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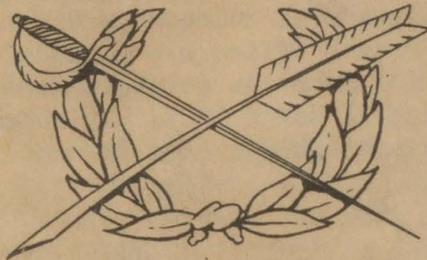
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# Digest of Opinions

OF THE

BRANCH OFFICE OF THE

## JUDGE ADVOCATE GENERAL



WITH THE  
MEDITERRANEAN THEATER OF OPERATIONS,  
U.S. ARMY

CUMULATIVE THROUGH 31 MARCH 1945

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with the  
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SUBJECT: Consolidated Digest of Opinions.

TO : All Staff Judge Advocates, Mediterranean Theater of  
Operations, U. S. Army.

Herewith for your information is a digest of selected holdings, opinions and reviews by the Board of Review in the Branch Office of The Judge Advocate General with the Mediterranean Theater of Operations, U. S. Army. Digests of selected reviews and opinions otherwise prepared in the Branch Office are included. This consolidated digest covers the period from the establishment of the Branch Office in North Africa through 31 March 1945. It supersedes all compilations of digests previously published by the Branch Office.



HUBERT D. HOOVER  
Colonel, J.A.G.D.  
Assistant Judge Advocate General

ABSENCE WITHOUT LEAVE - Commencing prior to 2 December 1942 - Maximum Punishment.

Accused absented himself from his organization without leave on 11 November 1942 and remained absent until he was apprehended by military police over four months later. Charged with desertion in violation of Article of War 58, he was convicted of absence without leave in violation of Article of War 61 and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. Executive Order 9267, 9 November 1942, suspended the limitations prescribed in the Table of Maximum Punishments upon punishments for absence without leave in violation of Article of War 61, but the effective date thereof was 1 December 1942. Since absence without leave is not a continuing offense, the suspension is only applicable to absences which commenced after that date. Hence the maximum authorized punishment for the offense of which accused was here found guilty was, as set forth in the table, dishonorable discharge, total forfeitures and confinement at hard labor for six months.

NATO 381, Walsh.

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ACCUSED - Unsworn Statement.

After accused had concluded an unsworn statement at the trial the president of the court "suggested" to him that "it would be well if he could tell us of his record with the 26th Infantry". Thereupon accused made an additional unsworn statement. Held: It was error for the court to suggest to accused that he amplify his unsworn statement. Accused was immune from cross-examination on it (MCM, 1928, par. 76); and he had a right to remain silent with respect to any subject (MCM, 1928, par. 120d). It does not appear that the statement elicited by the court injuriously affected the substantial rights of accused.

NATO 2519, Chesher (MJ).

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ACCUSED - Unsworn Statement - Questioning by Trial Judge Advocate Improper.

Accused elected to make an unsworn statement. Before the statement was heard the trial judge advocate questioned accused as to his name, grade, organization and station. Accused stated his name and organization and the approximate station of his organization. The unsworn statement was then heard. Since an unsworn statement is not evidence, the trial judge advocate had no right to examine accused. In view of the nature of the questioning, substantial rights of the accused were not injuriously affected.

NATO 1763, Laagus (MJ).

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ADMISSIONS - Of Accomplice or Co-offender after Criminal Transaction Completed' - Admissible Only as to Speaker.

Three accused, severally charged with the rape of the same woman, in violation of Article of War 92, were tried on common trial and found guilty. There was evidence that each forcibly had intercourse with the woman and that each rendered aid and assistance to the others. Over objection by the defense a witness was permitted to testify that subsequent to the rapes one of the accused, in the presence of another accused, told witness that he and two others had had intercourse. Witness did not recall which accused made the remark. While such an admission might properly have been admitted against the speaker alone, it should not have been admitted where the identity of the person making it was not established. The admission having been made after the criminal transaction was complete it was not admissible against an accomplice or co-offender. As the acts charged were established by other competent and uncontradicted evidence, the improper admission of the testimony did not injuriously affect the substantial rights of any of the accused.

NATO 1978, Mercier et al.

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ARTICLE OF WAR 2 - Jurisdiction over Civilian Seamen in Foreign Theater.

Accused was a civilian member of the crew of a ship owned by the United States and controlled by the War Shipping Administration but allocated to the British transport service. He committed murder on board while the ship, which was carrying war materials for the British Army from North Africa to Italy, was docked in the harbor of Brindisi, Italy. The vessel was an integral part of the line of communications serving the Allied armies in the field in Italy. At the time of the offense the armies of the United States and of Great Britain in the Italian theater of combat operations were under the unified command of an American general officer, and were engaged in coordinated and joint operations against the common enemy. Materiel was frequently pooled. Held: Accused was a person accompanying or serving the United States armies in the field within the meaning of Article of War 2 and was therefore subject to trial by court-martial.

NATO 1626, Harris.

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ARTICLE OF WAR 2 - Jurisdiction over Employee of War Shipping Administration.

Accused, a civilian employed as a ship's officer on a vessel owned by the United States and operated by the War Shipping Administra-

tion, committed offenses while the ship, which was carrying stores consigned to the Army, was in a harbor in Tunisia. He was a person accompanying the armies in the field within the meaning of Article of War 2 and was therefore subject to military law and trial by court-martial.

NATO 437, De Jonge.

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ARTICLE OF WAR 40 - Findings of Not Guilty May Not Be Reconsidered on Proceedings in Revision.

Accused was charged with larceny in violation of Article of War 93 (Charge I and Specification). The court found him not guilty of the larceny and undertook by exceptions and substitutions to find him guilty of suffering the property in question to be wrongfully disposed of by sale. Subsequently, the court reconvened upon its own motion for proceedings in revision, revoked its former findings and found accused guilty "of the specification, Charge I (83 AW)" and guilty "of Charge I: (83 AW)". The court was without legal power to reconsider its findings with respect to the charge and specification in so far as they concerned the findings of not guilty of larceny. A finding of not guilty may not legally be reconsidered on proceedings in revision.

3d Ind, (MTO 4514, Palmieri) AJAG, 16 Nov 44.

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ARTICLE OF WAR 43 - Sentence - Vote in Adjudging.

Accused was sentenced to confinement for 15 years but only two-thirds of the members present concurred. Concurrence of three-fourths of the members present is required in order to render legal a sentence to confinement in excess of ten years. The defect was, however, cured by reduction of the sentence by the reviewing authority to ten years.

NATO 830, Cooke.

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ARTICLE OF WAR 64 - Legality of Order to Go on March.

Accused was found guilty, in violation of Article of War 64, of willful disobedience of an order by his company commander to "go on the march". There was some evidence indicating that the march involved was in the nature of punishment, but there was also substantial proof that it was "extra instruction" to improve "march discipline", an extra battalion exercise for all men in the organization who had not performed properly on previous marches. If the march ordered had been intended only as a punishment, a question as to the legality of the order would have been raised, as the kind of march described is not an authorized

form of punishment. Such was not the case here. Proper march discipline is a well recognized necessity in military units and marches may be employed legally for training and exercise. There was sufficient evidence that the order was a legal one.

NATO 1461, Sulewski.

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ARTICLE OF WAR 64 - Lifting Up Weapon against Officer - Proof.

Accused was found guilty of lifting up a weapon, a rifle, against his superior officer who was in the execution of his office. The evidence showed that the officer approached accused's tent following unruly conduct by accused, and announced that he was about to enter. Accused expressed his consent to the entrance provided the officer came alone and without anything in his hands. Upon entrance the officer observed that accused had his rifle in the "ready position" pointed in the direction of the officer. Thereafter the accused had the weapon in his possession but did not point it at the officer. No physical attempt or menace of violence was directed towards the officer. It appearing that the position of accused when the officer entered the tent was no different from what it had been prior to that time, and there having been no menacing move or gesture thereafter, the evidence did not support the findings of guilty. There is no lifting up of a weapon against an officer, within the meaning of Article of War 64, unless the act involved amounts to an assault.

NATO 759, Thompson.

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ARTICLE OF WAR 64 - Offering Violence against Officer in Execution of His Office.

Accused was found guilty of assaulting a medical officer in violation of Article of War 64. The evidence showed that while the officer was riding along a roadway in a command car he had to stop when accused thrust his foot before the car. The officer commenced to investigate the conduct of the accused and also took steps to quell a disorder among military personnel present. While so engaged the officer was struck by accused. The officer was in the execution of his office when the assault was committed upon his person, for the circumstances warranted his interposition because of the disorder within the meaning of Article of War 68, and his attempt to quell the disorder was an act authorizedly done by military usage. Record sufficient to support findings.

NATO 899, Benton.

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ARTICLE OF WAR 83 - Willfully Suffering Government Property to Be  
Disposed of - Control of Property by Accused.

X Accused was found guilty, in violation of Article of War 83, of willfully suffering military property of the United States to be wrongfully disposed of by sale. The evidence showed that on the night of the date alleged accused accompanied Riccio, an Italian civilian in whose home accused was visiting, to the home of another civilian where a quantity of flour belonging to the United States was being unloaded by Italian civilians from trucks belonging to the United States Army. The flour had been stolen from the Army and was being delivered for resale on the black market. Riccio participated in the unloading. Accused took no action to stop the unlawful enterprise but stood watch until the unloading was completed and then gave assistance in repairing one of the trucks, thereby making possible the movement of this truck from the scene. Accused thus aided and encouraged the nefarious scheme, became a party to it and became chargeable with the control, though unlawful, of the property disposed of. He had an obligation or duty with respect to the care of the property beyond that imposed on persons generally (Dig. Op. JAG, 1912-40, sec. 441 (2) ) and his conduct as shown constituted a violation of Article of War 83.X

NATO 3779, Nogiec (MJ) (Memorandum).

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ARTICLE OF WAR 84 - Proof of Government Ownership.

Accused were found guilty of the unlawful sale of gasoline, military property of the United States, in violation of Article of War 84, and of wrongful disposition of the same gasoline, in violation of Article of War 83. The evidence showed that the gasoline was loaded on an Army truck at a quartermaster truck-aviation unit and transported to an airfield near Tebessa, Tunisia. Accused were members of that quartermaster organization. The containers were of the type commonly used in the field. Held: The circumstances justified an inference that the gasoline was military property of the United States issued for use in the military service. CM 207591, Nash et al, Dig. Op. JAG, 1912-40, sec. 452 (10), distinguished.

NATO 252, Dickerson et al.

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ARTICLE OF WAR 85 - Drunk on Duty - Officer of a Service as Officer  
of the Day.

Accused, an officer of the Army of the United States, detailed for duty in the Quartermaster Corps, was found guilty of being drunk while on duty as officer of the day. A motion for a finding of not

guilty, based upon the contention that accused was "never legally on duty" was denied. Held: Even assuming that the detail of accused involved contravention of Army Regulations (AR 600-20, C5, 3 May 43), accused was, when found drunk, legally "on duty" within the purview of Article of War 85. Accused was an officer of the Army and had the legal power, by virtue of his office, to exercise command. He was not prohibited by statute from doing so. A guard was in fact formed and accused was in fact detailed thereto as officer of the day. He entered upon his prescribed duties, some of which, it must be assumed, involved the ordinary military duties of vigilance, intelligence, maintenance of order and protection of government property. Although his detail as officer of the day may have involved administrative error in so far as it purported to clothe him with command power incident to his duties, that error did not deprive him of his inherent power as an officer of the Army and was not such as to relieve him of his normal military obligations. If the purpose of the Congress to punish drunkenness occurring while an officer is about the business of the Army is to be accomplished, an accused person must not escape amenability because of an administrative irregularity in his selection and detail for the duty.

NATO 2876, Gay.

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#### ARTICLE OF WAR 85 - Drunk on Duty - When "On Duty".

Accused, in command of an antiaircraft battalion in a theater of active operations where enemy air attack was to be expected, was found drunk in camp, while at mess and in the vicinity of his quarters. Though having no tactical control over units of his command, he was in administrative control of his battalion and was actually exercising functions of command. Simultaneously he was filling a position as a staff officer and tactical adviser to the brigade commander to whom he was attached. He was constantly and continuously on duty in both capacities and conviction under Article of War 85 was warranted by evidence that accused was found drunk.

NATO 1045, MacLachlen.

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#### ARTICLE OF WAR 86 - Sentinel - Definition.

Accused was found guilty of leaving his post as a sentinel before being regularly relieved, in violation of Article of War 86. On 27 December 1943, near Adelfia, Italy, accused was on duty as a "guard" at an antiaircraft installation consisting of a searchlight with a power plant, a 50 caliber antiaircraft gun and a machine gun, his duty being to walk about the area armed with a submachine gun, to protect the searchlight equipment and keep out "the Italians". In case of an alert it was the duty of the guard to start the power plant and "continue on guard". He left the area during his tour. He was in fact

charged with the special obligations of watchfulness and vigilance which characterize the duties of a sentinel. The court was justified in concluding he was a sentinel and in finding him guilty of violation of Article of War 86.

NATO 1757, Flaherty (MJ).

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ARTICLE OF WAR 95 - Unnatural Practices.

Accused was found guilty of committing indecent and improper acts on various enlisted personnel of his command, in violation of Article of War 95. Under pretext of official license, on separate and distinct occasions, accused took perverse liberties by manually touching and stroking the bodies of soldiers. His movements were in the nature of fondling and were suggestive of what might be done to a person of the opposite sex. In each instance the enlisted man was summoned before the accused for some asserted breach of military discipline and detained for a long period of time. Much of the time he kept the soldiers standing at attention or parade rest for the ostensible purpose of correcting the soldiers' posture. All circumstances in evidence evinced either a depravity of instinct or, as betrayed also by his acts, an innate moral perverseness. The conduct of the accused demonstrated his moral unfitness to continue as an officer. Record sufficient to support the findings and sentence.

NATO 466, Brewer.

