fact for the court's sole determination. He was properly found guilty of housebreaking. (CM ETO 2840 Benson 1944)

Two accused, without invitation or authority, entered a dwelling house through an open door. They then proceeded to put the householders in fear with a pistol, and, without justification, took money from their persons. Thereafter, the householders were compelled to commit acts of sodomy with them. Accused were found guilty of unlawful entry into the dwelling with intent to commit robbery and sodomy, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Housebreaking: "As in the case of burglary * * *, the actual commission of a criminal offense in the building entered, in this case robbery * * *, is probative of an intent to commit the same at the time of the unlawful entry." (2) Robbery: "Any failure by the prosecution to prove that the robbery was accomplished 'by force and violence' (as well as by intimidation) was not fatal", as those words as used in the specification "were merely descriptive and accused were adequately notified of the offense charged." (CM ETO 764, Copeland and Ruggles) (3) Sodomy was likewise adequately proved. (4) The question of whether drunkenness affected the mental capacity of accused to entertain the various intents necessary for the offenses was one for the trial court. (CM ETO 3679 Roehrborn 1944)

Accused had visited a private French home. After being given cider, he demanded a girl. Refused, he left but shortly returned. When denied entrance a second time, he fired four shots through the door; gained entrance thereby; kissed and fondled the householder's daughter. He was found guilty of violations of AW 93, to wit: (a) assault with intent to do bodily harm on the householder by threatening and shooting at him; and (b) unlawful entry into the house with intent to commit assault and battery. He was also found guilty of a violation of AW 96, to wit: assault and battery upon the daughter "by kissing, squeezing, fondling and holding her forcibly and against her will". HELD: LEGALLY SUFFICIENT. (1) Housebreaking: "The unlawful entrance of the dwelling * * * was clearly shown by accused's intimidation of the occupants of the house by threats and by firing four times * * * through the door", so that, as a result, the householder opened the door. "There is a constructive breaking when

451(32)(32) Housebreaking

the entry is gained by a trick, such as concealing one's self in a box; or under false pretense, such as personating a gas or telephone inspector, or by intimidating the inmates through violence or threats into opening the door' (MCM, 1928 par 194 149d, p 169; Cf CM ETO 3754 Gillenwaters)." (2) Assault and Battery: Accused's intent to commit an assault and battery was shown by his subsequent assault and battery on the daughter in pulling her by the hand and kissing her while he menaced two other occupants with his carbine. (3) "Confinement in a penitentiary is authorized for the offense of housebreaking by AW 42 and sections 22-1801 (6:55) and 24-401 (6:401), District of Columbia Code." (CM ETO 3707 Manning 1944)

Three accused were found guilty of the following violations of AW 93: Housebreaking; Assaults with intent to do bodily harm by striking and kicking on the body; and the larceny of a ring; assault with intent to rape a girl. HELD: LEGALLY INSUFFICIENT ON THE ASSAULT SPECIFICATIONS. (1) Housebreaking: "The fact that accused unlawfully entered this house and subsequently committed a larceny therein is sufficient to support and prove the allegation * * * that the entry into the dwelling was with intent to commit a criminal offense. Evidence of an actual larceny is competent to prove an intent to steal * * *." (2) Assault with Hands and Feet with Intent to do Bodily Harm: "There was no testimony that the instrumentality of any of these assaults was other than hands or fists. Each victim was struck by one accused. No kicking was proved. A fist is not a dangerous weapon or instrument and an assault with intent to do bodily harm is a felony, a violation of AW 93, only when a dangerous weapon or instrument is employed * * *. The conduct thus proved constituted a simple assault and battery, a lesser included offense, and was in violation." (3) The larceny was adequately proved. (4) The assault with attempt to rape was also sufficiently shown. The girl "was thrown on a bed and on the floor and force was employed by three of accused to hold her down. The lifting or attempted lifting up of her skirt proved the intent charged. The three accused were shown to have aided and abetted each other in this attempt to obtain carnal knowledge * * * by one of their number by force, rape. It is unnecessary to determine which of the accused was to have had the intercourse since the common law distinction between aiders and abettors and the principal is no longer of legal significance. * * * Although two persons can not be guilty of a single joint rape, all persons present aiding and abetting another in the commission of rape are guilty and punishable as principals * * *. By analogy, the same rule applies with respect to the offense of attempted rape or that of assault with intent to commit rape. Accused here were properly found guilty as principals of acting jointly and in pursuance of a common intent in their assault * * * with intent to rape * * *." (CM ETO 4071 Marks et al 1944)

(32) Housebreaking.

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Accused was charged with burglariously breaking and entering a dwelling house with intent to commit larceny, in violation of AW 93. He was found guilty of the unlawful entry into that house with intent to commit larceny, in violation of AW 93. He was also found guilty of the larceny of a wrist watch of \$50 value and one pair of ladies' hose valued at \$.50, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) "Housebreaking is a lesser included offense of burglary. * * * This offense is broader than burglary in several particulars including the fact that the entry may be 'either in the night or in the daytime'" (MCM, par 149e. (1928, p 169). "The corpus delicti of the offense was amply proven and accused found in possession of the missing property * * *." (2) Value; Larceny: A sergeant's testimony, "that, in his opinion, the watch was worth 'ten or twelve pounds * * * right close around \$50.00' is not adequate proof of the market value of the watch. However, he is somewhat qualified as an instrument specialist. As to proof of market value of a watch and other articles of stolen personal property before it", it has been held that a court can, from inspection alone, determine that the property has some value. "There is no competent evidence as to the market value of the rayon stockings. However, in addition to the fact that the court could find that the hose in question had some value, the court could also take judicial notice of AR 30-3000 (Quartermaster Corps Price List of Clothing and Equipage). (MCM, 1928, par 125, p 135). Therein rayon stockings are listed, and priced at 53¢ a pair." "It may therefore be inferred from the evidence and from the descriptions of the stolen articles that they had some substantial aggregate value in excess of \$20.00." (CM ETO 4300 Kondrik 1944)

AW 93

VARIOUS CRIMES

451(32)

(32) Housebreaking

(35) Larceny451(35)(35) Larceny:

201 <u>Pulaski</u>	2587 <u>Trerice</u>	5741 <u>Kennedy</u>
839 <u>Nelson</u>	2632 <u>Johnson</u>	6423 <u>Knapp</u>
913 <u>Pierno</u>	2765 <u>DeVol</u>	8438 <u>Barrett</u>
960 <u>Fazio</u>	2829 <u>Newton</u>	
1017 <u>McCutcheon</u>	2901 <u>Childrey</u>	
1103 <u>Burns</u>	2911 <u>Arndt</u>	
1191 <u>Acosta</u>	3056 <u>Walker</u>	
1549 <u>Copprue</u>	3153 <u>Van Breemen</u>	
1606 <u>Sayre</u>	3311 <u>Engle</u>	
1621 <u>Leatherberry</u>	3374 <u>Bailey</u> (identity	
1670 <u>Torres</u>	money)	
1704 <u>Renfrow</u>	3643 <u>Boyles</u>	
1737 <u>Mosser</u>	3719 <u>Connor</u>	
1844 <u>Sharp</u>	4055 <u>Ackerman</u>	
1904 <u>Mayes</u>	4177 <u>Remsing</u>	
2042 <u>Smith</u>	4222 <u>Politi</u>	
2194 <u>Henderson</u>	4233 <u>Washington</u>	
2260 <u>Talbott, Jr.</u>	4309 <u>McCann</u>	
2358 <u>Pheil</u>	4452 <u>Treviso</u>	
2390 <u>Mock</u>	4661 <u>Ducote</u> (poss.,	
2409 <u>Cummings</u>	money)	
2546 <u>Eastwood</u>		

Cross References:

334	3212 <u>Robillard</u> (prejudicial error elsewhere)
399	2409 <u>Cummings</u> (penitentiary confinement)
433(2)	5445 <u>Dann</u> (pillage and plunder case)
451(17)	1302 <u>Splain</u> (compare embezzlement)
451(32)	4071 <u>Marks</u>
	4300 <u>Kondrik</u> (value)
451(58)	533 <u>Brown</u> (robbery; lesser included offense)
451(105)	492 <u>Lewis</u> (value; allegations and proof)
454(64a)	3292 <u>Pilat</u> (offense herein, not larceny)

451(35-36)(35) Larceny Specifications; Ownership:(35a) Larceny Specifications; Multiplicity:(36) Larceny Specifications; Value:

(35) Larceny Specifications; Ownership: "Larceny of Government-owned property may be laid under Article of War 93 * * *. There was no direct evidence that the shirt and trousers described * * * were property of the United States as alleged, but each of these articles is described as being 'olive drab' and 'general issue', and the owner testified that chevrons were on the shirt before it was stolen and that the shirt was issued to him when he became a soldier. The articles were introduced in evidence. The question of whether the articles described were the property of the United States was one of fact for the sole determination of the court * * *." (CM ETO 1411 Riess 1944)

"Larceny of government property may be charged under the 93rd Article of War." (CM ETO 1764 Jones and Mundy 1944)

(35a) Specifications--Multiplicity: By a number of separate specifications each setting forth various items allegedly stolen at the same place on or about the same date from a number of different owners, accused was charged with larceny in violation of AW 93. He was found guilty. HELD: LEGALLY SUFFICIENT. No prejudice resulted, when the court denied accused's motion to strike, made on the ground that each specification after the first one alleged a separate charge and that there was a duplicity of crimes alleged. Multiplicity of charges and specifications should be avoided. "Assuming but not deciding that * * * the various thefts should have been at least partially consolidated," yet accused was guilty of a number of charged offenses other than the one referred to above. He could legally have been sentenced to death. However, he was only sentenced to confinement for twenty years. (CM ETO 952 Mosser 1943)

(36) Specifications as to Value: Accused was charged with stealing money of described values. The proof showed that he had principally stolen English currency (pounds). He was found guilty of a violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) While proof that the money stolen consisted of English notes would not support a specification that American money had been stolen, the instant specifications merely described the stolen property as money of stated American value. "Proof of the theft of 'money' was therefore fully supported by proof of theft of English currency because in England the latter 'is used as a circulating medium by authority of the laws of the United States.'" (2) The defense stated that it had no objection when the court took judicial notice that one English pound was valued at \$4.035. (3) The court properly took judicial notice of Training Manual 14-215. Since this was a rule or regulation of the Secretary of War, it had the force of law. (CM ETO 1671 Mathews 1944)

(36a) Larceny; Proof in General

451(36a)

(30a) Larceny; Proof in General:

Accused was found guilty of the larceny of a pocketbook containing £37, British currency, of about \$150.00 value, from another soldier, in violation of AW 93. HELD: LEGALLY INSUFFICIENT BECAUSE A "CONFESSION" WAS IMPROPERLY ADMITTED IN EVIDENCE.

(A) Confession: Accused would not confess until his commanding officer talked to him. The latter stated that, if he would admit the theft, he would "try and get him off by 'busting him' and transferring him out of the company." On another occasion, he told accused that he would try and get him off as easy as he could with a reduction in grade and a transfer, "but could not promise him that he would not be court-martialed". Accused confessed orally, after which his commanding officer left the room. Thereafter, accused made a written confession to another. "The fact that a confession is made by the accused to his superior officer may be the decisive element in determining whether or not it was a voluntary confession." Accused was under the immediate command of the superior officer to whom he confessed. He would naturally look to him for penalties or favors. The officer's "promise was clearly one of at least partial immunity within the rule pertaining to admissibility of confessions, and there can be no question but what such promise would prevent the admissibility of accused's written confession had it been made directly and exclusively to" the superior officer. In the circumstances, it must be concluded that the initial taint cast upon the oral confession carried over to the written confession. Both should have been excluded, because they were obtained under promise of favor and partial immunity. This conclusion remains, even though the defense did not object to the introduction of the confessions. (Note that the defense could also have objected to the oral confession on the ground that it was not "best evidence", but failure to object on that ground resulted in a waiver thereof.)

(B) Possession: "Evidence that accused was found in possession of recently stolen property is not only admissible but may also raise the presumption that he stole the property." (MCM, 1928, par. 112a, p. 110) At the time of his oral confession, accused delivered up the money alleged to have been stolen to his superior officer. It was part of other funds in his possession. "Notwithstanding the condemnation of accused's oral confessions as inadmissible on the ground heretofore stated, those parts of these confessions which relate strictly to pertinent facts discovered as a result of information furnished by the confession will be admissible. The pertinent facts however must be proved by evidence other than that contained in the illegal confession." In the instant case, the superior officer testified that accused gave him the money, and another witness testified that accused said, "I have about £52-10s in notes on me now", and then gave the money to the officer, stating that the victim's "money was among the bills and notes." This was admissible.

(C) Prejudice in the Entire Record: Prejudicial error, which injuriously affected accused's substantial rights within the purview of Article of War

451(36a)(36a) Larceny; Proof in General

37 resulted from the improper admission of the confessions in evidence. Although theft of the victim's money by some person was shown, accused claimed that he had won his money in gambling. (MCM, 1928, par. 149g, p. 171) "The fate of the accused * * * is not to be determined by the simple expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. * * * The court had before it both legal and illegal evidence. It is an impossibility for the Board of Review to measure the influence of the illegal evidence upon the court and should it attempt to do so it would be usurping the functions of the court. * * * An accused has not received a fair and impartial trial if his conviction is based upon a body of evidence part of which is legal and which standing alone possesses only sufficient weight to tip the scales in favor of its sufficiency but does not contain the robust quality of moral certainty and determinativeness, and part of which is illegal composed of confessions which are some of the 'strongest forms of proof known to law.'" (CM ETO 1201 Pheil 1944)

Accused and a co-conspirator were jointly charged with, and found guilty of, the larceny of \$83, exchange value about \$334.90, from an Army Post Exchange, in violation of AW 93. HELD: LEGALLY INSUFFICIENT AS TO ACCUSED, BECAUSE HIS "CONFESSION" WAS IMPROPERLY ADMITTED IN EVIDENCE.

(A) Confession: During a re-trial investigation, accused's superior officer told him he wanted his honest story and that it would be better for him to make a clean breast of the matter because the truth would come out sooner or later. The officer became excited. He mentioned "Leavenworth", and stated that, if he could, he would like to give accused a "damn good beating". Without being previously advised of his rights, accused finally "broke" and admitted the larceny. Thereafter and on the same day, but after being advised of his rights, accused signed a writing which embodied his earlier oral confession. About a week later and after having again been advised of his rights, accused signed another similar written confession made to the investigating officer. HELD: The first oral and written confessions were inadmissible in evidence as confessions because they were involuntary. The second written confession, made a week later, was also inadmissible. "The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof that clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made * * *." (Wharton's Criminal Evidence, Vol. 2, sec. 601, pp. 998-1002) This latter requirement was not met herein.

(B) Possession: Evidence that accused was found in possession of recently stolen property is not only admissible but may also raise a presumption that he stole the property. Possession of part of stolen property infers the theft of all the property. (MCM, 1928, par. 112a, p. 112) Northstanding the inadmissibility of accused's confession, "all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony." (Wharton's Criminal Evidence, 11th Ed., Vol. 2, Sec. 600)

(36a) Larceny; Proof in General

451(36a)

Those parts of accused's confession which related strictly to inculpatory facts discovered as a result of information furnished by the confession were admissible. The inculpatory facts, however, had to be proved by evidence other than that contained in the illegal confession. Here, accused's statements led to discovery of a "cache" in a basement. But the money which was recovered from that basement "cache" was not before the court, nor was it identified as that taken from the Post Exchange. Apart from the confession, there was no means to identify the property. Accused's statement that it was his "cache" was insufficient. "In connection with the discovery of the alleged inculpatory facts, there should be proof, beyond a reasonable doubt, of the identity of the property, and identification should be complete before admission of the inculpatory facts".

(C) Co-conspirator: Admissions and confessions of one conspirator done or made after the common design is accomplished are not admissible against another except when done or made in furtherance of an escape. Nor was there, in the instant case, evidence that accused was present when his co-conspirator made his subsequent statements. (Note that this fact does not prevent the use of such admission or confession against the one who made it.)

(D) Prejudice: Viewing this record in the light of the foregoing discussion, it must be concluded that prejudicial error resulted, and that the evidence insufficiently supported the finding of accused's guilt of the charge against him. (CM ETO 1486 MacDonald, et al 1944)

Accused was found guilty of the larceny of funds in a "contribution" box, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's confession was properly introduced in evidence. "Proof of the corpus delicti * * * rests primarily upon hearsay evidence * * *. The evidence was given not only without objection by the defense, but also its subsequent motion to strike the evidence was voluntarily withdrawn. Under such circumstances the hearsay evidence may be considered and given its natural probative effect as if it were in law admissible." (CM ETO 2098 Taylor 1944)

Accused Bailey was found guilty of larceny, in violation of AW 93. HELD: LEGALLY INSUFFICIENT. (1) Confession: "After the prosecution rested, defense counsel stated that he wished to place Bailey on the stand to testify solely concerning the manner in which the statement was obtained. The law member ruled that if Bailey took the stand as a witness he would be subject to cross-examination on all matters bearing on his guilt or innocence. Defense counsel thereupon withdrew his request, and each accused elected to remain silent. * * * Bailey's statement was an acknowledgment of guilty and was therefore a confession. A confession obtained by coercion or improper inducement cannot be used to convict an accused. Whether a confession is voluntary is character and therefore admissible in evidence is a question to be determined by the law member, or, in his absence, by the president subject to objection by any member of

451(36a)

(36a) Larceny; Proof in General

the court. Where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, the presumption is that the confession was voluntarily made. The testimony of accused to show improper influence should be offered and received before the confession is admitted. A refusal to permit accused to testify as to the involuntary character of a confession, or to present other evidence on that issue, is error. An accused has the right to take the stand for the sole purpose of testifying to facts tending to prove the involuntary character of his confession without subjecting himself to cross-examination on the issue of his guilt or innocence of the offense. To hold that he does not have that right would force upon him the choice of one of two alternatives: Either he must refrain from testifying altogether and permit the introduction of an involuntary confession, or, in order to prove its involuntary character, he must take the stand and thereby subject himself to cross-examination covering the whole subject of his guilt or innocence of the offense. Either alternative would result in a deprivation of his privilege against self-incrimination guaranteed to him by the Fifth Amendment to the Federal Constitution and also secured to him by AW 24. Therefore the law member's action herein was improper. (2) Total Evidence; Larceny: "The evidence does not show that Bailey was the only person who had opportunity to take G's billfold, camera or watch movements * * *. The money seen in the possession of Bailey * ** was not identified as to amount, denominations of the bank notes, or in any other way, as being the same money that was taken * * *. Therefore the presumption of guilt based upon the unexplained possession of recently stolen property does not arise in this case." It cannot reasonably be said that aside from the confession there is compelling proof of Bailey's guilt. (Rule: Eliminating the confession, is the evidence "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty"?) (CM ETO 9128 Houchins, et al 1945)

(37) Larceny; Proof by Possession of Subject
Matter451(37)(37) Larceny; Proof by Possession of Subject Matter:

Cross References: 451(36a) 1201 Pheil
 1486 MacDonald
 9128 Houchins

Accused's possession of the recently stolen cutlery was not satisfactorily explained and may raise a presumption that he stole the property." Likewise, "proof of a subsequent sale of stolen property goes to show intent to steal, and, there, evidence of such sale may be introduced to support the charge of larceny." (CM ETO 885 Van Horn 1945)

"It has been held that where several articles have been stolen, the corpus delicti in each case having been established, and accused is found in possession of part of the stolen articles after the theft, such fact may be considered as tending to show he was guilty of stealing all of the articles * * *. If the finding of part of the stolen articles in accused's possession furnishes the basis for such an inference, an admission by accused himself that he actually stole some of the articles would normally provide an even stronger inference that he took all of the articles alleged." (CM ETO 952 Mosser 1942)

"Although the accused was proven to have been in possession of only a portion of the stolen property, such evidence coupled with proof that he had access to all of it at a time not unreasonably remote under the circumstances, is sufficient to support the inference that he stole the whole." (CM ETO 1415 Cochran 1944)

After stolen goods were found in accused's possession, he was found guilty of larceny in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused's possession of the stolen property was not explained at the trial, and accused remained silent. Unexplained possession of recently stolen property is evidence of guilt. (CM ETO 1607 Nelson 1944)

451(38,40)(38) Larceny; Asportation or Trespass(40) Larceny; Proof of Intent(38) Larceny; Asportation or Trespass:

"Although the sums stolen belonged to different persons, the larceny was a single one. 'Thus, where a thief * * * goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.' (MCM, 1928g, p 171; Dig Op JAG 1912-1940, sec 428(14), p 298). Accused's possession was complete and the transposition of the loot from his victims' pockets to his own involved sufficient movement to constitute the carrying away alleged in the specification. The record sustains the court's findings of guilty." (CM ETO 2736 Davis 1944)

(40) Larceny; Proof of Intent:

Accused officer took a pair of pink trousers and a tan khaki shirt from another officer's room. Although he denied the intent to permanently deprive the other officer of the articles, he was found guilty of larceny in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Intent may be inferred from the circumstances. (MCM, 1928, par. 149g, p. 173). Although accused testified that he took the clothing only temporarily, they were not discovered until a search was instituted about three weeks later. In the interim, accused had maintained complete silence. While he also testified that he had intended to have the clothes cleaned, he had made no effort towards this end. Accused admittedly had other clothing which he could have worn. (2) Without objection, the prosecution introduced evidence that another pair of pink trousers, with the name of the owner erased and accused's name inserted, was found in accused's room. The purpose of the evidence is conjectural. "It may have been presented as evidence of the commission of a possible similar offense by accused (MCM, 1928, par. 112b, p. 112) or to show that he had another pair of trousers which he would have worn during the time he had possession of the property alleged to have been stolen." However, whatever the reason for its introduction, it could not have been prejudicial. (CM ETO 1327 Urie 1944)

"The question as to whether accused intended permanently to deprive the owner of possession of the bicycle was a question of fact, and it was for the court to determine whether or not evidence offered by accused in explanation of his possession of recently stolen property, namely, that he took the machine but intended to return it, constituted a satisfactory explanation of such possession." (CM ETO 2840 Benson 1944)

(41) Larceny; Ownership451(41)

"The fact that the money and personal property * * * was in the office of * * * Company when taken, is evidence upon which the inference that the company owned the same may be based. (2Wharton's Criminal Law, sec. 1174, p. 1494; Underhill's Criminal Evidence, sec. 508, p. 1028) There was adequate evidence of the de facto existence of the corporation." (CM ETO 875 Fazio 1943)

Accused officer was found guilty of a number of larceny specifications in violation of AW 93. He was also found guilty of borrowing from-- and failing to repay--an enlisted man, in violation of AW 95. HELD: LEGALLY SUFFICIENT. (1) AW 93 Larceny: Enlisted men whose money was taken had transferred the bare custody thereof to the first sergeant for the limited purpose of safe-keeping. Although accused, as commanding officer of the unit of which these enlisted men were members, presumably had general supervisory control over the safe (where the money was placed in envelopes) and its contents, and had physical access to the safe for the purpose of removing and replacing certain articles and papers other than these envelopes, he had no right whatever to handle the envelopes or their contents in any capacity, except as might be specifically authorized by the owners of the contents. His removal of the money and conversion of it to his own purposes warranted the court in inferring the existence of a specific intent permanently to deprive the owners of their property in the money. His previous larcenious taking of another's money (also charged in a separate specification) "throws light upon the question of his specific intent at the time of these later takings." "An intention to restore stolen property or money or even its actual restoration, is no defense to a charge of larceny * * *." (2) AW 95: Accused was properly found guilty of violating AW 95, to require his dismissal. It was proved that he had borrowed from an enlisted man as alleged, and that he had failed to repay as he had promised. This conclusion remains, even though he repaid a portion of the sum during the week preceding his trial. (CM ETO 3335 Witmer 1944)

451(42)(42) Larceny; Value(42) Larceny; Value:

Cross References: 395(28a) See generally

Money valued at between twenty and fifty dollars, as well as additional property, had been stolen. Proof of value was uncertain. Accused was found guilty of larceny of property of a value not in excess of fifty dollars but more than twenty dollars. HELD: LEGALLY SUFFICIENT. Where as here, proof of the total value of the stolen property was uncertain, the court was correct in approving only so much of the finding of guilty of larceny as was supported by the value of the stolen money alone. (CM ETO 875 Fazio 1943)

"Although the value of the articles was not fully established, they were before the court as exhibits and its findings that they were of some value less than \$20 were clearly justified." (NCM, 1928, par. 149g, p. 173) (CM ETO 885 Van Horn 1943)

Among other findings of guilt on other charges, accused was found guilty of the larceny of a \$48.00 ring, in violation of AW 93. HELD: LEGALLY SUFFICIENT. It is questionable whether it was established that the ring was worth more than \$20.00. However, the findings of guilt on the other charges sufficiently justified the sentence which was imposed upon accused. Hence, the question of the value of the ring becomes unimportant. (CM ETO 2158 Huckabay 1944)

Although the value of the stolen property was not proved, "there was evidence from which the court would be warranted in determining that the property had some substantial value not in excess of \$20." (CM ETO 1453 Fowler 1944; CM ETO 2840 Benson 1944)

"The evidence of the value of the British War Savings Certificates, savings stamps, check book and cigarettes was not satisfactory. The owner was not competent to express an opinion as to their respective values and the court could properly find only that these items had some value not in excess of \$20." (CM ETO 4058 McConnell 1944)

(42) Larceny; Value

451(42)

Accused was found guilty of the larceny of a radio from a French civilian of the exchange value of about \$100, in violation of AW 93. HELD: LEGALLY SUFFICIENT ONLY, FOR LARCENY OF A RADIO OF SOME VALUE NOT IN EXCESS OF \$50.00. There was a stipulation "that if a French radio dealer were called to testify as a witness * * *, he would testify that a radio of the type involved in this case costs new in 1939, 1350 francs; that the present price of such a radio involved in this case is 3500 francs." "No evidence was adduced as to the exchange value of the franc in U.S. Currency. Its value as foreign exchange on the open market--and hence to a French civilian--is, according to common knowledge, only a fraction of the arbitrary value employed by the U.S. Government in computing exchange in connection with the payment in francs of its armed forces serving in France. It would be manifestly inappropriate to apply this rate in the instant case and thereby ascribe to the stolen radio an exchange value of \$70.00, thus constituting the theft thereof a felony. Accused's concomitant conviction of burglary renders the error immaterial insofar as the sentence is concerned." (CM ETO. 6217 Barkus 1945)

Accused was found guilty of a violation of AW 93, after his larceny of 5500 French francs and 400 German marks. He was sentenced to confinement for five years. HELD: LEGALLY SUFFICIENT, (1) Value: -- French Francs: "The primary question presented involves the process of determining the valuation of the stolen currency in terms of United States dollars. Although the usual measure of value in larceny cases is market value at the time and place of the theft * * *, rigid application of said rule is not feasible in the instant case since there is no legitimate market for francs or German marks in terms of dollars (Cf: CM ETO 5539, Hufendick). Although it is common knowledge that a dollar will bring upwards of 100 francs in 'black market' transactions, the only legitimate rate of exchange of French francs for American dollars is on the basis of 49.5663 francs for one dollar, (Cir 364, WD, 8 Sept 1944) and Finance Circular No. 80, Office of The Fiscal Director, Hq. ETO, 22 Jan 1945). This rate is not of limited application i.e., to be used solely in connection with the payment in francs of United States forces serving in France, but is the official rate of exchange between the two governments for all transactions necessitating an exchange between the two currencies. Based on this official rate accused could have obtained from any Army Finance Officer over \$110.00 in American currency for the 5500 stolen francs. In Cm ETO 6217, Barkus, the Board of Review held that a radio valued at 3500 francs was property 'of some value not in excess of \$50.00'. The Barkus case is distinguishable from the instant case in that valuation of property can be made directly in terms of dollars and the franc-dollar rate of exchange need not be taken into consideration. When the larceny is of French currency, the official rate of exchange must be applied." (2) Value--German Marks: "Accused also stole 400 German marks, including 300 marks in 100-mark notes. No general exchange rate has been established between the Reichsmark or Allied Military Mark and the dollar. However, a provisional basis of 10 marks to the dollar is being used for purposes of calculating troop pay (Joint United States Treasury and War Dept.

451(42)(42) Larceny; Value

Press Release, 3 Oct. 1944; Finance Cir. No. 80, supra, p. 9). There is no legitimate market for the exchange of German marks into Allied currencies. Although the record of trial is devoid of direct evidence on this point, it appears almost certain that the 400 marks taken from the civilian were not Allied Military Marks. Under existing regulations in the ETO, Army Finance Officers can accept indigenous German currency only in amounts not in excess of a value of approximately 50 marks (Finance Cir. No. 80, supra, p. 26). Despite the fact that accused would have found it impossible to dispose of the three 100-mark notes through legitimate channels, the marks had real value to the civilian from whom they were stolen. It is arguable that calculated in terms of real purchasing power, the value of the mark is being adversely affected by the continuous defeats, administered to the Army of the Third Reich by the Allied forces, accompanied by such events as the capture of a substantial part of the German gold reserves * * *. In view of the myriad factors that must be considered in any valuation of the mark in terms of dollars, the Board of Review is of the opinion that the best interests of justice are served by the application of the provisional rate of 10 marks to one dollar, a rate determined after deliberation by the agencies of the U.S. Government charged with such decisions." (CM ETO 8187 Chappell 1945)

(49) Larceny; Joint Offenders451(49)(49) Larceny; Joint Offenders:

"The evidence is substantial that both accused participated in the 'snatching' of a purse." Although separately charged both accused were equally guilty regardless of the identity of the actual perpetrator of the theft." (CM ETO 1764 Jones and Mundy 1944)

Accused was found guilty of larceny, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "There is evidence of preconcert between accused and R * * *, and that accused acted as 'lookout' during the asportation. His active participation in the larcenious transaction establishes his guilt of the larceny even though the proof shows that R * * * rather than he actually effected the initial manual asportation of the property." (CM ETO 2951 Pedigo 1944)

AW 93

VARIOUS CRIMES

451(49)

(39) Larceny; Joint Offenders:

(50) Manslaughter; Proof451(50)(50) Manslaughter; Proof:Not Digested:

29 Davis
 4042 Rosinski (charged with AW 92 murder;
 guilty of lesser offense)

Cross References:

399 2103 Kern (penitentiary confinement)
 433(2) 3937 Bigrow (AW 75; drunkenness
 450(2) Manslaughter lesser offense to murder:
 72 Jacobs
 82 McKenzie
 506 Bryson
 835 Davis
 1725 Warner
 3162 Hughes
 3614 Davis
 3639 McAbee
 3957 Barnecko
 4043 Colins
 4581 Rose (not lesser to murder)
 4993 Key (also omit word "wilfully")
 4945 Montoya
 6015 McDowell (also see 451(50) herein)
 6397 Butler (insufficient evidence)
 6074 Howard (No showing of malice)

451(50)(50) Manslaughter; Proof

Accused, without authority, took an Army ambulance for his only personal use. He obtained the services of co-accused to drive for him. The latter had knowledge that the trip was unauthorized, but accused told him he "would take the risk". The trip was made at night during inclement weather, and without an offside light on the ambulance. At a time when the driver admittedly could not see a thing, and when the ambulance was about two feet over the white dividing line of a highway, a collision occurred with a British vehicle. The latter vehicle was going about fifteen miles per hour in third gear at the time and was at the edge of the grass verge to the highway and well within its own side of the road. It was struck on its offside mudguard. An occupant of the British vehicle was killed. Charged jointly, accused and coaccused were, among other things, found guilty of involuntary manslaughter in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The above evidence adequately established guilt of involuntary manslaughter. While the specification varied from the prescribed form in that it failed to include the word "wilfully" (MCM, Form No. 67), this omission was proper in the circumstances. The specification sufficiently alleged an involuntary manslaughter. (2) The joint charge: Although accused was not driving at the time of the accident, the unauthorized trip was primarily for his benefit. Both accused and co-accused were knowingly engaging in a wrongful joint enterprise. As the element of intent is not involved in the offense of involuntary manslaughter, but that of negligence, only, the negligence of the driver may be imputed to his companion--not on the basis of principal and agent nor of master and servant, but because both were joint venturers in a joint enterprise. Moreover, "one who participates in or is responsible for the reckless operation of a motor vehicle may be guilty of the offense, although not actually in control of the car." (42 C.J. sec. 1273, p. 1323). Accused was thus charged herein with the responsibility to see that the vehicle was properly driven. He omitted to perform that duty. (CM ETO 393 Caton and Fikes 1943)

Accused had been driving the leading truck of a two-truck convoy for about twelve consecutive hours. There had been three intermediate stops for approximately an hour each during that period. At midnight, he fell asleep at the wheel of his moving truck. The truck jumped the curb of a sidewalk, and killed a pedestrian. He was charged with wilfully, feloniously and unlawfully killing that pedestrian, in violation of AW 93. He was found guilty. HELD: LEGALLY SUFFICIENT. (1) Specification: "The theory of the prosecution's evidence was that accused operated the motor vehicle in such grossly negligent manner as to constitute the resultant homicide involuntary manslaughter. The defense contended that the allegations of the specification charged accused with the crime of voluntary manslaughter and that the proof of negligent homicide did not support the charge." Defense's argument was unsound. "By the use of the word 'wilfully' the allegations of the specification become sufficiently brought to permit proof of either voluntary or involuntary manslaughter. An accused is thereby given notice that the prosecution's proof may take either one direction or the other or

(50) Manslaughter; Proof

451(50)

possibly both." (2) Culpable Negligence: "In order to sustain a conviction of involuntary manslaughter at common law the homicide must be occasioned by 'criminal', or 'gross', or 'culpable' negligence. * * * The terminology indicates, and the courts are practically unanimous in holding, that this type of negligence is of a degree higher than that required to sustain civil liability for negligence. They have declared that criminal, gross or culpable negligence must be of such a character as to show an utter disregard for life or limb, or a total disregard for the consequences, or conduct indicating such wilful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons * * *. Culpability for death of a human being caused by the grossly negligent act of the driver of a motor vehicle is subject to the same measure of responsibility for death which is caused by the grossly negligent handling of other instrumentalities. The test is the same: Was the accused so negligent as to show an utter indifference to the consequences and did his criminally negligent act proximately result in the death of the person alleged? The test is not what a reasonably prudent man would or would not do but whether his negligence is sufficiently gross to come within the descriptive phrases set out above." (3) Falling asleep: "Once there was submitted in the instant case competent proof of a substantial nature that accused was asleep at the steering wheel of the truck at the time of the accident the burden was cast upon him to go forward with the evidence and proof that there were no forewarnings of the approach of sleep. The burden of proving accused's guilt beyond a reasonable doubt never shifted from the prosecution, but the burden of producing evidence that he was overcome by sleep without premonitory warnings or symptoms - the 'burden of explanation' - passed to accused." "An automobile or truck is dangerous in the hands of a man fully awake * * *. In the hands of one drowsy or asleep, with control partially or entirely gone, the possibilities of injury * * * are unlimited. * * * However, it is not determined herein that a motor vehicle is a dangerous instrumentality. While the test of guilt of involuntary manslaughter is always one of culpable or gross negligence, the court in the instant case was entitled to infer accused's gross negligence from the fact that he fell asleep at the wheel. There is absent any exculpatory evidence * * *." The finding of accused's guilt was sufficiently supported by the evidence. (CM ETO 1317 Bentley 1944)

When accused and two others reached a training ground in advance of their company, they engaged in hunting birds and rabbits from their jeep. While moving across a stubble field at fifteen to twenty miles per hour, the jeep driver applied the brakes. Accused's shotgun, resting across his knees at "half-cock" and originally pointing away from the other occupants of the jeep, discharged itself. One of the other occupants of the jeep was killed. Accused was found guilty of involuntary manslaughter, in violation of AW 93. HELD: LEGALLY INSUFFICIENT. The evidence herein fell "short of shocking one's sense of proper action under the circumstances which is implicit in the conception and definition" of the requisit culpable negligence which is needed to sustain a finding of involuntary manslaughter. "The degree of negligence required at common law to support a criminal charge is universally recognized

451(50)

2. (50) Manslaughter; Proof

as being greater than that which suffices for civil tort actions." Criminality can only be predicted "upon that degree of negligence or carelessness which is denominated 'gross' and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of that indifference to consequences which in some offenses takes the place of criminal intent." "The highest degree of care is not the standard of care to be required in measuring responsibility under a statute providing that the killing of a human being by the 'culpable negligence' of another shall be manslaughter." "A proper understanding of the meaning of 'culpable negligence' of necessity rests upon the assumption that accused know the probable consequences, but was intentionally, recklessly or wantonly indifferent to the results." "Here proof of homicide while hunting unaccompanied by evidence that accused was reckless in his manner of hunting or in the handling of his gun - even though the hunting be done on another's property without a permit - is not a criminal offense." "The fact that his gun was not equipped with the most desirable type of safety device is not persuasive, much less conclusive, on the issue of culpable negligence." "Accused cannot be charged with the duty of anticipating that the jeep would have stopped suddenly. "His actions between the time of stopping and the discharge of the gun were more reflexive than conscious and the fact that he did not then have his hands on the weapon is not viewed as evidence of reckless disregard of or indifference to consequences." "The record of trial in this case is totally devoid of any evidence that accused did or failed to do anything which could reasonably be expected of him." (CM ETO 1414 Elia 1944) (Mimeographed full opinion mailed)

A demonstration of gun-firing was being given to enlisted men. Accused officer was in charge. Teaching them what he had learned at a British Battle School, he had guns fired close over their heads. The purpose was to add to their knowledge in regard to distinctions between various types of firing. The aim of one of the machine guns being fired became depressed, as a result of which five of the enlisted men were killed and fourteen others were injured. Accused was found guilty of the involuntary manslaughter of one of deceased, in violation of AW 93. HELD: LEGALLY SUFFICIENT.

(A) Involuntary Manslaughter: "In order to sustain a conviction of involuntary manslaughter at common law the homicide must be occasioned by 'criminals' or 'gross', or 'culpable' negligence". It "must be of such a character as to show an utter disregard for life or limb, or a total disregard for the consequences, or conduct indicating such wilful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons. * * * The test is not what a reasonably prudent man would or would not do but whether his negligence is sufficiently gross to come within the descriptive phrases set out above * * *."

(B) The Evidence: It was sufficiently established that accused was in charge of the demonstration, and that he was free from supervision and control of higher authority. In practice firing over the heads of soldiers, United States Army Regulations require the use of sand bags as firm bases for machine guns, and depression stops to prevent the muzzle from lowering.

(50) Manslaughter; Proof:451(50)

The court was justified in finding that accused negligently failed to use these precautions, even though British regulations in regard to this British-type demonstration did not provide for them. "The consequence of his misplacement of the right leg of the gun tripod coupled with his failure to mount the gun with sand bags and a depression stop were in full operation at the moment the fatal bullet was discharged". Although an enlisted man actually fired the gun, there was insufficient intervening cause to negative the conclusion that accused's negligence was the proximate cause of the death. An attempt to separate the negligence of the enlisted man and the negligence of the officer would be improper. Death dealing projectiles were being used in a dangerous operation. Accused must have known that slight deviations in the line of fire could produce tragic results. He had the duty to use safeguards required by the applicable field manual. Notwithstanding his knowledge of the requirements, "he elected to proceed in either defiant or reckless disregard of the same. Under such circumstances the conclusion is irrefragable that his negligence was of the quality designated as 'criminal', 'gross' or 'culpable'." The court's finding, that he was guilty of an unlawful homicide, was supported.

(C) Points of Law: (a) Amendments: During the arraignment, the defense moved to amend the specification so as to allege that accused killed all five of the enlisted men rather than only one of them, and also to add a charge under AW 96. The motion was properly denied. There is no legal authorization for the amendment of a charge, upon accused's motion, for the purpose of introducing other or additional offenses for which he may subsequently be brought to trial. Rather, only "the authority exercising general court-martial jurisdiction over an accused shall determine whether he shall be tried, the offenses for which he will be tried and the tribunal which shall try him (MCM, 1928, par. 34, pp. 22-23). There is vested in such authority a broad discretion in such matters. When he refers the charge for trial by the court appointed by him he has thus exercised this discretion and it is conclusively binding authority must possess power not only to designate who shall be tried by a general court but also for what offenses he shall be tried. The exercise of the latter power involves a plenary control of the pleadings, viz: the charge sheet."

(2) Judicial Notice; Regulations: "The court was authorized to take judicial notice of Army Regulations and the safety regulations contained in the applicable field manual * * *. Accused, a member of the military service, was charged with notice of same. * * * Evidence of accused's observance or nonobservance of the rules and regulations pertaining to safety measures in the conduct of firing demonstrations was * * * highly relevant and material on the issue of his inculpatory conduct." (3)

Theory of Case: Appeal: "The right and duty of the Board of Review to consider the entire evidence contained in a record of trial in the determination of the question as to whether there is substantial evidence to sustain the findings of the guilt of an accused, notwithstanding the theory or hypothesis upon which the case was tried in the lower court, is in accord with Congressional policy declared in the 37th Article of War wherein it is provided that errors in the admission or rejection of evidence in matters pertaining to pleading and practice shall not in-

451(50)(50) Manslaughter; Proof:

validate findings or sentence unless 'after an examination of the entire proceedings' the error has injuriously affected the substantial rights of the accused." Pursuant to this doctrine, the instant record has been checked to ascertain whether or not the lethal bullet may have come from another machine gun. However, the evidence narrowed its source to the machine gun described. (CM ETO 1554 Pritchard 1944)

Accused military policeman had apparently incurred the undeserved animosity of two physically-strong cooks. Hearing of their threats against him, he purchased, and commenced carrying, a knife with a 6 3/4-inch blade. He knew that he was not supposed to carry it. On a dark night, the two cooks committed an unprovoked assault upon him--one from behind. They had been drinking. At first unable to free himself, accused struck out with his knife and broke away. He killed both cooks. Accused was found guilty of manslaughter. in violation of AW 93. HELD: LEGALLY SUFFICIENT. Substantial evidence supported the finding that accused was guilty of voluntary manslaughter. There was no evidence, "other than the unexpectedly sudden and violent assault made upon him, to indicate that accused used his knife in 'the heat of sudden passion caused by provocation'". Nor does it appear that the killings were justified on the ground of self-defense. "One is not punishable criminally for taking the life of another person when he has been put under the necessity, or apparent necessity, of doing so without any fault of his own part, in order to protect himself from the peril of death or serious bodily harm at the hands of the persons whose lives he took. One cannot, however, go further than is reasonably necessary in defense of his person. He cannot carry his right of self-defense to the extent of using a deadly weapon upon his assailants, except where, to his apprehension as a reasonable man, such extreme measures are necessary to save himself from death or great bodily harm." Here, accused must have known that his assailants had no weapons. There was nothing to put him in fear of his life. Had he not possessed the lethal weapon, it would appear that merely an assault and battery would have occurred. (CM ETO 2103 Kern 1944)

Accused Garcia signed out for a military truck. While the truck was being driven by accused Coats, with Garcia riding in it, it hit and killed a pedestrian. (a) Accused Coats was found guilty of feloniously and unlawfully killing deceased by his negligent and reckless operation of the vehicle, in violation of AW 93. He was sentenced to two years confinement, but this period was reduced to six months by the reviewing authority, after it had been concluded that he was guilty only of the AW 96 offense of negligently operating the vehicle so as to cause it to collide with the woman. (b) Accused Garcia was found guilty of a violation of AW 93, in that, having been charged with responsibility for the operation of the vehicle, he did feloniously and unlawfully kill the pedestrian by negligently and without attention to duty, by allowing the driver to operate it in a negligent and reckless manner. He was found guilty, and sentenced to two-years confinement. The reviewing authority approved only so much of the finding as

(50) Manslaughter; Proof:451(50)

to show that this accused, having been charged with the responsibility for the operation of the vehicle, did negligently and without attention to duty, allow the driver to operate it negligently, thereby driving it into the pedestrian--in violation of AW 96. The reviewing authority reduced the sentence to 6 months confinement. HELD: FINDINGS LEGALLY SUFFICIENT, BUT: ACCUSED COAT'S CONFINEMENT MUST BE REDUCED TO THREE MONTHS.

ACCUSED COATS: The reviewing authority approved only so much of the finding against this accused as to show his negligent operation of the truck, and disapproved the allegations of a felonious and unlawful killing because of negligent and reckless operation. This was an approval only of simple negligence, "and not negligence of a criminal, gross or culpable degree which is involved in involuntary manslaughter and from which could be found the general criminal intent required in assault and battery." "However, an offender may be found guilty under AW 96 for operating a motor vehicle negligently, that is, where he fails to use the care which an ordinarily prudent driver would have used under the circumstances. The basis of such a charge is not the resulting death or injury to another person or to his property, but the failure to use due care in the operation of the vehicle. * * * Evidence as to any resulting injury or death is admissible, however, as an aid in determining an adequate penalty. Such conduct by accused is of a nature to bring discredit upon the military service", and is a violation of AW 96. (Cir 3 Mil Jus BOTJAG-E 250.49, 11 Mar 1944, par 6.) The above AW 96 offense is a lesser included offense to involuntary manslaughter. "Such negligence is of a lesser degree than the criminal gross or culpable negligence involved in the offense originally charged. It is simple negligence." It is apparent that the reviewing authority "was of the opinion that the lesser degree of negligence exhibited by accused did cause the vehicle to collide with and against her * * *." The evidence supported the findings as approved. Neither the Table of Maximum Punishments nor any Federal statute of general application denounces the offense of which this accused was found to be guilty. Sub-section (b), section 40-605 (6:246), Title 40, District of Columbia, however, contains a denunciation of reckless driving, for which it provides a punishment (sub-section (c) of not more than three months imprisonment, fine of not more than \$250, or both. By analogy, the punishment herein for simple negligence should not exceed the above. Coat's sentence must be reduced to three months and forfeiture of \$25 of his pay for a like period. (CM NATO 1151 (1944), (Bull JAG Mar 1944, Vol III, No 3 sec 454(76), pp 101-102). "The action of the reviewing authority omitted the words 'of his pay' with reference to the forfeiture imposed." However, it is apparent that this omission was inadvertent. They may be implied.

ACCUSED GARCIA: By the reviewing authority's action, this accused was charged "with the responsibility for the operation of the vehicle and with negligently and without attention to duty allowing Coats to operate it in a negligent manner, thereby driving the truck into and upon * * * /the victim/. The evidence shows that the vehicle was dispatched to Garcia, that he signed the trip ticket as official user, that he was senior to Coats and was in charge of the vehicle." (Both were T/5s.) "The responsibility of the official user of a Government vehicle is as follows: 'The

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responsibility of the official user of a Government vehicle is as follows: 'The senior officer, warrant officer or enlisted man present in a vehicle is responsible for the proper operation of the vehicle and that it does not exceed the speed limit' (ETOUSA Directive AG 451/2 Pub. CG, 24 Jan 1944, XXXIII, par 6, p 34) * * *. The court was authorized to take judicial notice of general orders and circulars of Headquarters ETO and the Board of Review may likewise take judicial notice of same upon appellate review (CM ETO 1538, Rhodes, and authorities cited therein). In CM ETO 1554, Pritchard, accused was charged with notice of Army Regulations and the safety regulations contained in an applicable field manual. The principals enunciated in the Pritchard and Rhodes cases are equally applicable to the above quoted directive with reference to Garcia." Garcia was held to be guilty of a "failure to discharge the military duty imposed upon him by the above-quoted directive, namely, to see that the vehicle was properly operated. The grave-men of such offense was not joint criminal responsibility as such with Coats for the negligent operation of the vehicle. The directive was not intended to, nor could it legally change fundamental principles with respect to criminal liability for simple negligence on the one hand and culpable, gross negligence on the other. It merely imposes upon the senior present in a vehicle the military duty of seeing that it is properly driven." Garcia was shown to have failed to perform this military duty. "The specification indicates an attempt * * * to charge accused with involuntary manslaughter in violation of AW 93. The specification was not drawn in the form ordinarily employed * * *." However, "the offense actually alleged was a violation of a military duty and that as a result of such violation accused committed the offense of involuntary manslaughter. The reviewing authority retained the words which charged Garcia with responsibility for the operation of the truck, and with his negligent failure to perform such duty. It is here held that the reviewing authority action "did not constitute an approval of findings of guilty of a lesser offense * * *, but * * * an approval of the findings of guilty of the offense originally charged, namely, the violation of a military duty and it merely lessened the degree of seriousness of the results of such violation of duty. Although the drafter of the specification supposed that he alleged the commission of the offense of involuntary manslaughter in violation of AW 93, he * * * alleged an offense chargeable under AW 96, namely, the violation of a military duty." The Board of Review so interprets it. "The most closely related offense * * * is that of failing to comply with general or standing orders, in violation of AW 96. "Such an offense is not listed in the Table of Maximum Punishments but is similar in character, considering the source of the quoted directive, namely, Headquarters, ETO, to that of failing to obey the order of a superior officer, the maximum penalty for which is confinement at hard labor for six months and forfeitures of two-thirds pay per month for a like period." (Distinguish CM ETO 393 Caton and Fikes—joint involuntary manslaughter, in which accused were joint venturers in a wrongful joint enterprise.) (CM ETO 2788 Coats and Garcia 1944)

Accused Greenwalt, without authorization, took an Army vehicle for his own purposes, and thereafter controlled its destination. He picked up

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Norman, and thereafter the latter drove the truck because he had a driver's license. They went to a bicycle shop in a nearby town, which they found to be closed. Although Greenawalt stated that he then intended to return to camp, Norman wanted to go to another nearby town. There was no evidence other than that Greenawalt consented. On this latter portion of the journey, an accident occurred when Norman drove the truck around a dangerous corner which he was unable to see until about 75 yards away. "The evidence, including the tire marks, showed that the truck was driven at such a rate of speed that after the brakes were applied, the vehicle traveled a distance of 97 feet, struck deceased who was either on or just coming on the highway/bridge at that point, demolished a stone wall about 18 inches thick, plunged into the creek, continued on for another 33 feet and came to rest against a stone wall. A 560-pound stone which was originally a part of the bridge abutment was apparently carried by the truck for a distance of about 45 feet. The body of deceased was severed in half." Accused were jointly charged and found guilty of involuntary manslaughter in violation of AW 93; of wilfully suffering a U.S. truck to be damaged by striking a stone wall, in violation of AW 83; and of wrongfully and unlawfully taking, using and operating, without proper authority, that U.S. truck, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Manslaughter: The above evidence supported the trial court conclusion that accused Norman operated the vehicle recklessly and with a wanton indifference to the consequences. In regard to Greenawalt: The principle, that accused were engaged in a joint enterprise, which could render the occupant of the vehicle liable for the negligence of its operator, applies to criminal as well as civil cases. "As the element of intent is not involved in the offense of involuntary manslaughter but that of negligence only, the negligence of Norman may be imputed to Greenawalt, not on the basis of principal and agent, but because the two men were joint adventurers in a joint enterprise * * *. There is a further basis on which the evidence is legally sufficient to sustain the findings" against Greenawalt. "One who participates in or is responsible for the reckless operation of a motor vehicle may be guilty of the offense, although not actually in control of the car" (42 C.J., sec 1273, p 1323). Greenawalt without authorization took the vehicle exclusively for his own purposes and he controlled its destination." "Under such circumstances, Greenawalt was chargeable with responsibility for the operation of the truck, which responsibility entailed, among other things, the duty of seeing that it was properly driven. His failure to perform this duty, coupled with the grossly negligent driving of Norman, caused the homicide." (2) Evidence rulings: (a) "The credibility of the exculpatory statements contained in Greenawalt's statement was a matter for the determination of the court which evidently rejected such exculpatory statement." (1 Wharton Criminal Evidence, sec 506, p 792; 2 Wharton's Criminal Evidence, sec 606, 882; OO 1012-1014 and 1521-1522) (b) Prior statements made by each accused were properly admitted in evidence against them individually, after proof that AW 24 rights had been met. (3) AW 83: Accused were properly found to be guilty of wilfully suffering the Government vehicle to be damaged by striking a stone wall. "The wilful or neglectful suffering specified by the article AW 83 may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; * * * permitting it to be * * * injured by other persons; loaning it to an irresponsible person by whom it is damaged, etc. (Winthrop' (MCM, 1928, par 143, p 158)," (4) The AW 96

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charge was likewise supported. (CM ETO 2926 Norman et al 1944)

This 28-year old accused was seeking a girl. In the course of his adventure, he shot and killed deceased. He was found guilty of a violation of AW 93, in that he had wilfully, feloniously and unlawfully killed deceased. He was sentenced to 6-years confinement in the U.S. Disciplinary Barracks at Fort Leavenworth. HELD: LEGALLY SUFFICIENT. (1) Identity: "Although it was clearly established * * * that accused was the soldier who killed deceased, the action of the prosecution in pointedly directing the attention of two witnesses to accused, by asking him to stand up, was improper * * *." However, no prejudice resulted. (5th Am; ETO 1107 Shuttleworth) (2) Punishment: "The maximum punishment imposable for voluntary manslaughter is dishonorable discharge, total forfeitures and confinement at hard labor for ten years (MCM, 1928, par 104c, p 99). Confinement of accused in a Federal Reformatory is authorized on conviction of the offense * * * by Sec 275, Fed Crim C (18 USCA 454) and Cir 229, WD, 8 June 1944, sec II, pars 1a(1) and 3a. The designation of the Disciplinary Barracks, Fort Leavenworth, Kansas, is also authorized (AW 42)." (CM ETO 3362 Shackelford 1944)

(1st Ind; CM ETO 3362 Shackelford 1944): "Attention is invited to the provisions of paragraph 90a, MCM, 1928, p 81 concerning the policy of the War Department respecting places of confinement of general prisoners. Confinement in a Federal reformatory is authorized on conviction of accused of the offense of voluntary manslaughter by section 275, Federal Criminal Code (18 USCA 454) and Cir. 229, WD, 8 June 1944, sec II, pars 1a(1) and 3a. The designation of a disciplinary barracks is also authorized (AW 42; par 2b, AR 600-395, 28 Mar 1944). Accused was convicted of an aggravated and particularly vicious felony and might well have been charged with and found guilty of murder. It is suggested that because of the seriousness of the crime committed a new action bearing the same date he substituted, wherein the Federal Reformatory, Chillicothe, Ohio, be designated as the place of confinement. 'Any action taken may be recalled and modified before it has been published or the party to be affected has been fully notified of the same' (MCM, 1928, par 87b, p 78)."

Accused was found guilty of a violation of AW 93, in that he had wilfully, feloniously and unlawfully killed his victim by stabbing him with a knife. HELD: LEGALLY SUFFICIENT. (1) Facts Surrounding Accused's Confession: A CID agent obtained accused's statement in the presence of another agent and a superintendent of police. He testified that a prior warning had been given, and that there had been no coercion, hope of reward or fear of punishment. Thereafter, the defense put accused on the stand for the limited purpose of telling the manner in which the statement had been obtained. Accused testified that the agent in effect told him he had killed the victim, that he knew he had killed him, and that there was no use in lying and getting other boys in trouble for what he had done. Accused's answers were

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written down. While his questioners did not lay hands on him, he stated they had acted "pretty rough", and he was afraid and intimidated. His rights were explained to him after the agent had written his statement. Accused was not told that anything would happen to him if he did not sign it. He signed the statement after he had read it and had been given his AW 24 rights. On cross-examination of accused after the latter had concluded telling how the confession was taken, the trial judge advocate asked "Was the statement you made true?" Accused replied, "Yes, sir." The defense did not object. Thereafter, accused's confession (containing a clause that his AW 24 rights had been explained to him) was admitted into evidence.

(2) Propriety of the Confession: "On the preliminary question of the admissibility of the confession the testimony of accused to show undue influence was properly offered and received * * *. Since accused became a witness on his own behalf for an expressly limited purpose which excluded inquiry into the issue of his guilt or innocence * * *", it was improper for the trial judge advocate to have asked whether his statement was true. His affirmative answer was a confession of guilt in open court "and constituted an invasion of his privilege to remain silent * * *, which privilege he significantly elected to assert both at the time he appeared as a witness for the limited purpose and later when his rights were explained to him." Failure of his counsel to object did not constitute a waiver in the circumstances. The improper question and answer may have influenced the law member in ruling the confession to be voluntary, and the court in finding accused to be guilty. "Testimonial worthlessness and unreliability constitute one of the underlying and fundamental principles on which involuntary confessions are rejected. * * * It cannot be said that the testimony of the agent * * * and accused, independently of the latter's admission of the truth of his statement, contain legal evidence of such quantity and quality as practically to compel a finding that the statement was voluntarily given. * * * The admission of the confession was therefore an error and the sufficiency of the evidence to support the finding of guilty by the court independently of the evidence illegally received must be determined * * *." (3) The independent evidence, apart from the confession, adequately supported the finding that accused was guilty of voluntary manslaughter. (CM ETO 3931 Marquez 1944)

Accused officer drank intoxicating liquor with three enlisted men "over a period of four hours in public places in the presence of civilians (and in one place American military personnel were also present). He became intoxicated to a high degree, and in such condition operated a Government vehicle upon a public highway in the vicinity of ***, Italy. Through his reckless operation of the same, while in this drunken condition, he was involved in a highway accident which resulted in the death of a soldier who was a passenger in his vehicle. He was found guilty of manslaughter in violation of AW 93; and of drinking intoxicating liquors in the company of the three enlisted men, in violation of AW 95. HELD: LEGALLY SUFFICIENT RE THE AW 93 CHARGE; LEGALLY INSUFFICIENT FOR AW 95 GUILT, BUT SUFFICIENT FOR AW 96 GUILT. (1) Manslaughter: In effect, it was charged that accused "did * * * unlawfully kill *** T*** by failing to exercise due

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caution and circumspection in that he *** did * * * while under the influence of intoxicating liquor operate a motor vehicle in * * * a dangerous and reckless manner". This specification did not follow Form" *** (MCM) "inasmuch as it omits the words 'wilfully' and 'feloniously'." "It is * * * clear that an indictment * * * at common law charging the crime of manslaughter which omits the adverb 'feloniously' is fatally defective * * *. However, the foregoing rule is inapplicable where the statute denouncing the crime does not use the word 'feloniously'." "* * * The specification in the instant case not only omits the adverb 'wilfully' but also the adverb 'feloniously'. However, the particularized allegations * * * set forth that accused operated the motor vehicle in a 'dangerous and reckless manner'. 'A reckless act, moreover, is always regarded as the equivalent of a wilful one'. * * * There are therefore contained within the four corners of the Specification allegations legally equivalent to the statement that accused 'wilfully' killed the deceased. * * * Accused was informed with accuracy and detail as to the nature of the offense for which he would be tried. Also, the resulting findings of guilty and sentence are based upon a pleading which describes the offense with such particularity as would enable accused successfully to plead it as a former conviction." The pleading was adequate. (2) The evidence (detailed) sufficiently established the manslaughter. Accused killed T*** "while in the 'commission of an unlawful act not amounting to a felony' within the purview of Sec 274 of the Fed Crim C (R.S. 5341, 18 USCA sec 453). While driving the truck when intoxicated was not a felony in the circumstances, there was adequate showing that the truck was driven "in a violently reckless manner at an excessive speed and in spite of warnings given" accused "of the presence of the cart on the highway. As a direct and proximate result * * * the deceased was thrown from the truck and sustained injuries from which he died. The degree and quality of accused's negligence was far beyond that of ordinary civil negligence and is well within the classification of 'gross', 'culpable' or 'criminal' negligence upon which his conviction of the crime of involuntary manslaughter may be sustained * * *." (3) Drinking intoxicating liquor with three enlisted men was also adequately shown. "By long established precedent such conduct was 'unbecoming an officer and a gentleman' and constituted a violation of the 95th Article of War." However the Specification in this regard alleged only that accused "did * * * drink intoxicating liquors in the company of three enlisted men." "Such Specification will not support a finding of guilty of a violation of" AW 95. "Had the Specification alleged the facts and circumstances connected with and resultant upon accused's conduct in drinking intoxicating liquor with and in the presence of the enlisted men, there would be no difficulty in sustaining" the finding of AW 95 guilt. Applying rules of construction herein, it must be concluded that "there is no recital that accused and the three enlisted men drank intoxicating liquor in public or under the observation of other military personnel or of civilians. Insofar as the allegations declare, the drinking might have been in private with no one present except the accused and the three soldiers." The evidence is now concluded to have been sufficient only to sustain a finding of guilt under AW 96 for this drinking, rather than under AW 95. Findings must be modified in this regard. (CM ETO 6235 Leonard 1945)

(Dissenting Opinion; CM ETO 6235 Leonard 1945: The decision herein "renders it an offense per se for an officer to drink in the company

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of his son, an enlisted man, or his wife, an enlisted woman or... under any similar situation not only in a tent or in a bivouac area but any place any where when such conduct might not in fact under the circumstances be prejudicial to good order and military discipline."

Although the opinion omits the facts herein, it would appear that accused must have been found guilty of voluntary manslaughter in violation of AW 93, and of an attempted larceny of Government property in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Murder v. Manslaughter: "The evidence * * *, would have justified a conviction of murder, in violation of AW 92 * * *. It is therefore legally sufficient to support the findings of guilty of voluntary manslaughter which offense is included in murder." (2) The attempted larceny of an Army vehicle was substantially shown. (3) The maximum punishment imposable for voluntary manslaughter is dishonorable discharge, total forfeitures, and confinement at hard labor for ten years * * *. Attempt to commit larceny of Government property is not separately listed in the Table of maximum punishments. An attempt which is not separately listed in the Table is subject only to the same limit on punishment as is the offense attempted if the latter is listed * * *. Confinement at hard labor for five years is therefore authorized. (4) Penitentiary Confinement: As confinement in a U.S. penitentiary is authorized upon conviction of voluntary manslaughter the entire sentence of confinement (15 years) may be executed in such penitentiary." (CM ETO 6015 McDowell 1945)

Two accused were found guilty of involuntary manslaughter, in violation of AW 93. They were also found guilty of a violation of AW 96, in that they violated an order not to fire weapons except in emergency or at the enemy. HELD: LEGALLY SUFFICIENT. "The evidence showed that each fired at a rabbit just prior to the shooting of the victim." (1) Lethal Weapons: There is "sufficient evidence to justify the court in finding that the weapons identified by Lt F * * and subjected to the ballistic tests were those taken from the possession of accused by B * * shortly after the fatal incident". (2) Who Fired Shot: The evidence "supports the finding of guilty of involuntary manslaughter as to accused Long. In view of the evidence that the fatal bullet came from Long's gun, the question arises whether the similar finding of guilty as to accused Adams may be sustained on the ground that he was knowingly engaged in the wrongful joint enterprise which caused the fatality * * *. Proof establishing that one of the accused did the killing but failing to establish which one, would support the findings of guilty as to both * * *". The principle is based "on the fact that the wrongful hunting or target practice is considered one wrongful transaction, and the guilt of each accused is bottomed on his participation therein. Here both Long and Adams violated a standing order which prohibited the discharge

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of fire arms except in emergency or at the enemy. Their hunting expedition was an unlawful enterprise not amounting to a felony. Proof of the exact source of the fatal bullet does not exculpate Adams, who knowingly and jointly participated in the promiscuous shooting * * * ". (CM ETO 9745 Adams, et al 1945)

VARIOUS CRIMES

AW 93

(50a) Mayhem

451(50a):

(50a) Mayhem:

Cross References: 454(82) Self-maiming; generally
454(91) Unfitting Self for Duty; generally

AW 93

VARIOUS CRIMES

451(50a)

(50a) Mayhem

(58) Robbery; Proof:

451(58)

(58) Robbery; Proof:

Not Digested:

- 2546 Eastwood
- 2744 Henry
- 2779 Ely
- 3478 Marchegiano
- 3677 Bussard
- 6228 Agee, et al
- 6428 Bostic (identity also)
- 6202 Hewitt (from presence of
victim)
- 10715 Goynes (from German)

- | | |
|---|---|
| <p>Cross References:</p> <p>451(32)</p> <p>399</p> <p>450(1)</p> <p>451(58)</p> <p>454(56b)</p> | <p>3679 <u>Rochrborn</u> (specification;
surplusage;
proof)</p> <p>2744 <u>Henry</u> (penitentiary confine-
ment)</p> <p>1453 <u>Fowler</u> (homicide during
robbery)</p> <p>533 <u>Brown</u> (larceny as lesser
offense)</p> <p>11978 <u>Bromley</u> (with fraterniza-
tion; inconsistent)</p> |
|---|---|

451(58)(58) Robbery; Proof:

Accused was found guilty of feloniously taking, stealing and carrying away from a woman, by force and violence and putting her in fear, her ladies' wrist watch, of the value of \$20.40, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) It was not necessary to specifically prove that the wrist watch was snapped from the woman's arm. It was sufficient for it to have been taken from her presence. "Taking property from the presence of a person and under his direct physical personal control, as where the property is lying beside the victim, is the equivalent of taking from his person." (2) "Although the specification alleges it was taken from her person, there was no variance between the averment and proof." Evidence that the watch was taken from her presence was adequate. (CM ETO 78 Watts 1942)

Accused snatched a handbag from under a woman's arm. Charged with robbery, he was found guilty of the lesser offense of larceny in violation of AW 93. HELD: LEGALLY SUFFICIENT. One of the essential elements of robbery is that the property must be taken "by violence or intimidation". (MCM, 1928, par. 149f, p. 170) The evidence herein did not disclose that the woman was intimidated in any manner. The only violence used was that employed in snatching the handbag from under the woman's arm. This was insufficient to support a charge of robbery. Accused was properly found guilty of the lesser-included offense of larceny. (CM ETO 533 Brown 1943)

Accused was charged with stealing money from a woman by force and violence and by putting her in fear, in violation of AW 93. He was found guilty as charged, excepting the words "putting her in fear." HELD: LEGALLY SUFFICIENT. (1) The identity of accused was sufficiently established. (2) Evidence that he was found in possession of recently stolen property was not only admissible but could also raise the presumption that he stole the property, and possession of part of the stolen property justifies the inference of theft of all thereof. (ETO 1486) (3) The court properly excepted the words "putting her in fear", in view of the fact that accused had hit her, and his victim was in a daze when the money was actually taken from her. "It is elementary that robbery may be committed either by violence or by putting the victim in such fear that he is warranted in making no resistance." (4) One of the two previous convictions against accused was too old to have been properly admitted. However, in view of the correct admission of another previous conviction for a similar offense and the clear evidence of accused's participation, no AW 37 prejudice resulted. And the 5-year sentence was considerably less than the ten-year maximum which might have been imposed. (ETO 3118). The omission of the words "at hard labor" from the sentence "was legally ineffective in view of the authorization for the requirement of hard labor in conjunction with confinement" at MCM, 1928, par 104c, p 99, fixing the punishment for robbery. (AW 37; ETO 515) (CM ETO 3628 Mason 1944)

(64) Sodomy

451(64)

(64) Sodomy:

Not Digested:

945	<u>Garrison</u>	3778	<u>Davey</u>
1134	<u>Scarborough</u>	3964	<u>Lawrence</u>
1638	<u>LaBorde</u>	4139	<u>Redd</u>
2082	<u>Hall</u>	4782	<u>Long</u>
2134	<u>Smiley, Jr.</u>	5017	<u>Lewis</u>
2194	<u>Henderson</u>	5561	<u>Holden</u>
2210	<u>Lavelle</u>	5879	<u>Martinez</u> (per os)
2380	<u>Rappold</u>	10098	<u>Mooney</u>
2695	<u>White, Jr.</u>		
2766	<u>Jared</u>		
2767	<u>Riddick</u>		
3283	<u>Massey</u>		
3499	<u>Bender</u>		

Cross References:	395(47)	5458	<u>Bennett</u>
	399	3380	<u>Rappold</u> (penitentiary confinement)
	399	8333	<u>Cook</u> (Pen. conf; attempted rape)
	451(32)	3679	<u>Roehrborn</u>
	450(4)	9611	<u>Prairiechief</u>
	454(13)	2905	<u>Chapman</u>
	454(15)		Attempts; solitation; as lesser; under AW 96.
	454(63a)	3717	<u>Farrington</u>

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(64) Sodomy

Accused was found guilty of sodomy, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) In view of accused's testimony that the alleged act of perversion had been accidental and while he was asleep, the court properly permitted another witness to testify concerning specific acts of perversion with accused. "Evidence which shows, or tends to show, the commission of another crime, is admissible when it shows the absence of the accident or mistake in the commission of the act charged against the accused." (Wharton's Criminal Evidence, Vol. 1, Sec. 354, page 536.) (2) Error resulted when "character" witnesses testified that accused had never "propositioned" either of them. This testimony did not concern the general reputation of the accused for morality and normal sexual conduct. "General character is the reputation one has made in the community in which he lives, the result of his general talk and conversation, and it cannot be shown by proof of particular acts of good conduct or bad conduct, but only by proof of his general reputation, that is, what his neighbors say about him, or how he is generally accepted, received or regarded by them." (Wharton's Criminal Evidence, Vol. 1, Page 563-4; Sec. 331) "The state cannot offer evidence of bad character of the accused except to rebut his evidence of good character, but when the defendant puts his character in issue, the prosecution may rebut such evidence by proof of bad reputation * * *." (Wharton's Criminal Evidence, Vol. 1, Page 456; Sec. 330.) (CM ETO 24 White 1942)

Accused officer was found guilty of sodomy, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Accused argued that he was intoxicated at the time the charged offense was allegedly committed. "Evidence of intoxication of an accused to the degree that he is rendered physically helpless and wholly incapable of committing the criminal acts is most relevant and competent evidence. It goes directly to the issue of fact as to whether accused actually committed the crime alleged. It is probative evidence, intended to establish the ultimate fact that accused did not commit the act or acts charged. A man may be in such drunken state that he is rendered wholly incapacitated to perform the acts constituting the offense. Such evidence traverses the prosecution's proof of the factum of the crime and creates an issue of fact which the Court must resolve. If it finds accused was intoxicated to such degree that he was in a stupor physically disabled from performing the criminal acts it will thereby find that he did not commit the crime and acquit him. In the instant case, it is obvious that the defense's evidence did not even approach the threshold of such defense. Proof that accused was in such intoxicated state that upon recovering sobriety he had no memory of his conduct during his inebriety is certainly not proof that his intoxication was of that severity as to disable him from committing the crime. * * * Ordinarily evidence of intoxication as a defense is relevant and material in those cases where proof of a specific intent is a necessary element of the crime. * * * However, sodomy is an offense which does not require proof of specific intent * * *. The voluntary intoxication of accused cannot therefore be considered as defensive evidence." (CM ETO 339 Gage 1943)

(64) Sodomy451(64)

After his plea of guilty, accused officer was found guilty of sodomy with an enlisted man, in violation of AW 93. HELD: LEGALLY SUFFICIENT.

(1) After accused pleaded guilty, the prosecution proceeded to introduce evidence. This evidence failed to establish the necessary detail of the insertion of the enlisted man's penis into accused's mouth. Accused's extra-judicial statement to another that he was guilty was a conclusion of law rather than a statement of fact, and did not establish this missing element of proof. However, "there is no requirement of law that evidence must be taken upon a plea of guilty; rather such evidence is intended to assist the court in fixing the punishment, and the reviewing authority in his consideration of the case. The finding of guilty may be supported solely on the plea of guilty." (2) Sanity report: Prior to trial, a report on accused's sanity was made. It was primarily intended for the use of the appointing authority. (MCM, 1928, par. 35c, p. 26) Accused did not raise the question of his sanity at the time of trial. "The trial judge advocate was correct in refusing to introduce it in evidence and the Law Member acted rightly in sustaining the position of the trial judge advocate. However, the latter by his offer to stipulate it in evidence made it available for the defense if it elected to raise the question of accused's mental responsibility. Inasmuch as the defense refused to stipulate and thereafter closed its case without presentation of further evidence, there was no prejudice to the rights of the accused." (3) Attached to the record is a letter from accused complaining of the administration of military justice in his case. It is addressed to the Commanding General of ETO and also the Commanding General of an Air Force. With the letter are various "certificates of facts". "The extraneous issues raised thereby were for consideration by the approving and confirming authorities and not for the Board of Review." (CM ETO 612 Suckow 1943)

Accused was found guilty of sodomy with a cow, in violation of AW 93. HELD: LEGALLY SUFFICIENT. Although there was no direct proof, accused's penetration of the cow could be inferred. A farmer had watched him chase the cow. Just before he was apprehended, automobile headlight beams showed him mounted on the cow. He attempted to escape. When he was apprehended, he was carrying most of his clothes. "The whole hind quarters of the cow were imprinted on his thighs and his penis was erect and stained with cow manure as were his hands." (CM ETO 705 Malone 1943)

The crime of sodomy denounced by AW 93 includes both carnal knowledge per os and carnal knowledge per anum. (CM ETO 1743 Penson 1944)

Accused was found guilty of sodomy with a fowl, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "Sodomy includes carnal connection by a male

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human being with a fowl * * *. Penetration may be proved by circumstantial evidence * * *. There is evidence in the record adequate to support the inference that accused effected penetration of the chicken." (CM ETO 1887 Lebel 1944)

Accused was found guilty of sodomy per os with a six-year old boy, in violation of AW 93. HELD: LEGALLY SUFFICIENT. The finding of guilt was based upon the direct testimony of the six-year old victim, who accused admitted having abused indecently. Although the child witness "was conclusively shown to have untruthfully denied the trial judge advocate's admitted gift of a candy bar immediately prior to the commencement of the trial, the action of the court in receiving his testimony" will not be disturbed. "In view of the corroboration as to every significant detail except the actual penetration per os, particularly the equivocal and damningly inconclusive character of the denial embodied in accused's signed statement, it affirmatively appears that, in this case, the court did not abuse its discretion. The record supports the conviction of sodomy." (CM ETO 2701 Webb 1944)

A soldier had carnal connection per os with a civilian boy. The victim was present at two identification parades at accused's camp. Although accused was then present, he failed to pick him out of a lineup of 30 men at the first parade. Rather, he was "positive" that accused was not there, but that he was about the color of another who was there. Subsequent events showed that this other soldier was much darker than accused. At the second identification parade, accused was found guilty of sodomy, in violation of AW 93. HELD: LEGALLY SUFFICIENT. "A question of fact as to the identity of accused was raised * * *. The testimony concerning accused's identity was definite and convincing, although he was not observed or pointed out at the first identification parade held. The court heard the evidence, viewed the witnesses and found accused guilty * * *. There is substantial evidence in the record to sustain the findings of the court." (See CM ETO 6554 Hill and 7209 Williams (450(4) herein) re identification parade evidence.) (CM ETO 3964 Lawrence 1945)

Accused was found guilty of sodomy with a minor in violation of AW 93, and of wilfully and wrongfully and indecently exposing his penis to a minor, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Mental Capacity: In behalf of his defense, accused introduced a medical witness--the chief of the Neuro-Psychiatric Section of a Station Hospital. The latter testified that accused tended toward homosexuality, and that he was not normal mentally; that when accused committed the charged offenses he knew right from wrong, but was unable to adhere to the right because of his abnormal emotional drives. He then concluded that, according to the medical definition, accused was not insane. "At the conclusion of this testimony the defense asked for the appointment of a Medical Board to inquire into the mental condition of accused. This motion was denied." No error resulted. "There was nothing before the

(64) Sodomy451(64)

court from which it appeared that such inquiry ought to be made in the interest of justice. The psychiatrist called by the defense testified that accused was not medically insane (not psychotic), that he knew the difference between right and wrong, but was unable to adhere to the right because he was a psychopathic personality. * * * The law makes a distinction between a psychotic and a mere psychopathic personality, between the inability of a psychotic to adhere to the right and the inability of a constitutional psychopath without psychosis, to adhere to the right. Such inability in a psychotic constitutes mental irresponsibility, a defense for misconduct * * *. The inability of a constitutional psychopath who is without psychosis to adhere to the right is not mental irresponsibility and does not constitute a defense for wrong doing. * * * 'An accused is presumed to have been sane at the time of the offense charged until a reasonable doubt of his sanity at the time appears from the evidence' * * *. The evidence presented by the defense cannot be said to have created such doubt. The court is required to inquire into the mental condition of an accused only 'whenever at any time * * * it appears to the court for any reason that such inquiry ought to be made in the interest of justice' * * *. The record shows no abuse of discretion by the court in its ruling on this motion." (CM ETO 4219 Price 1944)

Accused was found guilty of sodomy per annum, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Plea to Jurisdiction: The defense made a "special plea to the jurisdiction of the court on the ground that the accused was not 'lawfully called, drafted or ordered into, or to duty or for training in, the said service' within the meaning of AW 2. He asked for a continuance under the provisions of AW 20, offering thereby to obtain proof that accused, on or about 17 October 1939, was convicted and sentenced to a term of three years in a "state criminal court for sodomy; that he eventually completed his sentence. "Defense counsel maintained that accused was unlawfully indicted into the military service through negligence or oversight of the Selective Service agency concerned, in violation of R.S. No. 1118, sec I, Act of Feb. 27, 1877 (19 Stat 242), 10 USCA 622 which declares' * * * no person who has been convicted of a felony shall be enlisted or mustered into the military service.' The court denied the plea. The plea was in effect a plea in bar * * *. It is proper practice * * *." (MCM, 1928, par 64, p 50-51) While a court is duty-bound to hear all relevant and competent evidence to support a plea in bar, no prejudice resulted from the failure to do so here because the court, before ruling on the plea, accepted as true the testimony which accused intended to adduce. "The question whether or not accused was illegally inducted was irrelevant to the issue of his guilt of the offense charged (CM ETO 4820, Skovan * * *). In effect, accused was assuring the court that he already was a convicted sodomist and felon and maintaining that his alleged illegal induction gave the court no jurisdiction to punish him for reverting to his degenerate practice while serving as a soldier with the army. Justice would be ill served indeed if a sodomist could

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thus evade punishment * * *. In this connection, it may be noted that an amendment to the Act cited by defense counsel authorized the Secretary of War, by regulations or otherwise, to make exceptions with relation to deserters and persons convicted of felonies so that they may enlist or be mustered into military service (Act of 29 July 1941, sec I, 55 Stat 606). However, as already shown, whether an exception was made to accused at the time of his induction was a question of law the court was not required to decide. Inasmuch as the plea in bar was bad on its face as a matter of law, the court's action in denying the same was proper". (ETO 2212, Goldiron) (2) The evidence supported the finding of guilt. (CM ETO 4685 Mitchell 1944).

(3) Embezzlement

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452 (AW 94) Frauds Against the Government:

Cross References: 402(7b) 11072 Copperman (Officer punishment)
Embezzlement

ETO 121 <u>Shoupe</u>	Has not been included, because it contains an out-of-date view on AW 70 investigations. See CM 229477 <u>Floyd</u> , and 428 (AW 70) herein.
ETO 132 <u>Kelly</u>	Has not been included, because it contains an out-of-date distinction between larceny and embezzlement. (See 451(17) 1302 <u>Splain</u> .)
ETO 134 <u>Stump</u>	Has not been included, because it contains an out-of-date distinction between larceny and embezzlement. (See 451(17) 1302 <u>Splain</u> .)

(3) In General:

Accused officer in charge of a distributing depot was found guilty of the following: (a) Violation of AW 94, in that he embezzled by converting to his own use #1200 of candy, property of the United States and furnished and intended for the military service, and selling the same, retaining the proceeds; (b) Violation of AW 94, in that he knowingly and willfully misappropriated sixty tins of peanuts and four "Zippo" lighters, value of about \$18.38, property of the United States furnished and intended for the military service, by wrongfully exchanging them for three leather Air Corps jackets; (c) Violation of AW 95, in that he knowingly made false statements regarding his accounts to a superior officer; and (d) Violation of AW 96, in that he wrongfully sold post exchange merchandise from his Depot Sales Section, the property of the United States, furnished and intended for the military service thereof. HELD: LEGALLY INSUFFICIENT FOR THE CHARGE OF MISAPPROPRIATION UNDER AW 94; LEGALLY SUFFICIENT FOR THE OTHER CHARGES.

(A) Embezzlement under AW 94; The Candy: (a) This offense allegedly occurred about 1 January 1943. "The court was authorized to take judicial notice of * * * cited General Orders and Circulars of Headquarters European Theater of Operations; similar Orders and Circulars of the Services of Supply, and of the Army Regulations (MCH, 1928, par.125, p.135* * *). The Board of Review may likewise take judicial notice of same upon appellate review."

(b) From 25 October 1942 to 30 April 1943 the post exchanges were the sales stores of the Quartermaster and it was part of his duties and functions to supervise, direct and control the procurement and distribution of all merchandise sold at retail through and by the retail post exchanges." "Post-exchanges operating as individual units under AR 210-65, or as subordinate outlets of retail distribution of the Army Exchange Service are instrumentalities of the United States, and are in all respects subject to military control and direction." "However, in their ownership of property and in

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(3) Embezzlement

contractual relations with others in the acquisition and sale of same, the Army Exchange Service and the retail post-exchanges are privately owned and operated. Their property is not the property of the United States but is held in trust for the benefit of the military personnel." The Quartermaster Depot over which accused officer had charge was between 25 October 1942 and 30 April 1943 a distributing depot. "Its function was to receive bulk merchandise from the Quartermaster and effect distribution of same to the retail sales stores (post exchanges). Beyond all doubt the merchandise * * * was property of the United States until title passed to the retail customers. During this period of time the Government * * *, acting through the intermediary of the Army, was in the business of supplying the 'ordinary needs' of the military personnel in the theater." (c) Accused was in charge of the depot. He had the responsibility "of complying with all rules and regulations issued or promulgated by higher authority for the management of said depot; the keeping of prescribed books and records of account; the safe warehousing and storing of all property intrusted to his care; the disposing of same only as authorized and directed by superior authority and finally of accounting truthfully and faithfully for all property placed under his care or control." (AR 35-6520) (d) Embezzlement, whether under AW 93 or AW 94, contains the same elements--with the exception that the property involved in the latter must be Government property. In enacting both AW 93 and AW 94, Congress eliminated the bothersome question as to the difference between "possession" and "custody". Today, "embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted or into whose hands it has lawfully come."

(e) Facts: Accused received the physical possession of the candy, and exercised the superior management, control and direction over it in the usual and ordinary course of business. Likewise, he directed its disposition. The first element, that the candy was intrusted to his care, was established. Secondly, it is held that between 25 October 1942 and 30 April 1943, the candy and merchandise distributed through the depots and retail stores was property of the United States, furnished and intended for the military service thereof. Third, it was adequately proved that accused assumed personal domination over the property by described irregular and clandestine operations, and unlawfully converted it to his own use. Fourth, "accused's conduct * * * was fraudulent and deceitful and bespeaks the necessary felonious intent to sustain the charge." (f) An unimportant variance resulted when, although the offense was alleged to have occurred about 1 January 1943, it was proved to have been committed about a week or two previously. "It was not necessary to prove that the offense was committed at the precise time laid in the Specification and evidence may be given referring to any other day before the preferring of charges and within the period of limitations." (g) The phrase in the specification, "by selling the said goods and retaining the proceeds therefrom", was surplusage. "No proof of the same was required in order to sustain the charge."

(B) Misappropriation under AW 94; The Peanuts and Lighters: The date of this alleged offense was about 5 May 1943. "On 1 May 1943 the post exchanges were removed from the control and direction of the Quartermaster

(3) Embezzlement

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and were placed under the jurisdiction of the Army Exchange Service. The Army Exchange Service has been since said date under the supervision, control and direction of the Commanding General, Services of Supply, European Theater of Operations." Various directives require the inference that on said date title to the assets and property on hand in the distributing depots and in the retail stores vested in the Army Exchange Service and the Post Exchanges.