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ARTICLE OF WAR 96 - Dissemination of Classified Information.

Accused was convicted of willfully, feloniously and unlawfully communicating, to persons not entitled to receive it, information secured by accused from secret documents, in violation of Article of War 96. The information was casually communicated to other officers and enlisted men and had to do with the then impending invasion of Italy. No intention to aid the enemy was suggested by the evidence. Intentional dissemination by accused of the classified matter was prejudicial to good order and military discipline within the meaning of Article of War 96, and was also violative of Section 31 (d), Title 50, United States Code.

NATO 1175, White (Advice by AJAG).

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ARTICLE OF WAR 96 - Immoral Advances to Woman - Punishment.

Accused was found guilty of wrongfully making "advances in approaching" a woman, a member of the Army Nurse Corps. The offense is not listed in the Table of Maximum Punishments but is punishable under Paragraph 104c of the Manual for Courts-Martial as under Section 22-2701 of the Code of the District of Columbia. Maximum of three months confinement authorized.

NATO 1703, Smotherman (MJ).

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ARTICLE OF WAR 96 - Uttering Falsely Made Instrument - Proof of Falsity.

Accused was found guilty, in violation of Article of War 96, of knowingly and with intent to defraud attempting to pass as true and genuine a certain falsely made writing of a public nature which might operate to the prejudice of another. While absent without leave accused presented to an air transport officer in Tunis a document purporting to be from accused's commanding officer reciting that accused was on furlough to visit his mother in the United States, stating that he was to travel by air and requesting that he be given immediate transportation. The document was questioned and accused disappeared. A second similar signed paper later found in the possession of accused was shown not to have been made or authorized by the purported signer, the same officer whose name appeared on the document presented by accused. The circumstances sufficiently proved that the document presented was falsely made without authority.

NATO 1377, McNerny (MJ).

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ARTICLE OF WAR 96 - Wanton Discharge of Rifle - Maximum Sentence.

Accused was convicted, in violation of Article of War 96, of wrongfully impersonating a military policeman to the prejudice of good order and military discipline, and of "wrongfully and wantonly" discharging a rifle, "in disregard of the lives and property of others". He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The offense charged with respect to the firing of the rifle was more than mere carelessness and was closely related to the offense of assault with a dangerous weapon with intent to do bodily harm in violation of Article of War 93. The sentence was not in excess of the legal maximum.

NATO 1206, Deal (MJ).

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ARTICLE OF WAR 96 - Wrongful Use of British Aircraft.

Accused was found guilty, in violation of Article of War 96, of wrongfully obtaining possession of a British aircraft and doing material damage to it. Accused, dressed and posing as a Royal Air Force officer, attempted to fly the plane and during an attempted take off the undercarriage collapsed and the plane was damaged. Record legally sufficient to establish violation of Article of War 96.

NATO 1472, Trop (MJ).

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ARTICLE OF WAR 104 - Presumption of Regularity in Administering Punishment.

Accused was found guilty of willful disobedience of a lawful command by an officer to dig a kitchen garbage hole, in violation of Article of War 64. There was evidence that the order was given to effectuate punishment under Article of War 104. The record did not show that the regulations contained in Paragraphs 106-108, Manual for Courts-Martial, 1928, were complied with, nor did it affirmatively appear that such regulations were not complied with. Held: In the absence of an affirmative showing to the contrary it must be presumed that the punishment under Article of War 104 was lawfully imposed after substantial compliance with all preliminary requirements (CM 200289, Petkoff).

NATO 2101, O'Neil (MJ) (Memorandum).

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ASSAULT - Indecent - Maximum Punishment.

Accused was found guilty of wrongfully making advances to an Army nurse, seizing her sweater, uttering lewd remarks, opening his bathrobe and untying his pajamas, in violation of Article of War 96. The acts of accused constituted an assault and battery aggravated by the circumstances that they were committed upon the person of a female and included indecent familiarities with her. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. Record legally sufficient to support the sentence.

NATO 1703, Smotherman.

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ASSAULT - With Intent to Commit Sodomy - Punishment where Sodomy Also Is Charged.

Accused was found guilty of three specifications, in violation of Article of War 93, one for sodomy, one for an assault with intent to commit sodomy, and one for assault with intent to do bodily harm. He was sentenced, among other things, to confinement at hard labor for ten years. Accused assaulted his unwilling victim with his fists, striking him a number of times and knocking him to the ground. Before making the assault accused had expressed his intention of committing sodomy upon his victim. Accused completed the act of sodomy and again viciously struck his victim on the head. The assault with intent to commit sodomy was an offense separate and distinct from the offense of sodomy committed by force upon an unwilling pathic, though both offenses were part of the same general transaction. Sentence authorized.

NATO 1702, Reynolds.

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ASSAULT - With Intent to Do Bodily Harm - Principals.

Two accused were found guilty of rape and of assault with intent to do bodily harm with a dangerous weapon. The evidence shows that in events leading up to the act of rape "they" shot men present in the hand and thigh. The two accused put the woman on the ground and had sexual intercourse with her without her consent and against her will. While engaged in the unlawful enterprise one of them fired the shots. The question as to who fired is of no consequence. Each was responsible, in law, for the act of the other. Record of trial legally sufficient to support findings of guilty of the assault.

NATO 779, Clark et al.

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ASSAULT - With Intent to Murder - Intent - Self-Defense.

Accused was found guilty of assault with intent to murder, in violation of Article of War 93. Shortly before the assault accused, who was in the company of his victim, X, had become angry when the two were denied entrance to an Italian home, had cocked a pistol with which he was armed and had declared his intention to shoot open the door. X remonstrated and drawing his own pistol told accused to desist. Later, at another place, accused reminded X of the previous argument and, with the words "I am going to finish you right now", shot him in the chest. Accused contended that the victim had previously actually threatened accused with a pistol and that accused fired because the victim had again reached for his pistol. Accused's use of a deadly weapon, the character of the injury inflicted and his declared resentment of the victim's conduct, warranted an inference of the requisite specific

intent to murder. The court was justified in concluding that there was no reasonable ground for accused to believe that he was in imminent danger and that it was necessary to fire upon the victim; and in concluding that the shot was fired aggressively and without any effort to retreat. The legal excuse of self-defense was not available to accused.

NATO 1707, Faircloth.

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ASSAULT - With Intent to Murder - Proof.

Two accused assaulted an Arab, one holding him while the other inflicted serious wounds with a knife. The blows were so vicious that one wound penetrated to the victim's lung. From the nature of the weapon used, the severity of the wounds inflicted, the absence of proof of any legal excuse, legal justification or provocation, and from the other attendant circumstances, the court was justified in inferring that the assault was made wantonly, willfully and with malice aforethought, i.e., with intent to commit murder.

NATO 1123, McGee et al.

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ASSAULT - With Intent to Rape - Abandonment of Purpose.

Accused was found guilty of assaults with intent to rape. He wrongfully entered two Arab huts and in each of them seized a woman occupant. In one instance the act of violence was accompanied by the words "zig zig" (meaning sexual intercourse), and in the other accused forced the woman to the floor and unbuttoned his trousers. In each case, after the woman had successfully resisted, accused offered her candy. Although accused desisted in his use of force, the facts justify an inference that in both cases, at the beginning, he intended to overcome the woman's resistance by force. What accused did immediately after the assault, whether by enticement or subterfuge, does not relieve him from responsibility. Once the assault with intent to commit rape has been made, it was not a defense that accused resorted to other means to accomplish his purpose or voluntarily desisted. Record sufficient to support findings.

NATO 583, Terrell.

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ASSAULT - With Intent to Rape - Abandonment of Purpose.

Two accused, H and D, were found guilty of assault with intent to rape in violation of Article of War 93. The evidence shows that accused, while armed, forced into a nearby cave a young woman who

had been standing about with a group of other Italians. Both accused assaulted the girl's father when he interfered. H, by pointing a pistol at the girl, forced her into a dark recess of the cave. Upon hearing the girl's cries for help, the father entered the cave and attempted to pull H from her; H assaulted the father again and the latter left. H struck the girl repeatedly, pushed her to the floor, held her there, tried to choke her, and beat her back upon the floor. He stooped over her and tore her underwear. The girl screamed and resisted continuously until accused left her. When H forced the girl into the cave, accused D loaded his rifle, placed himself outside the cave and pointed the rifle at the Italians thereabouts until H emerged, when both accused ran away. The actions of H justified an inference of a concurrent intent to have sexual intercourse with the girl and the violence employed indicated an intention to overcome any resistance which might be offered. D aided and abetted him. All elements of the offense charged were supported by the evidence. Once the assault with intent to rape had been committed it was no defense that accused desisted before accomplishing his purpose.

NATO 3569, Harrah et al.

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#### ASSAULT - With Intent to Rape - Failure of Proof.

Accused was found guilty of assault with intent to rape, in violation of Article of War 93. A woman of the Polish Army in Italy, dressed in men's clothing, was driving along a main heavily-travelled highway at night. She stopped to pick up accused, who had sprung in front of her truck seeking a ride to a nearby town. He entered the cab and, when she said she was not going to that town, he tried to seize her by the hands, but fled when she threatened him with a bottle. He re-entered the cab, struck her in the face, and attempted to drag her from the vehicle. He put his hand over her mouth to stifle her outcries, and again left the cab. While she was attempting to start the engine, accused returned, struck her, breaking her nose, and again fled. She tried to get help from a passing Italian truck, but failed due to linguistic difficulties. She screamed as accused reappeared. He tried to quiet her, then kicked her on the legs and said "starta". Accused ran away when another vehicle approached. The lights on the woman's vehicle were burning throughout the incident. At no time did accused make any lewd remarks or gestures, attempt to disrobe her, or touch any part of her body except her hands and mouth, even at moments when she was exhausted and helpless. Asked whether accused attempted to have intercourse with her, she testified: "I cannot state that, I know only that he tried to throw me out and beat me". There was no substantial evidence that at the time of the assault accused intended to commit rape. The record is devoid of any word or act of a nature which, as a matter of human experience, would ordinarily be expected to accompany a lustful purpose. The pleadings and proof were legally sufficient to support only so much of the findings of guilty as involved the lesser

included offense of assault and battery in violation of Article of War 96.

MTO 4623, Henderson.

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BURGLARY - Breaking and Entering with Intent to Rape.

One of two accused was found guilty of burglary, rape and attempt to commit rape and the other was found guilty of burglary and rape, all accomplished at the same time and place. Burglary is the breaking and entering in the night of another's dwelling house with intent to commit a felony therein. The evidence showed that accused scaled a courtyard wall at night, broke the door of the room where the prosecutrix was, and had sexual intercourse with her by force and without her consent. It was necessary to prove a specific intent, at the time of the entry, to commit a felony. Intent was to be inferred from the facts. When accused actually and immediately committed a felony after entering the house, it may be inferred that the entrance was with the intent to commit a felony. Record sufficient to support findings.

NATO 439, Hunt et al.

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CHALLENGES - Peremptory - Time of Submission.

Some time after arraignment accused submitted a peremptory challenge. The law member ruled that a peremptory challenge was not then in order. The ruling was correct. Accused had been accorded his right to exercise such a challenge before the court was sworn. Failure to exercise the right when it was tendered constituted a waiver. A vote by the members of the court upon the challenge was not required.

NATO 646, Simpson and Baker.

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CHALLENGES - To Member of Court Who Sat on Trial of Co-offender.

Accused was tried for wrongfully obtaining, carrying away and disposing of property of the United States in violation of Article of War 96. He challenged certain members of the court on the ground that they had sat as members of a general court-martial in the trial of an accused who was found guilty of the same offense as that with which accused was charged, the specific objection being that the challenged members, by their prior action, had formed and expressed definite opinions as to the guilt of accused. The court

denied the challenges in the cases of members who stated they had no definite or positive opinions as to the guilt or innocence of accused and could exclude from consideration all of the testimony considered in the previous case. The action of the court in denying the challenges was not improper. The fact that a member sat on a court which tried an alleged co-offender for participation in the same offense does not of itself render the member ineligible, unless, by reason of the nature of the offense charged, a finding of guilty in the case of one accused necessarily involves guilt of the other. As any of the co-offenders could have been found guilty without involving a conclusion of the guilt of any of the others, the legal propriety of the challenges was a question for the court.

NATO 1799, Quist.

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#### CHALLENGES - Waiver.

Accused was tried for rape by a court-martial which had completed the trial of another soldier for rape of the same woman, at the same place and at about the same time. There was evidence of general concert of action between the accused and the other soldier. The defense did not interpose any challenge and the defense counsel stated that accused did not object to any member of the court as constituted. Under Paragraph 58c, Manual for Courts-Martial, the members of the court were subject to challenge. They were not, however, ineligible to sit as members of the court. Their disqualification was subject to waiver through withholding challenge. The right of challenge was effectively waived.

NATO 423, Stroud.

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#### CHARGES - Multiplicity of Specifications.

Accused was properly charged with three separate robberies although they were very closely related in point of time and place. Each robbery was basically a separate trespass and as such constituted a distinct and complete offense. The case did not present the situation of larcenous taking of several articles from different persons where the taking was substantially the same transaction, and the rule against multiplicity is therefore inapplicable.

NATO 950, Harlan.

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#### CIVILIANS - Violation of Military Law.

Accused, a civilian, was First Assistant Engineer on a ship operated by the War Shipping Administration, transporting cargo

consigned to the United States Army abroad. While the ship was berthed in Bizerte Harbor, Tunisia, accused said to the master of the ship "You don't give a god damn what happens to the crew and you are no good or you would have had some liquor on board for the crew", or words to that effect. He also, at the same place, gave to a British seaman a small quantity of butter, property of the United States. He was found guilty of behaving himself with disrespect toward his superior officer in violation of Article of War 63, and of wrongfully disposing of property of the United States by giving it to an unauthorized person in violation of Article of War 94. Held: The master of the ship was not accused's superior officer in the sense in which that term is employed in Article of War 63. However, the misconduct of accused did have a direct and palpably adverse effect upon the operation of the Army and constituted a disorder to the prejudice of good order and military discipline in violation of Article of War 96. In the absence of proof that the butter was issued for use in the military service of the United States, accused could not properly be found guilty of violation of Article of War 94. However, the unauthorized and wrongful giving away of property of the United States was likewise a disorder prejudicial to good order and military discipline in violation of Article of War 96.