"Neither does it comport with reason or common sense to assume that the merchandise * * * continued to be owned by the United States * * *." "The plain inference is that since the funds were not property of the United States, the source of the funds was also not property of the United States. The prosecution had the duty of proving each element of the offense charged beyond a reasonable doubt (* * *, MCM, 1928, par.78a, pp.62-63)." It failed to prove that the peanuts and lighters were the property of the United States at the time of the misappropriation. Rather, the inference was that the property was owned by the Army Exchange Service. (Note that "in a charge of embezzlement under the 93d Article of War it makes 'no difference in whom the title to the property rests, provided it is not in accused' * * *. Oppositely, in a charge of embezzlement of Government property under the 94th Article of War, proof of ownership of the property in the United States is one of the vital elements of the offense and failure of proof of same is fatal to the prosecution's case.")

(C) False Statements under AW 95: This charge against accused was sufficiently proved. "Accused's recantation * * * at a subsequent interrogation is no defense * * *. The making of false statements by an officer in the course of an official investigation is an offense under the 95th Article of War * * *."

(D) Unlawful Sale under AW 96: There was substantial evidence that accused wrongfully and without authority effected sales of post-exchange merchandise from a distributing depot in violation of a circular. "The willful violation of an administrative directive constitutes a disorder to the prejudice of good order and military discipline under the 96th Article of War." (MCM, 1928, par.152a, p.187) (CM ETO 1538 Rhodes 1944)

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(7) False Claims Against452(7)False Claims Against The United States(7) Proof:Cross References: 419(2) 5569 Keele (re back-pay)

Accused was found guilty of obtaining money from the Government by false representations in violation of AW 94. For the purpose of obtaining a family allowance under the Servicemen's Dependents Allowance Act of 1942, accused filed a sworn application stating that he had a child. The prosecution introduced a written confession made by the accused to the investigating officer, admitting that he had no child and knew the statement was false and fraudulent. The only other evidence presented--without objection by the defense--was the testimony of the accused's commanding officer that when he preferred the charges he was sure accused did not have a child. HELD: LEGALLY INSUFFICIENT. The prosecution utterly failed to produce any evidence of the corpus delicti to support and corroborate the confession of accused. Apart from the confession, no competent evidence whatsoever was introduced concerning the alleged falsity of accused's statement, or concerning his alleged knowledge that the statement was false and fraudulent. Also, aside from a vague statement in his confession concerning repayment there was no evidence that accused received any money. In the present case, it is not a question of the evidence of the corpus delicti being legally insufficient in character to support and corroborate the confession of accused for there is no such evidence whatsoever. The mere introduction in evidence of the application itself wherein accused stated that one of his class A dependents was a child born 6 March 1942, cannot be deemed evidence of the corpus delicti. The document appeared on its face to be true and genuine and the prosecution introduced no competent evidence other than the confession to show that the statement contained therein was false and fraudulent.

The testimony of the commanding officer was obviously a conclusion based upon pure hearsay and manifestly incompetent and inadmissible. In view of the absence of any competent evidence whatsoever touching the corpus delicti to corroborate and support the confession of the accused, the admission of the conclusion was highly prejudicial to the substantial rights of the accused and any failure to object to the admission of such testimony did not waive or cure its incompetency. (CM ETO 1042 Collette 1944) (mimeographed full opinion mailed)

452(7)(7) False Claims Against

Accused officer obtained partial payments on his pay in excess of the amounts then due him. He was found guilty of a violation of AW 94, in that he wrongfully and feloniously presented for payment a claim against the United States to a Finance Officer duly authorized to pay the claim signed vouchers in named amounts for services alleged to have been rendered to the United States by him, which claims were false in that they exceeded the amount then due and payable to him, which claims were known to accused to be false. HELD: LEGALLY SUFFICIENT. The evidence established that accused drew partial payments in excess of the amount due him at the time. It also established that the Finance Office makes partial or full payments to any properly identified officer for his services to the date of his request, upon his submission of a voucher setting forth the amount claimed due, together with his pay data card. The responsibility for the correctness of the voucher rests upon the officer submitting it. (CM ETO 2506 Gibney 1944)

(9) Larceny; Proof452(9)Larceny(9) Proof in General:Not Digested:

950 Fazio
 2289 Grines
 2753 Setzer
 2828 Kulaca
 3056 Walker
 9062 Boyer

Cross References: 399 2210 Lavelle (Penitentiary confinement)
 2409 Cummings
 2829 Newton
 3713 Porter
 419(2) 4029 Hopkins (also AW 61)
 416(9)10331 Jones (jeep)

Shortly after accused had guarded a Government airplane, pouches of French francs, property of the United States and valued at \$80.00, were discovered to be missing therefrom. Accused confessed. He was found guilty of the larceny of United States property, in violation of AW 94. HELD: LEGALLY SUFFICIENT. The confession was admitted in evidence only after the corpus delicti had been adequately established. The fact that the property was missing was sufficiently shown by the introduction of an official statement or report from the commanding officer of the airplane. It was his official duty to know the matter stated therein, and to record it. The letter was an official document forming part of the official records respecting the missing property. A similar letter was also obtained in instances of this kind. Both the letter and its signature were identified. It is unimportant that it was not signed by the officer to whom the missing property had originally been issued. It could have been signed by the pilot, the co-pilot, or, in their absence, by "any man that is available". The contents of the letter, together

452(9)(9) Larceny; Proof

with evidence that four of the ten stolen pouches were not returned, that accused was guarding the airplane and later possessed a bundle which he admitted was taken from the ship, and that he told another he wanted to turn in "the money", was legally sufficient to establish the corpus delicti. (CM ETO 2185 Nelson 1944) (See 395(18) Memo, 30-Mar 45, Washington, re 49 Stat 1561)

Accused officer was found guilty of a violation of AW 94, in that he did feloniously take, steal, and carry away described cigarettes, chewing gum, soap, etc. of the aggregate value of about \$35, property of the United States furnished and intended for the military service thereof. He was sentenced to dismissal and 3 years confinement. The Reviewing Authority excepted findings re certain specific items alleged to have been stolen, but approved the balance of the findings and the sentence. HELD: LEGALLY SUFFICIENT. (1) Double Jeopardy: Accused had previously been charged with the violation of AW 93, re the theft of similar items alleged to have been the property of the Army Exchange Service. After his plea of not guilty, the prosecution had introduced some of its evidence therein. But upon concluding that it could not prove that the allegedly-stolen goods were the property of the Army Exchange Service, a nolle prosequi was entered by direction of the appointing authority and over defense's objection. "Accused's plea in bar was properly overruled. The offense alleged in the present case is not the same as the one alleged at the previous trial. The property of the Army Exchange Service is not the property of the United States * * *. Where accused is charged with larceny of the property of one person, proof that the property was owned by another would constitute a fatal variance * * *. Another fact required to be alleged and proved in the present case is that the property * * * was furnished or intended for the military service of the United States * * *. The two offenses, therefore, were not the same and the claim of former jeopardy was without basis * * *. (2) The evidence (detailed) "fully warranted findings (a) that accused took the property as alleged in the Specification except the items excluded by the action of the confirming authority; (b) that he carried such property away; (c) that the property belonged to the United States and was furnished and intended for the military service thereof; (d) that the property was of the value of about \$35.00; and (e) that he took and carried away the goods involved with intent to steal, that is, with a fraudulent intent to deprive the United States of its property in the goods." AW 94 guilt was established. (3) Punishment: "An officer convicted of a violation of AW 94 is punishable by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties (AW 94). The Table of Maximum Punishments does not apply to officers (MCM, 1928, par. 104a, p 95)." (CM ETO 7248 Street 1945)

(9) Larceny; Proof452(9)

Accused officer was found guilty of a violation of AW 94, in that he had stolen a watch, valued about \$29.45, property of the U.S., furnished and intended for the military service thereof. HELD: LEGALLY SUFFICIENT. The evidence shows that the watch was kept on a shelf over the bed of Lt Bobb "to whom it had been issued for his use as an AAF navigator and it was therefore acceptable to accused who slept in an adjoining bed * * *, and from whose trousers pocket it was seen to fall. Unexplained possession of recently stolen property is evidence of guilty. It is true that accused did attempt an explanation by saying that he had bought it or one similar to it of an unknown officer in * * * Wyoming. However, he denied having such a watch until he learned it had been seen in his possession; he claimed to have paid a price considerably in excess of its cost price; he knew neither its serial number or the kind of crystal on the watch, and although living in a barracks with twenty or more flying officers for some considerable time, he was unable to name anyone who had seen the watch in his possession. His explanation * * * is, without further explanation, certainly fantastic and unworthy of belief for if there actually were two such watches, no reason appears for leaving one watch in place of another when if accused's story can be believed, they were so similar that he did not discover their difference. The inference from the circumstances shown is compelling that accused took the watch as alleged and carried it away. His continued possession for approximately a month and his denial that he had such a watch when asked about it, indicate the fraudulent intent to deprive the owner permanently of the watch." (CM ETO 9342 Weils 1945)

"The felonious taking of Government property furnished and intended for the military service thereof (Specification 1) and its subsequent wrongful disposition (Specification 2) are distinct offenses under the 94th Article of War. An accused may be guilty of both offenses although the identical property is involved in each offense." (CM ETO 9784 Green 1945)

Accused took field jackets from soldiers to whom they had been issued. They were found guilty of larceny, in violation of AW 94. HELD: LEGALLY SUFFICIENT. "It is obvious that the field jackets were 'furnished and intended for the military service' of the United

States. The possession of the soldiers of the jackets did not vest title of same in them. They remained the property of the United States and when stolen by third persons the thieves committed the crime of larceny under the 94th Article of War." (CM ETO 1764 Jones and Mundy 1944)

(18) Misappropriation452(18)Misappropriation(18) Proof:Cross References: 452(3) 1538 Rhodes (Post Exchange property)Not Digested:11404 Holmes (jeep, radio)

Accused quartermaster supply officer was the ultimate responsible officer in control of quartermaster sales at his command. In the course of handling commissary supplies, four described sums of Icelandic money disappeared. The money had been under the accused's control and charge. Its disposition was not explained. Accused was found guilty of knowingly and willfully misappropriating the funds, the property of the United States and intended for the military service thereof, in violation of AW 94. HELD: LEGALLY SUFFICIENT. After evidence which established the above facts had been introduced, accused remained silent and offered no explanation, despite the fact that he was the logical person to explain what had happened. While he had this right to remain silent, and his silence could not be commented upon, a burden of explanation devolved upon him. His right to remain silent did not relieve him of such burden of going forward with the proof. In cases involving charges of embezzlement, misappropriation or misapplication of Government funds, this rule is of particular applicability. "It is both reasonable and just to require the accused to go forward with proof of facts of which he alone may have knowledge and which may serve to exculpate him from responsibility. In opposition, no injustice is inflicted if he refuses or fails to accept such challenge and remains silent in the face of proof of his inculpatory conduct." In view of his silence, accused has no right to complain if the available evidence and its legitimate inferences have been resolved against him. (CM ETO 1631 Pepper 1944)

AW 94

FRAUDS AGAINST THE GOVERNMENT

452(18)

452(21)(21) Wrongful Sale or Disposition

Accused and a companion took an Army truck without authority and without a trip ticket, although they knew they were supposed to have the latter. With his companion driving, they passed a sentry post without stopping, and despite an order to halt. They then used the car for their own convenience--riding about town and going to a theater. Accused was found guilty of applying Government property, furnished and intended for the use thereof, to his own use without proper authority, in violation of AW 94. HELD: LEGALLY SUFFICIENT. "The fact that accused did not drive the car is of no importance. He was present when the car was unlawfully taken; he aided and abetted in its taking by voluntarily becoming a passenger and by participating in its benefits." "While the United States may not have acquired the absolute title to the truck from the British government, yet it did hold lawful possession of same. This is an adequate property interest in the truck to sustain the charges * * *. The value of the truck was not clearly and properly established but the court was justified from the character of the property in inferring that it has some value." (CM ETO 128 Rindfleisch 1942)

Among other things, accused were found guilty of violations of AW 94, in that each (separately charged) did knowingly and wilfully apply to his own use, without proper authority, one GMC 6x6 ton cargo vehicle, bearing USA Number W4247075, Company Number 55, of the value of more than \$50, property of the United States, furnished and intended for the military service thereof. HELD: LEGALLY SUFFICIENT. "Although no evidence was adduced to prove the value of the truck which the record shows was misapplied as alleged, courts-martial may take judicial notice of the price of articles issued or used in the Military Establishment when published to the Army in orders, bulletins, or price lists (MCM, 1928, par 125, pp 134, 135). Army motor vehicles fall within this category. Moreover where the character of the property clearly appears in evidence, the court, from its own experience, may infer that the property has some value (MCM, 1928, par 149g, p 173). However it would have been better practice to have established its value by evidence adduced on the trial of the case, and also to have shown that it was a GMC truck, USA number W4247075. In view of all the other elements of identity proved as alleged, the latter omissions may be regarded as immaterial. (CM ETO 5666 Bowles et al 1945)

"Specification 2, Charge II alleges an offense under AW 94 notwithstanding it is laid under AW 96. The unauthorized and wrongful sale on 22 October 1944 to a French civilian by accused of 225 gerricans and at least 225 gallons of gasoline, property of the U.S. furnished and intended for the military service thereof, was proved * * *. By reference to the quarter-annual report of the Quartermaster, ETO, to the Quartermaster General for period 1 October 1944 to 31 December 1944 * * *, the value of the property is determined to be:

(21) Wrongful Sale or Disposition

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"225 jerricans	at \$2.00	\$450.00
"225 gallons gasoline	at 5/6 of .1934 per gal.	36.26
		<u>\$486.26</u>

"It is manifest from the evidence that approximately 1215 U.S. gallons of gasoline were sold instead of 225 gallons as alleged. Each jerrican contained $4\frac{1}{2}$ Imperial gallons or approximately 5.4 U.S. gallons. The term of imprisonment authorized for this offense is five years * * *" (2)
Testimony: "The court committed an obvious error in permitting Agent S * * * to testify to the contents of accused's written statement to him after the court property excluded a copy of the statement * * *. The defense made timely objection to the practice and the error was thereby saved * * *. Were the question of accused's guilt of the offense charged in doubt or if accused's conviction were dependent upon sketchy or fragmentary evidence * * *, The Board of Review would not hesitate to set aside the findings and the sentence. However, the legal evidence is of such robust and compelling strength that no conclusion other than accused's guilt is justified. The admission of the oral version of accused's statement was non-prejudicial error * * *." (CM ETO 6268 Maddox 1945)

(1st Ind CM ETO 6268 Maddox 1945: Accused was sentenced to confinement for 20 years. The AW 94 offense will carry 5 years. His second offense of carrying a concealed weapon will carry three months. His third offense was AWOL for two days. Hence, the sentence as imposed means that the 2-day AWOL carries 14 years, nine months confinement therefore. It is suggested that the sentence be reduced to 7 years.)

Accused L * * * was found guilty of wrongfully and knowingly selling to a French civilian 50 cigars, property of the United States intended for the military service thereof, in violation of AW 94. Accused B * * * was found guilty of wrongfully and knowingly selling to unknown French civilians 10 cartons of cigarettes and five cartons of chocolate bars, property of the United States intended for the military service, in violation of AW 94. Accused B * * * was also found guilty of another AW 94 violation of giving away one carton of chocolate bars. Thirdly, he was found guilty of a violation of AW 96, in that he made a false statement under oath, to the investigating officer in the above case re the sale of items to the civilians. **HELD: LEGALLY INSUFFICIENT IN PART AS TO ACCUSED B * * *.** (1) Accused L * * * -- The Cigars: "There is no affirmative evidence that the box of 50 cigars he sold or gave to M * * * was Government property. The record is completely devoid of evidence that any cigars were taken from Government supplies, that the accused had access to cigars which were the property of the U. S. or any evidence excluding the possibility that the cigars were the personal property of accused. In a charge of

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(21) Wrongful Sale or Disposition

wrongful sale or other disposition of Government property under the 94th Article of War, proof of ownership of the property in the United States is one of the vital elements of the offense and failure of proof of the same is fatal to the prosecution's case * * *." The evidence herein was insufficient to support the conviction of accused L * * *. (2) Accused B * * *—Cigarettes; Candy; False Oath: (a) The sales and/or gift of cigarettes and Hershey Tropical chocolate by this accused to French civilians was established. "The cartons of cigarettes and chocolates were the type normally issued gratuitously to United States Army troops. "While the necessary element of government ownership may be proved by circumstantial evidence (MCM, 1928, par 150i, p. 185) mere conjecture or suspicion does not warrant the conclusion that the cigarettes and chocolate were property of the United States * * *. In the instant case there is no evidence of a shortage or theft of cigarettes and chocolate from any Army installation nor evidence that B had access to Government supplies of this type. The record does not indicate that the property involved had characteristics peculiar to Government ownership (e.g., that the cigarettes had tax-free labels), and the distinct possibility remains that the cigarettes and chocolate were his personal property received in packages from the United States or from other legitimate sources. The Board of Review is of the opinion that the facts are not sufficiently conclusive to exclude all fair and rational inferences except the one that the cigarettes and chocolate were 'property of the United States, intended for the military service thereof' * * *." The record on these AW 94 Specifications against accused B * * * is insufficient to sustain those convictions. (2) False Oath: However, as to the AW 96 Specification charging a false oath re the above factual situation, "the question of ownership of the property in the United States is immaterial. When accused falsely denied having ever sold anything to French civilians, he made a false oath. This latter guilt is sufficient to sustain three years of the sentence." (CM ETO 6232 Lynch et al 1945)

In a second specification herein, accused was charged with two acts of misapplication. HELD: "The proof shows that accused committed a series of acts which, if not interrupted by circumstances independent of accused's will, would apparently have resulted in his misapplication of the government property involved. Some measure of possession or control is an essential prerequisite to the commission of the offense of misapplication. Accused is not shown to have succeeded in acquiring either. The record of trial is therefore legally sufficient" only for or attempted misapplication in violation of AW 96. (CM ETO 8565 Flanagan 1945.

(21) Wrongful Sale or Disposition

452(21)

Accused officer was found guilty of violations of AW 94, in that he did knowingly and wilfully apply described property of the U.S., furnished and intended for the military service thereof, to his own use. He was also found guilty of violations of AW 83, in that he wrongfully disposed of, by barter with a civilian, described articles, property of the U.S. furnished and intended for the military service thereof. HELD: LEGALLY SUFFICIENT FOR ALL SPECIFICATIONS AS VIOLATIONS OF AW 94. With respect to the second charge, "it is apparent that the specifications thereto should have been laid under AW 94 rather than AW 83. There is no allegation that accused, in the words of the statute, 'wilfully, or through neglect' suffered military property to be 'wrongfully disposed of', but rather it is alleged that he himself did 'wrongfully dispose' of such property by barter. * * * While originally, AW 83 or its earlier counterpart denounced offenses of this character, it has been 'practically superseded' in this respect by AW 94 * * *. Hence, it is the latter Article under which the specifications should have been charged in this instance. Allegations merely to the effect that accused 'wrongfully disposed' of military property by barter are insufficient for the purpose of charging that such wrongful disposition was committed either 'wilfully' or through neglect' as required * * *." However, the guilt of these specifications can be sustained as violations of AW 94, "and hence the designation of the wrong article is not material in this case * * *." (CM ETO 9421 Steele 1945)

Accused were found guilty of a violation of AW 94, in that they had wrongfully and knowingly sold to a Belgian civilian about, 14 November 1944, about 3 jerricans of gasoline of the value of about \$15.00, property of the U.S., furnished and intended for the military service thereof. HELD: LEGALLY INSUFFICIENT. An accused cannot be convicted legally upon his unsupported confession. In the instant case, "the prosecution's evidence of the corpus delicti did not even approach the minimum of proof necessary to permit the admission of accused's statements. If F * * *'s testimony with respect to the October purchase is considered, notwithstanding it was stricken by the court, it is manifest that the prosecution alleged accused sold three cans of gasoline on 14 November 1944 and proved the sale of six cans at a time at least two weeks prior thereto. This is not proof of any relevant matter. The court therefore rightfully excluded F * * *'s testimony pertaining to the purchase of the six cans of gasoline in October. Further, there is no proof that the Government gasoline and cans were missing on or about 14 November. Therefore, there is not even a scintilla of proof of the corpus delicti of the offense charged. Accused cannot be convicted on their confessions' alone * * *." (Note that Board does not decide whether the extrajudicial statements were admissible or not.) (CM ETO 9751 Whatley et al 1945)

(01) Absence Without Leave

453(01)

453(AW 95) Conduct Unbecoming an Officer and Gentleman:(01) Absence Without Leave:

Accused was a liaison officer attached to a French Division with headquarters in Paris. Instructed by his superior to go on a mission to that division and then to return, accused proceeded to Paris in a Government vehicle. He stopped at a bar and had drinks. He thereafter went on a spree in Paris, keeping the car in the interim, and never did perform his duty. When he discovered a secret overlay with which he had been entrusted to be still in his possession on the second day of his absence, he destroyed it in order to prevent it from falling into enemy hands. Ten days after the commencement of his absence, he returned to his own headquarters. He was found guilty of the following charges: (a) Absence without leave in violation of AW 61; (b) Drunk on duty in violation of AW 85; (c) Misappropriation of a Government motor vehicle valued at over \$50.00, in violation of AW 94; (d) Absence without leave in violation of AW 95; (e) Disobedience of his superior officer by failing to perform his duty and deliver a tactical overlay, in violation of AW 64; and (f) Detaining the driver of his military car during the period of his absence without leave, and using him to drive for his own personal use and benefit, in violation of AW 96.

HELD: LEGALLY INSUFFICIENT ON THE AWOL CHARGE IN VIOLATION OF AW 96; LEGALLY SUFFICIENT ON THE OTHER CHARGES. (1) Specification; Drunkenness; Motion: Defense moved that, since the drunkenness in violation of AW 85 was alleged to have occurred on the same day as the absence without leave, the exact time thereof be stated in order that it could be determined whether accused was alleged to be drunk while on a duty status. The motion, in effect, attacked the drunkenness charge on the ground that it was insufficient because it was indefinite and uncertain. "It raised matter properly determinable upon a motion to quash * * * and its determination rested within the judicial discretion of the court". The defense could reasonably be expected to assume that to sustain the drunkenness charge the prosecution had to prove the accused to be drunk at some time on the day alleged before the time on that date when he abandoned his duties and went absent without leave. "It is not apparent why the defense needed to be notified, when it made the motion, of the precise time of the drunkenness in order to protect accused's substantial rights. (ETO 895, Davis et al.) (2) Voluntary Statement: The question of whether a statement made by accused was voluntary was for the trial court. (ETO 2007 Harris Jr.) (3) Absence Without Leave: Accused was properly found to be guilty of absence without leave in violation of AW 61. However, he should not have been found guilty of the same absence without leave in violation of AW 95. While his drunkenness, etc. during the time of his absence might have been sufficient for an AW 95 charge, this was not so alleged. But as to the absence without leave, "there is nothing in the allegation indicating conduct unbecoming accused in a capacity other than

453(01)(01) Absence Without Leave

as an officer. No conduct unbecoming him in his capacity as a gentleman is alleged." (Winthrop, pp 711-2, 713; Dig Op JAG sec 453, pp 341 et seq) Although the AW 95 absence without leave charge was insufficiently supported, this does not affect the appropriateness of the sentence. (4)

Drunkenness and Wilful Disobedience: "The question whether accused's drunkenness on 26 August 1944, prior to the time of his abandonment of his duties on that date, was 'sufficient sensibly to impair the rational and full exercise of the mental and physical faculties'. (MCM, 1928, par 145, p 160) * * *, and yet was consistent with his wilfulness in disobeying the order of his superior officer to deliver the tactical overlay * * * was purely one of fact for the court (ETO 3937). In view of the substantial affirmative evidence (including accused's own sworn testimony that he deliberately destroyed the overlay and knew what he was doing at all times)" presented a fact question for the court. (Drunk on duty-- ETO 3577; wilful disobedience--ETO 2469,3080.) (5) The value: The court was justified in inferring that the market value of the Government command reconnaissance car was over \$50.00. Other elements of the AW 94 misappropriation and misapplication offense were adequately proved. (ETO 996, 3153). (6) Detaining Soldier: Accused's guilt of wrongfully detaining the enlisted man, to be his driver for personal use, in violation of AW 96, was adequately proved. (CM ETO 4184 Heil 1944)

(2a) Assaults453(2a-7a)(5) Borrowing from Enlisted Men(5a) Censorship Violations(7a) Defamatory and Insulting Statements(2a) Assaults:Not Digested:25 Kenny (Wrongfully accost girl)Cross References: 454(7) 4607 Gardner (Distinguish from AW 96 offense)(5) Borrowing from Enlisted Men:Cross References: 451(41) 3335 Witmer (repay in part)
454(19a) 5459 Kuse(5a) Censorship Violations:Cross References: 453(20a) 9542 Isenberg
454(65a) See generally(7a) Defamatory and Insulting Statements:Cross References : 454(38) 1388 Madden (lesser AW 96 offense)25 Kenny (Call civilian a swine in public--not digested)

AW 95

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

453(2a-7a)

(7b) Disorderly Conduct; in general453(7b-9)(9) Drinking--Enlisted Men(7b) Disorderly Conduct; In General:

Accused officer was found guilty of disorderly conduct, in violation of AW 95. HELD: LEGALLY SUFFICIENT. While accused was neither charged with being drunk nor of being drunk and disorderly, the evidence sufficiently established his disorderly conduct in violation of AW 95. While there was no specific testimony that he was in uniform, he was an officer on duty with American troops in England where the wearing of the uniform was mandatory while he was absent on pass among civilians. Accused carried a gas mask and a "short coat". It may be inferred that he was in uniform. (CM ETO 339 Gage 1943)

(9) Drinking With or in Presence of Enlisted Men:

Cross References: 433(18) 7246 Walker (Offense under AW 96 as lesser but not under AW 95 as charged)
 451(50) 6235 Leonard (Offense under AW 96 as lesser but not under AW 95 as charged)

AW 95

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

453(7b-9)

(10) Drunk and Disorderly; Proof453(10)(10) Drunk and Disorderly; Proof:

Cross References: 451(6) 5606 Geckler (Disorderly in uniform in public place)
 451(9) 7000 Skinner (with AW 83 and 93 offenses)
 454(7) 4607 Gardner (guilty of lesser AW 96 off)
 454(38) 1388 Madden (guilty of lesser AW 96 off.)

Accused officer was found guilty of being drunk and disorderly while in uniform in a public dance hall, in violation of AW 95. HELD: LEGALLY SUFFICIENT, ONLY FOR A FINDING OF GUILTY IN VIOLATION OF AW 96. Accused attended a public dance hall, did some drinking, and used offensive language toward military inferiors. He fell down while dancing the Conga, and caused unnecessary disturbance. However, this proof failed to indicate that his drunkenness was of such extent as to be characterized as gross. And his utterances were not so improper as to show that he was morally unfit to continue to be an officer. The conduct contemplated by AW 95 " * * * must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." (Winthrop, Reprint, pp. 711, 712) Accused's conduct was sufficiently bad only to have amounted to a violation of AW 96. While accused's motion for a finding of not guilty of a violation of AW 95 was properly denied, the finding of his guilt must now be reduced to the lesser offense of violating AW 96. (CM ETO 439 Nicholson 1943)

Accused officer's actions and conduct "on the night in question involved (a) fraternizing with enlisted personnel and consuming intoxicants with them; (b) drunkenness of a gross character before inferiors; (c) disorderly and riotous conduct before inferiors; (d) fighting with a noncommissioned officer who was obviously acting in the performance of his duties and, (e) attempting to enter American outpost lines without the proper password and engaging in noisy demonstrations within the proximity and hearing of the enemy." He was found guilty of (a) a violation of AW 95, in that he was grossly drunk and disorderly at a point beyond the outpost line of * * * and

453(10)(10) Drunk and Disorderly; Proof

near the enemy line and thereafter during his being taken back under custody; and (b) of a violation of AW 96, in that he struck a noncommissioned officer, in the execution of his duty, on the jaw with his fist. HELD: LEGALLY SUFFICIENT. (1) AW 95: "Proof of mere drunkenness, unaccompanied by any unseemly behavior, violence or disorder, will not in general sustain a conviction under the 95th Article of War, but will support a conviction under the 96th Article of War only. However, drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition is 'conduct unbecoming an officer and a gentleman'." The fact that an accused officer's conduct may have been observed only by military personnel does not ameliorate the offense. (2) Strike Noncom: Although accused's action in striking the noncommissioned officer was directly involved in the charge of misconduct in violation of AW 95, the offenses were not the same. "The conviction of an officer under both articles on the same facts is not illegal." There was neither cause nor provocation. (CM ETO 3303 Croucher 1944)

Accused major was found guilty of (a) a violation of AW 95, in that he had been grossly drunk and conspicuously disorderly, in the presence of officers and nurses of his command, on a train enroute between two military posts, and (b) a violation of AW 85 in that, while at a staging area near a port of embarkation in the U.S. and in command of a field hospital unit, he had been drunk while on duty for two days. He was dismissed the service. HELD: LEGALLY SUFFICIENT. (1) AW 95 Drunkenness: "The coach in which accused was riding was entirely filled with nurses and officers of his command. Accused, in their presence, drank steadily throughout the evening, became intoxicated and boisterous, and openly indulged in a prolonged, flagrant 'petting party' with a nurse who was also somewhat inebriated and cooperated 'more than fully' with accused. The following morning the nurse was still in their seat and accused was trying awkwardly to put on his trousers in the aisle of the coach. He showed visible effects of his drinking bout of the previous evening, during which he furnished liquor to other members of his command. Some of the nurses and an officer also became intoxicated. The degree of accused's intoxication was such that during the latter part of the evening he was not able * * * to perform his duties as commanding officer of his organization." The above evidence sufficiently showed a violation of AW 95. Accused's conduct as a whole far transgressed military canons of fairness and decency. His drunkenness was gross, and his disorderly conduct was decidedly conspicuous. (2) AW 85 Drunk on Duty: It was clearly established that accused was guilty as charged in the AW 85 specification. "He was the commanding officer of an organization which was in a staging area for about three days, preparing to go overseas. It was necessary that, as such commanding officer, he perform highly important duties during this short, critical period concerning the preparation of his unit for its overseas departure. Apart from attending one meeting he performed no duties what-

(10) Drunk and Disorderly; Proof

453(10)

soever, and was so intoxicated during this time that it was necessary for his adjutant to take entire charge of the necessary supervisory work."
(CM ETO 3966 Buck 1944)

Accused officer was found guilty of a violation of AW 95, in that, while in command as leader of a platoon, and before the enemy, he was drunk and unfit for military duty, thereby endangering the safety of his platoon. He was also found guilty of a violation of AW 96, in that he had failed to obey a superior officer's order to sit and remain at a designated spot until receipt of further orders. HELD: LEGALLY SUFFICIENT ONLY FOR AW 96 GUILT: LEGALLY INSUFFICIENT FOR AW 95 GUILT. (1) AW 95: In regard to the specification alleging a violation of AW 95, "it was clearly and conclusively established * * * that he was drunk and unfit for duty while before the enemy at the time and place alleged. He testified that he 'realized that I was in no condition to lead the platoon and turned the platoon over to the platoon sergeant * * *'. There was no evidence showing that the safety of the platoon was endangered by his conduct. It has repeatedly been held that such conduct by an officer will support a conviction under AW 96 * * *." "There is no difficulty in condemning accused's conduct as 'dishonoring or otherwise disgracing the individual as an officer', but it must here be held that it was not conduct unbecoming a gentleman—the second required element for an AW 95 offense. "It was not charged that accused's conduct included 'drunkenness of a gross character', nor did the evidence show that his drunkenness could properly be so described." After he turned the platoon over to the sergeant, he followed his battalion commander as requested, sat down where he was ordered to, walked 12 to 15 yards to the other side of a building and vomitted, and then slept for half an hour. This was only a violation of AW 96. (2) AW 96: The failure to obey, charged under AW 96, was sufficiently supported. (CM ETO 5465 McBride Jr. 1945)

Accused officer was found guilty of the following offenses: (a) AW 93—assault with intent to do bodily harm by pointing a machine gun (dangerous weapon); and assault with a dangerous weapon by pointing an automatic pistol; (b) AW 95—drunk and disorderly while in uniform; and (c) AW 96—wrongfully striking an enlisted man with his fist. HELD: LEGALLY SUFFICIENT. (1) Assault and Battery: "With respect to the assaults and batteries, the uncontradicted evidence shows that accused deliberately and without provocation attacked two of the guards in whose custody he was placed, by kicking one in the groin and striking the other in the face with his hand. Since no specific intent is required in these offenses, the drunkenness of the accused is immaterial * * * (CM ETO 1197, Carr). (2) AW 93 Assaults: "The assaults charged under AW 93 * * * involve the specific intent referred to in the Specifications, and such intent

453(10)(10) Drunk and Disorderly; Proof

must be proved * * *. There is no doubt that the pointing of a loaded pistol at an intended victim accompanied by threats and expressions of intent to kill him, constitutes an assault with intent to do bodily harm with a dangerous weapon within the meaning of the Article of War * * *. Where accused was intoxicated, * * *, however, the question is * * * raised whether his intoxication is such as to negative the existence of the required specific intent. The effect of intoxication from this point of view has repeatedly been held to be a question of fact for the sole determination of the court, whose findings will be disturbed only where * * * unsupported by competent, substantial evidence * * *. While in the present case the evidence is clear that accused was intoxicated, there is nothing to compel an inference that his drunkenness was such as to deprive him of a conscious intent to put into effect the threats which he expressed at the times he pointed the pistols." Rather, the contrary appears.

(3) AW 95 Drunk and Disorderly: Accused's drunken and disorderly conduct (detail) was sufficient to show him morally unfit to be an officer and to be considered a gentleman. Standing alone, this guilt would be sufficient to sustain the finding. "However, consideration must be given to the question whether the court was consistent in finding that the accused's drunkenness was sufficiently gross as to constitute a violation of AW 95 and at the same time not so serious as to deprive him of the ability to entertain the specific intent required for the offenses charged under AW 93. An examination of the body of law which has developed under AW 95 reveals that the 'gross drunkenness' required for a conviction is primarily a matter of the flagrant and disgraceful display of intoxication before military personnel or civilians * * *. No cases are found wherein it has been required that the drunkenness be of such a degree from the point of view of its effect upon the accused's consciousness, as to deprive him of the ability to entertain the specific intent to do bodily harm to an adversary. Hence there is no reason why the court could not consistently find that accused in this case was grossly drunk but at the same time capable of such specific intent, and having so concluded, its findings, in view of the substantial evidence supporting them, will not be disturbed. * * * Moreover, it has been held that a finding of guilty of drunk and disorderly conduct under AW 95 may be sustained although the drunkenness shown is not gross in character, where the disorderly conduct is in itself sufficient to constitute a violation of the Article * * *. Under either theory therefore, the finding of guilty of a violation of AW 95" is supported. (CM ETO 7585 Manning 1945)

Accused officer was found guilty of charges of drunken and disorderly conduct on 6 January 1945, in violation of both AW 95 and 96.
HELD: LEGALLY SUFFICIENT. (1) Reference to Trial: The first indorsement on the charge sheet referring this case to the court for trial was signed by an officer who subsequently sat as a member of that court. No objection was made. No prejudicial error resulted. (2) Action Sheet: "The

(10) Drunk and Disorderly; Proof

453(10)

action approving the sentence was signed by * * *, Colonel, Infantry, Commanding. It appears that this officer was the regular chief of staff of the division. There is no order or declaration in the record showing his assumption of command. "However, it may be presumed, in the absence of evidence to the contrary, that the command of the division devolved upon him and that in approving the sentence he was properly executing his official duties." (3) Multiplicity: The specifications of AW 95 and 96, "are identical and cover the same events and transactions. This is not an illegal multiplicity * * * as the same facts and circumstances may give rise to two or more defenses * * *, and an officer may be charged with and found guilty of violations of the 95th and 96th AWs, although the separate offenses stem from the same set of facts." (4) Specifications: Each specification alleges that accused "was * * * drunk and disorderly under such circumstances as to bring discredit upon the military service." While the form is not to be commended, "it does allege that (a) Accused was drunk and disorderly, (b) 'under such circumstances', the details of which are not specified or described. The word 'circumstances' means facts or things standing round or about some central fact * * *. The central fact was accused's drunken condition and disorderly conduct. The 'circumstances' included the facts as to where and when he was drunk and disorderly and who was affected thereby. The phrase 'to bring discredit upon the military service' * * * is a legal conclusion lifted from" AW 96, and adding "nothing of factual weight * * *. However, even when the legal conclusions * * * are rejected as valueless, sufficient facts are alleged to constitute an offense under both" AW 95 and 96. "While accused would have been entitled to require the specifications to be made more definite and certain had he made timely objection", he did not do so. No question of double jeopardy can arise in the future. (5) The Evidence sufficiently established accused officer's guilt both under AW 95 and 96 (detail facts re his interference with a midwife attending a birth, etc) (CM ETO 10362 Hindmarch 1945)

PHILOSOPHY

1. The first part of the paper discusses the nature of the problem. It is argued that the problem is not merely a technical one, but one that involves deep philosophical issues. The author examines the various ways in which the problem has been approached in the literature, and finds that each approach has its own strengths and weaknesses. The author then proposes a new way of thinking about the problem, one that is based on a different set of assumptions. This new approach is then applied to the problem at hand, and the results are compared with those of the previous approaches. The author concludes that the new approach is superior to the others, and that it provides a more complete and satisfying solution to the problem.

2. The second part of the paper discusses the implications of the new approach. It is argued that the new approach has important implications for the way in which we think about the world, and for the way in which we live our lives. The author examines the various ways in which the new approach can be applied to other areas of philosophy, and finds that it has a wide range of applications. The author concludes that the new approach is not just a technical solution to a specific problem, but a new way of thinking that can be applied to many other areas of philosophy and life.

3. The third part of the paper discusses the future of the new approach. It is argued that the new approach is still in its early stages, and that there is much more work to be done. The author examines the various ways in which the new approach can be developed and refined, and finds that there are many opportunities for further research. The author concludes that the new approach is a promising new way of thinking, and that it has the potential to revolutionize the way in which we think about the world and live our lives.

(11) Drunk in Uniform; Proof

453(11)

(11) Drunk in Uniform; Proof:

Accused officer was found guilty of being drunk and disorderly in uniform at a public place, in violation of AW 95. HELD: LEGALLY SUFFICIENT. Accused's drunkenness was admitted. While there was no direct evidence that he was in uniform the facts, that he was obviously recognized and treated as such by two enlisted men who were strangers to him, and that was an officer, afford a basis for the legitimate inference that he was in uniform. (CM ETO 580 Gorman 1943)

After accused officer had become grossly drunk in a public place, he first halted and committed an unprovoked assault with his fists upon two British civilians, one of whom was a woman. He stopped another British couple, threatened them with bodily harm, and would not let them pass. He halted vehicular traffic, and used foul language to British police and civilians. He threatened to shoot people. He attempted to kick a policeman in the testicles, and resisted arrest by British policemen. He was found guilty (a) of being drunk and disorderly in uniform in a public place, in violation of AW 95, and (b) of wrongfully striking named civilians with his hands, and forcibly resisting arrest, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Multiplicity: The charges covered identical offense. But it has been previously held that there is no error in such duplication, although the offenses may be punished only in their most important aspect. (2) Intoxication: Accused denied all memory of striking the civilians and resisting arrest, and ascribed his loss of memory to his indulgence in intoxicants. But specific intent was not an essential of the offenses with which he was charged. Hence, his voluntary drunkenness did not constitute a defense. (3) Resisting British Arrest: "The British police were authorized to arrest accused for an offense committed against British law (United States of America (Visiting Forces) Act, 1942. (3 & 4 Geo. 6 c. 51) Sec. 1 (2); Cir. 72, ETOUSA, 9 Sept. 1943, par III ld). Although the evidence does not show that accused was necessary in view of his violent and drunken misconduct at the time." (4) Violation of AW 95: In Winthrop, Reprint, pp. 711-712, it is stated that the word "unbecoming" as used in AW 95 "is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety * * * but morally unbecoming." It is also stated that the conduct contemplated by AW 95 "must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." Accused's acts were in violation of AW 95. (CM ETO 1197 Carr 1944)

AW 95

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

453(11)

(11) Drunk in Uniform; Proof

(13) Failure to Pay Debts453(13)(13) Failure to Pay Debts:Cross References: 453(23) 2581 Rambo

Although he had promised in writing to do so, accused officer failed to pay a large indebtedness which he owed to a hotel. He was found guilty of failing to pay his debts, in violation of AW 95. HELD: LEGALLY SUFFICIENT. "The dishonorable failure of an officer to pay a private indebtedness may be charged under either AW 95 or AW 96, as the circumstances may warrant (RCM, 1928, par 152b, p. 188)." (CM ETO 1803 Wright 1944)

AW 95

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

453(13)

(18) False Official Certificates or Statements453(18)(18) False Official Certificates or Statements:Not Digested:

2507 Foot (False trip ticket)
 6255 Jacob (Under oath)
 8165 Craddock

Cross References: 415 8164 Brunner
 451(17) 3454 Thurber Jr (lesser offense; no intent;
 LW 96)
 452(3) 1538 Rhodes
 454(104a) 5389 Pomerantz (also under AW 96; multi-
 plicity)

Accused Post Exchange Officer was found guilty of (a) officially and knowingly submitting a false inventory, in violation of AW 95, and (b) wrongfully causing post exchange supplies to be sold at higher than established prices and, being aware of certain shortages, failing either to correct or to report them, in violation of AW 95. HELD: LEGALLY SUFFICIENT. (1) Violation of AW 95: Accused submitted a Post Exchange inventory which was false, in that it listed items which did not exist. He made it in that manner, with intent to conceal an existing shortage. "This monthly inventory was a required official report, and the action of accused in knowingly preparing and presenting it is clearly conduct unbecoming an officer and a gentleman as denounced by the 95th Article of War." (2) Violation of AW 96: The two specifications hereunder were also adequately proved. (3) Points of Law: (a) It was proper to conclude that the Sub-Exchange which accused operated had received a copy of the official price list and its supplements. "While there is no direct evidence that accused had notice of their contents, there is substantial evidence which justifies the inference that he did in fact possess full knowledge * * *." (b) It was improper to introduce in evidence a prepared written statement which set forth standard prices and also the "boosted" prices which accused used in his sales. This was not the best evidence. Absence of objection to its introduction did not validate the statement as evidence. However, a witness was properly permitted to refresh his memory from the list. Since its formal admission in evidence was unnecessary, no prejudice resulted. (c) Testimony of accused's possible profits on his improper sales was properly admitted, despite the fact that the witness was neither qualified as an expert nor as one skilled to make the calculations. Defense made no objection, and hence waived his right to attack the witness's qualification. (MCM, 1928, par. 116a, pp. 119, 120.) (d) * * * Where books and papers are voluminous, a qualified witness may summarize and explain the facts shown by such books and papers when they are all in court and the opposing counsel has full opportunity to

453(18)

(18) False Official Certificates or Statements

cross-examine as to the correctness of the witness' testimony." (20 Am. Jur., Evidence, sec. 831, p. 698) (CM ETO 765 Claros 1943)

It is an offense in violation of AW 95, for an officer knowingly to make a false statement in the course of an official investigation. (CM ETO 1786 Hambright 1944)

Charged with making a false official statement with intent to deceive a guard on duty at the main gate of his station, in violation of AW 95, accused officer was found guilty of the lesser included offense of violating AW 96. HELD: LEGALLY SUFFICIENT. "Abundant, competent, substantial and uncontradicted testimony establishes the falsity of the statement if made, and strongly supports the inference that it was motivated and accompanied by an intent to deceive the guard for the purpose of preventing his anticipated compliance with his orders to inquire and make a record of the destination of the off-base trip upon which the accused was then and there knowingly and surreptitiously setting forth in a government vehicle. Knowingly making a false official statement is, for an officer, a violation of Article of War 95 (MCM, 1928, par. 151, p. 186) * * *. However, the offense alleged is equally a violation of Article of War 96", and the court's finding of guilt in violation of the latter article of war was proper. (CM ETO 1953 Lewis 1944)

During an official inquiry in regard to a fight at which it was believed that accused was present, accused made a false statement. He was found to be guilty of a violation of AW 95. He was also found guilty of a violation of AW 96, in that, having been instructed to search men for illegal weapons before they went on pass, he failed to do so. HELD: LEGALLY SUFFICIENT. (1) AW 95: Accused knew that the investigation at which he made his statement was official. His own statement was also official. "It is presumed that a falsehood is engendered by an intent to deceive." It is immaterial that accused was not advised of his AW 24 rights at the time he made the statement. "The failure of a superior officer to advise a soldier that he need not answer an official question does not render the answer inadmissible on the trial of a charge that the answer was false * * *." (2) A variance of two days between the specification and the proof re the date of the offense was immaterial. (3) AW 96: The finding of guilt under this specification was likewise supported. (CM ETO 2777 Woodson 1944)

(18) False Official Certificates or Statements

453(18)

Accused officer was found guilty of being drunk on duty in violating of AW 85, of making a false official statement in violation of AW 95, and of wrongfully drinking intoxicating liquor in the presence of an enlisted man during the progress of an attack, in violation of AW 95. The Reviewing Authority reduced the last finding of guilt from AW 95 to AW 96. HELD: LEGALLY SUFFICIENT. (1) The false official statement charge was proved. "Accused was asked by his Commanding Officer if he had been drinking. Under the conditions, those of combat, the question and the answer were official. The answer was false. * * * Accused's conduct in this respect was properly charged as a violation of AW 95." (2) The drinking in the presence of an enlisted man was likewise established. "This conduct, while improperly charged and found as an offense under AW 95, was a clear violation of AW 96." (CM ETO 7246 Walker 1945).

Among other things, accused officer was found guilty of a violation of AW 95, in that he made a false official statement with intent to deceive an investigating officer. HELD: LEGALLY SUFFICIENT. "The official statement was signed and sworn to, and in effect confessed as false in court. This is an offense under AW 95 * * *." (CM ETO 8457 Porter 1945).

AW 95

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN -

453(18)

(19a) False Returns

453(19-

(20a) Immoral Conduct

20aa)

(20aa) Mail Censorship Violations(19a) False Returns:

Cross References: 415 8164 Brunner (charged under both AW 57 and AW 95)

(20a) Immoral Conduct:

Accused officer pleaded guilty to a charge of making indecent advances toward a 15-year old youth by fondling his penis and by performing mutual acts of masturbation with him, in violation of AW 95. He was found guilty. HELD: LEGALLY SUFFICIENT. The effect in law of a plea of guilty "is that of a confession of the offense charged. The record shows that accused was represented by counsel, that the effect of his plea of guilty was fully explained to him by the court and that accused understood the effect of his plea of guilty. * * * The evidence submitted herein in no way denied or contradicted the plea of guilty." (CM ETO 1266 Shipman 1944)

(20aa) Mail Censorship Violations:

Accused officer was charged with and found guilty of six violations of AW 95, in that he violated, first Cir 65, ETO, 26 August 1943, and subsequently Cir 33 ETO, 21 Mar 1944, in wrongfully repeating and discussing information contained in described letters written by enlisted men, and censored by him. He was also charged with and found guilty of the identical offenses in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Judicial Notice: The court properly took judicial notice of the two ETO Circulars referred to above, "both providing that unit censors will not repeat or discuss information contained in communications censored by them." (2) AW 96 Offenses: "There is ample evidence to justify the conclusion that there was a disclosure by accused of the contents and authorship of the letters specified, in violation of theater directives then in force. Such a violation of standing administrative directives constitutes a disorder or neglect to the prejudice of good military order and discipline under" AW 96. "In two instances * * *, the exact date of commission of the offense has not been proved, although the approximate date is fixed in each case. However the offenses

453(20aa-
20b)

(20aa) Mail Censorship: Violations
(20b) Mails Wrongfully Take From

are such that time is not of the essence and since the specifications clearly give notice of the offenses charged, failure to prove the exact date is immaterial * * *. In any event, the approximate dates proved are close enough to fall within the 'on or about' phraseology of the specifications." "The record contains ample evidence to justify the court's inference that accused, an experienced censor, was aware of the * * * principle of censorship embodied * * *." (2) AW 95 Offenses: "This is not a case of the improper opening and reading of the mail of another which is described by Winthrop * * *. Accused had authority in his capacity as censor to read the letters in question * * *. In all six instances accused disclosed not only the contents, but also the authorship of letters written by enlisted members of his organization and entrusted to him for censorship purposes. In each case, disclosure was made to an enlisted man of the same organization who happened to be present while accused was censoring the letter in question. None of these men had any right or reason to know the matters disclosed. The disclosures were made casually, although intentionally, and without any apparent malicious motive or intent to injure the authors of the letters." With two possible exceptions, "it cannot be said that the comments were made for the purpose of ridiculing the writers of the communications; nor can it be said that they had such effect." In the circumstances herein, it is concluded that accused's offenses constituted a violation of AW 95. "The censorship of mail is a military necessity imposed by the requirements of security. Any unnecessary extension of the invasion of privacy inherent in censorship constitutes a breach of trust or confidence * * *. Regardless of the presence or absence of any malicious intent, the deliberate and indiscriminate disclosure by censor of the contents and authorship of a soldier's mail to other soldiers of the same organization is a flagrant violation of the writer's absolute right of privacy in this respect. A breach of trust of this character seriously impairs the morale and discipline of the command, destroys confidence in the integrity of military administration, and represents a sufficiently grave departure from the standards of conduct required of a commissioned officer to constitute a violation of AW 95." (CM ETO 9542 Isenberg 1945).

(20b) Mails; Wrongfully Take From:

Cross References: 454(64a). See generally
3292 Pilat

(23) Making Checks with Insufficient Funds

453(23)

(23) Making Checks with Insufficient Funds:

Cross References: 454(67) See in general
1803 Wright
2506 Gibney

Accused officer was found guilty (a) of having, with intent to defraud, wrongfully and unlawfully made and uttered twelve separate checks in varying amounts (a separate specification for each), and cashing them, well knowing that he did not have sufficient funds in the banks on which they were made to cover them, in violation of AW 95, and (b) of having dishonorably failed and neglected to pay described debts, in violation of AW 96. HELD: LEGALLY SUFFICIENT for the violations of AW 95; LEGALLY SUFFICIENT only in part for the violation of AW 96. (1) The Bad Checks: The gist of the offenses charged in violation of AW 95 was the intent to defraud. A bank employee properly was permitted to testify in regard to the true status of accused's account with that bank, despite the introduction of the bank statement for his account in evidence. Although that bank had previously honored more than fifty previous overdrafts for accused, the above testimony indicated that it had constantly pressed him to pay up. It further indicated that accused was not warranted in assuming that his checks would be honored to an unlimited extent, but to a limited extent only. The overdrafts alleged in the specifications were sufficiently shown. These, together with accused's admission that he knew at the time that he was doing wrong and could not then see how he could pay the checks immediately, fully warranted the court in finding that he entertained the necessary wrongful intent. (2) Neglect to pay debts: Only a part of the debt which accused was alleged not have paid had definitely become due at the time the charges herein were drawn. The finding of his guilt in violation of AW 95 is supported only as to these definitely-due debts. "The dishonorable failure of an officer to pay a private indebtedness may be charged under either AW 95 or AW 96, as the circumstances may warrant (MCM, 1928, par. 152b, p. 188)." (CM ETO 2581 Rambo 1944)

AW 95

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

453(23)

(23) Making Checks With Insufficient
Funds

(25a) Resisting Arrest
(25b) Secrecy Violations
(26a) Wrongful Sale

453(25a-26a)

(25a) Resisting Arrest:

Cross References: 453(11) 1197 Carr

(25b) Secrecy Violations:

Cross References: 454(51a) 7245 Barnum (Find guilt under AW 96; also charged under 95. No multiplicity.)

(26a) Wrongful Sale:

Cross References: 454(104a) 5389 Pomerantz (Permit another to make a wrongful sale; also charged under AW 96; multiplicity.)
 454(18a) 11216 Andrews (Black market operation)

Accused officers were found guilty of a violation of AW 96, in that they wrongfully applied a jeep to their own use, and guilty of a violation of AW 95, in that they openly and publicly peddled whiskey to enlisted men of the * * * Battalion, Transportation Corps, for one thousand francs per bottles, said whiskey having been furnished them for 76½ francs per bottles. HELD: LEGALLY SUFFICIENT. (1) The misapplication of the jeep was sufficiently shown. (2) The Whiskey Peddling: "The evidence shows that each accused did 'openly and publicly, peddle whiskey to enlisted men', as alleged. To 'peddle' means to sell in small quantities. Both officers participated jointly in the venture. They acquired the whiskey as a ration for 'an imaginary battalion' and although no witness testified directly as to the amount the officers paid for the liquor, the net price quoted at the time at the ration station was 76½ francs. The accused sold the liquor for 1000 francs per bottle. This amount was paid by enlisted men to each accused. Later 8000 francs were turned over to the commanding officer of accused's base to be returned to the enlisted men as part of the exorbitant price charged by the officers in the sale." In this connection the court was asked to take judicial notice of Circular No. 45 Normandy Base Section, CZ, ETO, * * * providing: 'The sale, gift or barter of strong spirits and liquors, such as calvados, cognac and hard cider, is prohibited. The purchase of these

453(26a)

(26a) Wrongful Sale

intoxicants by members of the military service is prohibited'. Although not specifically enumerated in the circular, the sale of Scotch whiskey is certainly a strong spirit and liquor within the scope and meaning of this administrative directive. CM 241385, Fields is authority for the proposition that accused, as officers on duty within the military district herein indicated, were chargeable with knowledge of the circulars and directives of such command." The conduct of these officers herein constituted a violation of AW 95. "In their unsworn statements, each accused made reference to the members of their family and both stated that they would not 'intentionally' do anything to bring disgrace upon them. Such statements evidence the fact that accused failed to realize the impropriety of their conduct. This unawareness constitutes one of the strongest indictments against the accused * * *." (CM ETO 6881 Hege et al 1945)

(2) Absence Without Leave
(5a) Army Regulations; Violate

454(2,5a)

454 (AW 96) General Article:

Cross References: 402(7) 1991 Picerson (Dismissal of officer; violate)
2581 Rambo (Dismissal of officer; violate)
428(12b) In General; pleading conclusions.

(2) Absence Without Leave:

Cross References: 433(2) 4512 Gault Jr (AWOL as an AW 96 offense)

(5a) Army Regulations; Violate:

Cross References: See individual topics generally.
454(22b) 9345 Haug (engage in private business)

AW 96

GENERAL ARTICLE

454

(7) Assault and Battery; Proof454(7)(7) Assault and Battery; Proof:Not Digested:

- 25 Kenny
- 515 Edwards (Assault officer by striking)
- 1515 Smith (Attempt to strike)
- 3076 Patterson (Lt strikes police officer with fists)
- 3570 Chestnut (Strike girl on throat and face)
- 3858 Jordan et al (Muzzle to victim's forehead; fire shots over head)
- 4139 Redd (Indecent assault and battery)
- 4149 Lewis (Strike girl; tear clothes from her body)
- 4661 Ducote (Strike girl on face)
- 5608 Gehm (Indecent assault)
- 5362 Cooper (with bayonet; threats; also in 450(4))
- 7202 Hewitt (fists)

Cross References:

As lesser offense to:

- 451(3) 9064 Simms (assault to commit sodomy)
 1725 Warner (Assault to commit manslaughter)
 4059 Bosnich (Assault to murder)
 6288 Falise (Assault to rape)
 451(4) 4825 Gray (Assault to do bodily harm)
 6227 White (Assault to do bodily harm)
 451(6) 1177 Combess (Assault to do bodily harm)
 1690 Armijo (Assault to do bodily harm)
 4071 Marks (Assault to do bodily harm)
 451(9) 5420 Smith (Assault to do bodily harm with dangerous weapon)
 8163 Davison (Assault to do bodily harm with dangerous
 weapon)
 422(1) 5546 Roscher (AW 64 offense)
 422(5) 9162 Wilbourn (AW 64 offense)
 451(6) 8189 Ritts (Assault to do bodily harm)

-
- 450(4) 7209 Williams (with rape and housebreaking)
 451(2) 5386 Green, et al (assault to rape; aggravated assault)
 451(32) 3707 Manning (kissing, squeezing, fondling and holding a
 girl against her will)
 453(10) 7585 Manning (Wrongfully strike an enlisted man)
 453(1) 3303 Croucher (Officer strikes NCO, in execution of duty,
 on jaw with fist)
 454(38) 9304 Sutt, Jr (Officer wrongfully strikes enlisted man
 and civilians)
 454(56c) 8458 Penick (With disorderly conduct, and associating with
 enlisted men)
 454(63a) Indecent liberties; minors etc., see generally.

(7) Assault and Battery; Proof

454(7)

Accused officer was stationed in an allied country and among a friendly people. Without provocation, in a public place and while in uniform, he committed an assault upon several of these people. At the same time, he used filthy and degrading epithets. He was found guilty of a violation of AW 96. HELD: LEGALLY SUFFICIENT. The offense committed by accused were within the purview of those denounced by AW 96. (CM ETO 3076 Patterson 1944)

Accused enlisted man attended a public dance hall where, without any provocation, he struck a British commissioned officer in the face with his fist without any provocation whatever. He was charged with a violation of AW 96, in that he had wrongfully and wilfully struck the British officer in the face with his fist, knowing him to be a British commissioned officer. The court excepted the words that accused knew the victim to be a British officer, but found him guilty of the balance of the charge. Accused was sentenced to confinement for two years. HELD: LEGALLY SUFFICIENT ONLY TO SUPPORT A SENTENCE OF SIX MONTHS FOR ASSAULT AND BATTERY. (1) Previous AW 104 punishment was imposed upon accused by his commanding officer for the above misconduct. "Disciplinary punishment administered under AW 104 for the commission of a major offense is void * * *." "To permit a junior officer authorized to administer disciplinary punishment under the Article to have uncontrolled discretion in determining whether or not an offense is 'minor' in character, and to hold that his decision in this regard is final in all respects, would deprive higher military authority of all power in the premises * * *." Denial of accused's plea in bar, based on the previous AW 104 punishment, was proper in the instant case. (2) The court found accused to be guilty only of assault and battery. The original allegation describing the status of the assaulted person, and stating that the offense prejudiced "proper relations with allied British military authority", merely characterized the degree of aggravation of the offense alleged for consideration in fixing a sentence within the maximum limitation. Accused's offense was an aggravated one, but that in itself does not change the nature of the offense, nor does it create a different offense. A maximum of six months confinement and 2/3 pay for six months, as prescribed in the Table of Maximum Punishments, was all the sentence the court could legally impose. (CM ETO 3209 Palmer 1944)

Each of the two accused herein was found guilty of a violation of AW 96, in that he wrongfully and unlawfully committed an aggravated assault and battery upon Mademoiselle * * * by striking her with his fist, and tearing her clothes and attempting to throw her upon the ground. Each was sentenced to confinement for five years (cut to one year by reviewing authority). HELD: LEGALLY SUFFICIENT. (1) Evidence: "The evidence demonstrates that each accused could properly have been charged with assault with intent to commit rape. The manner in which

454(7)

(7) Assault and Battery; Proof

the girls were pursued by both accused, both armed with rifles, the enforced separation of the girls * * *, their striking * * * in the face with their fists, their attempt to throw her on the ground, her resistance, cries and after the attack, her disheveled appearance, the prompt flight of the * * * soldiers, the fly of one of whom was open, upon the arrival of two officers, all present a pattern of conduct from which the court" could properly have inferred an intent to commit rape. (Cite Eto 3869 Marcum; 2195 Shorter; 371 Leach. Discuss.) (2) Specification: While the limitation of punishment for a mere assault and battery is 6 months confinement, the instant specification sufficiently alleged an aggravated assault and battery for which the present sentences were within the authorized maximum. "The terminology of the specification * * * against each accused is inapt in the use of the word 'aggravated', which appears to be merely the conclusion of the pleader. Nevertheless, combined with the allegations of striking the victim, tearing her clothes and attempting to throw her upon the ground, it may reasonably be said to have fairly apprised each accused that he was charged with a more serious offense than simple assault and battery and punishable by a more severe sentence. * * *. The Board of Review * * * has heretofore exercised the power to construe and interpret specifications in accordance with the true intent and meaning of the pleader" (ETO 3803 Gaddis et al; 3740 Sanders et al). "An indictment which will enable a person of common understanding to know what is intended is sufficient * * *." The language in the instant specifications "as to each accused informed him that he was charged with an 'aggravated' assault, that the person so assaulted was a woman and that he struck her with his fist, tore her clothes and attempted to throw her upon the ground. In the opinion of the Board of Review, while the specification does not describe with technical accuracy an indecent assault, neither accused was misled by the language used and was sufficiently apprised that he was so charged." (Note that in indecent assault cases, "the questions of age or sex of the victim are immaterial.") (3) Court Membership: The court adjourned on 6 October and reconvened 10 October. On 9 October, a new assistant trial judge advocate was appointed vice a relieved one. The record fails to show the presence or absence of this new assistant trial judge advocate upon reconvening. "His absence, however, 'in no wise affected the validity of the proceedings or rights of accused.'" (CM ETO 4235 Bartholomew 1944)

Accused officer was charged with being drunk and conspicuously disorderly in violation of AW 95, but was found guilty (as approved) of the lesser offense under AW 96. He was also found guilty of assault and battery in violation of AW 96. HELD: LEGALLY SUFFICIENT. When accused struck his victim with his fist, he was guilty of an assault and battery in violation of AW 96. "An assault and battery laid under AW 96, as distinguished from an assault, in violation of AW 95, does not require proof of specific intent as an essential element of the offense. The voluntary drunken condition of the accused at the time was not exculpatory (MCM, 1928, par 126, 1491, pp 135, 177)." (CM ETO 4607 Gardner 1944)

(7) Assault and Battery; Proof454(7)

Accused officer was found guilty of violations of AW 96, in that he wrongfully struck an enlisted man in the face with his fist, and of being drunk and disorderly in uniform in a public place. HELD: LEGALLY SUFFICIENT. The offenses of which accused was found guilty constituted violations of AW 96. (Winthrop, Reprint, 1920, pp 715-718.) (CM ETO 8456 Thorpe 1945)

AW 96

GENERAL ARTICLE

454(7)

(7) Assault and Battery; Proof

(8) Assault With Dangerous Weapon454(8)(8) Assault With Dangerous Weapon:Not Digested:5561 Holden et al

Cross References: 450(4) 3740 Sanders et al (Threaten and hold two men at point of gun, pursuant to intent to rape third person)

"With respect to Specification 1, Charge II alleging assault with intent to do bodily harm by shooting with a dangerous weapon, to wit, a carbine, in violation of AW 93, the Reviewing Authority approved only so much of the findings of guilty as involves a finding of guilty of assault by accused by shooting, at the time and place and at the person alleged, with a dangerous weapon, to wit, a carbine. Thus, in effect, the Reviewing Authority declares that accused is guilty of assault without intent to do bodily harm in violation of AW 93. This action should have declared the findings approved in violation of AW 96, since the conduct of shooting with a dangerous weapon without intent to do bodily harm is lesser than and included in the offense charged and constitutes a violation of AW 96 (Dig Op JAG, 1912-1940, sec 451(8) p 313; CM 195931, Willis)."
(CM ETO 5420 Smith 1944)

AW 96

GENERAL ARTICLE

454(8)

(13) Attempts in General454(13)(13) Attempts in General:Not Digested:

800 Ungard (Attempt to escape arrest)
 991 Gugliotta (Attempted sodomy)
 5621 Thornton (Attempted rape; life sentence reduced to 20 years)

Cross References: 399 8333 Cook (Attempted sodomy; penitentiary)
 423(1) 8163 Davison (Attempted assault; AW 65)
 451(50)6015 McDowell (Attempted larceny of government property; punishment)
 452(21)8565 Flanagan (Attempted misapplication; lesser offense)
 454(18a)9937 Pipes (Attempted destruction of official statement)

454(13)

(13) Attempts in General

When accused and other negro soldiers had been ordered to disburse by an officer, accused told them, "Don't go. Stay here and stick up for your rights and get this thing settled." Thereafter, he told an officer who had grasped his arm, "Take your hands off me", etc. He was found guilty of (a) wilful disobedience in violation of AW 64; (b) inciting a riot in violation of AW 96; and (c) wilfull defiance, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) AW 64: Accused's wilful disobedience of a direct order from his superior officer was adequately shown. Although he heard that order, he wholly ignored it. (2): AW 96 "Riot": The first specification hereunder alleges that accused "attempted to create a riot among a group of colored soldiers * * * by urging the members of said group * * * to defy, etc." The phrase 'among a group' and the participle 'urging' do not connote action by the group of colored soldiers in conjunction with accused. Rather they indicate that accused acting alone endeavored to influence the actions and conduct of the group for the purpose of producing a riotous condition at the time and place alleged. This allegation is obviously equivalent to a charge that accused incited a riot. * * * Unlike the offense of attempting to 'commit a riot' which requires the joint action of three or more persons (2 Wharton's Criminal Law - 12th Ed. sec. 1859, p 2191) the offense of 'inciting a riot' may be committed by one individual. The specification therefore charges accused, a soldier, with the common law offense of inciting a riot among other soldiers which without doubt is a disorder to the prejudice of good order and military discipline denounced by the 96th Article of War". (Winthrop Reprint, p 722.) The evidence supported the finding of guilt. (3) AW 96 Wilful Defiance: Lastly, accused was charged with acting with wilful defiance of military authority by seizing two colored soldiers who had received a lawful command from an officer in the execution of his office, to leave the scene, and by saying to them, "Don't go, stay and stand up for your rights," or words to that effect. The evidence supported the allegation. This constituted a disorder to the prejudice of good order and military discipline under AW 96. (Winthrop, Reprint, p 722) (CM ETO 2608 Hughes 1944.)

Accused was found guilty of the following violations of AW 96: (a) Attempted statutory rape with a 9-year old girl; (b) Sodomy with that same girl on the same occasion; and (c) Contributing to the girl's delinquency on that occasion by pretruding his penis through his trousers in her presence, rubbing it between her legs, and requesting her to play with it. He was sentenced to 20-years confinement in a penitentiary. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the findings. (2) Multiplicity: Separate specifications allege the attempted carnal knowledge, and the contributing to the girl's delinquency. The latter acts were, in substance, a part of the first. "The two offenses contribute different aspects of the same act." (MCM, 1928, par 27, p 17.) "While the Board of Review may not disturb findings of guilty merely because they are predicated on a multiplicity of charges arising out of the same transaction * * *, the Board will regard the sentence imposed to the end that the act or offense of accused is punished only in its most important

(13) Attempts in General.454(13)

aspect (MCM, 1928, par 80, O 67)." Confinement for 5 years is authorized for sodomy, and 15 years for attempting to have carnal knowledge of this 9-year old girl. (CM ETO 2905 Chapman 1944)

Accused was found guilty of a violation of AW 96, in that he had unlawfully attempted to have carnal knowledge of a girl under the age of consent. He was sentenced to confinement for 15 years. HELD: LEGALLY SUFFICIENT ONLY TO SUPPORT CONFINEMENT FOR TEN YEARS. (1) Sentence: "Accused's sentence includes the maximum period of confinement authorized by the Penal Code of the United States for the offense included in a charge of carnal knowledge of a female under 16 (18 USC 455). While such an attempt is undoubtedly an offense included in a charge of carnal knowledge of a female under 16, no maximum punishment for the latter offense is listed in the Table of Maximum Punishments, paragraph 104c, MCM, 1928, whose provision that the punishment listed opposite each offense 'in the table below' shall be the maximum 'for any included offense if not so listed', is, therefore, not applicable. In holding the maximum limit on punishment the same for attempted sodomy as for the consummated offense", CM 230666 (1943) asserts that "An attempt which is not separately listed in the table of maximum punishments is subject only to the same limit on punishment as is the offense attempted, if the latter is listed" (Bull. JAG, Vol II, February 1943, sec 402 (1), p 61). Sodomy is listed. Carnal knowledge of a female under 16 is not. Attempted carnal knowledge of a female under 16 is, therefore, not subject to the same maximum punishment as the consummated act itself, is one of those 'offenses not thus provided for /which/ remain punishable as authorized by statute or by the custom of the service' (MCM, 1928, par 104c, p 96). The Federal Statute last cited makes carnal knowledge of a female under 16 a felony. Section 276 of the Federal Criminal Code (18 USC 455) provides that: 'Whoever shall assault another with intent to commit any felony, except murder or rape, shall * * * be imprisoned not more than ten years * * *.' The rape, excepted along with murder, from the provisions of the section just quoted, is the offense denounced in section 457 of the Criminal Code: 'Whoever shall commit the crime of rape shall suffer death' (18 USC 457). It does not include the offense commonly referred to as statutory rape which is officially designated merely as 'carnal knowledge of a female under 16'. 'An attempt to commit a crime is an act done with intent to commit that particular crime * * *'. (MCM, 1928 par 15c, p 190). "An assault is a necessary element of many felonies and is usually an element of an attempt to commit the same crimes' (22 CJS, sec 287a, p 429). In the case under consideration an attempt was charged but the evidence showed the offense constituted an assault with intent to have carnal knowledge * * *, and it might appropriately have been so characterized in the specification. The record of trial is, therefore, legally sufficient to support" a sentence of only ten years. (2) "Penitentiary confinement is not authorized, the offense, as charged, not being specifically made punishable by penitentiary confinement for more

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(13) Attempts in General

than one year by any Federal statute or by any law of the District of Columbia (AW 42; Dig. Ops. JAG 399(2), p. 246)." (CM ETO 3926 Manus 1944)

Accused was found guilty of a violation of AW 96, in that he wrongfully and unlawfully attempted to have carnal knowledge with a girl under the age of consent (8-years old). He was sentenced to confinement for 15 years. HELD: LEGALLY SUFFICIENT TO SUPPORT ONLY A SENTENCE OF TEN YEARS. "An attempt to commit a crime is an act done with intent to commit that particular crime and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission (MCM, 1928, par 152b, p 190)." Accused admitted that he was highly sexed; and had sought unsuccessfully, and was then seeking, to meet a woman with whom he could satisfy his desires. He was caught in the act by a police officer. (2) Confinement: "The sentence, as approved * * *, includes confinement * * * for 15 years and a Federal penitentiary was designated as the place of confinement. This Board has recently held that for the commission of the offense of attempted carnal knowledge of a female under 16, the maximum period of confinement which may be imposed is ten years (CM ETO 3926, Manus). So much of the sentence * * * as provides for confinement * * * in excess of ten years is therefore illegal. Furthermore, penitentiary confinement is not authorized for this offense. (CM ETO 3930 Perez 1944)

Separately charged but jointly tried, two of the accused herein were found guilty, among other things, of attempts to commit the crime of rape on a woman. HELD: LEGALLY SUFFICIENT. (1) The evidence established their attempt to rape the woman. "The intent was shown by their words and conduct; their respective assaults upon her constituted the requisite overt acts. In this instance, they might as well have been charged with assault with intent to rape as with attempted rape, the proof being adequate to establish either offense." (2) "The maximum penalty for attempted rape is the maximum for the most closely related offense listed in the Table of Maximum Punishments (MCM, 1928, par 104c), via. assault with intent to commit rape (CM 229156, Bradford (1943, 17 B.R. p. 61)." (CM ETO 3947 Whitehead, et al 1944)

Accused was found guilty of the following violations of AW 96: (a) forcible and felonious attempt, against her will, to have carnal knowledge of a German girl about 13 years of age; and (b) wrongfully fraternizing with German civilians on the same occasion. HELD: LEGALLY INSUFFICIENT on the fraternization specification. (1) Carnal Knowledge: "The evidence would have substantially proved the crime of assault with intent to commit rape * * *. Such offense may be committed upon a female under

(13) Attempts in General

454(13)

the age of consent * * *. The allegation * * * 'alleged in effect that accused attempted to have sexual intercourse with the child * * *. However, the Specification does not meet the requirement of the civil criminal law with respect to charging the crime of attempting to commit rape inasmuch as it does not allege the commission of an overt act. * * * Nevertheless as a pleading before courts-martial it is probably sufficient. By implication the necessity of pleading the commission of an overt act in charging the indigenous offense of attempting to commit a crime is eliminated by the Manual for Courts-Martial (MCM, 1928, App. 4, Form 128, p. 254). Therefore the Specification may be construed as charging the crime of an attempt to commit rape. The evidence fully sustains that charge." Nonetheless, the Board of Review believes that the real test re whether an AW 96 offense has been stated "is to consider the allegations not in their technical, legalistic aspect but as a factual statement of accused's actions * * *. It is obvious that there is described a course of conduct by accused which falls short of the act of intercourse but which includes action directed at the girl with the intention of engaging her ultimately without her consent in the sexual act. Such conduct involving a young girl of the age of 13 years may well be considered of such nature as to reflect discredit upon the military service (Detail facts; discuss standards of conduct of American soldiers among the German people.) "The violation or attempted violation of the persons of German women by American soldiers has an especial impact upon the military service which cannot be denied or treated casually. The occupation of Germany by American military forces for an indefinite period of years is part of the accepted program for the discipline and ultimate rehabilitation of the German people. If the American people are to assume the role of teacher and preceptor, their standards of human relationship and the conduct of their representatives in Germany must be beyond reproach."

"There is no maximum punishment prescribed * * * for the offense alleged * * *. The most closely related offense appears to be assault with intent to commit rape. The maximum punishment for the latter offense is dishonorable discharge, total forfeitures and confinement at hard labor for 20 years * * *. Such maximum should be applied in the instant case."

(2) Fraternization: "The terms 'fraternization and 'fraternize' as used in connection with the relationship of American soldiers and the German civilian population definitely concern friendly association and comradely social relationships. The indigenous meaning of the words deny their applications to instances wherein American soldiers inflict upon German civilians acts of violence or where the latter are victims of anti-social or criminal acts committed by the former. * * * The evidence in the instant case disclosed a course of conduct by accused that does not fall within the definition of 'fraternization'." The record is legally insufficient as the fraternization specification. (3) Guilty Plea: Accused plea of guilty to the fraternization specification must have been made under a misconception. "It would be a travesty on * * * military justice for the Board of Review to consider that accused was bound by his plea when the undisputed evidence * * * showed he did not commit the offense charged." (CM ETO 10967 Harris 1945)

AW 96

GENERAL ARTICLE

454(13)

(13) Attempts in General

(15) Attempt to Commit Sodomy454(15)(15) Attempt to Commit Sodomy: Maximum Punishment:Cross References: 402 991 Cugliotta(15a) Proof in General:

Charged with sodomy with a cow in violation of AW 93, accused was found guilty of the lesser included offense of attempt to commit sodomy with the cow, in violation of AW 96. HELD: LEGALLY SUFFICIENT. "Sodomy consists of sexual connection with any brute animal * * *." To establish the offense, actual penetration must be proved. (MCM, 1948, par. 149k, p. 177; * * *). Attempt to commit sodomy is an offense under the 96th Article of War." (MCM, 1928, par. 152c, p. 190) (CM ETO 1638 LaBorde 1944)

(15b) Proof of Lesser Offense; Solicitation:

"To offer and solicit the opportunity to commit sodomy is an offense under the 96th Article of War * * *. The evidence here shows that accused, by words and actions, offered and solicited such opportunity so unmistakably that all understood his meaning. * * * That accused was drunk or in bad company cannot excuse or condone his conduct." (CM ETO 520 German 1943)

Accused asked a third party to participate in an act of sodomy with him. Before he was able to proceed, he was frightened from the room. Although accused may have been kneeling and had his hands on a couch, there was no overt act. Rather, he did not actually touch the third person. He was found guilty of attempting to commit sodomy, in violation of AW 96. HELD: LEGALLY SUFFICIENT ONLY TO SUSTAIN A LESSER INCLUDED OFFENSE OF SOLICITATION. Accused was guilty only of soliciting and offering to commit sodomy in violation of AW 96. (CM ETO 945 Garrison 1943)

AW 96

GENERAL ARTICLE

454(15)

(15) Attempt to Commit Sodomy

(18) Bigamy

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(18) Bigamy:

At a time when he had a lawful living wife, accused married a second girl. Despite his defense he was drunk and did not know what he was doing at the time of the second marriage, he was found guilty of bigamy, in violation of AW 96. HELD: LEGALLY SUFFICIENT. Bigamy has long been recognized as an offense under Articles of War 95 and 96. The essential elements of the offense are: "(1) A valid marriage entered into by the accused prior to and undissolved at the time of second marriage; (2) Survival of the first spouse, to the knowledge of the accused, and (3) His subsequent marriage to a different spouse." "On the trial of the accused's subsisting first marriage by: (1) Stipulation as to the fact itself; and (2) Introduction - by stipulation - of the accused's admissions to" another. The above was corroborated by a third party's strictly hearsay testimony "that he had checked the accused's 201 file and found that it showed an allotment to the first wife. In bigamy cases, * * * 'the corpus delicti is the alleged first marriage, and must be 'clearly proved' independently of the defendant's confession' (2 Wharton's Criminal Law, 12th Ed., sec. 2045, p. 2359). The accused's testimony on the stand eliminated any question as to the sufficiency of the prosecution's showing of the subsisting first marriage. 'As basis for admission of extrajudicial confession, proof of corpus delicti may consist of testimony of accused himself.'" Accused's second marriage was established by competent evidence. His defense that he was intoxicated at the time was inadequate, and was somewhat stultified by his subsequent incriminating letters to his second spouse. (CM ETO 1729 Reynolds 1944)

Accused officer married an English girl at a time when he had two living wives in the United States. He was found guilty of the following violations of AW 96: (a) Bigamy; (b) Marriage in the ETO without approval of a general officer as required in Cir 88 ETO 1943; (c) False fraudulent execution, with intent to deceive, of military permission to marry, and of a military certificate containing his divorce; (d) offering and delivering those two documents as true and genuine, with intent to deceive a registrar to whom he had applied for a license to marry the English girl; and (e) Making a false statement under oath. HELD: LEGALLY SUFFICIENT. (1) Offenses: The various offenses were sufficiently established. The court properly took judicial notice of the ETO Circular, of which accused was charged with notice. (2) Essential elements of bigamy are: "(1) A valid marriage entered into by accused prior to and undissolved at the time of the second marriage. (2) Survival of the first spouse to the knowledge of accused. (3) His subsequent marriage to a different spouse." (3) The False Oath Specification: While the specification alleging the false statement under oath did not further state that it "was given during the course of an official investigation

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or inquiry, nor did it set forth the name and capacity of the officer before whom it was made", yet accused pleaded guilty thereto, and freely admitted that he made the statement under oath. The person to whom he made it appeared. Accused could not have been misled by the specification. The specification, with its reasonable inferences, stated an offense. "The making by an officer of a false statement under oath is certainly a disorder to the prejudice of good order and military discipline" in violation of AW 96. (ETO 1447; MCM, 1928, par 87b p 74.) (CM ETO 3456 Neff 1944)

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11072 Copperman

Cross References:

451(35) 1411 Riess (Identity of shirt and trousers)
 1764 Jones-Mundy (Charged under AW 93 as larceny; govern-
 ment; depot)

452(3) 1538 Rhodes (Post Exchange property to own use; candy;
 peanuts; lighters)

452(9) 7253 Street

452(12) 1764 Jones-Mundy (field jackets; ownership)

452(21) 6232 Lynch
 6268 Laddox (AW 94 offense charged under AW 96)

453(26a) 10282 Vandiver (AW 94 guilt should have been AW 84 guilt)
 6881 Hege

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Among other things, both accused were found guilty of a violation of AW 96 in that each did, from on or about 30 September to 6 October 1944, "wrongfully and willfully dispose of 800 gallons of gasoline, issued for use in the military service of the United States. Accused F was additionally found guilty of a violation of AW 83 in that, in the same period, he did, "through neglect lose one spare wheel and tire of the value of about \$50.00, issued for use in the military service of the United States. HELD: LEGALLY INSUFFICIENT IN PART. (1) AW 96--Gasoline Disposal: It cannot reasonably be claimed that the evidence, independently of certain hearsay testimony of Captain L** to the effect that the gasoline tanks on the truck taken by accused were full /detailed/, "substantially compelled a finding that during the period of at least 19 hours which intervened between the filling of tanks and the unauthorized taking of the truck by accused, the gasoline was not legitimately used, as was not infrequent, to meet the needs of passing convoys, and that when taken by accused the truck was loaded with gasoline." It must be concluded that the improper admission of the hearsay was prejudicial in this (2) AW 83--Wheel and Tire; Value; Variance: "Except as to value, there was sufficient evidence to warrant a finding of guilty against accused F** of losing through neglect a spare wheel and tire issued for use in the military service of the United States. Since there was no evidence of the value of the wheel or tire, or of the condition of either, the court was warranted in finding that the wheel and tire were of some value not in excess of \$20:00. The offense is charged as a violation of AW 83. The Specification, however, fails to allege that the wheel and tire were military property belonging to the U.S. * * * It alleges that they were issued for use in the military service of the U.S. The Specification therefore sets out a violation of AW 84 * * * The designation of the wrong Article is not material in this case (MCM, 1928, Par 28, p 18)." (CM ETO 5032 Brown et al 1945)

Accused was found guilty of a violation of AW 96, in that he willfully and wrongfully sold to a civilian approximately 110 gallons of gasoline, property of the U.S. and furnished and intended for the military service thereof. He was sentenced to confinement for ten years. HELD: LEGALLY INSUFFICIENT ONLY TO SUPPORT GUILT OF SALE OF 110 GALLONS OF GASOLINE VALUED \$17.73, AND A SENTENCE TO CONFINEMENT FOR SIX MONTHS. (1) Specification: The Specification herein follows Form 112, Appendix 4, MCM, 1928, p 252; "but contains no allegation of the value of the property sold. However, in alleging the offense of wrongfully and knowingly selling or disposing of Government property under the 9th paragraph of the 94th Article of War the value of the property is not an element of the offense. The gravamen of the crime is the sale or disposition, wrongfully and knowingly, of Government property furnished or intended for the military service * * *. The laying of it under a charge alleging violation of the 96th Article of War did not change the nature of the offense alleged * * *. (2) The wrongful sale, constituting a violation of AW 94, was adequately shown. (3) Value: "No market value of the gasoline was alleged or proved at the time and place of sale." "Such value is necessary in determining the pun-

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ishment * * *." "The court and the Board of Review are authorized to take judicial notice of 'Price of articles issued or used in the Military Establishment when published to the Army in orders, bulletins, or price lists' (MCLs 1928, par 125, p 135). Consistent with such provisions of the MCM it has been held that the court may take judicial notice of Army price lists to establish the value 'of government articles of a distinctive character made specially for use in the military service and not having a market value in their manufactured form' * * *. Within the classification such property are Army overcoats * * *, a .45 caliber revolver and holster issued by the Government * * *; olive drab blouse, trousers, wool shirt and belt * * *; rayon stockings * * *; Army motor vehicles * * *. However, it has been determined that 'except as to distinctive articles of Government issue or other chattels, which because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value' * * *. Included within the general classification of such personal property are photographic exposure meters * * *; watches and cameras * * *; commercial drawing sets * * *; articles of civilian clothing not Government issue * * *. With respect to gasoline furnished to the American Army in the European Theater of Operations certain facts have been * * * and now are open and notorious. All of such gasoline is procured from the British Minister of Fuel under 'Reciprocal Aid' based on the Act of Congress approved 11 March 1941 (c. 11, 55 Stat. 31; 18 USCA secs. 411-419), commonly known as the 'Lend-Lease' Act. No other gasoline is available to or used by the American forces. In France no commercial sources of supply of gasoline to these forces exist and there is no value established in commercial markets which are open to the American Army. Distribution and marketing of gasoline upon a commercial basis such as prevailed during the pre-war years have ceased to exist in France. The prices of gasoline furnished to the American Army are fixed and determined by the British Minister of Fuel and such prices are used by the Quartermaster, ETO, in his quarterly reports to the Quartermaster General, Washington, D.C., under the 'Lend-Lease' Act. Such reports (excluding such products as are consumed by the Army Air Forces) are made on Form O.F.D. No. RA-3. There are no other prices of gasoline recognized officially by the U.S. in the theater. The facts here stated are not secret and are within the general knowledge of the American military personnel. They are distinctive and peculiar to the theater. * * * Gasoline in the ETO possesses no established market value" (MCM, 1928, par 125, p 134-135.) "It is submitted that the condition with respect to the procurement, distribution and use of gasoline and the value to be allocated to same within the ETO is a general fact concerning which the military courts and Board of Review may take judicial notice. A condition exists and has existed for some months past in the theater which finds no counterpart in continental United States. The military exigencies and demands and the diplomatic agreements between the United States and Great Britain with respect to the procurement and distribution of gasoline have served to make the facts pertaining thereto matters of general knowledge of which military judicial tribunals sitting within the theater may take notice without proof. * * * The principal civilian gasoline market (excluding distribution by the French government) is commonly designated as a 'black market', i.e. illicit dealing in gasoline

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which in the vast majority of instances has been stolen from the U. S. armed forces. Its prices bear no legitimate relationship to peace-time gasoline prices or to the intrinsic worth of the product. * * * Under such circumstances the rationale of the theory of 'market value' of property does not exist. Judicial notice is taken of the price of gasoline, as reported in the quarter-annual reports of the Quartermaster, ETO, to the Quartermaster General for the relevant period. During the period 1 October to 31 December 1944, this price was .16117 cents per United States gallon. Therefore, the value of the 110 gallons sold by accused was \$17.73. (2) Guilt: Accused was guilty of willfully and wrongfully disposing approximately 110 gallons of gasoline, property of the U.S. furnished and intended for the military service thereof, of a total value of \$17.73, by selling the same to a named civilian. The sentence must be reduced to confinement for six months, forfeiture of all pay and allowances due or to become due, and dishonorable discharge from the service. (CM ETO 5539 Hufendick, 21 April 1945)

(1st Ind. 5539 Hufendick, 1945: "It is obvious that no gravity is added to an offense merely by alleging it to be a violation of AW 96. The specification states a violation of AW 94 and for that offense the President has prescribed a maximum limit of punishment by which all in the military service are bound." Gasoline "is one of the critical articles of supply in this theater. * * * Those soldiers, who like this accused, were recreant to their duty and sold the gasoline entrusted to them for personal gain, were guilty of a treacherous offense against the Army and their country, * * *. Courts-martial are courts of justice, it is true, but they are also disciplinary agents of the military commanders. Congress intended them to so function. To say that because no value was alleged, conviction can be upheld only for property of some value less than \$20.00, ignores common sense, the realities facing our armies in Europe, and the knowledge of every common soldier, particularly this accused who sold it for \$1.00 per gallon. Although not necessary to the result reached in this case, I fully approve the principles stated. "In view of the reduction of the period of confinement, I recommend that the" Disciplinary Training Center be designated as the place of confinement, in lieu of the U.S. Disciplinary Barracks.)