NATO 437, De Jonge.

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#### CONFESSIONS - Adequacy of Proof of Corpus Delicti.

Accused was found guilty, in violation of Article of War 96, of wrongfully and unlawfully abstracting and removing from United States mail packages certain specified articles before the packages had been delivered to the addressees, in violation of Section 317, Title 18, United States Code. Two confessions of accused were introduced in evidence wherein all essential elements of the offense were admitted. The other evidence in the case showed that accused had been on duty at an Army post office over a period including the dates of the alleged acts, and that a postal officer, having occasion to check accused's property, discovered the articles specified. Wrappers were found in the room where accused worked which indicated they had been on packages that had been in the mail. When confronted with the articles, accused "identified" them. Held: The evidence other than the confessions supported inferences that the articles had been abstracted as alleged. The minimum legal requirements as to proof of the corpus delicti were satisfied.

NATO 1366, Anderson.

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CONFESSIONS - Admissions Distinguished - Proof of Voluntariness.

The company commander of accused's organization was permitted to testify that, in his opinion, the statements accused made to him "contained a confession". The statements, which were received in evidence without any showing that they were voluntarily made, were not in fact confessions since they fell short of admissions of guilt. But they did constitute admissions against interest which the court properly admitted without requiring any inquiry into the circumstances under which they were made (MCM, 1928, 114b). The opinion expressed by the company commander as to the legal effect of these statements was patently incorrect, but was harmless.

NATO 937, Barbieri et al.

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CONFESSIONS - Showing of Voluntariness.

Without objection by the defense, the confession of accused to a superior officer was received in evidence without preliminary proof that it had been voluntarily made. The confession itself contained a recital that accused had been advised that it might be used against him and that the confession was voluntarily made. No improper advantage of accused was suggested and in the absence of proof or suggestion of any facts to the contrary the confession was properly regarded as having been voluntarily made.

NATO 1366, Anderson.

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CONFESSIONS - To Officer, Without Warning of Rights - Involuntary.

Accused left their units while before the enemy and sought safety in the rear. They were found guilty of violation of Article of War 75. There were received in evidence confessions by accused made to their battery commander without preliminary warning and while they were being returned to their battalion. The confessions, having been made to a military superior without warning of the rights of accused to remain silent and under circumstances indicating a possibility that coercion may have resulted from questioning by the officer, should have been excluded.

NATO 1499, Miller et al (MJ).

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CONTINUANCE - Denial of Motion For - Held Abuse of Discretion.

Accused was found guilty of assault with intent to rape in violation of Article of War 93. Six days prior to his arraignment accused stated he wished the services of a Captain B, whom he knew personally, as his defense counsel. Captain B was in fact the regularly appointed defense counsel of the court before which accused was arraigned. Assuming that Captain B would be available the assistant defense counsel made no effort to prepare the defense. On the day of trial, Captain B was engaged elsewhere in trying cases and was expected to return in about two days. The regularly appointed assistant defense counsel advised the court that accused desired to be represented by Captain B and appropriately formally moved for a continuance on that ground. Defense gave as further grounds in support of the motion its desire for an opportunity to obtain testimony of three absent persons whose testimony, it asserted, would tend to establish an alibi; also testimony as to the date of a certain order which defense believed to be of importance in the same connection. The court denied the motion. The denial of the application for a continuance involved an abuse of discretion which injuriously affected the rights of the accused in that (1) accused was unjustifiably deprived of his right to be represented by individual military counsel of his own selection as provided in Article of War 17; and (2) accused was not afforded an opportunity adequately to prepare and present his defense. Accused was not chargeable with any lack of due diligence and there was a sufficient showing that the desired evidence, as well as counsel, would be available within a reasonable time. Record held legally insufficient to support the findings and sentence.

NATO 1243, Evans.

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CONTINUANCE - Motion for Consideration of Ex Parte Statements Obtained after Trial.

A motion by the defense for a continuance for the purpose of securing additional material testimony of absent witnesses was denied. After the trial certain affidavits of these witnesses not wholly consistent with the defense counsel's statement of their expected testimony, were produced by the staff judge advocate. The affidavits were taken ex parte. Held: The affidavits neither justified the denial of the motion nor corrected errors of record. The validity of the proceedings must be judged from an examination of the record of trial itself.

NATO 1243, Evans

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DESERTION - Evidence of Intent to Return - Materiality.

In a trial involving desertion in violation of Article of War 58, the defense sought to establish that accused intended to return to the Army about a certain date and introduced testimony that accused had so stated to a witness. This testimony was admitted but, in his ruling, the law member improperly announced that its admissibility was "extremely doubtful" and erroneously admonished the court to receive with caution testimony regarding accused's intentions. Since the question of whether accused intended permanently to separate himself from the service when he absented himself from his command was of controlling importance, his declarations to third persons regarding this intent were verbal acts which were material and admissible. The law member should not have questioned the propriety of this testimony. Upon the whole record it did not appear that the substantial rights of accused were prejudicially affected by the ruling.

NATO 1647, Kirinich.

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DESERTION - Restoration to Duty by Detachment Commander Not Constructive. Condonation.

Accused was convicted of desertion and misbehavior before the enemy in violation of Articles of War 58 and 75, respectively. There was evidence that after he rejoined his organization, following his offenses, he was placed on duty by his detachment commander. An unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for a desertion to which the restoration relates, but a mere assignment of a deserter to duty by a detachment commander does not amount to restoration within the meaning of the rule. The rule contemplates an administrative act to effect removal of the charge of desertion and a consequent restoration to duty, an act which must be accomplished by an authority competent to order trial for desertion. As trial for wartime desertion may be ordered only by an officer exercising general court-martial jurisdiction, there was here no constructive condonation of the offense.

NATO 1869, Rodriguez(MJ).  
NATO 2139, Grabowski.

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DESERTION - Variance - Desertion with Intent to Remain Permanently Absent Cannot Be Found under Charge of Desertion to Avoid Important Service.

Accused was charged with desertion by absenting himself without leave from his organization with intent to avoid hazardous duty. He was found guilty except as to the allegation alleging intent to avoid hazardous duty, with a substitution of words alleging desertion in the

broad form, that is, absence without leave accompanied by an intent not to return. The variance was fatal to the findings of guilty of desertion for a general intent not to return to the service of the United States was not an element of the offense charged and the offense found was not therefore a lesser included offense with respect to that alleged. The record of trial was legally sufficient to support only so much of the findings of guilty as involved findings of guilty of absence without leave from command in violation of Article of War 61.

NATO 2572, Hayes.

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused was found guilty of desertion by absenting himself without leave with intent to avoid hazardous duty, to wit, combat with the enemy. The evidence showed that on 1 April 1943, accused's company attacked the enemy near Maknassy, Tunisia. That night the company withdrew to a position about four miles west of Maknassy where it remained in mobile reserve. On 3 April accused absented himself without leave from the company and remained absent until 8 May 1943. From the unauthorized absence under the circumstances noted the court was justified in inferring an intent to avoid hazardous duty of combat.

NATO 412, Weaver.

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused was found guilty of desertion with intent to avoid hazardous duty. The evidence showed that without authority he left his company when it was facing enemy elements less than a mile away. He remained absent for 126 days. There was substantial evidence that his company was engaged in actual combat when he absented himself. Under these circumstances the court was warranted in concluding that accused left his company with the specific intent to avoid hazardous duty.

NATO 867, McCullough.

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused, by his own admission, deliberately absented himself from his company in an attempt to avoid combat duty in a then forthcoming invasion of Sicily because, according to his own testimony, he "did not feel mentally able to withstand another battle experience". He turned in to the military police when he learned the landing in Sicily was successful. Accused's company commander testified accused

had been through the "El Guettar battle" and had performed his duties satisfactorily. As the accused absented himself from his organization without leave with intent to avoid hazardous duty, the evidence sustained findings of guilty of violation of Article of War 58.

NATO 1020, Mabry.  
NATO 1188, Clementi.

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused's organization was near Bizerte, Tunisia about 9 July 1943. His platoon leader had informed the platoon, at a time when accused was present, that the company was preparing to embark for an unknown destination for the purpose of engaging in combat with the enemy. Accused was absent from reveille formation on 9 July. About 13 July his organization landed in Sicily and engaged the enemy. Accused was not seen by any member of the organization until he returned thereto about 15 August 1943. The facts and circumstances justify the inference that when accused left the organization he did so to avoid hazardous service as alleged. He was properly found guilty of violation of Article of War 58.

NATO 1183, Garner.

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused was a member of an engineer unit doing road repair work. Although it had never done infantry duty the unit was alerted for a mission as corps infantry reserve due to an anticipated armored attack by the enemy. The organization had recently been under enemy shellfire. Accused knew the nature of and reason for the mission. Accused left his organization, went to the rear and did not return for 11 days. In view of the circumstances the court was warranted in finding accused guilty of absenting himself without leave with intent to avoid hazardous combat duty in violation of Article of War 58.

NATO 1247, Brett (MJ).

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused was found guilty of desertion with intent to avoid hazardous duty. He absented himself without leave from his organization for 87 days. When he left the organization, an armored infantry company, it was engaged in patrol activity and

in guarding mine fields, no other troops being between it and the enemy. The duty of the organization was to keep the enemy from passing through the area it was occupying and defending. The organization was subject to actual combat at all times. The court was justified in finding that the absence was with specific intent to avoid hazardous service, and constituted desertion.

NATO 1283, Guest.

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused failed to disembark from a transport with his organization which was engaged in an amphibious landing in Sicily against the enemy. He stated to another soldier that he intended to disguise himself as a sailor and return to the United States. He did in fact conceal himself on board the transport. Accused thus became absent without leave and did not return to military control for about three weeks. The proof of unauthorized absence coupled with both the expressed intent to desert and the overt act of concealing himself on the transport supported a conviction of desertion in violation of Article of War 58.

NATO 1323, McClure (MJ).

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DESERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused was found guilty of desertion by absenting himself without proper leave from his organization with intent to avoid engagement with the enemy, in violation of Article of War 58. Accused's organization, situated on the Anzio Beachhead, Italy, received orders to move to a forward assembly area. Tents were struck, packs rolled and preparations for the move were made. The assembly area was two and one-half miles from the enemy and under some enemy artillery fire. Accused had been informed of the movement and did not go forward with his organization. Two days later the organization entered combat and sustained severe casualties. It is a matter of common knowledge that during the period involved the entire beachhead at Anzio was under enemy fire and attack, and that the fighting there was severe. Accused re-joined his organization after his company had been withdrawn from active combat. The conclusion that accused had absented himself with specific intent to avoid hazardous duty was fairly inferable.

NATO 2046, Jamruska.

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DESSERTION - With Intent to Avoid Hazardous Duty - Proof.

Accused was found guilty of desertion with intent to avoid hazardous duty, in violation of Article of War 58. Accused, who had been absent without leave from his organization while it was in a rest area in Italy, was returned to his company by military police at a time when the organization was preparing to go to a staging area. Tents had already been struck. There was testimony that "it is a common assumption that when you go to a staging area, sooner or later you will get" into action against the enemy. Accused unauthorizedly absented himself about an hour after return. The court was warranted in concluding that accused was motivated at the time he absented himself by the specific intent to avoid the hazardous duty of participating with his organization in action against the enemy.

NATO 2328, Hanson.

NATO 2329, Himes.

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DESSERTION - With Intent to Shirk Important Service. - Proof.

Accused was found guilty of desertion with intent to shirk important service in that after being alerted for shipment to a place unknown, he absented himself without leave, in violation of Article of War 58. He was alerted at a replacement depot in North Africa for shipment, and was told of the sailing list he was on but not the exact destination, which was secret. The general belief in the organization was that the destination was Italy, which had recently become combat area. Accused absented himself without leave from his command and remained unauthorizedly absent for a period of five days, after which he surrendered himself. The shipment on which accused was expected to go was completed while he was so absent. Accused stated that he had missed other shipments and did not consider his conduct serious in nature. Held: The alleged intent was sufficiently proved, as was the importance of the service involved. The offense was complete when accused intentionally avoided the shipment.

NATO 1566, Donohue.

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DISLOYALTY - Declaration of Intent Not to Perform Combat Duty - Under Circumstances, No Offense.

Accused was found guilty of violating Article of War 96, in that, with intent to avoid an impending move to a combat sector, he wrongfully refused to perform combat duty with his company. Accused had previously been in combat for seven or eight days. At the time alleged, he was with his company in a rest center behind

the lines. His company commander talked to accused "just like a father", on an informal and friendly basis, in an effort to determine his willingness and fitness to serve at the front. In response to direct questioning initiated by the officer, accused stated that "he could not stand it" in the front lines because of headaches caused by an eye injury, that the shells affected his eyes and he could not sleep. He requested assignment as a cook, for which he had been trained, but the officer stated he could use him only as a rifleman. On a prior occasion, accused had been told by a medical officer that nothing could be done for the injury, but that it might correct itself. It was not shown whether accused knew, as was the fact, that his company was to return to the front within a few days. His company officer did not give him a "direct order", but pointed out the consequences of a court-martial and sentence. When accused maintained that he "would refuse to do duty", he was placed in arrest. These honest declarations disclosing accused's true sentiments, made only when questioned by his military superiors, were not of a nature to bring discredit upon the military service and were not to the prejudice of good order and military discipline, punishable under Article of War 96. Despite the palpable error in his mental attitude toward combat duty, accused answered frankly and truthfully, as it was his duty to do. Had he refused to reply to the questioning by the officer, he would have been chargeable with other military offenses. There is no evidence that accused's remarks manifested recalcitrance, intentional defiance of military authority, contempt or disrespect in substance or manner of delivery. It does not appear that anyone but the company commander heard his remarks, or that they could have induced insubordination by other persons. The circumstances differ from those in NATO 107, Burke, where a statement of intended refusal to engage in combat was deemed an obstruction to and a specific interference with a military mission then in progress. Record not legally sufficient to support the findings of guilty.