Besides guilt of AWOL in violation of AW 61, accused was also found guilty of a violation of AW 96, in that he wrongfully had in his possession 11,000 packages of cigarettes, 10,200 boxes of matches and 1,300 packages of tobacco, property of the United States, and intended to apply said property to his own use and benefit. HELD: LEGALLY SUFFICIENT ONLY FOR THE AWOL. (1) Black Market "There is a total absence of proof that the cigarettes and tobacco were property of the United States. Its delivery to the Post Exchange officer of * * * shows by inference that it was the property of the Army Exchange Service. It is well established that property of the Army Exchange Service is not the property of the United States and that a charge of stealing or misappropriating property of the United States is not supported by proof that the property was owned by the Army Exchange Service. The variance is fatal." (CM ETO 5659 Maze Jr, 27 April 1945)

Accused was found guilty of a violation of AW 96 in that, in France on or about 16 December 1944, he did "prejudice the success of The United States forces by wrongfully and unlawfully disposing of gasoline, military property of the United States vitally needed for combat operations." He was sentenced to confinement for life. HELD: LEGALLY SUFFICIENT ONLY FOR THE DISPOSAL OF APPROXIMATELY 20 GALLONS OF GOVERNMENT-OWNED GASOLINE OF A VALUE LESS THAN \$20.00. Sentence must be reduced to six months confinement, dishonorable discharge and total forfeitures. (1) Black Market Offense: It has heretofore been held in this Theater in CM ETO 8234, Young, et al, CM ETO 8236 Fleming, and CM ETO 8599 Hart et al, "that the wrongful and unauthorized disposition of Government property intended for adapted to, or suitable for use by the armed forces of the United States under circumstances which constitute an interference with or obstruction of the war effort constitutes an offense of more serious import and consequences than the offenses denounced by the 84th and 94th Articles of War. * * * However, such offense * * * must be both alleged and proved. In the instant case, it will be assumed (without deciding) that the allegations of the Specification stated facts sufficient to constitute the more serious offense. The evidence in support of the Specification is adequate to prove that accused wrongfully and without authority sold and delivered approximately 20 gallons of Government gasoline to a French civilian." After waiver of objection by the defense, and at the invitation of the prosecution, the court took judicial notice that vast quantities of gasoline are needed for supply for allied vehicles in the European Theater of Operations. "The foregoing constitutes the total proof * * * of those highly necessary and relevant facts and circumstances which would show the accused 'prejudiced the success of the United States Forces' by diverting from their established channel of distribution 'gasoline, military property * * * vitally needed for combat operations'. The suggestion of the trial judge advocate that judicial notice should be taken of the need of vast quantities of gasoline * * * does not refer to the time and place of the alleged offense. It refers to conditions at date of trial--'are needed'. However, the form of expression used * * * is immaterial. If judicial notice of the necessary facts is allowable, such right exists independent of any invitation of the prosecution. Stipulations or admissions of course cannot bring facts within the sphere of judicial notice which in law do not belong there * * *. The Board of Review has consistently asserted the right to take judicial notice of permissible pertinent facts independent of any suggestion or invitation either of the court or the parties * * *." Both the court and the Board of Review herein were authorized "to take judicial notice of the fact that the American forces in the European Theater of Operations possess and have possessed thousands of motor vehicles powered by internal combustion engines; that a continuous supply of tremendous quantities of gasoline has been and is necessary in order to furnish the fuel for said engines and that the ultimate success of the American Arms in the theater has been and is largely dependent upon the movement of said vehicles." "But it is manifest that after the court and the Board of Review have judicially noticed said generally known facts, prosecution's case falls far short of the proof necessary to sustain the highly necessary all

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gations above indicated. Had there been proof that there were wholesale thefts, wrongful dispositions or misappropriations of Government gasoline at or about the time and at or in the proximity of the place alleged: that these thefts, wrongful dispositions and misappropriations resulted in the diversion of gasoline in more than nominal quantity from the usual and legitimate channels of distribution which would have eventually delivered it to combat and other troops for consumption, and that accused's instant wrongful disposition was part of the mass irregularities, there would exist in the record of trial proof of facts from which the court and Board of Review could legitimately and reasonably infer that at the time and place alleged this particular gasoline was a vitally-needed commodity and that accused, when and at the place he diverted it prejudiced the success of the American arms. Therein lies the difference between the instant case and the Young case. * * * To allow this conviction to rest upon the general facts above stated which may be judicially noticed, without proof of the specific conditions existing when and at the place of the diversion as hereinabove stated, will introduce an uncertainty into the law which is not only undesirable but also indefensible." "It must be noticed that Congress by enacting the 24th and 94th Articles of War declared specifically the circumstances and conditions under which a member of the military service may be punished for wrongful disposal of Government military property. These Articles establish the generally prevailing rules. Departure from the principles therein set forth is justified only under extraordinary and unusual circumstances which lie outside of their ambit and are of such nature as to make it reasonably apparent that Congress did not intend to include the indicted conduct within the denouncements of said Articles. Then and only then can a charge involving wrongful disposal of Government military property be laid under the 96th Article of War, and those extraordinary and unusual facts and circumstances must be alleged and proved." "The unauthorized disposition of property owned by the U. S. Government not specifically 'issued for use in the military service' (AW 84) or 'furnished or intended for the military service' (AW 94) is a disorder to the prejudice of good order and military discipline under the 96th Article of War (CM 235011 Goodman, 21 BR 243 (1943))." (Distinguish CM 162158 (1924) Dig Op JAG 1912-1940, sec 452(20), p 340.) (CM ETO 6226 Baly, 5 May 1945)

Accused was found guilty of a violation of AW 84, in that he unlawfully sold to a French civilian eleven 5-gallon jerricans containing 55 gallons of 80-octane gasoline, valued more than \$50, issued for use in the military service of the United States. He was also found guilty of a violation of AW 96 for the same activity, the specification additionally alleging that the gasoline "was vital for the military effort, such conduct being at that time in the nature of impeding the military war effort." HELD: LEGALLY INSUFFICIENT AS TO THE AW 96 CHARGE. (1) Multiplicity: "The offense charged under the 24th Article of War, although covering the same 80-octane gasoline as is the subject of the offense charged under the 96th Article of War, is separate and distinct from the latter offense." (2) The AW 84 offense was adequately alleged and proved. AW 84 "applies to any property issued for use in the military service." (3) AW 96: This Specification stated an offense "in the nature of

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diversion by accused of articles and supplies intended for, adapted to or suitable for use by the armed forces of the U.S. in connection with actual combat. The proof of the sale of the gasoline by accused is complete. However, the prosecution attempted to prove the allegations that the gasoline 'was vital to the military effort' and that such diversion impeded the military war effort by asking the court to take judicial notice of the following documents:" (a) Letter, ETO, 16 October 1944 addressed to Commanding Generals, U.S. Strategic Air Forces in Europe, and (b) Letter from Hq 9th Air Force dated 7 November 1944 to subordinate units. "Assuming that the court was entitled to take judicial notice * * * /the letters/ fall far short of the evidence required to prove the exceedingly necessary elements of the Specification above underscored. At most the letter from Hq ETO expresses the opinion of the Commanding General, ETO that unauthorized disposal of gasoline 'in its cumulative effect impedes the military effort'. Such ex parte expression of opinion, as it is of belief, certainly does not constitute legal proof of the necessary factual allegations that accused's action in diverting the gasoline impeded the war effort. The Ninth Air Force letter insofar as it was more than a mere expression of opinion and policy of the Commanding General was unsworn hearsay made by a person not subject to cross-examination and possessed no evidential value. 'Hearsay is not evidence'. * * * The maximum evidential value of these letters * * * was to invite the attention of the court to * * * matters of general knowledge * * *" such as were discussed in CM ETO 6226 Ealy, "but they did not supply necessary proof of specific conditions existing at the time and place alleged or that this particular 'gasoline was a vitally needed commodity and that accused when he diverted it prejudiced the success of the American Ams.' There was therefore a complete failure of proof with respect to the allegations of the Specification" under AW 96. (4) Guilt: "The offense proved was the identical offense covered by" the AW 84 specification. Hence the record of trial is legally insufficient only on the AW 96 specification. (5) Punishment: "The offense of selling Government property issued for use in the military service under the 84th Article of War is essentially a military offense * * *, and is not recognized as an offense of a civil nature punishable by penitentiary confinement for more than one year by some statute of the U.S. or by a law of the District of Columbia (AW 42). Place of confinement must be changed to the U. S. Disciplinary Barracks. (CM ETO 7506 Hardin, 5 May 1945)

(1st Ind, CM ETO 7506 Hardin 1945: "The facts which increase the offenses under the 84th and 94th Articles of War to a more serious military offense must be proved as any other fact and proof of their existence at the time and place of the offense is vital.")

 CM ETO 7609 Reed 1945: Companion case to ETO 7506 Hardin. Not Digested.

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Five accused were jointly tried and found guilty of the following specifications in violation of AW 96:

- (1) In that they did, at or near * * * and Paris, France, and at various and sundry places between said places, between 1 September and 30 November 1944, jointly and in conjunction with each other and other members of * * * Battalion and other operating personnel, agree and conspire to defraud the United States through pillaging, division of spoils, and mutual inaction against pillaging by each other, through wrongful conversion to their own joint and several purposes and profit, of military supplies and equipment, the property of the United States in the possession and custody of military agencies, furnished and intended for the military service thereof, while such supplies and equipment were en route to military forces engaging the enemy and other military forces of the U.S., during a critical combat period in the theater of active military operations; and pursuant thereto, did, at divers times and places as herein alleged wrongfully divert such supplies and equipment from the military purposes for which such supplies were intended, to their own purpose of personal profit.
- (2) That three of the accused did, jointly and in the execution of a conspiracy previously entered into between themselves, did at or near * * *, France, between 1 September and 30 November 1944 wrongfully dispose of 400 packets of cigarettes, property of the U. S. and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, while cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.
- (3) Same as Specification 2, except as to names, times, places and amounts.
- (4-7) Specifications against individual accused for wrongfully disposing of described cigarettes at described places at described times, said cigarettes being the property of the U. S. and intended for use in the military service thereof, thereby contributing to a shortage in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations.

HELD: LEGALLY SUFFICIENT IN MOST RESPECTS, BUT SENTENCES MUST BE REDUCED AS HEREINAFTER DESCRIBED.

(A) In General: (1) Court Membership; Challenges: Defense challenged a court member on the ground that he had "sat as a member of a court which tried military persons other than the instant accused on charges similar to those involved in the present case and that in the process of said previous trials the prosecution presented evidence to establish the corpus delicti of the offense then in issue of the same kind and quality as would be presented in the instant case." That member took the stand and testified. "It is the function of the court to determine the existence or non-existence of the alleged grounds of challenge and the burden of maintaining a challenge rests on the challenging party." "Its findings under the circumstances will not be disturbed on appellate review." The record also "presents sufficient grounds to permit the challenge * * * to

be considered as a challenge to the array. Challenges to the array are not permitted in courts-martial. It therefore follows the denial of such challenge was proper." (Note that Board of Review could have considered the failure of defense to exercise its peremptory challenge as a waiver of its rights in the above regard.) (2) Motion for Severance: This motion, made before arraignment but prior to pleas, was properly denied (CM ETO 895 Davis; 3147 Gayles). (3) Conspiracy Specification: As amended, the first specification "obviously alleged facts constituting both common law conspiracy and conspiracy under Section 37, Federal Criminal Code (18 USCA 88) * * *. It was not necessary to allege in this case (of an unlawful and corrupt understanding, arrangement or agreement) the specific acts of diversion, conversion and disposition of supplies." Moreover, it was properly placed under AW 96. "Conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim is obviously an offense under the 94th Article of War * * *. The conspiracy here charged is not of that nature as no 'false or fraudulent claim' is involved." (4) Surrounding Facts: One witness was properly permitted to testify "with respect to theft of government property and of the looting of railroad trains occurring during the time and at the locations alleged * * *. The evidence served to inform the court as to the surrounding facts and circumstances of the offenses * * * charged." (5) Hearsay: One witness was permitted, over objection, to testify that the most important topic of conversation at a described time related to pilfering and sale of U.S. supplies from trains. "The testimony as to the declarations of unknown third persons was rank hearsay and its admission in evidence was erroneous. The existence of a conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged conspirators done or made in his absence unless there is proof aliunde that he is connected with the conspiracy." Likewise, other described evidence should have been excluded. However, no prejudice resulted from this error.

(B) Specification One; Conspiracy: (1) This specification alleges "facts constituting the crime of conspiracy under sec 37, Fed Crim C (18 USCA 88) inasmuch as the concluding clause 'and pursuant thereto, did * * * wrongfully divert such supplies and equipment from the military purposes for which supplies were intended, to their own purpose of personal profit' alleges the necessary overt acts. * * * Conspiracy is an independent substantive offense both at common law and under the Federal statutes."

(2) "The corpus delicti of a conspiracy is 'the unlawful combination, confederacy and agreement between two or more persons.'" LCM, 1928, par 114a, p 115 "does not treat the subject of admissions (as distinguished from confessions) in connection with the question of quantum of proof necessary to sustain a conviction." However, it is a generally accepted Federal court doctrine "that to warrant a conviction of a crime both confessions and admissions made after the commission of the alleged criminal act must be corroborated by some independent evidence. The requirement of some independent proof as applied both to confessions and admissions after the crime has not been relaxed merely because the facts seem to indicate that the disclosures have been voluntarily made by accused * * *. However, the foregoing rule applicable to admissions after the crime does not apply to admissions made prior to the crime. The

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instant convictions rest primarily on confessions. As to proof of the corpus delicti of the conspiracy, "it should be noted that prosecution's evidence, independent of accused's statements, did not identify any of the accused as among the thieves. There is also a total absence of testimony that they were ever seen in possession of incriminating articles. Further, there is no proof that any of them engaged in reported conversations with respect to the theft of supplies or sale of them. But proof of the corpus delicti need not directly connect an accused with the conspiracy * * *, and it was not necessary that accused or any other member of the group who are parties to the conspiracy participate in all of the acts * * *." (3) "The evidence * * * convincingly proved that during the period alleged there were widespread and frequent thefts of cigarettes and Post Exchange merchandise (all the property of the United States) from railroad cars during their transit from * * * to Paris. The cars were opened and the merchandise removed therefrom without authority. The looting was of the same general style and pattern and the articles stolen were of the same type and kind. Specific testimony of eye witnesses disclosed the looting of freight cars within the battalion's operating district and their removal of certain of their contents by American soldiers. Pertinent testimony indicated that during the period of persistent looting, members of the * * * Battalion were seen in possession of extraordinary amounts of money and cigarettes. * * * It is difficult to reconcile the uncontradicted evidence of looting and larceny with the idea that such trespasses and thefts were disconnected and independent episodes." "While the proof of the existence of the conspiracy in the instant case must depend primarily upon evidence of a series of illegal acts, it is a reasonable inference therefrom that there was 'a closeness of personal association and a concurrence of sentiment' on the part of the wrongdoers. It was not necessary * * * to show either that there was a formal agreement and understanding * * *, nor an 'actual meeting * * *' to effectuate the purpose of the conspiracy. It may be assumed that this conspiracy did not have its origin or inception in a deliberately organized plot to defraud the Government * * *. Its focal point was a recognized non-feasance in the form of mutual inaction of the railway operatives and maintenance men whereby each was permitted to seek his own advantage without fear of detection or retribution. Such attitude resulted from the repeated commission by them of the illegal acts, which were notoriously open and within the knowledge of a substantial part of the membership of the battalion." It is therefore concluded that the corpus delicti was sufficiently established to permit the introduction of accuseds' various confessions. (4) Confessions: "The extra-judicial voluntary statements of accused * * * definitely admitted that he either broke and entered freight cars, took cigarettes and other merchandise therefrom, sold the same and retained the proceeds, or participated in and shared with others in the illicitly gained profits from similar transactions. Each accused admitted the commission of one or more overt acts in the furtherance of the conspiracy. (5) Variance: "A casual reading of the statements * * * may lead to the conclusion that the prosecution alleged one large conspiracy and proved several different and smaller ones. Such procedure has been condemned as a fatal variance by one line of authorities * * *." However, "the evidence when properly considered and applied does not show several disconnected and smaller conspiracies but rather one large conspiracy involving known and unknown

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personnel of the * * * Battalion and possibly soldiers of other organizations and the direct participation of the accused in that general conspiracy." Accused's guilt under the first specification was adequately established, whether the offense be considered as a common law conspiracy or a specific violation of the cited Federal Criminal Code Section (18 USCA 88; sec 37).

(C) Specifications 2 to 7; Wrongful Disposition: (1) These specification charged that the several accused did at the times and places alleged "wrongfully dispose of /cigarettes/ property of the United States and intended for use in the military service thereof, thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for the morale of the armed forces, during a critical period of combat operations." "The Board of Review in its appellate function has the power to construe and interpret specifications." "The specifications when considered as a whole allege something more than the unauthorized disposal of Government property furnished or intended for the military service thereof under the 9th paragraph of AW 94. * * * The offenses are not identical with but are of the same general nature and of the same degree of seriousness as the offense of destroying injuring national defense materials, as denounced by Congress in the Act of April 20, 1918, c. 59, sec. 5, as added by Act Nov. 30, 1940, c. 926, 524 Stat. 1220 (50 USCA 105). Therefore the conclusion that the specifications charged the accused with conduct which interfered with or obstructe the national defense and the prosecution of the war, is both logical and reasonable under the circumstances." (2) Proof: "Under such interpretation * * * the value of the property * * * is imaterial. Likewise the source of accused's possession has no bearing on their guilt!" (3) Evidence "The evidence clearly reveals that the War Department had determined prior to the dates of the offenses charged that cigarettes were necessary material for use by the combat forces and had supplied the same in abundant quantities. * * * The determination by the War Department, by its action in supplying cigarettes", that cigarettes were war material and morale builders "must be conclusively accepted by the Board of Review." The thefts resulted "in a diversion of the stolen articles from the usual and legitimate channels of distribution which eventually would have delivered them to combat and other troops for consumption. There was therefore a direct and positive interference with and obstruction of the national defense and of the war effort. Whether this * * * was great or small or whether it was effective or futile in its impact upon the course of events is an imaterial matter. * * * Their offenses embraced the moral turpitude of larcenous conduct denounced by the 9th paragraph of AW 94 and also the elements of sabotage and sedition * * *. While not traitors they were certainly saboteurs who consciously and deliberately stole property intended for combat and other soldiers * * *." It was to prevent diversions of war supplies "from reaching a cumulative total whereby they would produce undesirable results that Congress denounced certain conduct as criminal by specific (50 USCA 105, supra) and by general (AW 96) legislation." The corpus delicti was established. The extra-judicial statements "show that each accused except F** admitted overt acts by himself which directly convict him of the offenses with which he is charged. The record of trial is insufficient to support conviction of F** on the second specification."

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(D) Maximum Punishments: (1) Conspiracy: "Neither the offense of conspiracy (Specification 1) nor any closely related offense is listed in the table of maximum punishments." "Paragraph 104c of the MCM, 1928, provides that offenses the punishment which is not otherwise therein prescribed 'remain punishable as authorized by statute or by the custom of the service'. 'It is the custom of the service, where no limit of punishment for an offense is specifically prescribed in the Executive Order, to follow Congressional expression of what constitutes appropriate punishment'." "By reference to section 37, Federal Criminal Code, the sentence of a court-martial upon conviction of the offense of conspiracy without force or violence should not include confinement in excess of two years. The question whether conspiracy under section 37 is a crime or offense not capital under the 96th Article of War is specifically reserved inasmuch as the application of paragraph 104c, MCM, 1928 suffices in the instant case. (2) Obstructing National Defense: "Likewise neither the offense of interfering with or obstructing the national defense or prosecution of the war by diverting supplies furnished and intended for the military service from their regular channels of distribution to combat and other troops during a critical period of military operations (Specifications 2-7) nor any closely related offense is listed in the table of maximum punishments. The maximum punishments prescribed for the offense of wrongfully or knowingly selling or disposing of property of the United States furnished or intended for the military service thereof in violation of AW 94 * * * are inapplicable as the offense here charged constitutes not only a violation of that Article but as herein indicated a far more serious offense involving malignant injury to the nation in violation of AW 96 * * *. However, Congress has denounced the offense of willfully injuring or destroying or of attempting to injure or destroy, with intent to injure, interfere with or obstruct the national defense, national defense materials, national defense premises and national defense utilities and has prescribed as the punishment upon conviction of one of such offenses a fine of 'not more than \$10,000 or punishment of not more than ten years or both' (Act April 20, 1918, c. 59, sec. 5, as added by Act Nov. 30, 1940, c. 926, 54 Stat. 1220, 50 USCA 105). * * * By custom of the service * * *, therefore, the sentence of courts-martial should not include confinement in excess of ten years for each offense. In connection with the determination of the maximum punishment which may be imposed it is informative also to note that Congress has provided that the theft from railroad cars containing inter-state or foreign shipments of freight or express shall be punished by a fine of not more than \$5,000 or imprisonment of not more than ten years or both (Act Jan. 21, 1933, c. 16; 47 Stat. 733, 18 USCA 409)." Sentences must be adjusted herein accordingly. (CM ETO 8234 Young, 3 May 1945)

(1st Ind; CM ETO 8234 Young et al 1945: "I do not believe we should cumulate the findings of guilty in order to increase the penalty but rather adopt a policy which is in line with the well established practice of the Federal civil courts of allowing sentences of confinement on separate counts to be served concurrently. While the practice itself is unknown to military jurisprudence its adoption in principle in this case is sound.")

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CM ETO 8236 Fleming, et al 1945: Companion case to CM ETO 8234 Young, ante.
Not Digested.

CM ETO 8599 Hart, et al 1945: Companion case to CM ETO 8234 Young, ante,
with some additional testimony (eye-wit-
ness). Not Digested.

Accused officer was found guilty of the following violations of AW 96: (a) Wrongfully and unlawfully transporting one case of cigarettes, value about \$25, property of the U.S., then lately before feloniously stolen, taken and carried away, of which circumstances he knew; (b) Feloniously receiving, having and concealing described similar property and also candy; and (c) Failing to report the location of said property. HELD: LEGALLY SUFFICIENT. (1) Ownership: On the evidence introduced, "and on the further fact, common known, that the cigarettes and candy of the kind and quantity involved here could not have been the subject of legitimate sale to or purchase from a private individual, and could have been owned after leaving America only by the Government of the United States, the Army Exchange Service, or an allied government, it follows * * * that this property must have at some time been stolen. There was no one who could have legally transferred ownership or control of the property to the French soldier or to any person whom he may in turn have represented for the purpose of making deliveries to Madame F**". Somewhere along the line these goods were acquired by trespass, without consent of the owner, and there was a larceny. There was ample proof to support the hypothesis that accused knew this was stolen property." (2) First Specification: This alleges "that accused knowingly transported one of the cases of stolen cigarettes * * *", in violation of AW 96. "It does not necessarily involve any statutory or common law offense. That accused did, and knowingly, was to aid and assist in the wrongful diversion of property from its intended purpose of consumption by U. S. military personnel to channels of black market trade." His guilt was proved. (3) Second Specification: This alleges "that accused feloniously received one carton of cigarettes and one box of chocolates, property stolen from the U. S. Government, in violation of AW 96. Receiving stolen property is a common law offense is a common law offense * * *. As such, it is properly chargeable under AW 96 * * *. To constitute this offense it is essential: (1) that the goods should have been stolen, (2) that accused should have received the property, and (3) that he knew it to have been stolen. The proof sustains each of these elements * * *. The prosecution did not prove specific ownership of the property. Title to this property, after it left the U. S., could only have been in the Government of the U. S., the Army Exchange Service, or an allied government. The specification * * * alleged that the property was that of the U. S. This allegation may be treated as surplusage, since an erroneous allegation as to

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the ownership of stolen property is not material if the criminal act be described with sufficient certainty so as to identify it with the one accused is called to answer." (4) Third Specification: This "alleges accused's failure to report the transaction and the location of this stolen property to the authorities as an offense, in violation of AW 96. * * * His duty under the circumstances and the fact that he knew this duty required no exposition." An AW 96 offense was alleged and proved. (5) Good Faith: "The honesty of purpose and good faith of accused was an issue in each of the three offenses." Accused testified that he was playing the role of a detective, etc. However; "he accepted, if in fact he did not demand as the price of his silence, 30,000 francs which he knew came from illegal gains and sent 20,000 francs home to his father. * * * An innocent man would not have" done so. (CM ETO 9258 Davis, 18 May 1945)

Accused officer was found guilty of a black market operation in violation of AW 96; and also of behaving in a manner unbecoming an officer and gentleman, by partially destroying a signed statement which he had previously made to the CID, and attempting to chew it up in the presence of enlisted men, in violation of AW 96. HOLD: LEGALLY INSUFFICIENT FOR MORE THAN AN AW 94 OFFENSE ON THE BLACK MARKET CHARGE. (1) Charge Sheet Alteration: "The alteration of the charge sheet by pasting a sheet of paper over the original charges so that same are obscured is not the proper method to amend the charges * * *. Specification 4 alleges an offense which was revealed during the course of the investigation. It was added when the other specifications were rewritten and rearranged. There is no evidence that the amended charge sheet was submitted to the accuser for his reverification or to afford him opportunity to withdraw as accuser. The consequence is that Specification 4 was never verified and was referred to trial in that condition." The practice has been disapproved. However; "under the construction and interpretation which has been placed upon AW 70, the said irregularities do not affect either the jurisdiction of the court or the substantial rights of accused * * *. Nonetheless, they are subject to criticism. The Board of Review again expresses its disapprobation of such practices which violate the spirit of AW 70." (2) Black Market: The black market specification alleged that accused did, without proper authority, "dispose of two 60-pound cases of butter, value about \$60, property of the U. S., and intended for the military service thereof; by taking same away from * * * subsistence Warehouse in a civilian car, thereby tending to impede the war effort." "It will be assumed that the above Specification * * * states facts constituting an offense under AW 96 of wrongful and unauthorized disposition of Government property intended for, adapted to, or suitable for use by the armed forces of the U. S. under circumstances which constitute an interference with or obstruction of the war effort * * *. There is, however, a total absence of proof in this case of * * * circumstances which would show that accused 'impeded the war effort'. Judicial notice cannot be taken of such facts * * *. Consequently, the offense involving greater culpability and moral turpitude than the offenses denounced by Congress in the 84th and 94th Articles of War, was not proved and the record is legally insufficient to support the finding of accused's guilt of

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such offense * * *. However, the Specification does charge an offense under the 9th paragraph of AW 94, an offense of lesser degree than the one assumedly alleged. The gravamen of the lesser crime is the sale or disposition, wrongfully and knowingly, of Government property furnished or intended for the military service. The value of the property is not an element of the offense. The propriety of laying the charge under AW 96 is therefore an immaterial consideration." Accused's guilt of a violation of AW 94 was proved. (3) Destroy CID Statement: This Specification for a violation of AW 96 was confused. Furthermore, it "does not contain the specific declaration that accused's conduct was 'felonious' or 'wrongful' or 'illegal' or 'unlawful' * * *. Considering the Specification as a whole, however, the Board of Review believes that it alleges wrongful conduct by accused." It is inconceivable that the attempted destruction of his previous statement could be other than a wrongful act. Under no circumstances is a suspected person entitled to destroy a statement given by him in an authorized investigation of a case. The branding of his conduct as 'wrongful' or 'unlawful' would add nothing either to the quality or quantity of his acts." Conclusions contained in the specification may be disregarded. An AW 96 offense was alleged and proved. (CM ETO 9987 Pipes, 18 May 1945)

Accused officer was found guilty of violations as follows: (a) AW 96--violate ETO Cir 53 by reselling 7 cartons of cigarettes and described candy and coffee, items purchased in an Army exchange; (b) AW 95--wrongfully and publicly resell the above items in a public street of Paris at described exorbitant prices; (c) AW 94--wrongfully dispose of by delivering to a civilian two cases of cigarettes, property of the U.S. furnished and intended for the military service thereof (two specifications for each case); and (d) AW 61--AWOL from command for three days. HELD: LEGALLY SUFFICIENT. (1) The evidence "establishes that accused purchased certain items of Army Exchange merchandise at the established exchange price and that he later transported this property in a jeep to a public square in Paris, France, where he peddled and sold the goods (American cigarettes and candy) to French civilians, at exorbitant prices. Par. 7g, Cir 53, Hq. ETO, 17 May 1944, provides that: 'The resale, barter or exchange of any item purchased in an exchange is prohibited'. The conduct of accused * * * constitutes, in addition to a direct violation of the directive of his Command, an act of a most disgraceful and dishonorable nature, which seriously compromises his character and standing as an officer and gentleman. He was a member of the Exchange Council and the officer responsible for the operation of a Branch Exchange for the benefit of General Staff and other officers, and therefore, knew or should have known of the prohibition * * *. He is charged with a knowledge of the circulars and directives of his Command." (2) All findings of guilt were sustained. (CM ETO 11216 Andrews 1945)

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(19) Borrowing from Enlisted Men454(19)(19) Borrowing From Enlisted Men:

At the latter's request, an enlisted man loaned accused officer \$25.00. No receipt was given and no definite date of repayment was fixed, although the enlisted man expected to get his money back. It was not repaid. Accused officer was found guilty of a violation of AW 96. HELD: LEGALLY SUFFICIENT. The above conduct on the part of the officer constituted a violation of AW 96. (CM ETO 1786 Hambright 1944)

Accused officer borrowed money from enlisted men, six of whom were members of his company, and all of whom were members of his battalion. He was found guilty of a violation of AW 96. HELD: LEGALLY SUFFICIENT. The acts shown were "all within the general rule that borrowing by an officer from enlisted men of his organization is a violation of Article of War 96." While the specific dates of the loans were not shown as to several of the transactions, the two-year statute of limitations provided by AW 39 could not have run. Accused has been in the service less than two years, so it is reasonable to assume that the offenses occurred within the statutory period. (CM ETO 2972 Collins 1944)

454(19a)(19a) Borrowing from Officers(19a) Borrowing from Officers:

Accused commanding officer of an MP company was found guilty of a violation of AW 96, in that he had dishonorably failed and neglected to pay enumerated debts to officers. He was also found guilty of violations of AW 95, in that he had dishonorably failed and neglected to pay enumerated debts to enlisted men. HELD: LEGALLY SUFFICIENT (1) AW 96: Accused borrowed various sums from various officers at times when he was unable to repay for any definite time (note that he set date of repayment in two weeks as to one loan, without apparent ability to do so). Thereafter, while he acknowledged his debts, he did not repay the amounts, and was indifferent in regard to their repayment. "While 'unless failure or neglect to pay a debt involves evasion or indifference to just obligations, there is no offense cognizable under the Articles of War' (CM 240754, Request; CM 207212, Thompson), accused herein obtained the loans without disclosing his financial situation to be involved, met repeated requests for repayment with complete indifference toward his admitted obligations and failed to apply any of his September pay on these debts though at the time of the trial he still had money." In the circumstances, an offense in violation of AW 96 was proved. (2) AW 95: Likewise in the circumstances, accused's borrowing from enlisted men, his indifferent failure to repay, and his concealment of various facts concerning his own financial situation, amounted to violations of AW 95. (CM ETO 5459 Kuse 1945)

(20) Breach of Parole

454(20)

(20) Breach of Parole:

Cross References: 416(14) 5774 Schiavello

454(20a)(20a) Breach of Peace(20a) Breach of Peace:

Cross References: 454(72a) 7001 Guy (Officer fails to stop EI fight)

Among other things, accused were found guilty of a violation of AW 96 in that they did, in the night time, breach and disturb the peace by wrongfully and unlawfully entering the dwelling of a private civilian, and while in said dwelling with force and arms unlawfully and riotously and in violent and tumultuous manner and to the terror and disturbance of the private family, did forcibly search the dwelling, including the bedroom, in an attempt to find a 16-year old girl. They were sentenced to ten years. HELD: LEGALLY SUFFICIENT. (1) An AW 96 offense was sufficiently stated. "It is not alleged that such acts were committed wilfully or with any specific intent and therefore drunkenness would not constitute a defense. In any event, even if the specification is interpreted to require a specific intent as an element of the offense charged, whether the accused were too drunk to be capable of entertaining the requisite intent was, under the evidence here presented, a question of fact for the court." (2) Punishment: "The wording of the specification suggests that the draftsman thereof intended to charge an offense closely related to committing a riot denounced by AW 89 for which no limitation of punishment is prescribed by the Table of Maximum Punishments. While it is true that there are decisions holding that conduct similar to that of which accused were here found guilty constitutes a riot (49 ALR 1135), the question whether the conduct here shown could be said to be a riot or conduct closely related to that offense is at least a rather close one especially when it is remembered that a riot imports at least some suggestion of mob violence and is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such' * * *. In any event, the offense here in question is analogous to that mentioned in CM 238825, Jones * * * for which ten years confinement was imposed and, in addition, the accused were convicted of absence without leave in violation of AW 61 for which the limitation of punishment set forth in the Table of Maximum Punishments has now been suspended. The sentence is therefore within the authorized maximum." (CM ETO 5741 Kennedy et al 1945)

(21) Breach of Restraint454(21)(21) Breach of Restraint:Not Digested:

2023 Corcoran (breach restriction)
 2289 Grines (breach restriction)
 800 Ungard (attempt to escape arrest)
 1904 Mayer (breach restriction)
 3991 Valdez
 5032 Brown (Lesser to AW 69; breach of restraint; breach of restriction)
 8189 Ritts, et al (breach restriction)

Cross References: 385 8194 Shearer
 395(7) 3212 Robillard

Accused's commanding officer told him that an absence without leave which he had committed was a court-martial offense, but that he was going to impose only company punishment upon him. He then restricted him for one week. Entry thereof was made in the company punishment book under AW 104. Accused broke his restriction. He was found guilty of that breach, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Punishment under AW 104: While the company punishment inflicted upon accused was legal in its amount, there was a total failure of the officer to tell him of his right to demand a court-martial in lieu of summary punishment, and of his right to appeal from the punishment imposed. The restriction imposed upon accused was therefore not a "lawful command" within the purview of AW 64. (2) Cumpability: Despite the above conclusion, accused did not have the right deliberately and wilfully to flout the commander's disciplinary control over him. "His conduct in ignoring his commander's control and authority displayed such a spirit of insubordination and defiance as to constitute a disorder prejudicial to good order and military discipline under the 96th Article of War." (CM ETO 1366 English 1944)

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454(21)

(22) Carnal Knowledge454(22)(22) Carnal Knowledge:Not Digest:2875 Gray, et al2905 Chapman3470 Harris

Cross References: 454(56a) 4119 Willis (Fornication; lesser offense)
454(13) 10967 Harris (Attempt; interpretation of)

Accused had been found guilty of having carnal knowledge with a girl under sixteen years of age, in violation of AW 96, by a summary court-martial. However, the reviewing authority concluded that this was null and void, because the specification against accused had omitted the words "unlawfully and feloniously". Accused was not found guilty by a general court-martial of unlawfully and feloniously having carnal knowledge with the same girl under sixteen years of age, in violation of AW 96. HELD: LEGALLY SUFFICIENT. Accused's plea of double jeopardy should have been sustained. In a statutory rape case, the "intent" of an accused is immaterial. "The act is malum prohibitum. All that it is necessary to allege and prove is the act of intercourse, and that the girl was under sixteen years of age. The words 'unlawfully and feloniously' in the otherwise identical specification of which he was subsequently tried by general court are conclusions of the pleader and, as such, mere surplusage." "Although the commanding officer was directed not to try cases of statutory rape by inferior court-martial, such direction could not deprive the summary court-martial of the jurisdiction conferred by statute." The summary court trial of this accused was complete when the reviewing authority took final action. Double jeopardy in violation of AW 40 resulted, when he was again tried for the same offense before the instant court-martial. (CM)
ETO 2550 Tallent 1944

Accused were found guilty of having carnal knowledge of a female under sixteen years of age, in violation of AW 96. HELD: LEGALLY

454(22)(22) Carnal Knowledge

SUFFICIENT. Certain civil offenses constitute violations of AW 96, provided they are committed under circumstances rendering them prejudicial not only to good order but also to military discipline. "Unlawful carnal knowledge of a female under sixteen years of age is a felony denounced by Federal statute (sec. 279 Federal Criminal Code, 18 USCA 458; 35 Stat. 1143; D.C. Code 22-2801 (6:32), p. 536)." "Accused were soldiers in the military service of the United States in time of war, stationed at a camp in an allied country and among a friendly people. A school girl of the community, of less than thirteen years of age, was allowed in the camp and in one of the soldier's living quarters where she became common property and was defiled by each of" the accused. This constituted a violation of AW 96. (CM ETO 2620 Tolbert 1944)

Accused was found guilty of the statutory rape of a nine-year old girl, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) "Since the witness was below the age of consent, * * *, it was not required that the prosecution show lack of consent and the use of force. Carnal knowledge of a female under sixteen years of age by a soldier in the military service of the United States is conduct discreditable to the service and, as such, is a violation of Article of War 96." (2) The conviction of accused was sufficiently based solely on the uncorroborated testimony of his nine-year old victim. "The witness was sworn, after which the trial judge advocate asked her, in effect, if she knew that her oath required that she tell the truth. The acceptance of her testimony by the court was a matter of discretion based upon her apparent understanding of the moral importance of telling the truth. This understanding may be determined without preliminary examination but by the coherence and intelligence of the witness' testimony." (CM ETO 2759 Davis 1944)

The offense of unlawful carnal knowledge of a female under the age of sixteen years, committed in England, is properly laid under the 96th Article of War. Reference to British law is improper (Military Justice Cir. 6, BOTJAG with ETO, par. 2, 11 Nov 1943). The offense is denounced and made punishable for the first offense by imprisonment for not more than fifteen years by Federal Criminal Code Section 279 (35 Stat. 1143; U.S.C. 458). Evidence bearing upon the extent of the female's age below sixteen years, and accused's knowledge or belief with respect to her age, is immaterial. Likewise, an allegation, that the female under sixteen years of age was above the age of thirteen years, is immaterial, and may be treated as surplusage. (CM ETO 1366 English 1944)

1st Ind CM ETO 1366 English 1944: In the trial of a case involving "statutory rape" committed in England, it is improper for a trial judge advocate to refer to Memo No. 1 JA, 303, ETO, 1 Jan 1943,

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stating: "If evidence of the law of England is introduced to show that 'statutory rape' is a crime in England, evidence of this statutory defense would appear to be admissible in evidence in applicable cases to show a recognized extenuating circumstance." This memorandum is not in force. "The English Law covering this type of offense is entirely irrelevant and not for consideration or application by United States courts-martial (See Military Justice Cir. 6, BOTJAG with ETO, par. 2, 11 Nov 1943.)"