MTO 4787, Grady.

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DYING DECLARATION - Sense of Impending Death - Proof.

Deceased was shot in the chest by a fellow soldier in a sudden quarrel at their platoon command post. While being carried from the scene, in a bleeding condition, deceased was heard to say: "Boys, I am shot bad". At his battalion aid station, the attending surgeon found that deceased "seemed very ill, had no pulse". Two bottles of plasma were required before the pulse could be felt. When evacuated to a Medical Battalion Clearing Station, he was alive but not rational. On arrival at that Station, his condition was deemed fair but comatose. He died en route to the field hospital, about four hours after he was wounded. While at his battalion aid station, deceased called Jones, a friend, to his bedside and told him he had been shot by accused.

When asked whether accused shot him intentionally, he answered: "Yes, he did". Jones testified: "He told me all he wanted to do was get back there (to the platoon command post at the front). So I told him he would be all right, and he asked me if I thought so. I said, 'Yes', it was a small shot in the shoulder. He asked me if I would write to his wife." Jones could not testify as to whether deceased knew that he was dying at the time of this conversation. The circumstances do not warrant the inference that deceased "was under a sense of impending death", thus bringing the statements within the exception to the hearsay rule admitting in evidence dying declarations. The statements were however elicited in cross-examination on the part of the defense for its own purposes. Their reception by the court did not constitute error which injuriously affected the substantial rights of accused.

MTO 4750, Smith.

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**EVIDENCE - Accomplice's Testimony Requires No Corroboration.**

Accused was found guilty of wrongfully obtaining, carrying away and disposing of specified property of the United States in violation of Article of War 96. The evidence consisted of his confession, proof of the making of certain false requisitions, and testimony of an accomplice as to the acts and statements of accused. A motion for a finding of not guilty upon the ground that there was no evidence of the corpus delicti was properly overruled. The testimony of the accomplice respecting acts and statements by his confederates in furtherance of the common design was admissible against all who joined in the commission of the offense. Corroboration of the accomplice was not required.

NATO 1800, Burgoyne.

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**EVIDENCE - Character of Deceased in Homicide Case May Not Be Shown by Proof of Particular Acts.**

During a trial for murder, in violation of Article of War 92, the defense attempted to "determine the character of deceased" by asking a witness "Did you know whether Limuel (deceased) got in any fights in town". An objection to the question was sustained. The ruling was correct. An inquiry as to whether deceased had engaged in certain specified fights was irrelevant and objectionable. While inquiry into deceased's general reputation in his organization as a peaceful and law abiding individual might have been of probative value and admissible, if a proper foundation had been laid, the inquiry into specific unlawful acts or incidents of violence was improper.

NATO 2642, Jernigan

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EVIDENCE - Hearsay Identification.

The investigating officer, upon cross-examination by the defense, testified to certain extrajudicial identifications of accused. The proceedings by the investigating officer were conducted through an interpreter and the witness testified only to what the interpreter reported to him. The testimony was therefore hearsay. In so far as this testimony was produced by the defense for purpose of impeachment, it was not objectionable except for the fact that the identifications came through an interpreter.

NATO 1490, Johnson et al.

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EVIDENCE - Hearsay Identification.

Upon a trial for rape, witnesses testified that the victim and her husband, prior to trial, had identified the accused as the woman's assailant. The testimony was incompetent but, in view of the uncontroverted evidence of identity, was harmless.

NATO 423, Stroud.  
NATO 460, Trevino.

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EVIDENCE - Memoranda - Use to Refresh Memory or Accurately Represent Knowledge when Made.

An officer who investigated the charges read to the court from a document described as a copy of his notes but which was in fact a statement prepared by this witness for accused's signature. The rules relative to the use of memoranda permit a witness to refresh his memory, or a part of it, by reference to memoranda; and if he does not actually remember the facts but relies on the memoranda exclusively they may be admitted in evidence if the witness can state that the memoranda accurately represented his knowledge at the time of making (MCM, 1928, par. 119b). The procedure followed in the instant case did not conform to either rule.

NATO 2840, Tolbert.

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EVIDENCE - Records, Official - Death Certificate of Foreign Municipality.

Accused was found guilty of manslaughter. To prove the death of the victim, there was received in evidence what purported to be a death certificate originating in the municipality of Piombino, Italy. In view of a stipulation concerning the death certificate entered into by the prosecution and the defense, and the other evidence of record, the death was sufficiently established. Foreign death certificates of this character, however, are not ordinarily admissible to prove the facts recited, at least without proof or agreement that the record was made pursuant to law and prescribed procedure in the regular course of official business. The rule of Paragraph 117 of the Manual for Courts-Martial, permitting the use of official writings to prove the facts recited, though general in terms, can not be extended to the use of records of foreign government agencies. Accepting as applicable the Federal statute concerning use of foreign records as evidence (28 U.S. Code, sec. 695a), to the extent that it supplements the Manual for Courts-Martial (1928, par. 111), proof of execution pursuant to the foreign laws and procedure is a legal necessity.

MTO 4347, Saunders (MJ) (Ltr, AJAG, 15 Dec 44).

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FALSE OFFICIAL REPORT - With Intent to Create an Affray - Maximum Punishment.

Accused was found guilty of a specification which in effect alleged that he made a false report with the specific intent to create a disorder amounting to an affray. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for two years. The reviewing authority approved the sentence but reduced the confinement to one year. Held: The report was more than a simple false official statement made with deceitful purpose, as there was a specific intent to create a serious public disturbance. The maximum limitations upon punishment for making a false official statement or report are not applicable, nor are the limitations upon punishment for creating a disorder under such circumstances as to bring discredit upon the military service. The disorder here was laden with most serious consequences and closely approached rioting. An affray, more than a mere disorder, was intended and accomplished. There is no prescribed limitation upon punishment for the offense in question which would require reduction of the sentence adjudged.

NATO 1896, Krawczyk (MJ).

FORCING A SAFEGUARD - Meaning of "Safeguard" under Article of War  
78 - Disorder.

A railway transport officer of the American or British Army in Italy ordered that a certain railroad station be placed off-limits to personnel of the Allied forces. "Off Limits" signs were posted on the premises. British sentinels were posted to insure compliance with the orders, to protect the operation of the railroad and property of the Allied armies, and to prevent disorders. Accused entered the forbidden premises, refused to leave when ordered, participated in an assault on two sentinels, and helped to disarm them. Accused was found guilty of forcing a safeguard in violation of Article of War 78. Regardless of whether accused's acts amounted to a "forcing", no "safeguard" within the meaning of Article of War 78 was established. The essence of a safeguard is a commitment by the commander of belligerent forces for the protection of persons or property of the opposing belligerent, or, possibly, of a neutral affected by the belligerency. A safeguard is not a device adopted by an Army to protect its own property or nationals or to insure order within its own forces, even in a theater of war. The proof supported only so much of the findings of guilty of the specification which charged in substance that accused wrongfully and by force overwhelmed the guards posted to protect the station and premises. This was a disorder violative of Article of War 96.

MTO 4846, Owens.

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FORGERY - Allied Military Currency May Be Subject of Forgery.

Accused was convicted of forgery by falsely and fraudulently altering Allied Military Currency notes, used in Italy, writings of a public nature, which might operate to the prejudice of another, in violation of Article of War 93. He added zeros to the figures on 100-lira notes so that in poor light they appeared to be 1000-lira notes. These he and his confederates intended to pass at night. The notes were of a nature "which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice". Record legally sufficient.

NATO 2171, Tatko.

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✓ FORMER JEOPARDY - Conviction of Assault with Intent to Murder as  
Bar to Trial for Murder.

Accused was found guilty of murder, in violation of Article of War 92, the specification alleging that he did "on or about 18 October 1943 \* \* \* kill one Lieutenant Colonel Paul H. Dolman, a human being by shooting him with a rifle". Accused pleaded former jeopardy in that he had been tried by general court-martial and

convicted of assault with intent to murder Lieutenant Colonel Dolman by shooting him with a rifle, and had been finally sentenced. It was shown that Lieutenant Colonel Dolman was living at the time of the previous trial but died thereafter, whereupon the charge of murder was preferred, and that the same acts of accused were the basis for both sets of charges. The plea was overruled. The action of the court in overruling the plea was proper. Lieutenant Colonel Dolman's death occurred subsequent to the first trial, thus changing the character and effect of accused's acts and bringing into existence a new offense, trial for which was not barred by Article of War 40.

NATO 3015, Baugh.

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HOUSEBREAKING - Entry of "Pup Tent".

Accused was found guilty of housebreaking in violation of Article of War 93, by unlawfully entering a "tent dwelling", with intent to commit larceny. The evidence showed that the tent dwelling was a "pup tent", used as sleeping quarters for two soldiers. The tent was not a building in the sense in which that word is used in Paragraph 149e of the Manual for Courts-Martial defining housebreaking, and consequently accused was not properly convicted of housebreaking (a felony) in violation of Article of War 93. His acts constituted a military offense in violation of Article of War 96.

NATO 1618, Majorana.

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HOUSEBREAKING - Intent - Proof.

Accused were found guilty of housebreaking with intent to rob, in violation of Article of War 93. The three accused entered uninvited an Italian dwelling. One of them, A, brandishing an axe, demanded a pistol of the family there present. The father, in fright, complied with the demand. The three left, A firing a shot outside near a window. They returned soon and A, demanding more pistols, fired a pistol in the direction of the father. The three men broke furniture and took some money from a drawer in the house. The entry was unlawful and the intent to commit robbery was inferable from the circumstances.

NATO 1490, Johnson et al.

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#### INSANITY - Mental Capacity - Determined by Court.

Accused was found guilty of shamefully abandoning his company and seeking safety in the rear when his organization was engaged with the enemy, in violation of Article of War 75. A psychiatrist testified that in his opinion, at the time of the offense accused was capable of distinguishing right from wrong but it was "probable that it would have been almost impossible for him to adhere to the right". The medical opinion, suggestive of mental incapacity, was for the consideration of the court, in the light of its own knowledge of human motives and behavior under battle conditions. Upon the entire record, the court was justified in finding that accused could distinguish right from wrong and could adhere to the right.

NATO 1824, Myers (MJ).

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#### KIDNAPPING - Sufficiency of Allegation.

Accused were found guilty of an offense in violation of Article of War 96 in that they "acting jointly, and in pursuance of a common intent, did, while engaged in the commission of a felony, viz, robbery against one D'Atri Pasquali, at Naples, Italy, on or about 12 January 1944, wrongfully, feloniously, and unlawfully force the said D'Atri Pasquali to accompany them from near the port of Naples, Italy, to near 66 Pasquali Scura, Naples, Italy," without his consent. The evidence supported these allegations. The language employed in the specification suggests that it was intended to charge kidnapping. There is serious doubt, however, as to whether that offense was well pleaded or proved under either common law or federal statutes. At common law it was generally held that an essential element of the offense of kidnapping was the taking of the victim to another country (35 C.J. p. 903 et seq). Section 408a, Title 18, United States Code, commonly known as the "Lindberg Act", denounces kidnapping but only when it involves inter-state or foreign commerce, and that element of the offense was not here present. Section 22-2101, Code of the District of Columbia likewise denounces kidnapping but contains as an essential element the requirement that the act be "for ransom or reward", and it is questionable if the record contained evidence to prove the presence of that element. The offense described was, however, clearly a disorder to the prejudice of military discipline and conduct of a nature to bring discredit upon the military service, properly chargeable under Article of War 96.

NATO 2481, Conrad et al.

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LARCENY - Confession - Corroboration.

Accused was found guilty of the larceny of 13 cases of rations, property of the United States furnished and intended for the military service, in violation of Article of War 94. Evidence aliunde accused's confession showed that military policemen on patrol in Naples, Italy, observed a speeding Army truck and after pursuit brought it to a halt. Accused was in the truck. The 13 cases of rations, property of the United States, were found on the truck. Five men seen on the truck while it was in motion had jumped off and run away. The confession of accused found sufficient corroboration in the facts and circumstances surrounding his apprehension.

NATO 2190, Venable.

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LARCENY - Multiplication of Charges.

Accused were convicted of larceny and wrongful disposition by sale of the same articles, property of the United States, furnished and intended for the military service, in violation of Article of War 94. This did not constitute an unreasonable multiplication of charges as the felonious taking and the subsequent sale were distinct offenses and were properly so charged. Punishment was properly imposed for both offenses.

NATO 1135, Morning et al.

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LESSER INCLUDED OFFENSES - Suffering Property To Be Disposed of,  
Not Lesser Offense Included in Larceny.

Accused was charged with larceny in violation of Article of War 93. The court found him not guilty of the larceny and undertook by exceptions and substitutions to find him guilty of suffering the property in question to be wrongfully disposed of by sale. The offense of wrongful disposition so found was not a lesser included offense within the larceny charged. The two offenses were separate and distinct, the offense found containing elements not included in the offense charged.

3d Ind. (MTO 4514, Palmieri) AJAG, 16 Nov 44.

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**MANSLAUGHTER, VOLUNTARY - Adequate Provocation - Self-Defense.**

Accused engaged in an argument with deceased during a card game. Deceased, who had been drinking, approached accused in a threatening manner, whereupon accused, who was armed with a pistol held in his right hand, retreated from the room. Deceased followed him. Accused asked deceased "not to swing at him", but when the two were in an adjoining room and accused was trying to retreat therefrom, deceased lunged at accused and struck him "a pretty good wallop" on the face, knocking accused's hat off. Accused thereupon fired one shot, killing deceased. Accused was convicted of murder, in violation of Article of War 92, but the reviewing authority approved only so much of the findings as involved voluntary manslaughter, in violation of Article of War 93, and reduced the confinement from life to ten years. The evidence supported the view that the killing was done in the heat of passion, under adequate provocation, as the assault and battery by deceased inflicted bodily harm on accused. The homicide was voluntary manslaughter rather than murder. The right of self-defense was not available to accused, for the circumstances did not form a reasonable basis for a belief by accused that the killing was necessary to save his life or prevent great bodily harm to himself.

NATO 1758, Doss.

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**MANSLAUGHTER, VOLUNTARY - Established When Evidence Shows Murder.**

Upon trial for murder accused was found guilty of voluntary manslaughter. He provoked a quarrel with an Arab over 50 francs which accused claimed was owed him, and a disorder followed. A French woman, in search of assistance, hailed two military policemen who were off duty and unarmed. The military policemen were brought to accused. He thrust them into a corner and struck both with a knife. One died two days later. The reduction of the charge of murder to manslaughter, possibly induced by the belief that the homicide was "committed in the heat of sudden passion caused by provocation", was favorable to accused and his rights were not thereby injured. Findings legally authorized.

NATO 581, Grant.

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**MANSLAUGHTER, VOLUNTARY - May Be Homicide Committed in Heat of Passion Induced by Fear.**

Upon trial for murder accused was found guilty of voluntary manslaughter. He unlawfully entered a dwelling, became fearful of his own safety, and in his fear and excitement fired upon and killed

an occupant. While the characteristic element of voluntary manslaughter is sudden heat of passion, aroused by provocation, the passion may consist of fear such as a normal person would entertain under the circumstances. The court having resolved the questions of fact in favor of accused in so far as murder was concerned, its findings of guilty of voluntary manslaughter were not legally improper.

NATO 440, Gilbert.

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#### MANSLAUGHTER, VOLUNTARY - Self-Defense - Proof.

Accused was found guilty of voluntary manslaughter by shooting H with a rifle. The homicide was proved. Just prior to the shooting H became enraged because accused asked him what he had done with accused's canteen. An argument ensued in which curses were exchanged. Accused retired from the scene and commenced sweeping about his tent. H went to his tent, secured a rifle and made a threat. Accused then secured his rifle but retreated. H fired at accused, the bullet striking in a tree above accused's head. Accused then fired the fatal shots. As a matter of law, upon these facts, accused killed in self-defense. The danger accused faced was apparently real and he believed it was imminent. He retreated as far as was reasonably necessary. As the elements of self-defense were present, the homicide was not unlawful. Record legally insufficient to support findings of guilty.

NATO 550, Mitchell.

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#### MANSLAUGHTER, VOLUNTARY - Through Gross Negligence.

Accused, an officer, was found guilty of voluntary manslaughter, in violation of Article of War 93. He discharged his pistol near an officers' mess on the main street in Cerignola, Italy, where both vehicular and pedestrian traffic was heavy. There was evidence indicating that the pistol was fired to frighten a group of 15 or more Italians who were gathered about the door of the mess building. The bullet ricocheted in the course of its flight and struck and killed deceased who was about 100 yards distant. Accused testified that he pointed the pistol in the air and discharged it in an attempt to slow down a speeding truck. The discharge of a deadly weapon under the circumstances and conditions shown was reckless or grossly careless, and accused must be held to have intended the consequences of the act. The pistol was discharged in a manner predictably calculated to endanger life. Record legally sufficient.

NATO 2371, Newman.

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**MAXIMUM PUNISHMENT - Unlawful Entry of a Tent with Intent to Commit Larceny.**

Accused was found guilty of unlawfully entering the tent of another soldier with the intent to commit larceny therein, a military offense violative of Article of War 96. The maximum authorized punishment for the offense was the same as that for housebreaking to which the stated offense was closely related.

NATO 1618, Majorana.

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**MAYHEM - Self-Injury - Proof.**

Accused was found guilty of mayhem in violation of Article of War 93, in that on 31 May 1944 he "did . . . unlawfully, willfully, and feloniously shoot himself in the foot with a rifle". Accused was a runner. About one week after a "big push" started on 11 May, accused offered money to Scheive, another runner, to shoot him in the foot or leg. He repeated the request many times, the last occasion being one day before the actual shooting. Scheive had about concluded that accused considered it a joke. About 19 May accused asked another soldier to do the same thing, repeated his request, and offered payment. Although the second soldier had heard such requests made before in a joking manner within the unit, he believed that accused was serious. Accused was nervous at the time. On 31 May, while accused and Scheive were returning to their company from the battalion in course of their duty, accused shot himself through the foot with his rifle, inflicting a painful wound. The evidence was conflicting as to whether accused was authorized to have his rifle loaded at the time. Accused had placed the weapon against his left leg and had pulled the bolt. He contended that he was testing the rifle and that it was discharged accidentally. He admitted that he did not usually test his rifle with the muzzle resting on his foot. The record was legally sufficient to support the findings of mayhem, that is, willful and malicious self-injury to a member used in fighting. A person may be guilty of the offense of mayhem on his own person, in violation of Article of War 93.

MTO 5875, Sherrod.

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**MISBEHAVIOR BEFORE THE ENEMY - Abandoning Organization.**

Accused was found guilty of shamefully abandoning his company and seeking safety in the rear at a time when the company was engaged with the enemy. Accused was assigned to a wire section as trouble shooter and switchboard operator. His section was required to go out frequently to repair telephone lines damaged by enemy shell fire and air attacks. While the company was engaged in combat in Tunisia,

accused left the scene without authority and remained absent until he surrendered in Algiers, stating that he was a "straggler". Absence under such circumstances amounted to a shameful abandonment of his organization and it must be inferred that in fact he sought safety in the rear. Record sufficient to support findings.

NATO 470, Seeger.

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MISBEHAVIOR BEFORE THE ENEMY - Absence of Duty to Rejoin Company  
Engaged with the Enemy.

Accused was found guilty of violation of Article of War 75, in that he "did, in the vicinity of Monzuno, Italy, on or about 11 October 1944, misbehave himself before the enemy by failing to rejoin his company, then engaged with the enemy, when under a duty to do so". On 10 October accused was in confinement in the regimental stockade at Rosignano, Italy. The Executive Officer of the regiment called a group of prisoners, including accused, into his presence and spoke to them individually, at a place some distance from the stockade. He stated they were being returned to their organizations which were in combat in the vicinity of Monzuno, that they were needed there and that he "was ordering each one back to fight" with his company. He told accused that his sentence would be suspended and he would be placed on a full duty status upon his return to his company. Long range enemy artillery fire "had been" falling in the vicinity of the place where accused received these instructions. The men were returned under guard to the stockade, to procure arms and equipment and await transportation to their companies. They were not to be released from confinement until they had actually rejoined their units and receipts for them had been obtained by the guards. On 11 October accused escaped from confinement while still under guard at the stockade. He did not rejoin his company. The record was legally insufficient to support the findings. At the time of the escape and thereafter, accused's place of duty was not in his company but in the stockade where he had been confined. The escape did not in itself amount to failure to rejoin the company. Although the escape evidenced an intention by accused not to rejoin his company and engage in combat, a person cannot be punished for his intention or state of mind alone.

MTO 4977, Emory.

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MISBEHAVIOR BEFORE THE ENEMY - Avowal of Intention Not To Advance  
with Company in Forthcoming Attack.

Accused, an officer and platoon leader, was found guilty of misbehavior before the enemy by refusing to advance with his command

which had been ordered forward, in violation of Article of War 75. His company commander was advised that accused had declared he was not going to go forward that night in an attack his platoon had been ordered to make at 2300 hours. The company commander talked to accused concerning the report and accused stated: "That is right; I could not take it any longer". Accused was then relieved of his duties and placed in arrest. Defense moved for a finding of not guilty in that at the time of the advance accused was under the restraint of arrest and could not advance as previously ordered. The motion was properly denied as the gravamen of the misbehavior as alleged was not accused's failure to make the advance, but was his avowal of his intention not to go forward. The refusal charged lay in his declaration rather than his physical actions. His statements of themselves amounted to conduct not conformable to the "standard of behavior before the enemy set by the history of our arms".

NATO 1614, Langer.

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MISBEHAVIOR BEFORE THE ENEMY - Offense in Violation of Article of War 75 Not Alleged Where Acts Were Not Charged as Having Been Committed "Before the Enemy".

Accused was found guilty of violation of Article of War 75 in that he "did, in the vicinity of Velletri, Italy, on or about 30 May 1944, fail to rejoin his company which was then engaged with the enemy". The specification did not allege that the misconduct was committed "before the enemy", nor does it contain any allegations from which an inference to that effect may be reasonably drawn. Although the specification alleged that accused's company "was then engaged with the enemy", there was nothing to indicate the locality in which that "engagement" was in progress. The allegation that the misconduct occurred at Velletri, Italy, did not specify that accused, while in that locality, was "before the enemy". The specification did not charge a violation of Article of War 75, and the defect could not be cured by proof (Dig. Op. JAG, 1912-40, sec. 433 (1) ). However, the specification did charge an offense in violation of Article of War 96.

NATO 3100, Agnone (MJ).

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MISBEHAVIOR BEFORE THE ENEMY - Penitentiary Confinement.

Accused was found guilty of running away from his company, then engaged with the enemy, in violation of Article of War 75. A Federal reformatory was designated as the place of confinement. War Department Letter, February 20, 1941 (AG 2-6-41), authorizes confinement in a Federal reformatory or correctional institution only when confinement in a penitentiary is authorized by law. Penitentiary confinement is not

authorized in as much as the offense of which accused was convicted is not one of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States of general application in the United States or by the law of the District of Columbia (AW 42). A place of confinement other than a penitentiary, Federal correctional institution or reformatory, must be designated.

NATO 811, Schwartz.

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MISBEHAVIOR BEFORE THE ENEMY - Proof.

Accused was found guilty of shamefully abandoning his company while before the enemy, in violation of Article of War 75, ~~and of desertion with intent to avoid hazardous duty, in violation of Article of War 58.~~ The evidence shows that accused was present with his company, ~~while~~ <sup>when</sup> it was engaged in combat with the enemy, went to the rear for water during a lull in the battle and failed to return to the organization. He went to a first aid station and there was told to return to his command. Instead he proceeded to a city over 300 miles from the combat zone, where he remained unauthorizedly absent until after the fighting was over. ~~The requirements of proof of violation of both Articles of War 75 and 58 were fully satisfied.~~

NATO 397, Barbieri et al.

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MISBEHAVIOR BEFORE THE ENEMY - Proof.

Accused was a member of a company in actual combat with the enemy. He had been assigned to an outpost position. The company was subjected to machine gun, mortar and artillery fire. Accused absented himself without leave and went to the rear where he stayed for several days. The evidence was sufficient to support a conviction of accused of "running away" from his company while engaged with the enemy, in violation of Article of War 75.

NATO 1101, Ragens (MJ).

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MISBEHAVIOR BEFORE THE ENEMY - Refusal to Participate in Bomber Mission in Tactical Support of Ground Forces.

Accused was found guilty of misbehavior before the enemy, in violation of Article of War 75, in that on separate dates he refused to participate in aerial flights with his command. Accused's refusal to participate in two bombardment missions occurred at an air base

located 200 air miles, about 40 minutes flying time, from where Allied ground troops were locked in battle with the enemy. Accused's command, a heavy bombardment squadron operating from the base, was charged with immediate tactical support of the ground troops. It was reasonable to infer that within 40 minutes after the take-off on such missions accused would have been over enemy territory and in actual combat. Considered in the light of aerial warfare operations in the present war, the heavy bombardment squadron located within 200 air miles, or about 40 minutes flying time, from the front was, for all practical purposes, on the front. Taking off from such a base on a combat mission against the enemy was the aerial counterpart of the action of ground troops leaving their positions for immediate attack. Upon the facts disclosed, accused's failure to embark at the scheduled time for departure on the missions constituted misbehavior before the enemy.

NATO 2893, Kopetchry (and see Bull. JAG, Jan 45, sec. 433).

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#### MISBEHAVIOR BEFORE THE ENEMY - Running Away.

Accused was found guilty of running away from his company when it was engaged with the enemy, in violation of Article of War 75. He absented himself without leave while his company was being reorganized "in battle". Although the company while being reorganized was not at that moment exchanging fire with the enemy, it was in a battle area as a part of a larger tactical organization, units of which were in actual combat, and the company was preparing to go forward for combat. The circumstances suffice to support the allegation that the company was engaged with the enemy and that accused "ran away". His running away was misbehavior "before the enemy".

NATO 1185, Oswald.

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#### MISBEHAVIOR BEFORE THE ENEMY - Running Away.

Accused without permission left his company while it was engaged with the enemy. He testified he went to a medical aid station because he was dizzy, had a headache and his hearing was affected. He also testified that when he was told by a medical officer to "come back in a couple of days" he tried but was unable to find and rejoin his company which was about half a mile away. The court was warranted in rejecting the explanation. Violation of Article of War 75 was established.

NATO 1188, Clementi.

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MISBEHAVIOR BEFORE THE ENEMY - What Contact with Enemy Required.

Accused, a motor vehicle driver, refused to drive his truck forward when ordered, at a time when his company, though not actually fighting was before the enemy, within range of its artillery and under fire. The contact with the enemy was real and such as to render misbehavior under the circumstances misbehavior before the enemy in violation of Article of War 75.

NATO 1186, Holmes.

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MISBEHAVIOR BEFORE THE ENEMY - Variance - Desertion, Obstruction of Orders, or Misbehavior through Escape, Cannot Be Found under Charge of Misbehavior by Failure to Rejoin Unit in Combat.