Two accused were found guilty of the statutory rape of a girl under 16, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Age of Victim: In order to prove the age of the victim, the prosecution called a British police inspector. He produced an "original" birth certificate, which was then introduced after defense counsel stated, "No objection". After its admission, it was withdrawn and a copy was substituted. "Congress has specifically provided the form of certification and authentication of any document of record in a public office of a foreign country as follows: 'A copy of any foreign document of record or on file in a public office of a foreign country, or political subdivision thereof, certified by the lawful custodian of such document, shall be admissible in evidence in any court of the United States when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, certifying that the copy of such foreign document has been certified by the lawful custodian thereof. Nothing contained in this section shall be deemed to alter, amend, or repeal section 689 of this title' (Act June 20, 1936, c 640, sec 6; 49 Stat 1563; 28 USCA sec 695e). The phrase 'any court of the United States' found in the foregoing statute includes courts-martial * * *. The foregoing statute is particularly applicable to British birth certificates * * *. However, the defense counsel, when it was offered in evidence, affirmatively indicated that he had no objection to its admission. Under these circumstances the irregularity was clearly waived." The principle of waiver stated in MCM, 1928, par 116a, p 120, "may be applied to the authentication of public records of a friendly foreign host country wherein Federal military courts are sitting." (2) Accused's conduct "was a reflection not only upon the moral standards of the American people but was also directly prejudicial to good order and military discipline and constituted conduct of a nature to bring discredit upon the American military service" in violation of AW 96. (CM ETO 2663 Bell et al 1944) (See 395(18) Memo TJAG 30 Mar 45 Washington re 49 Stat. 1561)

(1st Ind; CM ETO 2663 Bell et al 1944): The 15-year confinements imposed upon each accused "are the maximum and most severe adjudged in this Theater for statutory rape. In the interest of uniformity, the sentences should be reduced to ten years * * *."

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(22) Carnal Knowledge

Among other things, accused was found guilty of the offense of carnal knowledge of a female under 16 years of age, in violation of AW 96. He was sentenced to confinement for five years. HELD: LEGALLY SUFFICIENT.

Basis of Offense of Carnal Knowledge: In the European Theater of Operations, "the Board of Review held in CM ETO 1366, English, that the offense of carnal knowledge of a female under 16 was properly chargeable under AW 96, because 'this offense is denounced and made punishable for a first offense by imprisonment for not more than 15 years by Fed. Crim. C. sec. 279 (35 Stat 1143; USC 458)'. No doubt influenced by CM 211420, McDonald, the Board of Review held in CM ETO 2620, Tolbert & Jackson, that the offense under present consideration was properly laid under AW 96, because it was not only 'a crime or offense not capital', a felony denounced by Federal Statute (sec 458, Title 18, USC), but because it was service discrediting as well, the McDonald case, supra, being cited as authority for the latter proposition. In CM ETO 2663, Bell & Kimber, the Board of Review held that similar conduct was prejudicial to good order and military discipline and also service discrediting, in violation of AW 96, on the authority of CM ETO 1366, English, and CM ETO 2620, Tolbert & Jackson. In CM ETO 2759, Davis, the Board of Review held this conduct was service discrediting, in violation of AW 96, on the authority of the McDonald case, and CM ETO 2620, Tolbert & Jackson. And, in CM ETO 2875, Gray et al, this offense was held properly laid under AW 96, on the authority of the McDonald case and CM ETO 2620, Tolbert & Jackson, the Board saying that the conduct was 'also a felony denounced by Federal Statute (18 USCA 458).'" Since in England, legal definition of statutory rape is somewhat different than in the U.S., "it follows that not every case of 'statutory rape' under sec 458, title 18, USC, would bring discredit to our military service if committed in England." "It does not seem, therefore, that the Army's right to punish conduct which falls below American standards should be stated to rest on such a tenuous basis, viz: that it is service discrediting * * *. Congress intends that crimes should be tried as crimes, and that service discrediting conduct was something else again, and should be so tried." For a proper interpretation, special and local Federal laws should be distinguished from Federal laws of general application. "The particularization by the 1928 edition of the Manual, of those local statutes which it says are limited, necessarily excludes from such limitation statutes of general application. The Federal statute which denounced the offense of carnal knowledge of a female under 16 is a statute of general application as that definition is employed by military law. (Analogy: It is an offense punishable by penitentiary confinement under AW 42, and all offenses so punishable are condemned by U.S. statutes of general application. AW 42 definitions in this regard should also apply to AW 96.) "The conduct of accused being an offense, denounced by section 458, title 18, USC, is a 'crime or offense not capital', and, as such, a violation of AW 96." (Refuse to follow CM 211420, McDonald) (CM ETO 3044 Mullaney 1944)

NOTE RE ABOVE CASE: By letter, 22 February 1945, The Judge Advocate General stated that he was unable to concur in the opinion rendered in CM ETO 3044 Mullaney 1945. He stated: MCM 1928, par 15c is appli-

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cable. CM 211420 McDonald is not to be overruled. "Statutory rape must be prosecuted as conduct of a nature to bring discredit upon the military service under AW 96. The fact that public opinion in England or in other foreign countries might not condemn the act is immaterial, if the act were to the discredit of the military service judged by American standard. The foregoing in no way affects the legality of the conviction or the sentence in ETO 3044 Mullaney. Under our authorities it is unnecessary that the specification should allege that the act done was to the discredit of the military service if in fact it was. Penitentiary confinement is authorized under District of Columbia Code Sec 22-2801 (6:32)." (See IV Bull. JAG 57 (454(88)); SPJGJ ETO 3044, 22 February 1945)

AW 96

GENERAL ARTICLE

454(22)

(22a) Censorship Violations
(22aa) Civilian Clothing; Wrongfully
Wear.

554(22a-aa)

(22a) Censorship Violations:

Cross References: 454(65a) See, in general

(22aa) Civilian Clothing; Wrongfully Wear:

Not Digested:

1691 Artwell
2215 Broderick
2216 Gallagher
6198 Bean

454(22b)

(22b) Commercial Activities; Private Business(22b) Commercial Activities: Engage in Private Business:

Two officers and an enlisted man (Goldstein) were found guilty of joint charges of (a) wrongfully applying an Army jeep to their own use and benefit, in violation of AW 96; and (b) wrongfully engaging in commercial transactions for personal gain, to wit, purchasing and reselling at a profit approximately 362 bottles of champagne to private French hotel operators. The enlisted man was additionally found guilty of AW 96 specifications of selling described champagne in France at a price of 225 francs per bottle, which price was in excess of the legal prices established by the French Republic. All sentences included confinement. The enlisted man's dishonorable discharge was suspended. HELD: LEGALLY INSUFFICIENT AS TO THE ENLISTED MAN, ON THE SPECIFICATIONS OF SALES ABOVE THE FRENCH PRICE LEVELS. (1) The AW 94 offense was established. (2) Private Commercial Activities: "The activities alleged are not only incompatible with the status of accused * * * as officers of the Army, but are of such nature as to tend to interfere with and hamper the full and proper discharge of their duties in this active theater of operations and certainly to give rise to the reasonable inference that they would have that effect." The constitute violations of AR 600-10, WD, 8 July 1944, par 2e. "Failure to comply with Army Regulations has long been recognized as an offense in violation of AW 96 (CM ETO 1872, Sadlon * * *). The Specification manifestly stated such an offense. Testimony of the purchasers of the champagne established the corpus delicti of each of the joint offenses alleged and accuseds' confessions proved their guilt thereof beyond doubt. The evidence that the amount of prisoner-of-war interrogation work was greatly decreased during the period of accuseds' activities and that sufficient personnel were available therefor was introduced for the evident purpose of establishing that such activities did not interfere with or hamper their discharge of their duties. Such fact, however, is immaterial under the terms of the above quoted Army Regulations where, as here, the activities tended toward such interference and hampering and would be likely to have that effect." (3) Sell Above Established Prices: Defense stipulated to the contents of a letter which stated a French director's opinion of ceiling prices in his district, pursuant to French laws of 1942 which fixed the champagne price as of the 1st of September 1939. "The due and legal constitution of the authority under which 'the French laws of 1942' were promulgated is not shown in the letter or supplied by the stipulations and, particularly in view of the hostile occupation of the district in question at the time under consideration, certainly may not be presumed or judicially noticed. Moreover, the letter and stipulation show only 'prevailing prices of champagne' on 7 November 1944, well over a month after the termination of the period during which the sales were effected, and the opinion of the official, whose authority is not proved and may not be presumed or judicially noticed, of ceiling prices in the district in question as of 1 September 1944. * * * There was thus a failure of proof * * *, which failure could not be cured by mere acquiescence on the part of the defense. (4) Con-

(22b) Commercial Activities; Private Business545(22b)

fession; Oaths: "The admission in evidence of the confessions was free from error in view of the evidence that accused stated that they knew the contents thereof, that they were true and that they were signed by them. There is no requirement in the law that a confession be sworn to in order to be admissible." The confession was sufficiently shown to have been voluntary. "A confession will not be excluded because of mere 'casual remarks or indefinite expressions' which need not be regarded as having inspired hope or fear". (CM ETO 9345 Haug et al 1945)

(1st Ind; CM ETO 9345 Haug 1945: As the offenses, if any, alleged against the enlisted man, re selling at above ceiling prices, "do not involve moral turpitude, the Board's opinion that the record of trial is legally insufficient to support the findings of guilty of those specifications * * * does not necessitate further action * * * with respect to him under paragraph 5 of Article of War 50 $\frac{1}{2}$. (Memorandum for the Secretary of War, April 13, 1923, Cps. JAG 250.404, signed by W. A. Bethel, Judge Advocate General, and subsequently approved by the Secretary of War). It would be appropriate, however, to consider whether remission should be made of any part of his term of confinement in view of the invalid conviction of these three specifications."

454(22c-25a)(22c) Concealed Weapons(22d) Concealing Stolen Goods(23) Conspiracy(25a) Contribute to Delinquency of Minor(22c) Concealed Weapons:Not Digested:2901 Childrey

Cross References: 450(1) 3649 Mitchell (3" knife blade)
 451(2) 3911 Jackson (3" knife blade)
 454(33) Disobedience of Standing orders, generally

(22d) Concealing Stolen Goods:Not Digested:2911 Arndt(23) Conspiracy:

Cross References: See Individual topics; also
 454(18a) 8234 Young (black market--also note companion cases)
 454(49) 9341 Williams (conceal cause of death)

(25a) Contribute to Delinquency of Minor:

Cross References: 454(22) Carnal knowledge; generally.
 454(63a) Indecent liberties; generally.

(27) Defamatory and Insubordinate
Statements

454(27-30a)

(29a) Denying Identity

(30a) Destruction of Official Statements

(27) Defamatory and Insubordinate Statements:

Cross References: 454(38) 1388 Madden (Officer, as lesser offense
under AW 94)

"Under existing conditions in this theater, any conduct, whether by white or colored troops, which tends to promote racial discord in the military service is highly prejudicial to good order and military discipline." (CM ETO 3992 McKinnon 1944)

(29a) Denying Identity:

Not Digested:

2215 Broderick

(30a) Destruction of Official Statement:

Cross References: 454(18a) 9987 Pipes (Statement made to CID
officer, re black market)

454(32a-33a)(32a) Disobedience(33a) Disobedience of Standing Orders(32a) Disobedience:

Cross References: 422 1057 Redmond (Punishment under AW 104; punishable under AW 96 rather than AW 94)
 454(21) 1366 English (Punishment under AW 104; illegal, and yet an offense for violation)
 454(38) 1388 Madden
 454(45a) Failure to Obey; see generally

(33a) Disobedience of Standing Orders:Not Digested:

2215 Broderick (Officer goes into fire)
 3714 Whalen (Officer of Day; inspect guard)
 4550 Moore, et al
 4732 Long (Possess intoxicating liquor on transport; violate transport order)
 5010 Glover (Officer attempts to take off in airplane without proper clearing, in violation of Flying Bulletin)

Cross References:

450(1) 3649 Mitchell (Concealed 3" knife blade)
 451(2) 3911 Jackson (Concealed 3" knife blade)
 451(50) 9745 Adams (Firing of weapons)
 454(18) 3456 Neff (Marriage in violation of ETO circular; judicial notice to accused; bigamy; false oaths)
 454(65a) 1872 Sadlon (Mail regulations)
 454(69aa) 5609 Blizard (Hospital order re narcotics)
 454(105) 2966 Fomby (Transport civilian in Army vehicle; AR)

(33a) Disobedience of Standing Orders

454(33a)

Accused drove a government vehicle, in violation of a divisional standing order. He was found guilty of violating AW 96. HELD: LEGALLY SUFFICIENT. "This disobedience constituted an offense under the 96th Article of War * * *. Obviously accused was not driving the car during any training process. Even to suggest that he was driving on the occasion of an 'emergency' within the purview of the standing order is an affront to common sense. He was driving for his own pleasure and satisfaction on his own mission." (CM ETO 1447 Scholbe 1944)

Disobedience of a standing verbal order is a disorder and neglect to the prejudice of good order and military discipline, in violation of AW 96. (MCM, 1928, par. 152a, p. 187) (CM ETO 1953 Lewis 1944)

Among other things, accused was found guilty of a violation of AW 96, in that he had failed to obey an order from his officer to keep out of all farmyards and residences of French civilians. HELD: LEGALLY SUFFICIENT. Although the officer "read the battalion order" to the assembled company, it would have been preferable to have alleged the offense as a failure to obey a standing order rather than the failure to obey the direct order of" the officer. "However, inasmuch as the order itself was read personally by the officer at the company formation and accused was present at the time, it cannot be said that he was misled in any way as to the gist of the offense * * *." No prejudice resulted. (CM ETO 3416 Conyer Jr 1944)

Among other things, accused officer was found guilty of the following violation of AW 96: (a) Wrongfully exchanging Belgian francs for Dutch guilders in violation of Administrative Memorandum No. 35, Supreme Headquarters, Allied Expeditionary Force, 25 October 1944, subject: 'Transactions in Currency and Foreign Exchange Assets'; thereby unlawfully profiting to the extent of approximately \$535; and (b) wrongfully participating in a transaction involving the exchange of Belgian francs for Dutch guilders in violation of Section IV, Memorandum No. 98, 9th U.S. Army, dated 3 November 1944, prohibiting such transactions except through authorized agencies, thereby unlawfully profiting to the extent of approximately \$1,425. HELD: LEGALLY SUFFICIENT. (1) The evidence, including accused's admission, is unimpeached that he violated the specific terms of the prohibition in the two memoranda, of which the court took judicial notice, by participating in transactions involving the exchange of one currency, Belgian francs, against another currency, Dutch guilders, through other than authorized agencies. The only question * * * is whether such memoranda had the effect of legal, operative standing orders, binding upon accused at the time of his alleged offenses."

454(33a)(33a) Disobedience of Standing Orders.

(2) Memoranda; Notice of: The first memorandum referred to "is a 're-
stricted' document, signed 'By command of General Eisenhower' by the
Adjutant General, and marked 'Distribution 'D''.' As to the authenticity
* * * there can be little question, the action of the President * * * in
concurring, on behalf of the U.S., in the appointment of General Eisenhower
as Supreme Commander of the British and United States Expeditionary Forces
(The Stars and Stripes, 28 December 1943), later designated as Supreme
Headquarters, Allied Expeditionary Force, was indisputably in the exercise
of his constitutional powers in time of war as Commander in Chief of the
Army. It was therefore binding upon all within the sphere of the Presi-
dent's legal and constitutional authority * * * and could not be set aside
by the civilian courts as it was not in conflict with the Constitution or
laws of Congress * * *. The Board of Review will likewise not question
the authority of General Eisenhower as Supreme Commander of the Allied Ex-
peditionary Force to issue legal directives binding upon U.S. Army person-
nel of his command. In promulgating orders in their general military
capacity, superior military commanders directly represent, and exercise the
authority of, the Commander in Chief * * *. Thus the Board likewise will
not question the legality of an order promulgated by the Supreme Commander
regulating matters of currency among U.S. Army personnel of his command
in the absence of indication that it is in conflict with mandate of
higher authority. * * * The memorandum * * * was a valid and legal
directive. (3) The prohibition * * * is a matter of importance, directive
in nature and evidently of permanent duration. * * * It is thus in the
nature of a general order, apart from its designation as 'Administrative
Memorandum', which in view of the foregoing is not controlling (AR310-
50, WD, 8 August 1942, par 2). That it was operative on the date of
accused's offense * * * seems clear. It became effective as part of
the written military law * * * on the date of its promulgation, i.e.,
the date of its release and distribution by deposit in the mails (AR 310-
50, supra, par 14b). In the absence of evidence to the contrary, it may
be presumed that the directive was released and distributed on or about
the date it bears in the regular course of performance of their duties by
the officers concerned * * *. Accused was thus chargeable with notice
of the prohibition * * *." (4) Second Specification: The second trans-
action violated the directive above discussed also. "Assuming that the
draughtsman of this specification was not aware of said directive, this
does not prevent its being applicable where the facts alleged * * * set
forth a violation of its provisions. * * * Memorandum No. 98, Hq 9th
U.S. Army, dated 3 November 1944, was also violated by accused, whose
organization * * * was a component part thereof. With respect to its pro-
mulgation, the Army Commander had authority and power equivalent to that
of the Supreme Commander. * * * The Board of Review is of the opinion
that it was a legal and valid directive." (CM ETO 7553 Besdine, 1945)

(33a) Disobedience of Standing Orders

454(33a)

454(34-37)(34) Disorderly Conduct(35) Disrespectful Conduct Toward Superior Officer(37) Drinking With Enlisted Men:(34) Disorderly Conduct:Not Digested:E458 Penick (Officer; public place; in uniform)(35) Disrespectful Conduct Toward Superior Officer:Not Digested:1920 Horton (Insubordinate manner of behavior)3716 Spirer (While before enemy and military personnel, officer used malicious, defiant, threatening and disrespectful language toward his superior officer, to wit: threatened to cut his legs off, should he reach the Battalion Aid station where he was the doctor)3801 Smith (Threats and Insults to Superior Officer)

Cross References: 451(2) 4059 Bosnich (Merchant seaman on boat; disrespect to superior officer; specification struck from charges by law member)

422(6) 4750 Horton Jr

454(63b) See generally, re insubordinate conduct

(37) Drinking With Enlisted Men:Not Digested:3714 Whalen4782 Long (on boat)5010 Glover

Cross References: 451(50) 6235 Leonard (lesser to AW 95 charge)
 453(18) 7246 Walker (lesser to AW 95 charge)
 454(72a) 7001 Guy (As excuse for officer's failure to stop EM fight)

(37a) Driving While Drunk454(37a)(37a) Driving While Drunk:

Cross References: 454(69b) Negligent Operation of Vehicles

Accused officer was found guilty of (a) driving a vehicle while drunk, in violation of AW 96, and (b) wrongfully taking and using without lawful permission a Government vehicle, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) "The statement of accused that he had been driving the car was an admission only, and as such it was properly received in evidence without any showing of its voluntary nature." (MCM, 1928, par. 114b, p. 117) (2) "The number of drinks which accused consumed during the evening, his meeting with * * * having occurred about twenty minutes after his departure, had a material bearing on the issue of drunkenness and the witness should have been allowed to answer" questions in that regard. (3) When two witnesses stated that they were not sure whether they could recognize accused, the president of the court told accused to stand. He then asked them if he was the person. "The action of the president of the court in pointedly directing the attention of the two witnesses to accused in the manner disclosed by the record was improper and it is a practice not to be condoned." However, the procedure did not violate the Fifth Amendment to the Federal Constitution. (MCM, 1928, par. 122b, p. 130) (4) Non-prejudicial error resulted when the court refused to accept a stipulation that, if a named witness was present, he would testify that, to his knowledge, accused was not drunk. "A stipulation need not be accepted by the court nor is the court bound by a stipulation even if received (MCM, 1928, par. 126b, p. 136.) However, the issue as to whether accused was drunk while driving the vehicle was one of fact * * *. The court based its rejection of the stipulation on the ground that a number of witnesses had already testified on that issue. (CM ETO 1107 Shuttleworth 1943)

The allegation, "that accused did 'while under the influence of alcohol, recklessly operate a motovehicle upon the public highway in such a manner as to cause an accident' states an offense in violation of Article of War 96. It is not necessary that the words used in the specification state specifically that the alleged act was 'wrongful' or 'unlawful' if they imply such character. * * * The act of driving of a Government motor vehicle under the circumstances alleged is inherently wrong." (CM ETO 1366 English 1944) (See digest of other portions of this case in 454(21) and 454(63a) herein).

454(38)(38) Drunk and Disorderly(38) Drunk and Disorderly:Not Digested:

128 Rindfleisch (in uniform, public)
 873 Bloom
 2583 Moffit (in uniform, public)
 2867 Cowan (in command)
 3076 Patterson (public place)
 3212 Mull (in station)
 3801 Smith (in camp)
 4550 Moore et al (in quarters)
 5027 Newcombe (MP officer, station)
 5464 Hendry (public place)
 7902 Taylor (in camp)

Cross References: 451(1) 4386 Green (in uniform)
 453(10-1) Officers; lesser to AW 95 charge)
 10362 Hindmarch (charged under both AW 95
 and 96)
 454(7) 8456 Thorpe (with assault)
 422(5) 9162 Wilbourn (at scene of military operations
 in Germany)

(38) Drunk and Disorderly

454(38)

Accused officer was charged with (a) using insulting and defamatory language toward various persons, in violation of AW 95, and (b) being drunk and disorderly in uniform in a public place, in violation of AW 96, and (c) failure to obey an order of a superior officer, in violation of AW 96. He was found guilty of violations of AW 96.

HELD: LEGALLY SUFFICIENT. (1) Although accused's drunken and disorderly conduct may not have been so aggravated as to amount to conduct unbecoming an officer and a gentleman in violation of AW 95 because it was neither gross nor conspicuous, it undoubtedly was discreditable and as such properly punishable under AW 96. (2) The disobedience charge was likewise sufficiently supported. Accused had been told by his superior officer to stay around the area, and to be ready for duty the next morning. Instead, he left the area and did not return until about 3:15 am that next morning. (CM ETO 1388 Madden 1944)

Accused officer was found guilty of the following violations of AW 96: (a) drunk and disorderly in uniform in a public place; (b) wrongfully striking an enlisted man and a civilian with his fists; (c) wrongfully striking another civilian with his arms and hands; and (d) wrongfully grabbing and violently shoving another enlisted man backwards. He was dismissed from the service. HELD: LEGALLY SUFFICIENT. The evidence supported the findings of guilt. Dismissal of an officer is authorized as a penalty for his violation of AW 96. (CM ETO 9304 Suitt, Jr. 1945)

454(40a,44a)(40a) Drunk on Duty; Endanger Safety of Outfit Before the Enemy(44a) Failure to Disclose EM violations of Order; by Officer(40a) Drunk on Duty; Endanger Safety of Outfit Before the Enemy:

Accused was found guilty of a violation of AW 96 in that, while before the enemy, he did by his misconduct endanger the safety of Task Force * * *, which it was his duty to defend, in that he became drunk while a member of an anti-tank gun crew on outpost duty. HELD: LEGALLY SUFFICIENT. "The evidence adduced, while lacking in detail, showed that accused was assigned to perform the duties of an ammunition carrier with a five-man gun crew set up as an outpost to protect a road and bridge at a time when his platoon was under enemy fire. It was also shown that accused became grossly drunk while assigned to this duty. By such action he unfitted himself for the performance of his duty at a time when his services were highly necessary thus increasing the hazards to which his unit was already subjected. This offense, while here charged under AW 96, is similar to the conduct denounced by AW 75, and the evidence here presented might well have been sufficient to support a finding of guilty under the latter article had the offense been so charged * * *. In any event, the offense * * * constitutes a closely related military offense under AW 96 and the evidence present is sufficient to sustain a finding of guilty of the offense charged * * *." (CM ETO 4352 Schroepel 1944)

(44a) Failure to Disclose EM Violation of Order; by Officer:

Accused officer was found guilty of a violation of AW 96, in that he failed to disclose to his commanding officer that enlisted men of * * * Company were violating a company order prohibiting them from sending home money in an amount in excess of their pay plus 50%, when he knew that about 40 of the EM were violating that order. HELD: LEGALLY SUFFICIENT. (1) The PROSECUTION'S EVIDENCE PLUS ACCUSED'S CONFESSION established his guilt. Whether or not the order alleged to have been violated was in effect during the time of accused's offense was a question of fact for the court. Accused's conduct showed an intentional and calculated evasion of duties, which was to the prejudice of good order and military discipline within the meaning of AW 96. (2) ORDERS: "This case was referred for trial on 23 November 1944 to a court appointed by the Commanding General, Loire Section, and the action was signed 13 Jan 1945 by the Commanding General, Brittany Base Section. A copy of GO 66, Hq CZ, ETO, 30 Nov 1944 accomplishing the indicated changes or merging of commands should have been attached to the record (Mil. Jus. Cir. 2, Par 1, BOTJAG, 8 Feb 1944)." (CM ETO 7901 Barfield 1945)

(45a) Failure to Obey454(45a)(45a) Failure to Obey:Not Digested:

1515 Smith
 2867 Cowan
 3080 Holliday (Wrongfully refuse to
 go on bomber operational
 mission)
 3212 Mull (flight officer)
 4619 Traub (officer)
 8189 Ritts, et al

Cross References:

422 As Lesser Offense to AW 64 Charge:
 1057 Redmond
 4102 Savage
 4376 Jarvis
 4453 Boller
 4750 Horton (AW 96; Insubordination)
 5607 Baskin
 7584 Emery
 8455 McCoy (Specification)
 433(2) 6376 King (with AW 75)
 453(18) 2777 Woodson
 454(33) 3416 Conyer Jr
 Disobey Standing Orders; generally
 454(38) 1388 Madden
 454(69b) 7913 Smithey
 416(3) 7379 Keiser
 419(2) 9260 Rosenbaum
 422(5) 9162 Wilbourn (As lesser to AW 64 charge)

454(46)

(46) Failure to Pay Debts

(46) Failure to Pay Debts:

Not Digested:

2506 Gibney

Cross References: 454(81a) 7245 Barnum
 453(13,23) 1803 Wright (officer)
 2581 Rambo

"The mere failure of an officer to pay a debt is not a dishonorable act in violation of Article of War 96 unless the failure to pay the same is characterized by fraudulent design to evade payment or the debt was incurred deceitfully or fraudulently under facts and circumstances which would bring discredit upon the military service * * *." (CM ETO 2506 Gibney 1944)

(47a) Failure to Render Aid After Accident454(47a)(47a) Failure to Render Aid After Accident:

Accused were found guilty of violations of AW 96, in that (a) they wrongfully took an Army vehicle; and (b) they wrongfully and unlawfully left the scene of an accident without rendering the assistance called for after an enlisted man had been struck by their vehicle. HELD: LEGALLY SUFFICIENT. (1) Failure to Render Aid: At the time of the collision, the three accused herein were engaged in a joint enterprise. After their vehicle had struck the soldier pedestrian, they stopped; learned that he had probably been seriously injured. After a brief discussion among themselves, they left without rendering, or attempting to render him, assistance or disclosing his plight to anyone. Upon their departure, the victim was lying unconscious on the side of the road, and was bleeding profusely. Accused were properly found to be guilty of an AW 96 violation in failing to render him aid, on any and all of the following reasons: (a) Regulations: AR 850-15, par 18a(1) requires the driver of a vehicle to stop and render such assistance as may be needed in case of injury to person or damage to property. A similar type of directive is to be found in the European Theater of Operations. The senior present in a vehicle is responsible for its proper operation. "The duty of the driver to stop and render assistance in case of injury to a person, is an incident of the operation of a government vehicle." Accused Martindale was a corporal, while Halvorson, the driver, and Shelton were privates first class. "Under these circumstances each occupant was equally responsible with the driver for the latter's failure to render the necessary assistance to the injured soldier as required by the regulation and directive * * *." (2) Service Discrediting: "The findings are sustainable on a ground applicable to military drivers of vehicles generally, whether the vehicles are owned by the government or not. * * * Each accused was responsible for the operation of the motor vehicle. The failure of each of them to assist the victim of the collision constituted a neglect to the prejudice of good order, and conduct of a nature to bring discredit upon the military service in violation of AW 96." (Cite D.C. Code, sec. 40-609 (6:247), re this offense in the District of Columbia.) (3) Liability in General: "There is a third and independent consideration which operated to impose a duty upon each accused to render assistance to the stricken soldier even if they did not cause his injuries. The general rule is that the law imposes no duty upon anyone to assist another whose injuries he has neither caused nor aggravated * * *; but the rule is otherwise when the relationship existing between them is such that the law imposes a duty upon one to furnish the necessary assistance to the injured person * * *. A relationship of this character exists among soldiers of the Army of the U.S. The Government has a vital interest in the preservation of the life and health of every soldier. It has pursued continuously an active policy of conserving military manpower and of achieving its greatest possible utilization in the prosecution of the war. The victim of the accident in this case was an American soldier rendered helpless by his injuries. Under these circumstances, each

454(47a)(47a) Failure to Render Aid After Accident

accused was under a duty to the Government, by virtue of his status as a soldier, to render such assistance as he could reasonably provide to protect the injured fellow-soldier's life and to prevent the possible aggravation of his injuries. Every soldier is a member of a team engaged in the common enterprise of winning the war. The duty is predicated upon the need for surrounding with every reasonable safeguard the life, health and safety of every soldier in order to prevent waste of military manpower. Failure on the part of accused to fulfill this duty constituted a neglect to the prejudice of good order and military discipline, and conduct of a nature to bring discredit upon the military service. The fact that the conduct required of accused for fulfillment of this intensely practical obligation also accords with humanitarian and moral standards universally accepted among civilized people, is additional evidence of the validity of the rule." (CM ETO 4492 Shelton et al 1945)

(47b) Failure to Render Public Accounts

454(47b)

(47b) Failure to Render Public Accounts:

Accused Quartermaster sales officer was found guilty of receiving described public funds which he was not authorized to retain, and wrongfully failing to render his accounts theretofore as required by law (18 USCA sec. 176), in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The Law: It is provided in 18 USCA sec. 176 (Federal Criminal Code sec. 90): "Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years." "The statute is one of general application and violation of same by military personnel is properly chargeable under the 96th Article of War within the classification of 'crimes or offenses not capital'". (MCM, 1928, par. 152c, p. 189) "The offense * * * is not the imputed embezzlement of the money but the failure of the officer or agent of the United States to render his accounts for the same as provided by law. The offense may be complete without any actual embezzlement of the money. It is committed when it is shown that there is a wilful and felonious failure to comply with specified requirements of law in the rendering of his accounts of money received by him. * * * The phrase as 'provided by law' contained in said statute includes rules and regulations made and promulgated by heads of departments of the Federal Government under the authority of R.S. 161 (5 USCA sec. 22). They become part of the law and are as binding as if incorporated in the body of the law itself. * * * Army Regulations are rules and regulations within the purview of the foregoing rule." Accused's omissions herein were in violation of par. 12a, AR 35-6660, 29 August 1942. "Funds arising from sale of Quartermaster supplies are property of the United States." (2) Evidence: (a) The court correctly excluded the introduction into the evidence of an extract from the minutes of proceedings of a Board of Officers of a statement from a witness before that board. This would have been hearsay. (b) Photostatic copies of certain sales slips were properly admitted. The originals were not reasonably available. The photostatic copies were identical with the originals, and hence were in truth original rather than secondary evidence. (c) After defense counsel had permitted the introduction of certain exhibits "with an affirmation indication that he had no objection he could not thereafter ask that they be excluded from the record." (d) Official public records: The records kept in accused's office were prescribed and required by the Army Regulations. These had the force of law. "Where the fact to be proved is not one as to the existence of which the law declares the record to be the sole and conclusive evidence of the fact, parol evidence otherwise competent is admissible, especially when to exclude such evidence would prejudice the rights of innocent persons or enable a public officer to take advantage of his own default. Where it is sought to prove a negative, that is, that facts or documents do not

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(47b) Failure to Render Public Accounts

appear of record, or that as to certain acts or proceedings the record is silent, parol evidence is admissible as primary proof; the record is not higher evidence. That document or facts do not appear of record may be proved by the sworn testimony of the person who is legal custodian of the record, or, it is usually considered, by that of any other competent person." (22 C.J. Secs. 1281-1283; 32 C.J.S. sec. 807c.) (CM ETO 1631 Pepper 1944)

(47bb) Failure to Repay Money in Custody

454(47bb-d)

(47c) Failure to Report

(47d) Failure to Take Official Action

(47bb) Failure to Repay Money in Custody:

Not Digested:

1553 Salyards

(47c) Failure to Report:

Not Digested:

2507 Foote

Cross References: 454(18a) 9258 Davis

(47d) Failure to Take Official Action:

Cross References: 454(49) 9341 Williams

454(49)(49) False Official Reports or Statements(49) False Official Reports or Statements:Not Digested:1092 Sussex-Loasby

Cross References:

- 422(c) 4750 Horton (To officer, re correct name; AW 104; punish for minor offense)
- 451(17) 3454 Thurber Jr (Officer charged under AW 95. Finding omitted words "with intent to deceive." Guilt under AW 96)
- 453(18) 765 Claros
1786 Hambright
1953 Lewis
- 452(21) 6232 Lynch (At investigation, black market; punishment)
- 454(18) 3456 Neff (To registrar, in order to marry)
- 454(82) 5107 Nelson (endanger company; before enemy; life sentence)
- 454(104a) 5389 Pomerantz (Oath at AW 70 investigation)
- 438 9573 Konick (Court testimony, and Inspector-General statement)

During an official investigation, accused made a false statement under oath concerning the identity of a driver who had been involved in an automobile accident. He was found guilty of a violation of AW 96. HELD: LEGALLY SUFFICIENT. Accused's offense was properly charged under AW 96. His own testimony furnished evidence that the false statement was the result of wilful and deliberate premeditation. His subsequent "retraction of his prior false statement to the officer investigating the vehicular accident did not neutralize or purge his original offense." (CM ETO 1447 Scholbe 1944)

Accused officer was found guilty of the following violation of AW 96: (a) conspiring to conceal a criminal act, to wit: unlawful homicide, by reporting that an enlisted man had been killed by shell-blast; (b) making a false official report re that unlawful homicide, with intent to deceive; and (c) failing to take any action of the unlawful homicide, despite his knowledge thereof. HELD: LEGALLY INSUFFICIENT ON THE CONSPIRACY SPECIFICATION. (1) The conspiracy specification, "to which accused pleaded guilty, alleges that he conspired to conceal a criminal act, to wit: unlawful homicide, by reporting on an emergency medical tag that one K * * had been killed in action due to shell blast. Since the essential element of unlawful combination is wholly omitted, the specification is fatally defective as an allegation of conspiracy * * *. However, aside from its ambiguous and ineffective undertaking to charge

(49) False Official Reports or Statements454(49)

conspiracy, the specification contains language susceptible of being construed as charging accused with reporting K * * * killed in action in order to conceal his unlawful homicide, thus statement an offense in violation of AW 96." (2) The remaining two specifications stated AW offenses, and were adequately proved. (CM ETO 9341 Williams 1945)

454(50a)

(50a) False Papers Generally

(50a) False Papers Generally:

- Cross References: 416(9) 6195 Odhner (False orders and identification card)
454(18) 3456 Neff (Tender of, to registrar, in order to get married)
454(56) See generally, re forging furlough or pass
454(103a) See generally, re possession of

(52a) False Pretenses, Obtain 454(52a, 54, 54a)
Property By.
(54) False Swearing
(54a) Foreign Exchange, Illegal
Profit From.

(52a) False Pretenses; Obtain Property by:

Not Digested:

1415 Cochran

1926 Hallifield

2829 Newton

(54) False Swearing:

Cross References: 395(7) 3212 Robillard
454(18) 3456 Neff (Re-marriage in ETO)

(54a) Foreign Exchange, Illegal Profit From:

Cross References: 454(36a) 7553 Besdine

454(56)(56) Forging Furlough or Pass(56) Forging Furlough or Pass:

Cross References: 454(103a) 2831 Kaplan
454(50a) See generally

Accused was found guilty of knowingly and falsely making forging and uttering an enlisted man's pass, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Accused's offense is specifically denounced by an Act of Congress: "Whoever shall falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall wilfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than \$2000 or imprisoned not more than five years, or both." (Act June 15, 1917, c. 30, Title X, sec. 3; 40 Stat. 228; 18 USCA 132) (Underscoring supplied.) (2) The violation of said statute constitutes a crime or offense not capital under the 96th Article of War (MCM, 1928, sec. 152c), and penitentiary confinement is authorized. (CM ETO 2210 Lavelle 1944)

(56a) Fornication454(56a)(56a) Fornication:

Cross References: 454(22) See carnal knowledge, generally.
 450(2) 82 McKenzie (a killing, during act)

Accused was charged with the rape of Miss Elaine Frampton, in violation of AW 92. He was found guilty of a "lesser" offense in violation of AW 96, in that he had carnal knowledge of this female under 16 years of age. HELD: LEGALLY INSUFFICIENT TO SUPPORT FINDINGS, BUT LEGALLY SUFFICIENT FOR GUILT OF A VIOLATION OF AW 96, IN THAT ACCUSED ENGAGED IN SEXUAL INTERCOURSE WITH AN UNMARRIED FEMALE, SENTENCE MUST BE REDUCED TO SIX MONTHS AND TWO-THIRD FORFEITURES. (1) Birth Certificate: The Trial Judge Advocate offered a certified copy of an entry of birth of one "Elaine Frampton", in this case tried in England. The certification was "by the Registrar of Births and Deaths as being a true copy * * *. No further authentication appeared thereon." The copy indicated that the girl was under 16 years of age. Defense objected vigorously, but was overruled. "The ruling * * * was manifest error. The purported birth certificate was not authenticated by a consular officer of the U.S. as required by Act of June 20, 1936, c. 640, sec. 6; 49 Stat. 1563; 28 USCA sec. 695e, so as to entitle it to be introduced in evidence in a U.S. Court * * *. For this reason alone highly prejudicial error was committed by the court in admitting the document in evidence." (2) "Lesser" Offense of Statutory Rape: Although rape in violation of AW 92 was alleged, the court found guilty of "carnal knowledge of Miss Elaine Frampton, a female under sixteen years of age" in violation of AW 96. While carnal knowledge of a girl under 16 is a violation of AW 96 as a "crime or offense not capital", it is not a lesser included offense to the charged rape in violation of AW 92. Here, the original AW 92 charge made no mention of the fact that the victim may have been under 16 years of age. Therefore, cases, which hold that the lesser offense may be found when the original pleading has been sufficiently broad to allege the statutory offense, must be distinguished. (Note that, had the specification "contained all of its original allegations plus the addition supplied by the court, viz., 'a female under 16 years', these authorities would have been controlling". Ex parte Lane, 135 US 443, 448; CM 209548, Jones, 9 B.R. 77, 93-95.) "A comparative analysis of the elements of the crime of common law rape and of the statutory crime of carnal knowledge shows that they possess but one common denominator, viz., sexual penetration of the genitals of the female, and it is plain that the crime of carnal knowledge contains one element which is not contained in that of common law rape, viz., that the female was under 16 years of age. It is vital in the former; it is immaterial in the latter." (119 ALR 1202-7, etc; 1 Wharton Crim. Law, 12th Ed. sec 33, pp 50, 51; R.S. 1035; 18 USCA 565; etc.) "If the Wharton 'concentric layer' test * * * is applied to the elements of the crime of rape it will be noticed that there is a point reached in the 'stripping' process where a vital element of the crime of carnal knowledge is missing.

454(56a)(56a) Fornication.