Accused escaped from his regimental stockade while awaiting transportation under guard to his company at the front. The evidence was not legally sufficient to support a finding of violation of Article of War 75 in that he "did misbehave himself before the enemy by failing to rejoin his company, then engaged with the enemy, when under a duty to do so". Accused's escape with intention to avoid combat may have amounted to desertion as defined by Article of War 28 or to obstruction of orders in violation of Article of War 96. If in fact the escape occurred in the presence of the enemy it may of itself have amounted to misbehavior before the enemy under Article of War 75. But the facts constituting none of these offenses were charged or found, and the record demonstrated that the court did not intend to find any such offenses. Since no one of these offenses was identical with or included in the specific misbehavior alleged, a finding of guilty of desertion, obstruction of orders or misbehavior through escape, even had the court intended such a finding, would have been in fatal variance with the allegations. Where an accused is charged with specific acts of misbehavior before the enemy, he cannot legally be found guilty of other and distinct acts of misbehavior.

MTO 4977, Emory.

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MORNING REPORTS - Admissibility.

Under Army Regulations 345-400, 7 May 1943 (now AR 345-400, 3 Jan 1945), morning reports are now prepared in triplicate with disposition as follows: a.) the original (white) copy forwarded to The Adjutant General through specified channels, b.) the duplicate (yellow) copy retained in the reporting company and, c.) the triplicate (green) copy forwarded to the unit personnel section for record (par. 7). The original (white) copy and each of the other copies (yellow and green)

of the morning report now required to be simultaneously prepared are each, within the meaning of Paragraph 117a of the Manual for Courts-Martial, official writings generally competent to prove the facts and events recorded therein.

1st Ind, AJAG to SJA, EBS, 27 Jan 1944.

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MORNING REPORTS - Competency of Entries to Prove Facts and Events Recorded.

Paragraph 117a of the Manual for Courts-Martial provides, among other things, that a "permanent record compiled from mere notes or memoranda" is competent evidence of the facts and events recorded. Knowledge of the facts and events need not therefore be founded in the immediate visual sense of the recording officer. On the contrary, the test as to whether an entry is competent evidence lies in determining whether the entry is the prescribed, original and permanent record of the fact or event as ascertained or verified by the recording officer from sources recognized by competent military orders or custom as authentic for record purposes.

1st Ind, AJAG to SJA, 1st Armd Div, 17 Feb 1944.

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MORNING REPORTS - Exclusion of Entries Obviously Not Based on Personal Knowledge.

The Manual for Courts-Martial excepts from the rule of competency those records, including morning reports, which are "obviously not based on personal knowledge". The exclusionary rule is not construed to prohibit the use of entries compiled from memoranda where the entries constitute the first prescribed permanent record of the facts or events and where competent military orders or custom contemplates the use of the memoranda, although the use of the memoranda may admit elements of hearsay in that the memoranda are prepared by persons other than those who make the permanent record. Military custom supports this view. It is well known that in the preparation and authentication of morning reports by company commanders it is not unusual for them to utilize data and memoranda furnished by other military personnel of the company for the purpose of determining the facts and events recorded.

1st Ind, AJAG to SJA, 1st Armd Div, 17 Feb 1944.

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MORNING REPORTS - Extract Copy - Who May Authenticate.

Under Army Regulations 345-400, 7 May 1943 (now AR 345-400, 3 Jan 45), the three copies of the morning reports now prepared are respectively lodged in the immediate custody of the various recipients designated, The Adjutant General, the company commander and the unit personnel officer. The immediate custodian of the record from which the WD AGO Form No. 44 is prepared, i.e., The Adjutant General (original (white) copy), the company commander (duplicate (yellow) copy) or the unit personnel officer (triplicate (green) copy), as the case may be, should authenticate the Form No. 44 in the manner required by the Manual for Courts-Martial (1928, par. 116a (6) ).

1st Ind, AJAG to SJA, EBS, 27 Jan 1944.

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MORNING REPORTS - Hearsay Entries.

The entries contained in the morning reports introduced in evidence were not made upon personal knowledge as to the facts recited, and were therefore objectionable on the ground of hearsay. In as much as the facts as recited in the morning reports were otherwise established by competent and undisputed evidence, the substantial rights of accused were not injuriously affected.

NATO 603, Suci.

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MORNING REPORTS - Preparation and Authentication by Personnel Officer  
Is Proper if Required by Competent Orders.

In all cases in which a personnel officer is required by competent orders (by the Theater Commander) to prepare and authenticate morning reports, it becomes his duty by virtue of the requirement, to know the facts which he enters therein and to record them. The morning report so prepared and authenticated is a prescribed, original and permanent record and becomes therefore an "official statement in writing" generally admissible to prove the facts and events recited.

1st Ind, AJAG to SJA, 1st Armd Div, 17 Feb 1944.

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MURDER - Confession - Corroboration.

Accused was found guilty of murder, in violation of Article of War 92. He confessed to having killed his victim by kicking her about the head. There was no eyewitness to the assault. The evidence aliunde the confession showed that the lifeless body of the victim was discovered

at the place where accused stated he had assaulted her, that accused had a blood-stained appearance soon after the homicide, and that he was near the place where the victim was found at about the time the killing occurred. This evidence sufficiently corroborated the confession.

NATO 2377, Murphy.

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MURDER - Homicide in Performance of Legal Duty - Order Commanding  
Palpably Unlawful Act.

Accused was found guilty of murder in violation of Article of War 92. On the date alleged accused, a private, was a member of a guard detail which was stationed at an outpost within an airfield. Staff Sergeant Ross came to the outpost and advised a corporal, who was in charge of the detail, that an Italian boy who was shining shoes inside the gate would have to leave. An argument ensued. Sergeant Ross left the field and returned shortly thereafter with a written order. Another argument ensued. As Sergeant Ross was again leaving the field he displayed a pistol. The corporal of the guard then ordered the members of the guard detail, including accused, to "get their rifles and shoot the bastard". A short time thereafter Sergeant Ross and Lieutenant Colonel Paul H. Dolman returned to the field in a jeep. Accused fired two shots in the direction of the jeep, apparently intending to shoot Sergeant Ross. Colonel Dolman was struck by one of the bullets and died as a result of the wound. The general rule is that a homicide committed in the proper performance of a legal duty is justifiable. Thus the acts of a soldier done in good faith and without malice in compliance with the orders of a superior are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know them to be illegal. Where, however, the order is so manifestly beyond the power or discretion of the commander as to admit of no rational doubt of its unlawfulness it cannot be used as a cloak of immunity to render justifiable an act which, but for such order, would be unlawful. The court was justified in concluding that the order, commanding as it did the doing of a palpably unlawful act, was itself palpably unlawful and imposed no legal duty on accused. The conviction was proper.

NATO 3015, Baugh.

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MURDER - Intent - Homicide Resulting from Common Design of Several  
Accused.

Accused were found guilty of murder in violation of Article of War 92. About an hour prior to the fatal shooting the three accused with

one or two other colored soldiers entered a dance hall in a bawdy house in Italy, where they were told by deceased, a white American soldier, that the woman who "ran the place" did not like negroes "mixing in with white people at the dance". Accused withdrew to a near-by tavern where they sat for approximately an hour talking and drinking. Comment was made by one accused about "a Jim Crow place here". Finally someone proposed going to the dance hall to "straighten this thing out". Two of the accused were armed and the third made inquiry of another soldier as to whether or not he was armed. Accused returned to the dance hall where a scuffle occurred after which shots were fired through the door, killing deceased. In as much as accused joined in a common design to commit an unlawful act the natural and probable consequences of which involved the contingency of taking human life, all of the accused became responsible for the homicide committed by one of them while acting in furtherance of that common design. It was of no material importance which one of them fired the fatal shot.

NATO 2221, Harris et al.

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MURDER - Intent - Proof.

Accused was found guilty of murder in violation of Article of War 92. In company with three or four other members of his organization, accused left his bivouac area in the evening of the day alleged to investigate certain noises and screaming of unknown persons which had been heard on a nearby public street. Accused obtained and carried with him under his raincoat a "tommy" gun. When the group had gone 300 to 500 yards they came to a house in front of which deceased and another Arab were standing. There was then no noise, no disturbance and little light. Accused shouted at the Arabs: "Who are you beating around here?", and thereupon fired two bursts at them. Deceased was mortally wounded in the thigh. As the act of accused was unlawful, wanton and deliberate, and devoid of excuse or justification, the malicious intent requisite in murder was clearly inferable. It was immaterial whether accused's intended victim was the deceased, his companion, or both. All elements of murder were established.

NATO 1556, Boudreaux.

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MURDER - Intent - Proof.

Accused was found guilty of murder in violation of Article of War 92. Shortly before the shooting accused and deceased, who were tentmates, became engaged in an argument concerning card tricks. The argument developed into a tussle which was terminated by other

soldiers. There was evidence that accused had a knife in his hand part of the time. After the tussle deceased left the scene and returned about ten minutes later, empty-handed. He asked accused why he had drawn a knife on him, to which accused replied that he had not done so. Thereupon accused arose from a cot on which he had been sitting, with a rifle in his hand, and shot deceased in the abdomen. Though accused may not have entertained specific hatred or personal ill-will of long standing toward deceased, legal malice was properly inferred from the use of a dangerous weapon and the attendant facts and circumstances.

NATO 1715, Kinlow.

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MURDER - Intent - Responsibility of Several Accused for Acts in Furtherance of Common Design.

Two accused were convicted of murder, in violation of Article of War 92. Deceased and accused were visiting a French home in Tunisia, late on the evening of the day alleged. Deceased was armed with a pistol. Accused urged deceased to leave his pistol with the host and not to carry it. One accused threatened to take the pistol from deceased "in three or four days". The discussion grew into a quarrel and all arose to their feet. Accused, in concert, assaulted deceased with their hands and arms, in an apparent effort to secure the pistol. During the ensuing struggle, accused A who was armed with a knife raised it over his head and attempted to strike deceased, but the latter grasped his wrist and averted the blow. The second accused, B, grasped deceased's arm when he made a motion to withdraw his hand from his pocket. In the melee, the three fell on a divan and while they were there, the gun fell from deceased's pocket. B got possession of it and as all three jumped up he fired the pistol at deceased, killing him. It was inferable that when accused assaulted deceased, they were motivated by a common unlawful intent, either to obtain possession of the firearm or to accomplish the homicide. The assault became dangerous, violent and malicious - apt to cause the death of, or grievous bodily harm to, deceased. The shooting was a natural and probable consequence of the encounter. A attempted to stab deceased with at least the tacit approval of B. Under these circumstances each was criminally liable for whatever his co-conspirator did in furtherance of the common design. The shooting of deceased was clearly murder and both accused were properly found guilty.

NATO 1470, Hall et al.

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MURDER - Malice Aforethought - Killing of Innocent Bystander.

Accused was found guilty of murder, in violation of Article of War 92, and of assault with intent to murder, in violation of Article of War 93. Accused, deceased, Jefferson, and other soldiers were engaged in a dice game. Accused and Jefferson had an argument over money. Accused drew a knife which was knocked to the ground by other players. Jefferson picked it up and moved toward accused but was stopped and disarmed by the others. Deceased did not become involved in the fight. Immediately following this incident, accused went to his tent nearby, procured his loaded carbine, and returned to the group. He pointed his rifle at the men and threatened to shoot anyone who moved. He then aimed and fired at Jefferson. When the latter began to run away, accused fired a second shot at him. This shot mortally wounded deceased, who had been on his knees playing dice. Accused then pursued Jefferson and fired another shot, wounding him in the hip. When disarmed, accused, angry and cursing, said he was sorry he killed deceased and wished he had succeeded in killing Jefferson, "the one he was shooting at". The findings were warranted by the evidence. Accused entertained the requisite specific intent to murder Jefferson. As for deceased, an innocent bystander, "malice aforethought may exist when the act is unpremeditated". It may include an intention, "preceding or coexisting with the act or omission by which death is caused, . . . to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not" (MCM, 1928, par. 148a, p. 163). Record legally sufficient to support the findings.

MTO 5428, Coleman.

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MURDER - Proof.

Accused was found guilty of murder by shooting his victim with a rifle. The shooting followed a petty dispute between the two men and the utterance of threats by accused to shoot deceased. The circumstances exhibited nothing approaching legal excuse or justification. No adequate motive appeared but the homicide was deliberate, willful and premeditated. Malice aforethought was plainly inferable from the circumstances and remarks of accused. The elements of murder were fully established. Accused had been drinking, but from the evidence adduced there was nothing to indicate that he was not mentally responsible for his acts in all respects. Record legally sufficient to support the findings.

NATO 697, Gardner.

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MURDER - Provocation - Justification.

Accused was found guilty of murder by shooting his victim with a rifle. Accused testified that about 15 or 20 minutes before the shooting, he had decided to kill his victim. On the preceding night the latter had forced accused to submit to an unnatural sexual act. While the circumstances may have explained accused's acts, they could not be regarded as legal justification or as provocation sufficient to reduce the offense to voluntary manslaughter. Where "cooling time elapses between the provocation and the blow the killing is murder, even if passion persists" (MCM, 1928, par. 149a, p. 166). The killing here was shown to have been coolly and deliberately planned, with a specific and malicious intent to kill.

NATO 419, Addison.

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MURDER - Revision Proceedings to Increase Sentence to Comply with Mandatory Requirements, Authorized.

After finding accused guilty of murder in violation of Article of War 92, the court sentenced him to dishonorable discharge, total forfeitures and confinement at hard labor for 50 years. The reviewing authority returned the record of trial for proceedings in revision and the court thereupon sentenced the accused to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. Since a sentence to death or life imprisonment is mandatory for murder, the action of the court was proper under Article of War 40 (d).

NATO 544, Helton.

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MURDER - Right of Self-Defense Not Available to Aggressor.