Remove the element of non-consent of the victim and only the act of intercourse remains. Proof of the act of intercourse is also fundamental in a carnal knowledge charge but it only becomes a crime (in connection with present considerations) when there is added to it the extrinsic element that the female was under 16 years of age. The original Specification in this case did not allege that the victim was under 16 years of age. The finding of the court did allege such fact. It, therefore, added this new extrinsic element * * *. This latter fact is not in the concentric layers of the elements of proof of common law rape; hence it follows that the statutory offense of carnal knowledge cannot possibly be a lesser included offense of the crime of common law rape. "The record is therefore legally insufficient to support this finding. (3) Illicit Sexual Intercourse: However, the above statements do not mean that accused has not committed any offense. The court's finding that he did "have carnal knowledge of Miss Elaine Frampton" constituted a finding of a violation of AW 96. "The word 'Miss' contained in the finding connotes that Elaine was an unmarried woman. * * * The expression 'carnal knowledge' means 'sexual intercourse'. * * *. It will be noted that the marital status of accused is not given and the finding must therefore be considered without regard thereto." It is an offense under the Articles of War for a soldier, married or unmarried, to engage in sexual intercourse with an unmarried woman. "The offense at civil law most nearly related to accused's conduct is fornication. Fornication is * * * of statutory creation * * *. In general the term designates sexual intercourse between an unmarried woman * * *, although some statutes do not confine the offense to single persons * * *. Congress has not denounced the offense in statutes of general application * * *. It has, however, made fornication an offense in territories (Sec. 318, Fed. Crim. C., 18 USCA 518). In the District of Columbia, Congress has denounced fornication as a misdemeanor (D.C. Code sec. 22-1001 (6:176a)). Both of these statutes provide: 'If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months'. Under these statutes the accused must be "unmarried. "There is no specific Article of War making sexual intercourse between a male member of the military forces and a female not his wife an offense. It is believed, however, that Congressional policy, as to irregular sexual relations is definitely indicated by its statutes applicable to territories and the District of Columbia above cited and that it is consistent with this policy to conclude that irregular or illicit sexual relations indulged in by military personnel, whether married or unmarried, may be an offense under the 96th Article of War. It can be said, with confidence that promiscuous, illicit sexual intercourse of married or unmarried military personnel, although only practiced occasionally and at intervals, carries a train of consequences and results of a most disconcerting and demoralizing nature. It is almost the sole cause of the spread of venereal diseases. Pregnancy of the female involved begets serious legal questions and complications as to support of the mother during pregnancy and confinement of the child upon its birth, and these require both administrative and disciplinary action on the part of military authorities. The Army of the United States should not give its tacit approval to conduct on the part of its personnel that is productive of such

(56a) Fornication454(56a)

results. Illicit sexual relations maintained by military personnel whether married or unmarried may logically be considered as both 'conduct of a nature to bring discredit upon the military service' and also as a disorder 'to the prejudice of good order and military discipline' under the 96th Article of War. This case caused an immediate investigation and a train of circumstances which definitely brought discredit on the service." (4) Punishment: While the Table of Maximum Punishments in the MCM is of no aid herein, federal provisions for Territories and the District of Columbia for fornication may be used by way of analogy and a measuring rod. The maximum legal punishment upon conviction for the offense herein determined by a military court is confinement at hard labor for not more than 6 months, and a 2/3rds forfeiture of pay and allowances for a like period. (CM ETO 4119 Willis 1945) (See Memo TJAG 30 Mar 45 Washington re 49 Stat. 1561 (18 USCA 518))

AW 96

GENERAL ARTICLE

454(56a)

(56a) Fornication

(56b) Fraternization With Enemy454(56b)(56b) Fraternization With Enemy:

Cross References: 450(4) 9083 Berger (with rape)
 454(13) 10967 Harris (with attempted rape; inconsistent)

Accused officer was found guilty of a violation of AW 96, in that he did at * * * "violate First U.S. Army directive dated 15 September 1944, Subject: Relations of Troops with Civil Populace, by wrongfully fraternizing with civilians after having been duly warned against such fraternizing." He was also found guilty of a 3-day AWOL, in violation of AW 61. HELD: LEGALLY SUFFICIENT. Fraternization: "The evidence * * * showed that accused was in a civilian home visiting there, socially, with two women, in the town of * * *, on the date and as otherwise alleged * * *. This was in violation of a directive of the First U. S. Army. The court doubtless took judicial notice of the fact that * * * was at that time, so far at least as U. S. Army personnel were concerned, under the jurisdiction of the First Army. Regardless of whether or not accused knew of this order at the time of his first visit to the civilian home, his second visit, made the same day, occurred after he had been fully informed of the provisions of the order. This offense was properly charged under AW 96 * * *." (MCM, 1928, par 152a, p 187.) (CM ETO 6203 Mistretta 1945)

Among other things, accused officer was found guilty of violations of AW 96, in that (a) he wrongfully and without authority transported two Belgian civilian women in a United States Army vehicle, and (b) that he wrongfully and unlawfully fraternized with Belgian civilians by visiting and spending the night in a Belgian residence in violation of Letter Orders, Hq First U. S. Army, dated 15 September 1944. HELD: LEGALLY SUFFICIENT. "The court's findings that accused transported Belgian civilians as alleged was shown * * *. His fraternizing with Belgian civilians as alleged * * * was similarly established. (CM ETO 7269 Van Houten 1945)

Accused was found guilty of raping a 15-year old German girl in violation of AW 92 and, on the same occasion, wrongfully fraternizing with German civilians. HELD: LEGALLY INSUFFICIENT RE FRATERNIZATION. (1) The rape was proved. (2) Fraternization: "As for the charge of fraternization * * *, the evidence fails to show any contact whatever on the part of accused with the girl or any other German civilian except for the criminal acts constituting the rape for which he was convicted. For the reasons stated in * * * CM ETO 10967 Harris /454(13)/" the record insufficiently supports the fraternization specification. (CM ETO 10501 Liner 1945)

454(56b)(56b) Fraternization With Enemy

"Fraternization is not involved in a visit to a German home for the purpose of robbing or assaulting an occupant * * *. However, the evidence in this case indicates that the original entry was not so motivated but that the intent was formed thereafter. Thus, there is no inconsistency in the findings of guilty * * *." (CM ETO 11978 Bromley 1945)

(56c) Fraternization With Enlisted
Men454(56c)

Accused officer was found guilty of an AWOL in violation of AW 61, and was also found guilty of the following violations of AW 96: (a) disorderly in uniform in a public place; (b) assault and battery on a girl by throwing her to the floor; and (c) wrongfully and willfully fraternizing and associating socially with a two non-commissioned officers. HELD: LEGALLY SUFFICIENT. (1) Uniform: "There was no specific testimony that accused was in uniform." However, he was recognized as a lieutenant, "although one at least had not seen him before and even though he was not so addressed there * * *. Wearing the uniform is mandatory by military personnel during war. It has been repeatedly held that under such circumstances it may be inferred that he was in uniform." (2) Assault: Accused provoked a fray in a public place. A woman came up to quell the disturbance. His was none the less a battery against her even though she first placed hands upon him. "She had the definite right to go to the aid of her husband and accused none to retaliate." (3) Associate with EM: "The evidence shows that accused spent much time talking, drinking and playing darts with the enlisted men in a public place. In the opinion of the Board of Review, the record supports the conviction * * *." (Dissent, on this latter point.) (CM ETO 8458 Penick 1945)

454(59a-62a) (59a) Guard Duty Derelictions
 (61) Housebreaking
 (62a) Impersonation

(59a) Guard Duty Derelictions:

Cross References: 416(9) 1645 Gregory (Sentinel loiters on post)
 444 4443 Dick (When lesser to AW 86)
 5255 Duncan (Lesser to AW 86)
 5466 Strickland (Lesser to AW 86; punishment)
 5848 Kay (When lesser to AW 86)

(61) Housebreaking:

Not Digested
 4233 Washington

(62a) Impersonation:

Not Digested
 1017 McCutcheon (EM represent self to be officer)
 1092 Sussex-Loasby (Wrongfully wear RAF uniform; insignia)
 1704 Renfrow (EM represents self to be officer and pilot; wears ribbons)
 2210 Lavelle (Appear with sergeant's stripes)
 2293 Mills (EM appears in officer uniform)
 2444 Warner (EM appears in officer uniform)
 2901 Childrey (Wear false insignia; EM appears in officer's uniform)
 3482 Martin (EM appears in officer's uniform)
 3575 Hart (2nd Lt impersonates Colonel)
 3643 Boyles (Wear chevrons and aviation badge without authority)
 3714 Whalen (Officer wears sergeant's chevrons and fatigues while drinking)

Cross References: 416(9) 8631 Hamilton (EM wears officer's uniform)
 416(9) 6260 Calderon (EM wears officer's uniform)

"The unauthorized wearing of an officer's uniform by an enlisted man and representing himself to be a commissioned officer * * * is an offense under the 96th Article of War." (CM ETO 2723 Copprue 1944)

(63a) Indecent Liberties454(63a)(63a) Indecent Liberties:Not Digested:

- 2188 Prince (Wrongfully fondle another)
 2905 Chapman (Contribute to minor's delinquency)
 4139 Redd (Indecent assault and battery)
 4149 Lewis (Wrongfully strike girl; tear clothes from her body)
 5608 Gehm (Indecent Assault)

Cross References:

- 451(2) 3280 Boyce (Plea of guilty to "lesser offense" of indecent assault, where original charge was AW 93 assault to rape)
 4386 Green (Assault with intent to rape)
 451(32) 3707 Manning (Assault and battery by kissing, squeezing, fondling and holding girl forcibly and against her will)
 451(64) 4219 Price (Willfully and wrongfully and indecently exposing penis to minor)
 454(7) 4235 Bartholomew (Indecent assault; aggravated; maximum punishment)
 454(56a) 4119 Willis (Fornication)
 454(13) 2905 Chapman (Contribute to delinquency of 9-year old girl by showing penis, rubbing it between her legs, and requesting her to play with it; multiplicity of charges.)

AW 96

GENERAL ARTICLE

454(63a)

(63a) Indecent Liberties

(63a) Indecent Liberties

454 (63a)

Accused took an eleven-year old girl to a field. He removed her knickers, put his penis between her legs, and committed various other indecencies. He was found guilty of an unlawful and indecent assault upon her, in violation of AW 96. **HELD: LEGALLY SUFFICIENT.** (1) Specification: An indecent assault upon a minor female child constitutes a violation of AW 96, because it clearly brings discredit upon the military service. It is unnecessary specifically to allege that the offense was "to the discredit of the military service". (2) Proof: Although the girl testified that she did not know what accused was doing to her, he was properly found to be guilty. "It is no defense that the attack was made upon * * * one ignorant of the nature of the act. * * * The same rule applies where the party assaulted does not know what the act is." "And even non-resistance is no defense to an indictment for an assault with intent to take indecent liberties" in a case of this type. (1 Wharton's Criminal Law, 12th Ed., sec. 809, pp. 1104-1105) (3) Evidence: (a) Error but no prejudice resulted when a third party was permitted to testify that the girl had told her that the man "took off my knickers and laid on my belly." The rule applicable in rape cases--that a girl's immediate complaint to a third person may be admitted for corroborative purposes, even though not part of the res gestae--does not apply to the crime of taking indecent liberties with a child. (b) Judicial notice of the laws of England should not have been taken by the court. The laws of England applicable to this type of offense were not applicable in this court-martial proceeding. "No statute of England can have any legal effect upon the punishment to be imposed by a United States Army court-martial." (4) Punishment: "There is no Federal statute of general application or provision of the District of Columbia Code denouncing the offense alleged." Nor is the offense listed in the Table of Maximum Punishments of the Manual for Courts-Martial. However, the District of Columbia Code has a general provision applicable to unlisted assaults which provides for a maximum five-year penitentiary sentence. (Sec. 22-503 (6:28) District of Columbia Code) Applying this maximum, it is concluded that, since accused could have been sentenced to confinement for five years, no prejudice resulted from this sentence confining him for two years. (CM ETO 571 Leach 1943)

Accused was found guilty of taking indecent liberties with a six-year old girl and a seven-year old girl by placing his hand inside their clothing and against their legs and private parts, in violation of AW 96. **HELD: LEGALLY SUFFICIENT, AS TO ONLY ONE GIRL.** The evidence sufficiently supported accused's conviction for his offense against one girl. (1) Points of Law: (a) The offense: The wrongful and unlawful taking of indecent liberties with a female minor child is clearly an offensive which brings discredit upon the military service, and constitutes a violation of AW 96. ("At common law it was generally held that a man who took improper liberties with the person of a female without her consent was guilty of an assault. When the assault was committed upon a child, it was immaterial whether there was submission or resistance thereto.") (b) Incredible testimony: As in cases of rape or assault with intent to commit rape, conviction in the instant case may not be sustained where it is based upon uncorroborated testimony of complaining witness which is inherently incredible and unreliable.

454('63a)

(63a) Indecent Liberties

(c) "Accused's physical presence and opportunity to commit the alleged crime is not in itself substantial evidence of his actual commission thereof."

(d) The mother of one of the girls was properly permitted to repeat what her daughter had told her in response to questioning subsequent to the alleged commission of the offense. Although statements of this character not

substantially contemporaneous with the offense to which they relate are inadmissible except in cases of rape, there is authority to indicate the propriety of the admissibility of the testimony herein as a spontaneous utterance.

(e) The children's testimony: Article of War 19 requires that witnesses before a court-martial be examined on oath or affirmation. "The reason for this requirement is based upon the fundamental rule of competency that the witness must appreciate the difference between truth and falsehood, as well as his duty to tell the former * * *." No precise age determines the competency of a minor child to testify. However, there should be some for examination, either direct or indirect, addressed to the question of the child's competency. "In the instant case, the testimony elicited from the children fails to reveal the slightest evidence of their appreciation of the difference between truth and falsehood or of their duty to tell the truth." Additionally, the testimony of one of the children indicated that she may not have had the mental capacity or memory sufficient to enable her to give an intelligent account of the events to which she testified. "The failure of defense counsel to object to the testimony * * * did not operate as a waiver or render them competent witnesses or their testimony admissible", either as to their direct or their cross examination. The instant record has been examined without reference to the children's testimony. (2) Punishment:

(a) Place: The charged offense was punishable as an assault at common law. "As there is no Federal statute of general application within the continental United States and no law of the District of Columbia denouncing the offense, penitentiary confinement is not authorized for its commission * * *. As the designation of a Federal reformatory is authorized only when penitentiary confinement is authorized by law * * *, the designation of a Federal Reformatory" as the place of confinement for this accused herein should be changed to a place other than a penitentiary, Federal correctional institution or reformatory. (b)

Sentence: The charged offense is not listed in the Table of Maximum Punishments of the Manual for Courts Martial, nor is it listed in the District of Columbia Code. However, the latter Code does provide that persons committing assaults with intent to commit any other offense may be punished by a maximum of five years in a penitentiary. Since penitentiary punishment is not authorized herein, it may be concluded that the charged offense is of a less serious nature than those assaults referred to. "The period of confinement may equal, but may not exceed, the maximum period of confinement authorized for commission of the latter assaultx." The five-year sentence herein was legal. (CM ETO 2195 Shorter 1944)

Accused was found guilty of violations of AW 96, in that: (a) he wrongfully and unlawfully made indecent advances toward a 12-year old boy by fondling the boy's penis; and (b) he wrongfully and unlawfully, within the boy's presence, performed an act of gross indecency upon himself, to wit: masturbation. He was sentenced to 5-years confinement. HELD:

(63a) Indecent Liberties

454(63a)

LEGALLY SUFFICIENT, BUT SENTENCE IS EXCESSIVE. The above specifications respectively allege assault and battery, and indecent exposure. "Each offense, however, as alleged and established * * *, presents the more serious aspect of clearly service discrediting conduct calculated to corrupt the morals and contribute to the delinquency of a child. The District of Columbia Code provides that any person committing such an offense 'shall be guilty of a misdemeanor and punished by a fine not exceeding \$200 or imprisoned not exceeding 12 months, or by both fine and imprisonment". (D.C. Code, 1940 Ed, Title 11, Ch 9 sec 11-919, p 298.) "While the court was authorized to impose punishment with reference to each offense in its most serious aspect, it was, of course, limited to the aggregate of the maximum authorized for each offense * * *. In this instance, the maximum * * * is one year for each offense, authorizing an aggregate of two years confinement for the two offenses." (CM ETO 3436 Paquette 1944)

Accused was found guilty of a violation of AW 96, in that he wrongfully, unlawfully and feloniously took indecent liberties with a girl under 9 years of age by placing his hands on her private parts and fondling her. HELD: LEGALLY SUFFICIENT. (1) Oath: An 8 and a 9 year old girl, after voir dire to determine their competency, were properly permitted to testify under oath. The voir dire and their "subsequent testimony demonstrated their intelligence and understanding despite their youth and compels the conclusion that each of them possessed 'a sufficient knowledge of the nature and consequence of an oath' * * * to qualify them as witnesses." (159 U.S. 523, 524, 525; 40 L. Ed. 244, 247.) (2) Res Gestae: Error, but no prejudice, resulted when the defense's objection to testimony, re what the victim stated to one of the other children in the vicinity immediately after the assault, was sustained. "Such statements were, under the circumstances, spontaneous utterances of the victim made while under the emotional influence of her experience and properly admissible." (CM ETO 3869 Marcum 1944)

Accused was found guilty of a violation of AW 96, in that he had contributed to the delinquency of a minor under 16 "by handling, fondling and playing with his penis"; and guilty of a violation of AW 93, in that he had committed sodomy. HELD: LEGALLY SUFFICIENT. (1) Contribute to Delinquency: The acts performed by accused on his 15-year old male victim were grossly indecent. "An indecency of a similar nature committed on a youth 12 years of age was held in CM ETO 3436, Paquette, to be service discrediting conduct, in violation of AW 96, 'calculated to corrupt the morals and contribute to the delinquency of a child'. The record shows some discussion as to the meaning of 'minor', the descriptive term used here, under the District of Columbia Code. That Code, in establishing the Juvenile Court and its jurisdiction does not use the term 'minor'. It refers to 'children' (C.D. Code, 1920 edition, Title 11, Chapter 9, sec. 11-919) and defines children as persons under the age of 18 (Ibid.,

454(63a)(63a) Indecent Liberties

sec. 11-906). The 15-year old boy, mentioned in the Specification now under discussion, would, accordingly, be a child within the meaning of this Code. His age 'under 18' sufficiently describes him for the purpose of alleging an offense. In the prosecution for contributing to the delinquency of a child, it should appear that the child has been delinquent as a result of the conduct of accused. A serious question would arise, under the allegations found in this Specification, if the indecent advances of the adult were rejected by the child and if there was no consent by the child. In some jurisdictions, where the child has been made the unwilling subject of indecencies, the accused has been prosecuted for impairing ('corrupting' in CM ETO 3436, Paquette) the morals of a child. No such difficulty exists in the present case. It appears that with more or less encouragement by accused, the child became an acquiescent or complacent partner in the wrongdoing. The boy's person was erect. He made no effort to escape accused's advances. The boy wrongfully remained and accepted accused's indecencies. The boy himself was guilty of conduct commonly known as delinquency. The District of Columbia Code does not expressly use the word 'delinquency'. But employing the language of the more advanced school of social thought, it, in effect, condemns certain wrongful conduct by children and also makes punishable as for a misdemeanor any adult who wilfully contributes to or encourages such conduct of a child (Title II, secs 906, 907, D.C. Code.)" (2) Sodomy: "The offense of sodomy, in violation of AW 93, is punishable by imprisonment for five years. Penitentiary confinement is authorized. (CM ETO 3717 Farrington 1944)

Accused was found guilty of a violation of AW 96, in that he did wrongfully and feloniously commit an indecent assault upon a minor boy by taking down his trousers, straddling him, and placing his penis between the boy's legs. He was sentenced to confinement for 4 years, and a U.S. D.C. was designed as the place of confinement. HELD: LEGALLY SUFFICIENT. (1) The 9-year old victim was properly sworn in, even though no preliminary examination was had to test his intelligence and capacity and his ability to understand the nature and obligation of an oath. While it is better practice to determine these issues on the basis of a preliminary examination on voir dire, it is within the discretion of the court to determine the competency of a child witness by his demeanor on the stand and the coherence and intelligence of his testimony." This boy was properly permitted to testify. (2) Maximum Punishment: "While the conduct of the accused * * * approaches an assault with intent to commit sodomy and the proof might well have been sufficient to support a conviction of this offense had it been charged, the Specification as drawn alleges only an indecent assault upon a minor. The question of the maximum period of confinement which may be imposed for this offense has been the subject of some difficulty in the past. While it seems clear that the punishment * * * is not governed by the Table of Maximum Punishments * * *, or by any Federal penal statute of general application * * *, the question whether the maximum period of confinement is limited by the provisions of the District of Columbia Code has been a more troublesome one. For a time it was held that the maximum confinement imposable for the offense was two years on the theory

(63a) Indecent Liberties

454(63a)

that such offense was analogous to the offenses denounced by that provision of the District of Columbia Code (then Sec 37 Title 6, now Sec 22-901, Ch 9, Title 22) which makes punishable by confinement for two years certain acts of cruelty to children * * *. However, this position was subsequently abandoned on the ground that this statute was not intended to embrace the taking of sexual liberties with children or committing acts of a lascivious nature upon them but contemplated only 'physical harm to a child, abandoning one, or exploiting one for gain' * * *. With this decision, the position * * * became that the maximum punishment for offenses of this type was not only not prescribed by the Table * * * or by any Federal statute of general application but also that no maximum punishment therefor was to be found in the District of Columbia Code * * *. The general position that the offense here under consideration is not specifically denounced by the Table of maximum punishments or by any Federal statute or the District of Columbia Code was adopted in this theater in CM ETO 571, Leach (1943). However, it was pointed out * * * that the District of Columbia Code, after setting forth the punishment for assaults with intent to kill, to rape, to commit robbery and for other types of assaults, goes on to provide that whoever assaults another with intent to commit any offense which may be punished by confinement in the penitentiary may be imprisoned for five years (D.C. Code, 1940 Ed., Title 22, Ch. 5, sec. 22-503, p 497). While it was recognized that this omnibus provision did not specifically cover indecent assaults upon minors, the view was expressed that the period of confinement for that offense should not exceed that prescribed for the more serious types of assault denounced by the section of the Code cited above. Under this view, the period of confinement which may be imposed upon conviction of the offense of indecent assault upon a minor may equal, but may not exceed, that prescribed for assaults with intent to commit an offense which may be punished by confinement in a penitentiary, i.e., five years." (Also see ETO 2195, Shorter and ETO 3869 Marcum) "However, in CM ETO 3436, Paquette, another section of the District of Columbia Code was applied in determining the maximum punishment imposable for the offense of making indecent advances to a 12-year old youth by fondling his penis. A second Specification in the same case alleged that accused performed, in the presence of the same minor, 'an act of gross indecency upon himself, to wit: Masturbation.'" The court applied D.C. Title 11, Ch 9, Sec 11-919, p 298, permitting 12-month sentences for each offense. It then concluded that only a two-year sentence (one year for each of accused's two offenses) was permissible. "The Paquette case this represents a divergence from the views expressed in the Leach, Shorter and Marcum cases." "The offense in the Paquette case * * * involved conduct devoid of actual physical violence toward the 12-year old minor, who submitted with apparent complacency to the tickling of his penis by the accused. While technically the touching of the lad's private parts may, because of his minority, have constituted an assault despite his tacit consent, the onus of the offense, as pleaded and as established by the proof, was accused's conducting himself, in the relationship shown, in a manner tending to contribute to the minor's delinquency. For that reason the District of Columbia Juvenile Court Statute was held to apply.

454(63a)(63a) Indecent Liberties

In the instant case, the Specification alleges and the proof shows a veritable assault and battery accompanied by aggravating indecencies, adding elements clearly not essential to a conviction under the Juvenile Court Statute and bringing the case squarely within the rule announced in the Leach, Shorter and Marum cases. The fact that the indecencies accompanying the assault were of a nature which might be reasonably regarded as tending to contribute to the delinquency of a minor, does not affect the character of the greater offense charged, but merely constitutes the lesser conduct tending to contribute to the delinquency of a minor - an included one; just as, in the instant case, simple assault and battery is also a lesser offense, included in the greater offense of indecent assault upon a minor, with which accused was charged." The four-year sentence herein was proper. Designation of a U.S.D.C. as the place of confinement was likewise proper. (CM ETO 4028 Moreno 1945) (Note lengthy dissenting opinion.)

Accused officer was found guilty of wrongfully fondling two enlisted men. He was sentenced to a dismissal. HELD: LEGALLY SUFFICIENT. "The acts alleged and shown were indecent; and each constituted a violation of AW 96. * * * The only showing as to the date and place of the last offense was that it occurred in England, where accused's organization arrived in October 1943, and prior to accused's hospitalization on 20 June 1944. Since limitation had not run from the earliest possible date upon which such offense could have been committed in England, the vagueness in proof of time is not fatal (CM ETO 2972, Collins); and since the specific place, in this instance, is not of the essence of the offense (it being shown it occurred at accused's company's bivouac in England), failure to more particularly establish it was not material (Dig Op JAG 1912-40, sec 416(10), p 270)." (CM ETO 7570 Ritner 1945)

(63b) Inflammatory Address to Military Personnel 454(63b,c)
(63c) Insubordinate Conduct

(63b) Inflammatory Address to Military Personnel:

Cross References: 454(21) 1366 English (Insubordinate Conduct)

Accused chaplain addressed the assembled negro personnel of a company, using inflammatory and incendiary language which tended to stir up racial prejudice and incite violence. He referred to other soldiers of the Army as "damn die-hard Southerners" who were the cause of racial troubles. He advised his negro listeners to "beat the hell" out of white soldiers should they be assaulted by them, instead of leaving the scene and seeking the nearest military policeman. He was found guilty of a violation of AW 96. HELD: LEGALLY SUFFICIENT. As a chaplain, and clothed with some apparent authority and armed with rebellious and riotous ideas, accused disregarded the trust that his country imposed in him and endeavored to foment class hatred, violence and mutiny. (CM ETO 2729 McCurdy 1944)

(63c) Insubordinate Conduct:

Cross References: 422(6) 4750 Horton Jr (Not lesser to AW 64)
 421(2) 3801 Smith
 423 See Generally
 454(21) 1366 English
 454(27) 3992 McKinnon (Statements re racial discor
 454(35) 1920 Horton
 Also, see generally
 454(91a) Unlawful Assembly

AW 96

GENERAL ARTICLE

454(63c)

(64a) Interfere With Mails:454(64a)(64a) Interfere With Mails:

Cross References: 451(17) 3379 Gross (Mail Orderly improprieties;
detained mail, etc.)
454(65a) See generally -- Mail Censorship
Violations

Accused was found to be in unauthorized possession of described private letters. He was held guilty of wrongfully and unlawfully obstructing and interfering with United States Army mail. HELD: LEGALLY SUFFICIENT. (1) Specification: "The word 'obstruct' has been defined as 'to hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment difficult' * * *. The word 'interfere' has been defined 'to enter into, or to take a part in, the concerns of others; to intermeddle; interpose; intervene' * * *. There can be no serious contention offered against the ascertainment that a most reprehensible offense is committed when a person 'obstructs' or 'interferes' with United States Army mail, and that such offense is clearly one chargeable under the 96th Article of War as disorder to the prejudice of good order and military discipline (MCM, 1928, par. 152, p. 187 * * *). Regardless of orders, commands, directives or even specific Congressional denunciation it is difficult to imagine an act more prejudicial to 'good order and military discipline'." (2) Proof: (a) Since accused was neither charged with the theft of the letters nor their wrongful or unlawful possession, the proof herein did not have to meet the requirements for proof of larceny. His "unauthorized possession of the letters under the circumstances revealed by the evidence was certainly an obstruction and interference with the orderly processing of mail matter." Delay resulted. (b) Although it was charged that accused obstructed and interfered with United States Army mail, the proof showed that the subject matter consisted of private letters written by or addressed to individuals who were either civilian employees of the United States engaged in servicing and supplying the military forces, or military personnel. The letters concerned private matters only. Nonetheless, the proof sufficiently supported the finding of accused's guilt. The phrase "United States Army mail" describes mail matter which is despatched by or intended for delivery to persons in the service of the army, whether it be private or official communications or information. (CM ETO 1191 Acosta 1944)

Accused officer, in charge of an Army Postal Unit in England, was found guilty of: (a) A violation of AW 95, in that he wrongfully took from the U.S. Mail a sealed package, containing a field jacket, a bush jacket and a trench coat, and addressed to the Chief Quartermaster, ETO; and (b) A violation of AW 96, in that he wrongfully took and withheld from the owner without his consent a bush jacket, a trench coat and a field jacket, property of the United States of the value of about \$45,00 (value finding was excepted, in findings as finally approved). HELD: LEGALLY SUFFICIENT. (1) Evidence: The parcel in which the above articles

454(64a)(64a) Interfere With Mails

were enclosed arrived at accused's APO station, marked "Deliver to Postal Officer". It was delivered to him, and was opened publicly by him. On the carton, under the wrapper, was the name of a "General Littlejohn" (the court took judicial notice that this general was "Chief of Quartermaster, ETO"). After two weeks, accused commenced to wear two of these garments. He retained all three for some three months. In the circumstances, it must be concluded that "there was enough of a partially covered address visible above the top of the label to give notice to one handling the parcel" that it was to go to General Littlejohn. W.D. Memo No. W340-28-43, 25 April 1943, covers the disposition of articles found loose in the mails and the contents of undeliverable parcels. Postal Cir No. 33, dated 13 May 1943, covers the disposition of articles found loose in the mails and the contents of undeliverable parcels. Postal Cir No. 33, dated 13 May 1943, covers the disposition of articles found loose in the mails and the contents of undeliverable parcels also. (2) AW 95: When accused removed the garments from the package and used them, his custody and possession as a postal officer ceased and such act became a wrongful taking from the mails of the United States, a breach of official trust and properly punishable under AW 95" (Winthrop, Repring, p 714). Although alleged that the package was sealed, no fatal variance resulted because the package may have been unsealed. Accused could not have been misled. (3) The AW 96 specification was also proper. "The offense charged is not larceny, since there is no allegation of an intent to permanently deprive the owner of the possession of the property. Nor is the offense embezzlement since the specification contains no averment of any fiduciary relationship in respect to the property * * *. The offense alleged was proved without dispute, except that no evidence was offered as to the value of the garments. However, they were new when wrongfully taken. They were before the court and, although the court was not justified in finding them to be of specific value, it could have been inferred, under the circumstances, that they were of some value. Furthermore, since the offense of taking United States personal property with intent to convert to accused's own use, in violation of section 46 of the U.S. Crim C. (18 USC 99), does not depend upon the property being of any value * * *, it follows that an offense similar in nature but of less gravity, not involving the intent to permanently deprive, does not require any allegation or proof as to the value of the property taken." (CM ETO 3292 Pilot 1944)

After his plea of guilt, accused was found guilty of a violation of AW 96 in that, while entrusted with U.S. mail, he wilfully and unlawfully abstracted, with intent to steal and carry away, various items therefrom. HELD: LEGALLY SUFFICIENT. (1) Evidence: Since accused was not charged with larceny in violation of AW 93, questions as to the sufficiency of proof for larceny (including value) do not arise. "The offense as alleged and proved involved the wilful and unlawful abstraction of various packages of U.S. mail from an army post office by a soldier assigned there to duty. His relation and obligation with respect to the mail at that army post office were similar to those of a U. S. Postoffice Department employee

(64a) Interfere With Mails

454(64a)

with respect to the mail under the control and authority of that department." (2) Punishment: No punishment is provided in the Table of Maximum Punishments for this offense. "The penalty of the statute for the protection of the U. S. Mail in the case of postal employees (sec 318, Title 18, USC) or the statute for mail protection generally (sec 317, Title 18, USC), each providing a maximum period of confinement of five years, is applicable (MCM 1928, par 104c), except that penitentiary confinement is not authorized." (AW 42) (3) The law member herein, after accused's plea of guilty, explained the meaning thereof to him, but failed to state that the sentence might include a term of confinement. "When the law member, explaining to an accused the effect of his plea of guilty, erroneously states the maximum punishment that may be adjudged to be less than the maximum punishment authorized and the accused is convicted upon his plea of guilty, no evidence being introduced, the punishment imposed may not exceed that so stated by the court in its explanation." However, in the instant case, independent evidence apart from the guilty plea adequately established accused's guilt. Hence the sentence to 5-years confinement was proper. (CM ETO 3507 Goldstein 1944)

AW 96

GENERAL ARTICLE

454(64a)

(64a) Interfere With Mails

(64b) Interfere With Military Police
(65aa) Kidnaping
(65a) Mail Censorship Violations

454(64b-65a)

(64b) Interfere With Military Police:

Cross References: 428(5) 503 Richmond

(65aa) Kidnaping:

Cross References: 451(2) 4386 Green

(65a) Mail Censorship Violations:

Cross References 453(20aa) 9542 Isenberg
 454(64a) See generally--Interfere With Mail

Accused officer wrote two letters, in which he described in detail the movement and activities of the convoy on which he came overseas. He posted these letters at sea with the First Base Post Office, U.S. Army Postal service, addressed to civilian relatives in the United States. He was found guilty of writing these letters containing classified military information to unauthorized civilians, and wrongfully depositing them in the United States mails for delivery, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The Offense: "Failure to comply with general or standing orders, regulations or instructions of a department, district, post or other military establishment or with Army Regulations has long been recognized as an offense in violation of Article of War 96 * * *. The failure to obey, especially in the case of an officer, need not be wilful and the Article is violated where such failure occurs through mere neglect." "The evidence of accused's education and military status, his instruction in matters of military security and censorship and his receipt of Pamphlet 21-1, aggravates his dereliction, even apart from the consideration that he was charged with knowledge of the contents of the regulations and directives * * *." The court was authorized to take judicial notice of Army regulations 380-5, 28 Sep 1942, and Training Circulars No. 15, WD, 16 February 1943 and No. 66, WD, 12 May, 1943, Pamphlet WD, 21-1." (2) Variance: "The

454(65a)(65a) Mail Censorship Violations

allegations in each specification that accused 'did wrongfully deposit said letters in the United States mails for deliver' may be considered as merely descriptive of his act of mailing the letters in such a manner as was normal under the circumstances. As the phrase 'United States Mails' or 'mail' need not be given a technical construction * * *, the proof that the letters were handled by the First Base Post Office, U.S. Army Postal Service * * * did not constitute a variance from the specification." (3) Consorship signature: By signing the letters in the lower left-hand corner of each envelope, accused officer certified that "he had read, understood and complied with military censorship regulations." (CM ETO 1872 Sadlon 1944)

Accused was found guilty of mailing an uncensored letter in other than a military receptacle, thereby disobeying standing security and censorship regulations, in violation of AW 96. HELD: LEGALLY SUFFICIENT. The court correctly took judicial notice that posting mail in other than military receptacles is prohibited by the regulations existing in the European Theater of Operations. "The offense alleged and proved falls within the regulations appropriately implementing the express power of censorship conferred by the First War Power Act of 1941 * * *." (CM ETO 2273 Sherman 1944)

(67) Making Check With Insufficient Funds454(67)(67) Making Check With Insufficient Funds:Not Digested947 Yeomans1803 Wright2452 Briscoe2506 Gibney2962 McBee

Cross References: 453(23) As violation of AW 95; see generally.

Accused officer was found guilty of unlawfully making and uttering described checks, with intent to defraud, then knowing that he did not have and not intending that he should have, sufficient funds in his bank for their payment--in violation of AW 96. HELD: LEGALLY SUFFICIENT. The evidence sufficiently supported the finding of accused's guilt. The question of accused's intent was for the trial court. Its finding in that regard was supported by, among other things, accused's complete indifference to the serious condition of his bank account when he negotiated the checks. (a) It was proper to introduce a bank employee's testimony to show the true status of accused's bank account on the dates in question, in addition to the bank statement itself. (b) In regard to two of his checks, made when his account with the English bank on which they were drawn was overdrawn, accused subsequently deposited checks from his American bank to terminate its overdrawn status. Thereafter, the checks on the American bank were dishonored. (i) At the latter time, the English bank became vested with the right to charge accused's account with the total amount of the checks. (ii) The account held by accused in the American bank was a joint one with his wife. He claimed that he did not know of its depleted condition. "Both accused and his wife were authorized to draw checks in unlimited amounts on the joint account, and they were in different countries. The very fact that a joint account was established under such circumstances was sufficient to put accused on notice as to the possibility of sudden and large withdrawals by his wife without his knowledge." (CM ETO 1803 Wright 1944)

Accused officer was found guilty of wrongfully and unlawfully making and uttering a number of checks, knowing that he had insufficient funds in his bank account to cover them, and thereby fraudulently obtaining described goods, credits and services--in violation of AW 96. HELD: LEGALLY SUFFICIENT. "The gravamen of the offense of issuance of bank checks without sufficient funds or credit to insure payment thereof is the intent to defraud. In order to sustain a conviction the burden

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(67) Making Check With Insufficient Funds

was on the prosecution to prove beyond a reasonable doubt that accused not only signed and uttered the checks particularly described without a sufficient credit balance or without a credit arrangement at his bank to secure their prompt payment, but also that he uttered them with a fraudulent intent. Proof of merely 'over drafting' of one's bank account and nothing more does not prove a criminal offense * * *." However, "fraud may properly be inferred from evidence that accused, knowing that he had no funds or credit arrangement at his bank, procured money by means of his own worthless checks drawn on that bank, repeatedly and in the course of a systematic utterance of the checks." The conduct of accused discredited the entire military service and its reputation, in violation of AW 96. (CM ETO 2506 Gibney 1944).

Accused officer was found guilty of AWOLs in violation of AW 61, of making and uttering a bad check on a bank with knowledge that he had no funds therein, in violation of AW 96, and of wrongfully pledging and pawning a wristwatch, the property of the U.S. and furnished for the military service, in violation of AW 94. HELD: LEGALLY SUFFICIENT. (1) AW 96-Bad check: "as to the Specification * * * alleging the wrongful making and uttering of a ten-pound check, all elements of the offense were clearly established * * * except the matter of the intent to defraud. Although more definite and positive evidence on so important a point is desirable, the Board of Review is of the opinion that the evidence introduced furnished sufficient proof * * *. The accused made and uttered the check on 28 July 1944. On or before 5 August the check was returned marked 'No account'. That evidence alone was not competent to prove the fact it recited * * *. There was, however, stipulated testimony to the effect that the bank records were examined on 8 August and accused had no account. The stipulation may reasonably be taken to mean that accused had no account, joint or otherwise, with the bank during the period in question. It is significant that accused inferentially admitted that he never had an individual account with the bank. He stated that when he cashed the check he believed that a joint account had been opened in his name and that of a former girl friend, whose name he refused to divulge. He never made inquiry at the bank and never had an indication from it as to the existence of such an account. Under these circumstances, the Board of Review is of the opinion that the evidence is legally sufficient * * *. An accused is properly chargeable with knowledge as to the status of his bank account * * * and the fact that the account may be owned jointly, subject to withdrawals by accused in one country and by the other party to the joint account in another country, is sufficient to put him on notice * * *." (2) AW 94-The pawning of the wristwatch: "It is clear that accused did, without proper authority, apply to his own use and benefit a watch of the type owned by the Government and furnished or used in the military service. The watch bore marks which were evidence of Government ownership. Accused testified that the watch was the property of the Government, which he had found on the ground between Army Tents." And his confession substantiates this view. (CM ETO 8832 Groves 1945).

(67b) Marrying in Violation of Orders

454(67b)

(67b) Marrying in Violation of Orders:

Cross References: 454(18) 3456 Neff (With bigamy; false swearing; offering false certificate; judicial notice of ETO Circular; notice to accused)

Accused married in a foreign country, despite the prohibition against marriages in foreign countries by military personnel contained in Cir 179, WD, 8 June 1942 and Cir 305, WD, 8 Sept 1942, and despite specific written denial of permission to him to marry. He was found guilty of violating standing orders against marriage, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Prohibition of Marriage: "The question of the validity of regulations, War Department Orders or orders of the Commanding General of United States Army Forces on duty in a foreign country in time of war because they infringe upon or restrict rights guaranteed by the Federal Constitution, may not be entertained. When accused took the oath as a soldier in the Army of the United States, he by that act, of necessity, surrendered some of the privileges and immunities belonging to him as a citizen * * *." The prohibitions against marriage in a foreign country are valid. (2) Proof by Deposition: The sole proof of accused's marriage was contained in the deposition of a local clergyman who resided within ten miles of the place of trial. Although the deposition had been taken in required manner, with interrogatories and cross-interrogatories, the defense objected to its introduction in evidence on the ground that the clergyman should have appeared in court personally. The defense's objection to the deposition was properly overruled. The United States had no power to subpoena local witnesses in the foreign country where the trial occurred. Hence, "the witness did not reside within the jurisdiction of the court * * *." The deposition was taken in good faith. It covered relevant material, and was not cumulative of other evidence. (3) Applicability of AW 25 to Depositions taken in Foreign Countries: Article of War 25 authorizes the taking and use of depositions before military courts and tribunals is operative only in the continental United States, its territories and possessions. However, the authority convening a court-martial sitting in a foreign country is empowered in a case referred for trial by a court appointed by him upon application of either party to order the taking of a deposition upon oral or written interrogatories or the presentation of cross-interrogatories if the deposition is upon written interrogatories. The order should further nominate the person before whom the deposition will be taken and authenticated pursuant to AW 26. In a capital case testimony may be adduced by the defense by means of deposition but not by the prosecution. The evidence produced by the deposition will be subject to objections and exceptions by either the prosecution

454(67b)(67b) Marrying in Violation of Orders

or defense in the same manner and to the same degree as if the witness were physically present upon the witness stand. (CM ETO 567 Radloff 1943)

Accused was found guilty of (a) entering into a wrongful and unauthorized marriage in violation of Circular Number 88, Hq. ETOUSA, 3 Nov 1943-- in violation of AW 96, and (b) obtaining procurement of the performance of the marriage by false representation that his company commander had granted him permission to marry--in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the finding of guilt under the first charge. (2) It likewise supported the finding of guilt under the second charge. "Although the evidence does not show that the accused represented to the registrar that he had the permission of his company commander, it shows very definitely that he falsely represented that he had the permission of an officer and that he delivered to the registrar, for the purpose of inducing him to perform the marriage ceremony, a writing purporting to be a certificate of permission to marry, signed by a fictitious 'G.P * * *, Captain.' The accused was charged with and had actual knowledge of the provisions of Circular 88, in an effort to comply with which the registrar made 'permission' a condition precedent to his performance of the marriage. There was clearly an implied representation by the accused that the person whose name was signed to the certificate was his commanding officer, authorized to grant the requisite permission." Accused violated AW 96. (CM ETO 2273 Sherman 1944)

(68a) Military Duty; Violation of
(69a) Misbehavior Before Enemy

454(68a,69a)

(68a) Military Duty; Violation of:

Cross References:

- 451(50) 2788 Coats, Garcia (Liability of person responsible for
military vehicle; maximum punishment)
 453(01) 4184 Heil (Officer using driver of Army vehicle for his
own personal use and benefit during AWOL)

(69a) Misbehavior Before Enemy:

- Cross References: 454(40a) 4352 Schroepfel (Drunk on duty before
enemy; similar to related AW
75 offense of misbehavior)
 433 2212 Coldiron (Except words "before the
enemy"; lesser to AW 75)

454(69aa)(69aa) Narcotic Drugs(69aa) Narcotic Drugs:

Cross References: 454(95) 902 Barreto (With the use of Narcotic Drugs)

Accused officer was a doctor and ward surgeon. He was found guilty of violations of AW 96, in that (a) he did wrongfully use morphine tartrate, a narcotic drug, over a 7-day period, and (b) he did fail to record in his narcotic register 30 morphine syrettes received from the Pharmacy, in violation of hospital regulations. HELD: LEGALLY SUFFICIENT. (1) "The repeated use of drugs over a period of several days, for other than necessary medicinal purposes, evidencing addiction, certainly constitutes conduct prejudicial to good order and military discipline as charged in Specification 1. The failure of accused to inform the ward nurse of the receipt of narcotics for his ward, coupled with the fact that he had knowledge of the hospital regulation directing the ward nurse to make a record of all such drugs withdrawn and administered, constitutes an obvious violation of the spirit and intent of the regulation. As the ward medical officer and superior of the ward nurse, it became the duty and responsibility of accused to comply with the provisions of the regulation as he alone, of the personnel of Ward A, had knowledge of the acquisition of such narcotics. He was therefore properly found guilty of Specification 2 as charged." (2) Mental Capacity: Motion that the case be handled through medical channels, made at the beginning of trial, was denied. No contention of legal insanity was made at that time. Subsequent to trial, a medical board assembled, and "found that although accused is a constitutional psychopath, addicted to drugs and alcohol, he was sane at the time of the commission of the offenses alleged and at the time of the examination. It is * * * clear * * * that accused could distinguish right from wrong and that he was possessed of his normal mental faculties and accordingly responsible for his actions. It has been hold in numerous cases that where persons accused are addicted to alcohol, emotionally unstable or otherwise possessed of undesirable habits or physical abnormalities, yet sane at the time of the commission of the offense, that such accused are responsible for their conduct * * *." (CM ETO 5609 Blizard 1945)

(69b) Negligent Operation of Motor Vehicle

454(69b)

(69L) Negligent Operation of Motor Vehicle:

Cross References:

451(50) 2788 Coats, Garcia (Collision with pedestrian; lesser offense to AW 93 manslaughter; maximum punishment.