Accused was found guilty of murder in violation of Article of War 92 and sentenced to death. He had loaned deceased some money and on occasions when he had asked for repayment, arguments had developed. About 1200 hours on the day of the homicide, accused and deceased met and drank together at a bar for about two hours, after which they separated. As had happened on previous occasions, they argued about money. An hour or more later, accused decided to find deceased and "get things straightened out". He armed himself with a pistol and after drinking more liquor, searched for deceased. He found him at about 1900 hours, in a private house, visiting the occupants. Accused, who was holding his pistol in his hand, demanded "a showdown" or "some kind of agreement" with deceased. Accused testified that deceased said "Let's shoot" and reached inside his jacket. Deceased did not produce the weapon. There was proof that deceased did not reach inside his pocket. Accused raised his pistol and shot deceased, killing him. Deceased was later found to have a

pistol in his pocket. Accused contended the killing was in self-defense. There were no grounds for a reasonable belief by accused that it was necessary for him to kill to save his own life. On the facts of the case accused was the aggressor. The right of self-defense was not available to him. Murder was established.

NATO 1672, Spears.

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**MURDER - Self-Defense.**

Accused was found guilty of murder. He and deceased engaged in an argument which terminated when accused discharged a firearm. In a few minutes accused fired another shot in the air "to scare him away" Shortly thereafter accused set out with a rifle, stating he proposed to kill deceased. Upon seeing deceased who was then himself armed with a rifle held ready for instant use, accused called deceased by name, aimed at him and fired, killing him. Accused sought to invoke self-defense as an excuse. As accused was the first to use a firearm in a threatening manner, and was in fact stalking deceased with the avowed intention of killing him, it cannot be said he ever withdrew from the quarrel or evinced a disposition to avoid further trouble with deceased. After having provoked the difficulty accused could have purged himself of aggression and revived a right of self-defense only had he withdrawn or sought peace. Conviction sustained.

NATO 965, Saunders.

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**MURDER - Self-Defense - Aggressor.**

Accused was found guilty of murder in violation of Article of War 92. On the night of the homicide accused and another soldier went to an Italian civilian's home, where there were other soldiers and three Italian men, including the deceased. A difficulty arose between accused and his companion and the deceased, which resulted in accused being ejected from the house. Accused, with a pocket knife, "under his palm", immediately re-entered the house and inflicted on the deceased several knife wounds which resulted in his death. To justify or excuse a homicide on the ground of self-defense, it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor, and that the killing was believed on reasonable grounds to have been necessary to save his life or to prevent great bodily harm to himself. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can (MCM, 19.8, par. 148a). It did not appear that at the time of the stabbing accused was in immediate danger of losing his own life or of receiving serious bodily harm, or that there was no convenient or reasonable

mode of escaping, retreating or declining combat. After accused had been ejected from the room he re-entered and assaulted deceased. The court was warranted in concluding that if accused had theretofore been in imminent danger of great bodily harm, the danger had passed when he voluntarily returned to the fray armed with a dangerous weapon. Accused did not act in self-defense, and the homicide was neither justifiable nor excusable.

NATO 3850, Davis.

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MURDER - Self-Defense - Aggressor - Malice.

Accused was found guilty of murder in violation of Article of War 92. There was evidence that deceased assaulted accused, kicking him on the arm and in the face and choking him violently, almost strangling him. Accused got away, ran to his near-by room, armed himself with a knife, and returned to the scene of the assault. Accused stated he intended "to threaten him with the knife so he would leave me alone". An affray ensued during which deceased was cut in the abdomen by accused, from which injury deceased died the following day. Accused's return to threaten deceased warranted the conclusion, under the circumstances, that accused was an aggressor and consequently the homicide was without legal excuse. Malice was inferable from the nature and use of the deadly weapon and the other circumstances of the case. Record legally sufficient.

NATO 1626, Harris.

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MURDER - Self-Defense - Defense of Habitation.

Accused was found guilty of murder in violation of Article of War 92. On the day of the homicide accused was in a two-room house of prostitution. British soldiers had been present in the afternoon but had left. Several times during the evening persons knocked on the door seeking entrance. British soldiers attempting ingress were sent away by accused. Later deceased, a British soldier, and several companions knocked upon the front door of the house and talked loudly. They were not armed. The door opened and deceased started to enter, getting as far as the main doorway. Accused was in a rear room, in bed with a prostitute and another soldier. Awakened by the noise, accused seized a pistol and fired, the bullet passing through a curtained aperture, striking deceased and killing him. There was substantial evidentiary support for the view that the knocking on the door and the subsequent presence of deceased at the threshold of the house were accomplished without violence and under circumstances such as to exclude justification for a belief on the part of accused of a concomitant purpose to assault or offer personal violence to him or anyone within the abode - a purpose which if present under appropriate

conditions might, according to some authorities, render a homicide justifiable within the rule known as defense of habitation. The homicide was without legal excuse or justification.

NATO 3644, Brockington.

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**MURDER - Self-Defense - Interfering to Prevent a Felony.**

Accused was found guilty of murder in violation of Article of War 92. Late at night, on a dark country road, accused stopped a convoy of four Italian carts to obtain transportation to camp for himself and his two drunken companions, Privates Pharr and Morris. Pharr became involved in a dispute with deceased, one of the occupants of a cart. Deceased struck or endeavored to strike Pharr with a whip. Accused fired several shots with his revolver and admitted in his testimony that he intentionally shot deceased. He sought to excuse the killing as in defense of Pharr against a felonious assault. The court was justified in concluding that accused had no reasonable cause to believe that a felonious assault was being committed against Pharr by deceased. "If a party attempting a felony be not armed (either actually or apparently) with a deadly weapon, or does not possess (either actually or apparently) such superior strength and determination as to enable him to effect his purpose unless he be killed, then killing him by a deadly weapon is not excusable". Even if the appearance justified a belief that a felony was being attempted, the force employed by accused to resist the attack and to subdue the attacker manifestly exceeded that which was necessary under the circumstances. The homicide was not legally excusable.

NATO 3906, Ray.  
MTO 4061, Jones.

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**MUTINY - Attempt to Create.**

Accused was found guilty of an attempt to create a mutiny in violation of Article of War 66. There was evidence that a company guard had refused to arrest two men who had become involved in trouble and that the military police had been called in to make the arrest. Several of the men of the company assembled with their rifles and began shooting in the air in protest. The accused were among the inciters and ring leaders. The company commander called a formation to discuss the matter and the men thereafter dispersed but reassembled with their rifles and again commenced shooting in the air. Had the group of soldiers collectively defied lawful authority in an effort to free the men in custody of the military police, a mutiny would have been committed. But for the timely and vigorous intervention of the company commander the mutiny might have taken place. There was evidence that the accused made statements to

the group designed to induce the collective action indicated. 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. 152c). Voluntary abandonment of purpose after an act constituting an attempt is not a defense (MCM, 1928, par. 136a). Record legally sufficient to support findings.

NATO 371, Jackson et al.

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MUTINY - Attempt to Create - Penitentiary Punishment Authorized.

Attempt to create a mutiny is recognized by Federal civil statute as an offense of a civil nature and is so punishable by penitentiary confinement for more than one year (18 U. S. C. , Sec. 9,11,13). It is therefore punishable by penitentiary confinement under a sentence by court-martial which exceeds one year.

NATO 1075, Roland.

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MUTINY - Attempt to Create - Proof.

Accused, who had insolently defied the authority of his company commander, attempted to incite a group of soldiers, including some members of his company, to collective insubordination by inflaming them against his company commander, falsely stating to them that the company commander had "hit" him and, inter alia, exclaiming "what are we going to do about it \* \* \*". The acts were done with the intent to create a mutiny and as the acts proximately tended to accomplish that purpose, accused was properly convicted of violation of Article of War 66.

NATO 1075, Roland.

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MUTINY - Attempt to Create - Proof.

Accused were found guilty of an attempt to create a mutiny in violation of Article of War 66. About 20 soldiers including the four accused gathered below deck on a ship which they were unloading off the Italian coast. Members of the group were observed drinking, gambling, arguing and fighting or scuffling among themselves, and general disorder prevailed. A lieutenant of accused's organization, the senior Army officer on the ship, came upon the scene and at once ordered the men to cease drinking, to retire from the room and to go to bed. All present except the four accused withdrew as ordered. When accused failed to go the officer repeated the order, addressing

accused directly. Again the four did not obey but got together in a compact group muttering and cursing. The order was given and ignored a third time and one accused told the officer not to "get rough". Accused stood "toe to toe" with the officer who then drew his pistol and, as one accused said "Hit him, hit him", the officer thrust the pistol into the midriff of one of the four. The officer and accused remained in position momentarily and then accused slowly retired. The deliberate failure to obey the orders constituted collective insubordination. The concert of action as well as the remarks made carried an inference that the insubordination was the result of a combination, a tacit understanding, to resist lawful military authority. The mutinous intent was established and the acts done in furtherance thereof tended to the consummation of the mutiny contemplated. Record legally sufficient to support the findings.

NATO 1489, Timbers et al.

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MUTINY - Concert of Insubordination - Proof.

The three accused and 12 other prisoners in an Infantry Division stockade refused to go on a work detail on the morning of 29 December 1944 due to fear of shellfire. Each man was individually ordered to work by a superior officer, and each refused. That afternoon, the Commanding General of the Division spoke to the men, read and explained the 66th Article of War, and asked each individually whether he understood. When all answered in the affirmative, he repeated his explanation, told them they would be punished if they persisted, and gave them until the next morning to reconsider. The accused discussed the matter all afternoon with their tentmate Nazelrod, but declined to declare their intentions. They continued the discussion for four hours that evening with three other tentmates, who had been on the morning detail and who attempted to persuade accused to go to work next morning. They stated that their work had been carried on behind a high bank and "we were in a pretty good spot". Nazelrod said he thought he would "go back", but the three accused refused to commit themselves. On arising in the morning, they remained silent as to their intentions. Later, Nazelrod and the other 11 men went to work, but the accused refused to do so when ordered by their superior officer. They were tried jointly and found guilty of violation of Article of War 66, in that they "did . . . jointly, each acting in concert with the other, cause and participate in a mutiny by persistently and concertedly refusing to perform labor . . . in defiance of the lawful orders of . . . their superior officer, all with the intent to subvert for the time being lawful military authority". It sufficiently appears that a mutiny occurred and that each accused caused and participated therein. The evidence furnished a basis for the inference that the insubordination displayed was concerted, the result of a combination, an express or tacit understanding, to resist lawful military authority. The overt act consisted in the concerted refusal to obey the order to go to work with the road detail on December 30.

MTO 5033, Sivils et al.

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**PENITENTIARY CONFINEMENT - Not Authorized for Misapplication of Government Property.**

Accused was convicted of knowingly and willfully applying to his own use and wrongfully selling, on 3 November and 7 November 1943, property of the United States, furnished and intended for the military service, in violation of Article of War 94. Neither of these offenses is denounced as an offense of a civil nature by any Federal statute except Section 36 of the United States Criminal Code. Prior to amendment of Section 36 by the act approved 22 November 1943, it had been held to be unenforceable and did not constitute a basis for penitentiary confinement. As the offenses here were committed prior to the amendment, the amended statute may not be invoked, for such action would increase the punishment and would therefore have ex post facto effect. Penitentiary confinement not authorized.

NATO 1406, Bell et al.

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**PENITENTIARY CONFINEMENT - Not Authorized for Misappropriation of Government Property.**

Accused was convicted of knowingly and willfully misappropriating mattress covers, property of the United States, intended for the military service, in violation of Article of War 94. This offense is not expressly denounced as an offense of a civil nature and made so punishable by any statute of the United States or the District of Columbia, and penitentiary confinement is not therefore authorized.

NATO 1406, Bell et al.

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**PENITENTIARY CONFINEMENT - Principle of Closely Related Offenses Not Applicable.**

To justify penitentiary confinement some act of which accused was convicted must, by the terms of Article of War 42, be recognized as an offense of a civil nature by Federal civil statute, that is, must be identical with the offense denounced by the Federal statute. The principle of punishing as for a closely related offense embodied in Paragraph 104c, Manual for Courts-Martial, is applicable only to determination of the quantity of punishment as prescribed in the Table of Maximum Punishments. It may not be resorted to in determining the legal propriety of confinement in a penitentiary.

NATO 1406, Bell et al.

PREVIOUS CONVICTIONS - Offense Involved Must Precede Offense for which Accused Is on Trial.

Accused was tried for desertion and was found guilty of absence without leave beginning on 11 July 1943. Evidence of two "previous convictions", one for absence without leave from 30 December 1943 to 1 January 1944, and one for breach of restriction on 9 November 1943, was received by the court. The commission of the offenses involved in these previous convictions followed rather than preceded the commission of the offense for which accused was on trial. They were, therefore, erroneously received in evidence (MCM, 1928, par. 79c).

NATO 2045, Sanders.

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✓ PRISONERS OF WAR - Jurisdiction.

An Italian prisoner of war was found guilty by court-martial of sodomy, in violation of Article of War 93. Prisoners of war are subject to trial by courts-martial for offenses denounced by the Articles of War.

NATO 1810, Zilli (MJ).

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PUNISHMENT - Civilian - Maximum Limitations.

Accused, a civilian serving with the armies in the field, was tried by court-martial and sentenced to a fine of \$300.00. As the maximum punishments prescribed by Paragraph 104c, Manual for Courts-Martial, 1928, apply only to enlisted men, the limits upon punishment therein set forth do not apply in the case of accused.

NATO 437, De Jonge.

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PUNISHMENT - Different Aspects of Same Act.

Accused saw money in his victim's hand and, applying a knife to the victim's thumb, took the money. Accused was found guilty of robbery and assault with intent to do bodily harm with a dangerous weapon. Both offenses were committed but they were only different aspects of the same act. Accused may not legally be punished more severely than was authorized for the more serious offense, robbery (MCM, 1928, par. 80a).

NATO 1092, Scott.

PUNISHMENT - Mandatory - Article of War 85 - Effect of Substitution of Article of War 96.