Liability of person, other than driver, responsible for vehicle; violation of military duty; maximum punishment

454(37a) Drive While Drunk--see generally

Accused was found guilty of two specifications charging him with the reckless driving of a motor vehicle upon a public highway, and driving while drunk, in violation of AW 96. HELD: LEGALLY SUFFICIENT. Accused was properly found guilty of both offenses--reckless driving, and driving while drunk. The two offenses are separate and distinct. Both constitute violations of AW 96. (Note that the maximum punishment for reckless driving on a public thoroughfare include confinement for three months.) (CM ETO 2157 Cheek 1944)

Accused was found guilty of the AW 96 offenses subsequently set forth. As approved by the reviewing authority, was sentenced to confinement for three years. HELD: LEGALLY SUFFICIENT ONLY TO SUPPORT CONFINEMENT FOR NINE MONTHS. (1) Reckless Driving; Injuries: The first specification of which accused was found guilty charged that, by his negligence in operating an Army truck in a reckless and unauthorized manner, he feloniously and unlawfully struck and seriously injured Belgian civilians by running into and striking them with the truck. "This offense is not covered in the table of maximum punishments nor is it denounced by the Federal Criminal Code or the District of Columbia Code. * * * The most closely related offense is that of reckless driving, which is punishable by a maximum sentence of three months' confinement at hard labor and forfeiture of two-thirds pay for a like period in accordance with the punishment designated for that offense in Section 40-605(6:246), District of Columbia Code * * *. Unfortunately no provision has been made either by Act of Congress or by the Manual for Courts-Martial whereby the penalty for reckless driving of a motor vehicle may be increased because of the resultant

454(69b)(69b) Negligent Operation of Motor Vehicle

injury to human beings." (2) Unfit Self by Drinking: The second specification alleged that accused did "while on duty as a truck driver, render himself unfit for duty by excessive use of intoxicants", in violation of AW 96. "This offense is most closely analogous to that of being found drunk on duty in violation of AW 85, for which the maximum punishment is forfeiture of pay for twenty days (MCM, 1928, par. 104c, p 99). (3) Fail to Obey: The third specification "alleges that accused failed to obey a lawful command of a superior officer in violation of AW 96. The punishment for this offense is limited to confinement at hard labor for six months and forfeiture of two-thirds pay for a like period by the table of maximum punishments (MCM, 1928, par 104c, p 100)." The sentence must be reduced to dishonorable discharge, total forfeitures and confinement at hard labor for nine months (MCM, 1928, par 104c, p 102)." (CM ETO 7913 Smithey 1945)

(69c) Neutral Countries; Travel Into
(72a) Officer Fails to stop EM Fight

454(69c,72a)

(69c) Neutral Countries; Travel into:

Not Digested:

2215 Broderick

(72a) Officer Fails to Stop Enlisted Men Fight:

Accused officer was found guilty of a violation of AW 96 in that, being present at a fight between soldiers of two different American outfits, he failed "to use his utmost endeavor to stop same in that, being the only officer present at the time the fight occurred, he did not reduce them to discipline or stop the fight." He was sentenced to dismissal. HELD: LEGALLY SUFFICIENT. (1) The Offense: "At common law it was not only the right but also the duty of a private individual, without a warrant, to arrest any person committing or attempting to commit in his presence a felony or a misdemeanor amounting to a breach of peace and also to prevent the commission of such offense * * *. The common law right and duty of a peace officer to arrest under such circumstances, somewhat broader than that of a private person * * * has been further enlarged by statute * * *. Under the District of Columbia Code, it is a misdemeanor for any member of the police force to neglect to make an arrest for an offense against the laws of the United States committed in his presence (Title 4, sec 4-143 (20:494).)" AW 68 specifically recognizes a related power of officers, among others "This article and its predecessors are merely an application to the relations of the military service of the common law principle that it is the power and duty of any citizen to put a stop to a breach of the peace committed in his presence and to arrest a participant in an affray * * *. The obvious analogy between the position of an officer of the Army and a civilian peace officer with respect to the duty of maintaining good order in their respective spheres is indicated by Winthrop", Reprint, at page 726. "In the opinion of the Board of Review the failure of an officer to endeavor to the utmost by reasonable means to stop a fight between soldiers, at which he is present, to quell the disorder and to separate and arrest the participants is a neglect to the prejudice of good order and military discipline, if not also conduct of a nature to bring discredit upon the military service, in violation of AW 96. The Specification clearly states an offense." (2) The evidence supported the finding of guilt. "The fact that accused was present at the scene drinking with enlisted men and was thus guilty of prejudicial disorder in violation of AW 96 * * * cannot excuse or extenuate his failure to use his utmost endeavor to stop the fight." (CM ETO 7001 Guy 1945)

- (454(72b-78a))
- (72b) Plunder and Pillage
- (72c) Prices; Violate Ceiling Level
- (75) Receiving Stolen Goods
- (75a) Reckless Driving
- (78g) Resisting Arrest

(72b) Plunder and Pillage:

Cross References: 433(2) 5445 Dann (When AW 96 is not lesser to AW 75)
See in General, Sec I, Cir 2 Mil Jus 1945 (BOJAG)

(72c) Prices; Violate Ceiling Level:

Cross References: 454(22b) 9345 Haug (Champagne sales in France)

(75) Receiving Stolen Goods:

Cross References: 454(18a) 9258 Davis

(75a) Reckless Driving:

Cross References: 454(37a) Drive While Drunk
454(69b) Negligent Operation of Motor Vehicle

(78g) Resisting Arrest:

Cross References: 447 804 Ogletree (With AW 89 and AW 93 offenses)
1286 Davis (With other offenses; maximum punishment)
453(11) 1197 Carr (Civilian police; officer)

(81a) Secrecy Violations

454(81a)

(81a) Secrecy Violations:Not Digested:

4808 Jackson (Secret documents left by official courier officer in unattended jeep on public French street)

Accused officer had been intrusted with "top secret" information concerning the impending invasion of the European continent, and had been charged with the utmost secrecy. He was provided with a classification card to identify him as one so intrusted with military secrets in this particular operation. Notwithstanding, he deliberately disclosed the area of the operation, the composition of assaulting forces, and the proposed location and the part that his organization would play in the plan, to another officer who was not qualified to receive it. He was found guilty of the wrongful divulgence of said secret information, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The evidence established the above facts without contradiction. Accused's guilt was clear. His offense was in violation of AW 96. (2) Trial Judge Advocate's Remarks: (a) It was improper for the trial judge advocate to have told the court that the eyes of the ETO were focused on this trial. (b) It was improper for him to have stated that this record would not go through normal channels. (c) It was improper for him to have said that accused did not deny the offense (accused pleaded not guilty). (d) It was improper for him to have stated that, regardless of a stipulation permitting their entry into evidence, certain letters were merely hearsay. "It was the obligation of the trial judge advocate fairly, honestly and truthfully to present the government's case to the court. The members of the court were under sworn duty to try and determine the issues before it 'according to the evidence' and to administer justice 'without partiality, favor or affection'." This trial judge advocate's conduct was wholly contradictory to the solemn responsibilities placed upon him by Congressional mandate. However, "it is the general rule in the trial of criminal cases in the Federal civil courts that improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal of the judgment of conviction unless the court has been requested to instruct the jury to disregard them and has refused to do so, or unless the remarks are obviously prejudicial to the rights of the accused. * * * Courts-martial are judges both of law and facts * * * and consequently there is no procedure equivalent to that of the civil courts with respect to purging the trial from the effects of improper remarks or argument of the trial judge advocate." "While in the instant case the defense counsel did not make an affirmative objection to the improprieties

454(81a)(81a) Secrecy Violations

above noted * * * such objection was not necessary * * *." The matter may still be considered by the Board of Review. "Had the question of accused's guilt resolved itself to a narrow one of law or fact or had the evidence created a conflict on any material issue, the obvious error might have proved highly prejudicial and have required the setting aside of the court's findings." But here, the evidence of guilt was clear, convincing and uncontradicted. It must be concluded that no prejudicial error, in violation of AW 37, resulted. (CM ETO 2885 Nuttmann 1944)

Accused Lt. Col. was charged with violating AW 95 in that he wrongfully, unlawfully, knowingly and dishonorably failed to properly safeguard secret, confidential and restricted documents containing vital military information by leaving the classified matter in an unlocked and unsecured piece of hand luggage at a hotel in England for more than two months. He was similarly charged under AW 96, and was additionally charged under AW 96 with dishonorably failing and neglecting to pay described debts. He was found not guilty of the AW 95 charge, but was found guilty of the AW 96 charge's specifications and charge. HELD: LEGALLY SUFFICIENT. (1) Safeguarding secret, etc. material: The evidence showed that "accused failed 'to properly safeguard secret, confidential and restricted documents' at the time and place and in the manner alleged (CM ETO 4808 Jackson; CM ETO 1953 Lewis). (2) Debts: The evidence showed "that accused dishonorably failed and neglected to pay his debts as alleged. Accused's own testimony emphasized that presented by the prosecution and demonstrated his disingenuous attempts to postpone an accounting with his creditor in each instance. Such an attitude toward his creditors and his private indebtedness 'reflects discredit upon the service to which he belongs.'" (CM ETO 3024 Dunn; CM ETO 5459 Kuse). (3) Defense Brief: "Attached to the record of trial is a brief addressed to the reviewing authority submitted by the four defense counsel. No provision is made, in military procedure, for the oral argument and time to submit a 'more formal Brief' requested therein. The record shows that oral argument was made at the trial by the defense counsel after all the evidence had been presented, in accordance with the procedure set forth in the Manual for Courts-Martial, 1928 (Par 77, pp 61-62). No substantial right of accused was injuriously affected by failure of the reviewing authority to comply with these requests." (3) Multiplicity: No error resulted because the violation of secrecy was charged both under AW 95 and AW 96, and accused was found not guilty of the AW 95 charge but guilty of the AW 96 charge. No inconsistency resulted. (CM ETO 7245 Barnum 1945)

(82) Self Maiming454(82)(82) Self Maiming:

Cross References: 454(91) Unfit Self for Duty

After committing various offenses, accused shot himself in the head with a pistol. He was found guilty of unfitting himself for the full performance of military service by self-maiming, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Self Maiming: "The offense of self-maiming in violation of Article of War 96 should not be confused with that of mayhem in violation of Article of War 93. A person may be guilty of self-mayhem (MCM, 1928, par. 149b, p. 167). 'Mayhem is a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary.' * * *. 'But both in common speech and as the word is now used in statutes and in the criminal law generally, maim signifies to cripple or mutilate in any way, to inflict upon a person any injury which * * * renders him * * * defective in bodily vigor; to inflict any serious bodily injury.' * * *. A specific intent to maim is not necessary (Wharton's Crim. Law, 12th Ed., Vol. I, sec. 768; * * *). The word 'willful' means: 'done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.' (Black's Law Dictionary, 3d Ed., p. 1849). The evidence, including the medical testimony, shows beyond any doubt that accused wilfully maimed himself as alleged and thereby unfitted himself for the full performance of military service." (2) Evidence Rulings: (a) Both the pistol and a medical report of accused's sanity were admitted as prosecution's exhibits. The record fails to show either consent or objection thereto by the defense. However, no prejudice resulted. (b) A prior statement by accused was admitted on behalf of the prosecution. At the time, the defense commented that it had no objection to the competency of the statement, but that it would subsequently question its "credibility" by showing that accused did not know what he was saying when he made it. Instead, subsequent testimony indicated that the statement was of a voluntary nature, and that accused was conscious of what he was doing when he made it. The propriety of admitting the statement was a question of fact for the court. (CM ETO 1161 Waters 1944)

Accused was found guilty of the following violations of AW 96:

- (a) Making an official report that a certain area was clear of enemy troops, with disregard of knowledge of the facts, and thereby endangering the safety of his company, then engaged with the enemy; and (b) wilfully maiming himself by shooting himself in the toe with an M-1 rifle, with intent to avoid hazardous duty. HELD: LEGALLY SUFFICIENT. (1) Official Report: "Competent uncontradicted evidence established

454(82)(82) Self Maiming.

that the accused was given a hazardous and important military mission to perform, and that he failed to accomplish this assignment. Following such failure, accused officially reported to his company that he had completed the reconnaissance patrol and had not encountered the enemy. He asserted that the prescribed area of his patrol was cleared of enemy troops and that it was therefore all right for the task forces to occupy such territory. Based upon this report a patrol was ordered forward to occupy this area but prior to their leaving accused made known for the first time the fact that he had not accomplished the required reconnaissance or completed the mission concerning which he had previously reported. It is clear therefore, that such report was made by accused with disregard of the knowledge of the facts and as a result the safety of his company was endangered, as alleged." (2) Self-Maiming: Accused purposely shot himself in the foot, but sustained only a minor grazing of the second or third toe. "According to Winthrop, the gravament of the offense of mayhem, cognizable for a military court, is that the act must be of such a character as to permanently disable the person or to render one less able to fight or to defend himself against his adversary (Winthrop's Military Law and Precedents, Reprint, 1920, p. 676). The shooting herein did not result in disabling accused or incapacitate him from service and therefore he did not technically commit the offense of mayhem. However, from the fact that accused was notified that he was to guide a subsequent patrol over enemy occupied territory, the court was justified in inferring that the shooting was self-inflicted with intent to avoid hazardous duty. Such conduct is certainly service discrediting within the meaning of AW 96." (3) Maximum Punishments: Accused was sentenced to life imprisonment. "The Table of Maximum Punishments (MCM, 1928, par 104c, p 100) authorizes confinement for three months for the offense by a noncommissioned officer in knowingly making a false official statement or report in violation of AW 96. However, the offense, as charged by Specification 1 hereof, is unlike such listed offense, the punishment for which is limited and prescribed. The specification herein alleged a military offense of a different character, in that accused is charged with discreditable conduct which endangered the safety of his company when engaged in combat with the enemy. The misconduct describes death as the maximum punishment for any soldier who, before the enemy by any misconduct endangers the safety of any command which it is his duty to defend. The designation of AW 96 in the charge does not affect the legal sufficiency of the findings or the sentence (MCM, 1928, 1943, 15 B.R. 388)." The first Specification supports the life sentence herein. (CM ETO 5107 Nelson 1945)

<u>(86a) Sentinel Offenses</u>	
<u>(86b) Sodomy</u>	
<u>(88) Statutory Rape</u>	
<u>(88a) Threats with Gun</u>	
<u>(88b) Trespass</u>	

454(86a-88b)

(86a) Sentinel Offenses:

Cross References: 416(9) 1645 Gregory
 444 See generally; AW 86 offenses
 454(59a) See generally; Guard Duty derelictions

(86b) Sodomy:Not Digested

991 Gugliotta (attempted)
 580 Gorman (solicitation)
 2905 Chapman (with minor)
 5561 Holden (proper to allege sodomy under AW 96)

(88) Statutory Rape:

Cross References: 454(22) See Carnal Knowledge

(88a) Threats with Gun:

Cross References: 454(8) See Generally

(88b) Trespass:Not Digested

5362 Cooper (Wrongfully imprison a party in cellar; wrongfully search and forcibly enter a dwelling; wrongfully enter and trespass in a dwelling. Also see 450(4) for rape point herein.)

Cross References: 454(20a) 5741 Kennedy et al (Breach peace; punishment)

-454(86a-88b)

(89) Unauthorized Acts
(89a) Unauthorized Person in Station
(91) Unfit Self for Duty

454(89-91)

(89) Unauthorized Acts:

Cross References: 454(68A) Military Duty--violations of

(89a) Unauthorized Person in Station:

Not Digested

1953 Lewis (introduction of)

(91) Unfit Self for Duty:

Cross References: 454(69b) 7913 Smithey
 454(82) Self-maiming; see generally

Among other things, accused was found guilty of a violation of AW 96, in that he shot himself in the foot with a rifle on two separate occasions: "thereby unfitting himself for the full performance of military service." HELD: LEGALLY INSUFFICIENT. "The evidence showed that the wounds were not of sufficient seriousness to constitute mayhem. Neither was it alleged or proved that either of the wounds was self-inflicted with intent to avoid hazardous duty (Cf: CM NATO 464 (1943), II Bull JAG 468),' (CM ETO 11100 Froemming 1945)

"Accused was charged with shooting himself with a rifle 'thereby unfitting himself for the full performance of military service'. The evidence does not indicate any permanent injury or impairment of accused's right hand, and therefore there was no proof that the wound was of sufficient seriousness to constitute mayhem. Neither was it alleged or proved that the wound was self-inflicted with intent to avoid hazardous duty (Cf: CM NATO 464 (1943) II Bull. JAG 468). It was stated in CM 272944 (1945): 'However, the present charge does not fall within either of these categories. It is necessary to resort to the 'custom of the service' to determine the appropriate maximum punishment (MCM, 1928, par 104c). It is the custom of the service where no limitation is provided, to follow Congressional expression of what constitutes appropriate punishment * * *. Applying that rule to this case, it appears that the self-inflicted injury more closely resembles the type of injuries described in 18 U.S.C. 462 than it does mayhem, and therefore, that the maximum

punishment of 7 years' confinement prescribed in this Federal statute should serve as a guide where the self-inflicted wounds are not of such an extent and nature as to constitute mayhem, and there are no additional elements which may render the offense as charged and established, a more serious one than that contemplated by the form of specification used in the present case". Sentence herein must be reduced accordingly. (CM ETO 11636 Pellacore 1945)

(91a) Unlawful Assembly454(91a)(91a) Unlawful Assembly:

Cross References: 450(1) 5764 Lilly
 422(1) 2904 Smith (Unlawful arms-bearing and
 assemblage; other soldiers)

Not Digested

3912 Lane (Unlawful, etc. engaging in and becoming a part of a disorderly
 and riotous assembly of soldiers)

The commanding officer of a unit displaced the first sergeant. Non-commissioned officers of the unit did not like his decision. They thereafter participated in a meeting with enlisted personnel with intent to overrule it. Reveille was not held. Instead, the men met in the mess hall. The company commander sent word to the noncommissioned officers in the mess hall to report to him at the orderly room. They sent word back for him to come to the meeting at the mess hall. In the meantime, they dispatched one of their number to higher headquarters with a "round-robin" message signed by all personnel in which they complained of the unit's administration. Among other things, accused noncommissioned officers, separately charged but tried a common trial, were found guilty of participating in an unauthorized assembly of enlisted members of their unit, with intent to arouse insubordination among the enlisted personnel thereof and impede the exercise of the authority of its commissioned officers--in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Specification: Regardless of whether the draughtsman of the specification was aware of it, the specification herein may be considered to have fallen within the prohibition of the following Act of Congress: "(a) It shall be unlawful for any person, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States -- (1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States: * * * (b) For the purposes of this section, the term 'military or naval forces of the United States, as defined in section 1 of the National Defense Act of June 3, 1916, as amended (48 Stat. 153, U.S.C., title 10, sec. 2)" (Act June 28, 1940, c. 439, Title I, sec. 1; 54 Stat. 670; 18 USCA sec. 9). "(a) Any person who violates any of the provisions of this title /sections 9 to 13 of this title/ shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than ten years; or both. (b) No person convicted of violating any of the provisions of this title shall, during the five years next following his conviction, be eligible for employment by the United States, or by any department or agency thereof (including any corporation the stock of which is wholly owned by the United States)" (Act June 28, 1940, c. 439, Title I, sec. 5; 54 Stat. 671; 18 USCA sec. 13). The statute requires that the accused shall have entertained a specific intent to:

454(91a)(91a) Unlawful Assembly

"(1) interfere with)		((1) loyalty
or)		(or
(2) impair)	the	((2) morale
or)		(or
(3) influence)		((3) discipline

of the military forces of the United States."

Additionally, an accused must also

"(1) advise)		((1) insubordination
or)		(or
(2) counsel)		((2) disloyalty
or)		(or
(3) urge)		((3) mutiny
or)		(or
(4) in any manner)		((4) refusal of duty
cause)		(

by any member of the military forces of the United States."

The specification in the instant case was sufficient. (2) The evidence adequately supported the findings of guilt. It is to be particularly noticed that when a Staff Sergeant takes "an active, sympathetic part in an unlawful assembly of his subordinates he ipso facto causes insubordination, His presence in the role of a participant gives approval to an unlawful gathering, and such conduct is damaging to the disciplinary control of the men." (3) The common trial of these separately-charged accused was proper, in the absence of their specific objections. (4) Penitentiary confinement was authorized. (CM ETO 2005 Wilkins et al 1944)

All but one of accused soldiers participated in a disorderly assembly both at a parking lot and in front of a dance hall. At both places, orders from officers that they disperse were at first hesitantly obeyed, after which the groups reassembled. There were frequent instances of cursing, belligerent and inflammatory remarks, loud talking, disrespect shown to officers, and threats to drive away the trucks at the parking lot. One truck was actually driven to the dance hall, in open defiance of orders that the trucks were not to be removed, and an officer who attempted to stop that truck was forced to jump from the running board. Because of the threatening attitude of the assembly, one military policeman had to be taken from the dance hall. Accused were found guilty of, acting jointly and in pursuance of a common intent, unlawfully engaging in and becoming part of a disorderly and riotous assembly of soldiers, in violation of AW 96. HELD: LEGALLY SUFFICIENT AS TO ALL EXCEPT ONE ACCUSED. (1) Evidence: "Although such conduct * * * was undoubtedly disorderly, it is doubtful that their conduct was 'riotous' within the ordinary meaning of the word. However, the gist of the offense alleged and the sentences imposed are not affected by the questionable insertion of the word 'riotous' in the specification. Its use

(91a) Unlawful Assembly454(91a)

was merely descriptive." Although the evidence failed to show the active participation in the disorder on the part of one of the accused, it was adequate to support the convictions of the other accused. The intimidation and disorder was likely "to produce danger to the tranquillity and peace" of the neighborhood. (2) Punishment: Sentences herein varied from three to eight years confinement at hard labor. They were proper. The offense of "unlawful assembly" is neither listed in the Manual for Courts-Martial nor made punishable by any statute of the United States of general application within the continental United States. Likewise, an unlawful assembly of the character here involved is not made punishable by the law of the District of Columbia. However, the offense involves a violation of the 96th Article of War. (Note that the death sentence may not be imposed for a violation of AW 96.) (CM HTO 2566 Turner et al 1944)

AW 96

GENERAL ARTICLE

454(91a)

(91a) Unlawful Assembly

(92) Unlawful Discharge of Firearms
(94a) Urge Soldiers to Disobey

454(92)94a)

(92) Unlawful Discharge of Firearms:

Not Digested

866 O'Connell, et al
3801 Smith
3677 Bussard

Cross References: 405 4616 Molier
 422(5) 4376 Jarvis (Insufficient proof; Variance)
 447 1052 Geddies (with mutiny; seizure)

Throw Grenade: Among other things, accused was found guilty of a violation of AW 96, in that he did throw, and cause to explode, a grenade in the bivouac area of his unit. HELD: LEGALLY INSUFFICIENT. That charge "obviously alleges no offense. There is no allegation that accused wrongfully or unlawfully threw or caused the hand grenade to explode in the bivouac area. The absence of such inculpatory averment negatives any illegal conduct. The throwing or causing a grenade to explode in the area is not per se an offense." (Bull JAG Jan 1943, sec 454(37a); CM ETO 1336 English) (CM ETO 4704 Milburn 1944)

(94a) Urge Soldiers to Disobey:

Cross References: 454(13) 2608 Hughes (with attempt to create a riot)

454(95) (95) Use of Narcotics(95) Use of Narcotics:Cross References: 454(69aa) 5609 Blizard

Two accused were found guilty of wrongfully introducing marijuana into a quartermaster station and wrongfully using marijuana, a narcotic drug, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Narcotics: "By paragraph 4, General Orders 25, War Department, 11 March 1918, the possession of habit-forming drugs by military personnel not ordered by a medical officer is prohibited." This provision is still operative today. "Marijuana, or the plant Cannabis Sativa, has been recognized, regulated and taxed by Congress as a dangerous, habit-forming drug (Act of February 10, 1939; 53 Stat. 279 et seq and 384 et seq; 26 USCA 2590, 3230). * * * The court was authorized to take judicial notice of the fact that marijuana is a narcotic." "In passing it should be noted that the possession of marijuana by the accused in the small quantities shown would not be a violation of the Harrison Narcotic Act nor of the Marijuana Act * * * had the offense been committed within the continental United States, and it is extremely doubtful if the tax and penal provisions of the mentioned narcotic regulative statutes possess extraterritoriality * * *. The possession of a narcotic drug, viz: marijuana, as well as its use, is a violation of Article of War 96. "The proof of use of the narcotic includes proof of possession of same. While proof of mere possession will not necessarily sustain a charge of use of an article, contrawise proof of use will sustain a charge of possession. The 'possession' prohibited by the General Order means not only a mere physical holding, but also includes control of the thing possessed with the right to dispose of it in any manner the possessor sees fit." "It was not necessary for the prosecution to negative by allegations * * * and by its proof the fact that accused possessed marijuana by order of a medical officer. Such excepted possession was a matter of defense." The introduction of habit-forming narcotic drugs into a command, quarters, station or camp is an offense in violation of Article of War 96. Marijuana contains vicious habit-forming properties. (2) Variance: Although alleged that one accused introduced the drug at a described station, it was found that he introduced it at or near the station. This variance was not material. Accused was not misled. Nor may he again be placed in jeopardy for the charged offense. (3) Punishment: "The maximum punishment for the offense of possession a habit-forming drug is dishonorable discharge, total forfeitures and imprisonment at hard labor for one year * * *. The offense of introducing a habit-forming narcotic drug into command, quarters, station or camp for purposes other than sale carries a maximum punishment of dishonorable discharge, total forfeitures and confinement at hart labor for one year (MCM, 1928, par. 104c, p. 100)." (CM ETO 902 Barreto and Colitto 1943)

- (99) Violation of Standing Orders
- (100) Willfully Damaging Property
- (100a) Wrongful Casting Away of Uniform,
etc; wear civilian clothing
- (102a) Wrongful Entry into Home

454(99-102a)(99) Violation of Standing Orders:

Cross References: 454(33) See generally

(100) Willfully Damaging Property:Not Digested

- 991 Gugliotta (civilian bicycle)
- 3570 Chestnut (Destroy property of some value)

(100a) Wrongful Casting Away of Uniform, Arms and Equipment; Wear Civilian Clothing:Not Digested6198 Bean(102a) Wrongful Entry Into Home:Cross References: 454(2Ca) Breach of peace
454(3Ca) Trespass

454(103,a)(103) Wrongful Possession(103a) Wrongful Possession of Pass Forms(103) Wrongful Possession:

Accused were found guilty of (a) AWOL in violation of AW 61; and (b) knowingly, wrongfully and unlawfully possessing a quantity of cigarettes, matches, smoking tobacco and chewing tobacco, property of the Army Exchange Service of the U.S., in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Both offenses were established. (2) Punishment for the violation of AW 96, above stated, is not listed in the Manual for Courts Martial, nor is there any clearly analogous offense. However, it is held that "the offense is closely related to those denounced in sec 288 of the Fed Penal Code of 1910 (USC 18:467), that is, the buying, receiving or concealing, in the places described in section 272 of the Penal Code (USC 18:451), stolen property known to have been stolen. That statute authorizes confinement for three years for the acts thereby made criminal" (CM 199672, Southern, 4 B.R. 153) (CM ETO 5942 Williams, et al 1945)

(103a) Wrongful Possession of Pass Forms:

Accused went to a town other than where he was stationed, and had pass forms printed. They were similar to those granted by organization commanders to their men for short-period leaves to nearby localities. Accused was found guilty of wrongfully and without authority having in his possession one hundred of these pass forms, in violation of AW 96. HELD: LEGALLY SUFFICIENT. The inference is "that accused had these forms printed not only for his own unauthorized use but also for use by and probably for sale to other soldiers. Since the circumstances shown preclude any reasonable hypothesis except fraudulent concomitant intent, his possession of such passes was wrongful and unauthorized and constituted an offense denounced by" the following Act of Congress: "Whoever shall falsely make, forge, counterfeit, alter or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall wilfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than \$2000 or imprisoned not more than five years, or both." (15 June 1917, c. 30, title 10, sec. 3, 40 Stat. 228; 18 USCA 132) "The violations of said statute constitute a crime or offense not capital under the 96th Article of War (MCM, 1928, sec. 152c, pp. 188-189) (CM ETO 2831 Kaplan 1944)

(103b) Wrongful Printing of Pass Forms

454(103b,104)

(103b) Wrongful Printing of Pass Forms:

Accused was found guilty of violations of AW 96, in that he had wrongfully caused described pass forms to be printed. HELD: "The 'passes' involved in this case were blank, uncompleted printed forms for passes. A blank, printed form for a pass is not a 'military, or official pass or permit' within the contemplation of the Act of June 15, 1917, ch 30, title X, sec 3 (40 Stat. 228; 18 USCA 132). As none of the offenses of which accused were convicted are punishable by penitentiary confinement, designation of the U.S. Penitentiary * * * as the place of confinement is not authorized." (CM ETO 10563 Inzeo, et al 1945)

(104) Wrongful Sale:

Cross References: 454(18a) Black Market--generally
 452(3) 1538 Rhodes (Post Exchange Supplies)
 453(18) 765 Claros (Post Exchange Supplies)

454(104b)(104b) Wrongful Sale; Permit Another to Make(104b) Wrongful Sale; Permit Another to Make:

Accused officer was found guilty of the following violations of AW 96: (a) wrongfully and unlawfully allowing, permitting and suffering an enlisted man to dispose of a military rifle by trading it away; (b) wrongfully and deliberately inducing and ascertaining that enlisted man would conceal the fact that he had given permission and approval to that exchange; and (c) making a false affidavit under oath in regard to the above transaction at a formal AW 70 investigation. He was also recharged with the last specification under AW 95. HELD: LEGALLY SUFFICIENT. The evidence supports the findings of the various offenses under AW 95 and 96. "For an officer to make knowingly a false statement in the course of an official investigation is an offense under the 95th Article of War. The conviction of an officer under both Articles on the same facts is not illegal." (CM ETO 5389 Pomerantz 1945)

(105) Wrongful Taking; Vehicles, etc.454(105)(105) Wrongful Taking; Vehicles, etc.:Not Digested

1644 Allen
 1953 Lewis
 2474 Riden
 2507 Foote
 2553 Hammlett
 2753 Setzer
 3044 Mullaney
 3305 Nichelli (airplane,
 jeep)
 4138 Urban (bicycle)
 4275 Crawford (joint)
 4287 Allen
 5456 Winfield

Cross References: 416(3) 6260 Calderon (vehicle; clothes)
 399(2) 2753 Setzer
 419(2) 4303 Houston
 5633 Gibson (civilian vehicle)
 9260 Rosenbaum
 450(2) 6397 Butler (with murder)
 451(50) 2926 Norman (with AW 83 and 93)
 452(18) 128 Rindfleisch
 454(22b) 9345 Haug
 454(37a) 1107 Shuttleworth
 454(47a) 4492 Shelton (with fail to render aid)
 454(64a) 3292 Pilat (clothing from mail; value)

454(105)(105) Wrongful Taking; Vehicles, etc.

Instead of returning a government cargo truck to the motor pool upon completion of the duty to which he had been assigned, accused, without authority, used it for his own purposes. He was found guilty of wrongfully and without lawful permission or authority taking and using that government truck, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Accused's wrongful taking of the truck was clearly shown. (2) Value: The value of the truck was neither alleged nor shown, although it appeared from the testimony that it was a 2 $\frac{1}{2}$ -ton 10-wheel truck. "Considering the type of the vehicle concerned, the court may properly assume that the truck was at least of a value not in excess of \$20. The failure to allege any valuation * * * was not error which in the light of the proof in this case, prejudicially affected the substantial rights of the accused." (3) Punishment: "The offense of wrongfully and without lawful permission or authority, taking and using the truck is an offense similar to larceny and the same punishment may be imposed therefor. * * * The fact that a value was neither alleged nor proved, does not affect the legality of the sentence." (CM ETO 492 Lewis 1943)

"The offense of 'wrongful taking and using' Government property is analogous to larceny and the same punishment may be imposed upon one convicted thereof * * *." (CM ETO 2157 Cheek 1944)

Among many other offenses, accused was found guilty of wrongfully taking and using a government vehicle and of transporting a civilian in it in violation of Par 6a(3), AR 850-15, dated 28 August 1943, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Wrongful Use: Accused "denied he took the car and used it, he was just riding in it." However, accused accepted the invitation of its occupants to go for a ride after supper. "He got in the truck and started riding, raising no objection nor asking any questions when the truck continued on through several towns. It does not appear that at any time he questioned the trip. He was a truck driver and knew what was going on. He unquestionably knew that the truck was being used without permission, that he and the other two occupants were absent from their station without authority, and that their joint use of the truck for their individual purposes was wrongful." He was properly found to be guilty. (2) Transporting Civilian: Accused and his two companions picked up some girls. This was in violation of AR 850-15, par 6a(3), which provides that "Motor vehicles will be used only for official business and for the special purposes listed in b below." Accused was engaged in a joint adventure. Accused stated that while he did not let the girls in, the driver stopped and they got in; that they were just riding, but not with him. "The admitted facts strongly infer that accused had an active part in giving the girls a ride but whether he did or not, the circumstances of the trip * * * make each individually responsible for the acts of the others incident to the trip." (CM ETO 2966 Fomby 1944)

(105) Wrongful Taking; Vehicles, Etc.

454(105)

Accused was found guilty of absences without leave in violation of AW 61; of larceny in violation of AW 93; of escape from confinement in violation of AW 69; and of wrongfully taking a truck--the property of the American Red Cross--without consent of the owner, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) "The wrongful taking ('joy-riding') of the Red Cross truck, of a value of more than \$50, * * * was proved by stipulation and by accused's confession * * *. Accused admitted that he committed the offense, that it was he who took and used the truck. In other words, the corpus delicti of the offenses charged was proved by stipulation. Thereafter, it was permissible to use the confession of accused to show that it was he who committed the offense * * *." (2) Penitentiary Confinement: "Larceny of property the value of which exceeds \$50 is punishable by penitentiary confinement for five years (MCM, 1928, par. 104c, p 99; AW 42; Sec 287; Federal Crim C. (18 USC 466)). Absence without leave, in violation of AW 61, is punishable as a court-martial may direct. 'When a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary' (AW 42)." (CM ETO 3686 Morgan 1944)

Three capable and efficient officers, the accused herein, wrongfully and without permission took a jeep from the motor pool and in defiance of orders given them, went to Paris--not on official business --where, through their combined neglect, the jeep, of a value when new of about \$800.00, was stolen. They were found guilty of violations of AW 96, in that they had failed to obey the order to stay away from Paris, and for the wrongful use of the jeep; and of a violation of AW 83, in that, through neglect, they suffered the jeep to be lost by leaving it unlocked and unattended on the streets of Paris, France. HELD: LEGALLY SUFFICIENT. (CM ETO 5026 Kirchner 1944)

Among other things, accused was found guilty of the wrongful taking and use of an Army vehicle, in violation of AW 96. HELD: LEGALLY SUFFICIENT. "District of Columbia Code Title 22, sec 2204 (6:62) defines the offense of unauthorized taking and using of a motor vehicle of another and provides as punishment 'a fine not exceeding \$1000 or imprisonment not exceeding five years, or both such fine and imprisonment.' D.C.C. Title 24, sec 401 (6:401) provides in pertinent part that 'where the sentence is imprisonment for more than one year it shall be in a penitentiary.' AW 42 authorized penitentiary confinement where the offense is punishable by penitentiary confinement by 'some statute of the United States, of general application within the continental United

454(105)

(105) Wrongful Taking; Vehicles, etc.

States, * * * or by the law of the District of Columbia! It follows therefore that penitentiary confinement is authorized for the unauthorized taking and using of a government vehicle." (CM ETO 6383, Wilkinson 1945)

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(105a) Wrongfully Transport Civilian

454(105a)

(105a) Wrongfully Transport Civilian:

Cross References: 454(56b) 7269 Van Houten
454(105) 2966 Fomby

AW 96

GENERAL ARTICLE

454(105a)

(105a) Wrongfully Transport Civilian

(1) Authority of Commanding Officer

462(1)

462(AW 104) Disciplinary Powers of Commanding Officers:

Cross References:

- 422(1) 5546 Roscher (Inadequate punishment for drunk officer; acceptance, as evidence of guilt; inequality of sentences)
- 395(7) 548 Tabb (Evidence of previous AW 104 Punishment)
- 422(5) 1057 Redmond (Failure to Obey)
(Warning of Rights)
- 422(6) 110 Bartlett (Warning of Rights)
(Plea in Bar)
- 4750 Horton (Advise accused of rights)
(Minor offense; false official statements)

(1) Authority of Commanding Officer:

- Cross References: 422(6) 1661 Haas (Who may give company punishment; requirements; illegal order)
Also, see generally.

Accused was found guilty of willful disobedience of a lawful command of his superior officer, in violation of AW 64. REEL: RECALL INST. CIPHER

(1) The Evidence: Accused had been ordered by Lt X to button his collar during a drill. He reluctantly complied and the officer told him "We would hear more of it later." Lt Y, upon the suggestion of Lt X, ordered accused to take a hike, and accused refused to do so. Lt X admitted on cross-examination that he was having accused take the hike "as a disciplinary matter for his neglect of the previous day." There was no evidence that accused was notified that disciplinary action under AW 104 was contemplated, that he could demand trial by court-martial in lieu of accepting the punishment, or that he could appeal to superior authority if he believed the punishment to be unjust. The order to take the hike was illegal because it was given as punishment, and AW 104 was not complied with. (2) General Rules: A commanding officer is authorized to order a soldier to go on a practice march or hike as a form of additional training, as he is authorized to order other additional training for backward soldiers, provided the additional training is reasonable, as, for example, where a soldier is not up to standard in the manual of arms, close order drill, etc. As a commander, he could no doubt order an additional practice march if the physical condition of the soldier or his state of training is such as to require it and make it a reasonable measure of training. But this is not such a case. Lt X testified that this hike was

462(1,3)(1) Authority of Commanding Officer(3) As a Bar to Trial

ordered as a disciplinary measure for accused's neglect of the previous day. A practice march is clearly a military duty and is not in the nature of extra fatigue duty within the purview of AW 104. Courts-Martial are prohibited from degrading military duties such as drill by imposing them as punishments (MCM, 1928, Par 102, p 92). Obviously the same prohibition applies to disciplinary punishments; military duties may not be degraded by their use as forms of punishment under AW 104. (3) Requirements: The requirements under AW 104 that the accused (a) be given the opportunity to demand trial by court-martial before imposition of punishment and (b) be informed of his right to appeal to superior authority if he believes the punishment imposed is unjust, are mandatory. Failure of the officer imposing the punishment to notify the accused of his rights, nullifies the order of punishment and renders it illegal. CM 200289 (1933) (Dig. Op. JAG 1912-40, sec 422(6)) is distinguishable, because in that case the requirements of AW 104 were at least partially complied with, and it was reasonable to presume that the other preliminary requirements were also observed. In the present case, the record of trial is remotely silent as compliance with any of the requirements of the article, and indicates rather clearly that no compliance was attempted. (Digest taken from III Bull JAG 102-3.) (CM ETO 1015 Branham 1944)

(3) As a Bar to Trial:Not Digested:3812 Harshner (See 451(9) on another point)

Cross Reference:	419(2a)	4303 <u>Houston</u>	(Two AWOLs)
	454(7)	3209 <u>Palmer</u>	(By junior officer; bar to future trial)

(4) Punishments Authorized462(4)(4) Punishments Authorized:

Cross References: 422(5) 1057 Redmond (double punishment)
(Nature of Punishments)
422(6) 110 Bartlett (Bread and water; dungeon)
1821 Welma (Kitchen police; punishments)
3468 Bonton (Military duty; grave-digging)

AW 104 prescribes disciplinary punishments imposable for minor offenses without the intervention of a court-martial. Confinement under guard as a disciplinary punishment is expressly prohibited. An accused's commanding officer has authority to confine him temporarily, pending further action, for a refusal to report to the orderly and for recalcitrant conduct in general. If, however, the overnight confinement under guard is imposed solely as disciplinary punishment under AW 104, it is unauthorized. (1st Ind, CM ETO 2642 Gumbs 1944)

AW 104

DISCIPLINARY POWERS OF COMMANDING OFFICERS

462(4)

472 (AW 114) Authority to Administer Oaths:

Cross References: 428(7) 255 Cobb (Oath on charge sheet; taken by
subsequently-appointed Investigating
officer)
395(63a) Witnesses; oaths--in general
428(7) Charge Sheet Oaths--in General

AW 114

AUTHORITY TO ADMINISTER OATHS

472

473 (AW 115) Appointment of Reporters and Interpreters:

Cross References: 395(60) Interpreters; See in General

AW 115

APPOINTMENT OF REPORTERS AND INTERPRETERS

473

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