Accused, an officer, was charged with having been found drunk while on duty as officer of the day, in violation of Article of War 85. The mandatory punishment for this offense, when committed in time of war, is dismissal together with such other punishment as a court-martial may direct. The court found accused guilty of the specification and not guilty of the charge but guilty of violation of Article of War 96, and sentenced him to forfeit \$100.00 of his pay per month for six months. Upon proceedings in revision directed by the reviewing authority the sentence was revoked and dismissal was adjudged. Irrespective of the particular Article of War under which it was set forth, the offense was definitely one under the 85th Article of War. There was no ambiguity or contradiction in the finding as to the acts of accused. The characteristic elements of the offense, properly laid under the 85th Article of War, were not changed by the wrongful substitution of a different Article of War. Where as here, the court actually intended to find accused drunk on duty in time of war and the specification upon which he was found guilty was unequivocal in its appropriate allegations, the mere designation of the general Article of War instead of the specific one could not be material or affect the legal consequences incident to the finding of guilty of that offense. Because of the peculiar circumstances of the instant case, the punishment must be held to have been determinable by the offense described in the specification and not by the technical charge of the Article of War under which the specification stood. There was no legal impropriety in the revision proceedings.

NATO 2876, Gay.

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PUNISHMENT - Mandatory - Under Article of War 85 - Effect of Allegation of Being "Under Influence of Intoxicants".

Accused, an officer, was found guilty of two specifications, each of which alleged that on a certain date, while on a specified duty, he was "under the influence of intoxicants \* \* \* thereby rendering himself unable to fully perform his duties", in violation of Article of War 96. He was sentenced to forfeit \$110.00 of his pay per month for six months and to be restricted to the limits of his regimental area for three months. The reviewing authority approved the sentence and directed its execution. Terms such as "under the influence of intoxicants" and "intoxication" have long been held to be synonymous with drunkenness (Winthrop's Mil. Law and Prec., 1920, p. 612, n. 42). Since it was specially alleged under both specifications that the influence of intoxicants was such as to render accused unable fully to perform his duties, the averments of the specifications were tantamount to alleging intoxication sufficient sensibly to impair the rational and full exercise of his mental and physical faculties (MCM, 1928, par. 145). The term "found drunk" is an equivalent of the term "was drunk" (NATO 1045, MacLachlan). There is no legal connotation in the term "found drunk"

as it appears in Article of War 85 which is not embodied in the allegations here. The intendment of the statute (AW 85) may not be circumscribed by euphemisms in pleading. The specifications were sufficient fairly to apprise accused that he was charged with being drunk on duty and the court in legal effect found that on both occasions accused was found drunk on duty. The circumstance that the specifications were laid under Article of War 96 in lieu of Article of War 85 was not material. As the court found accused guilty of being (being found) drunk on duty, a sentence to dismissal was mandatory. Proceedings in revision to adjudge the mandatory sentence recommended.

NATO 3553, Whatley (Ltr, AJAG, 1 Oct 44).

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#### PUNISHMENT - Officers - Reduction.

The court purported by its sentence to reduce the accused, a first lieutenant, to the grade of second lieutenant. Such action was beyond the power of the court and void (MCM, 1928, par. 103c).

NATO 1175, White (Advice of AJAG).

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#### RAPE - Aider and Abettor Is Chargeable as Principal.

Accused was charged with rape as a principal. While his companions were raping two Arab women, he stood guard with a firearm over the husband of one of them and two others. The effect of the accused's action was to render aid in the perpetration of the crimes and make him an aider and abettor. At common law he would have been a principal in the second degree. The distinction between principals in the first and second degree is a distinction without a difference and is no longer required. . . Aiders and abettors under rules of general application may be charged as principals. Although two persons cannot be guilty of a single joint rape, because by the very nature of the act individual action is necessary, all persons present aiding and abetting another in the commission of rape are guilty as principals and punishable equally with the actual perpetrator of the crime. The accused was properly charged as a principal with the offense of rape as alleged. Record legally sufficient to support the findings.

NATO 385, Speed.

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#### RAPE - Consent Induced by Fear.

Two accused were found guilty of rape in violation of Article of War 92. There was substantial evidence that while one accused

held the victim's husband at the point of a rifle, the other accused with his rifle forced the victim from her house to a place about 50 yards away, where he "pushed her shoulder" to indicate she should lie on the ground. He thereupon had sexual intercourse with her. Upon completion of the act the woman, crying and shaking, rushed to her husband, screaming "I've been raped". As to whether she resisted, the victim testified, in part, that "At the time, I thought if I ran away or yelled, he was going to kill me. I wanted to live for my baby and husband" and "I was scared, I didn't know what I was doing" and "I was shaking with fright. When he pushed my shoulder, I laid down. I was so scared, I didn't want to resist". That the act of sexual intercourse was accomplished with force and without the woman's consent was inferable from the circumstances. Her testimony that she did not want to resist was explained by her fear-engrossed state of mind induced by the accused's violent conduct. It is rape, though a female may yield through fear.

NATO 3940, Maxey et al.

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RAPE - Hearsay Identification.

Evidence was admitted that prior to the trial the three accused were pointed out and identified by motions and actions of an Arab and his wife, as perpetrators of the rape. Further evidence was admitted that the two Arabs thereafter extrajudicially identified accused through an interpreter. It was improper as constituting hearsay for the witness to testify that a certain person on an occasion out of court identified the accused, whether the witness' knowledge of such extrajudicial identification was acquired through an understanding of the language used by the person making the identification or in consequence of any significant gesticulation or facial expression denoting identification. Such testimony was manifestly inadmissible where it included statements by the identifying person, spoken in a language not understood by the witness but translated for him by an interpreter. Positive identification of the accused was made in court by competent testimony and it did not appear that the substantial rights of accused were injuriously affected by the improperly admitted evidence.

NATO 1069, Scott et al.

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RAPE - Intended Marriage with Prosecutrix, or Condonation and Forgiveness by Her, No Defense.

Accused was tried for rape of an Italian woman, in violation of Article of War 92. The evidence warranted the conclusion that the intercourse was accomplished by force and without the woman's consent. The defense introduced evidence of condonation and forgiveness on the part of the prosecutrix, and of accused's intention to marry her:

Condonation and forgiveness by the injured party after consummation of the offense did not constitute a defense to the charge of rape. Evidence that accused intended to procure a divorce from his wife and marry the prosecutrix was not admissible as a matter of defense. The court was justified in finding accused guilty of rape as charged.

MTO 4164, Morandi.

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RAPE - Joinder of Several Accused.

Two accused, in furtherance of a common design, individually raped a woman. They were jointly charged with rape. In so far as accused were actual perpetrators of independent rapes, their joinder was improper pleading. In view of the common venture and concerted action, however, each was guilty as a principal of each rape and, upon this principle, their joinder was appropriate. The substantial rights of accused were not injuriously affected by the joinder.

NATO 1121, Bray et al.

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RAPE - Joint Offense May Be Found.

Two accused were found guilty of rape alleged to have been committed jointly and in pursuance of a common intent. Both accused violated the victim, forcibly and without her consent, in the course of a common venture in which each accused aided the other. The finding of joint action in pursuance of a common intent was therefore justified. The defense objected that "rape is not an offense that can be committed jointly". It is true that two or more cannot jointly commit a single rape, because by the very nature of the act individual action is necessary. However, this rule does not prevent the joinder of persons aiding and abetting one another in the commission of the crime. They are then chargeable as principals. Record legally sufficient to support the findings.

NATO 646, Simpson et al.

NATO 779, Clark et al.

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RAPE - Prompt Complaint by Prosecutrix - Admissible.

Upon a trial for the rape of a seven-year old child the mother testified over objection by the defense that the child told her, immediately after the child was returned to her home, that an "American brought me and hurt me". The testimony was properly admitted, as proof of prompt complaint, for the purpose of corroborating the testimony of the prosecutrix relative to the corpus delicti.

NATO 910, Hudgins.

NATO 384, Middleton et al.

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RECKLESS DRIVING - Of Motor Vehicle - Maximum Punishment.

Accused was found guilty, in violation of Article of War 96, of driving "a government vehicle in a reckless manner which caused a near accident, and endangering the safety of the vehicle". The proof showed reckless driving on a highway in Algeria. Reckless driving is not listed in the Table of Maximum Punishments and is not included in or closely related to any offense therein listed. Under Paragraph 104c of the Manual for Courts-Martial it is punishable as authorized by statute of the United States of general or special application in the continental United States, including the laws of the District of Columbia. The offense found is identical in all material respects with that denounced by Section 605, Title 40, of the Code of the District of Columbia which provides:

"(b) Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving".

The maximum confinement fixed by this statute for a first offense is confinement for three months. The offense found is distinct from and is not closely related to the offenses of damage or injury to military property, willfully or through neglect, as denounced by Articles of War 83 and 84, or to the offense of willfully destroying public property cognizable under Article of War 96. The maximum authorized punishment by confinement for the offense found is confinement for three months.

NATO 1151, Hutto.

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RECORDS - "Confinement Form" - Admissibility.

Accused was found guilty of one charge of desertion in violation of Article of War 58 and two charges of absence without leave in violation of Article of War 61. For the apparent purpose of showing the date of the termination of his third absence without leave the prosecution introduced, among other documents, a purported "confinement form" (being a letter from "Headquarters Stockade, Peninsular Base Section" to the "Commanding Officer, 504th MP Bn"). This document was not an authorized record and was inadmissible (MCM, 1928 par. 117a).

NATO 3047, Coffey.

REHEARINGS - By Same Court.

Accused was found guilty of sodomy in violation of Article of War 93, and sentenced. Two weeks later the court convened at the request of the accused and with the apparent approval of the reviewing authority. The reporter, court and personnel of the prosecution were again sworn. Evidence offered by the defense was received. The court also called further witnesses. The evidence received at the second hearing was supplementary and in part contradictory to that received at the first hearing. At the conclusion of the testimony the court again reached findings of guilty and adjudged a sentence similar to that previously adjudged. The reception of evidence and the making of new findings and reconsideration of the sentence were in legal effect an implied revocation of the original findings and sentence followed by a new trial or rehearing before a court composed of the officers who first heard the case. The requirement of Article of War 50 $\frac{1}{2}$ , that rehearings shall take place before a court composed of officers not members of the court which first heard the case was not observed. All members of the court who sat originally were incompetent to rehear the case. This requirement of the statute is jurisdictional. Since jurisdictional defects cannot be waived, the findings and sentence were void.

NATO 1661, Berkowitz.

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RIOT - Conspiracy to Commit - Unlawful Assembly - Rout.

Accused were charged with conspiring to commit a riot by unlawfully assembling and planning to enter a town and there violently and turbulently to assault the military police, to the disturbance of the military police and to the terror and disturbance of the inhabitants, in violation of Article of War 96. Soldiers of two companies bivouacked together became resentful over the arrest of a first sergeant by military police in a nearby town. They voiced personal grievances and charges of discrimination, and expressed a purpose to go into town that night to assault the police. A number of soldiers tried to get ammunition from the supply tent, but were stopped by an officer. Later, when the commanding officer of one company returned to camp with the first sergeant, whose release he had secured, he found a large group gathered at the orderly room. He made a lengthy talk, promised to take up their grievances with his superior in the morning, and ordered them to their tents. Disregarding this order, a group assembled within the bivouac area, where statements were made about shooting and killing "the MPs" and securing rifles and ammunition. Some of the soldiers then went to the supply tent, overpowered the guard, and seized and distributed a case of ammunition. Armed with rifles, groups of the soldiers approached the town from different directions, and when inside, fired shots at the military police. When three of the soldiers were arrested, the others returned to camp. The evidence clearly implicated each of the accused at one or more stages of the common enterprise. The Board of Review refrained from expressing an opinion as to the appropriateness

of a charge of conspiracy to commit a riot which is questioned by reputable authority, but held that the specification involved and sufficiently charged an offense included in that of riot. As a compound offense, it included as lesser offenses those of unlawful assembly and rout. To constitute the offense of unlawful assembly, no overt act was necessary and all who joined and gave countenance or support to it were criminally responsible for the acts of their associates. No formal or express agreement had to be proved. In any event, the assembly and plan here charged and proved were of a nature directly and palpably to disrupt military order and prejudice military discipline, within the meaning of Article of War 96.

NATO 534, Bishop et al.

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ROBBERY - Distinct Transactions Properly Charged as Separate Offenses.

Three accused drove a truck in front of automobiles occupied by Arabs and, forcing the latter to stop their vehicles, robbed the occupants of valuables including money by menacing the victims with firearms. Three vehicles were so stopped in turn and their victims similarly robbed. The first robbery took place about 0100 hours, the second at 0130 hours, and the third about 0215 hours of the day alleged. The accused were convicted of three specifications alleging robbery. The robberies described in the three specifications were separate transactions and were properly so alleged, for each robbery was basically a separate trespass and as such constituted a distinct and complete offense. There was no unreasonable multiplication of charges.

NATO 1329, Robinson et al.

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ROBBERY - Proof - Separate Offenses.

Accused was found guilty of robbery and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. The evidence shows that he stole property from three persons, that an assault in each instance either preceded or accompanied the larcenous taking, and that the taking was effected against the will of each victim by means of violence and intimidation. The situation presented a reasonably well-founded apprehension of present serious danger if resistance were offered. The robberies were committed with the aid of two accomplices for whose acts the accused became responsible as a principal. Accused was properly charged with three separate robberies, although they were closely related in point of time and space. Each robbery was basically a separate trespass and as such constituted a distinct and complete offense. Record sufficient to support findings and sentence.

NATO 950, Harlan.

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SELF-INJURY - Presumption of Negligence.

In the case of self-inflicted wounds caused by carelessness in varying degrees of negligence, the negligence, like any other fact in issue, may be proved by circumstantial evidence, that is, by inference from probative facts in evidence. Examples of such probative facts are the location or nature of the wound, the previous or subsequent remarks, demeanor or behavior of accused, or peculiar circumstances of time and place. Negligence in the discharge of a firearm cannot reasonably be inferred from the mere fact that a shot inflicting self-injury was fired from a weapon the dangerous character of which was known to the person injured. In human experience a hypothesis of accident is tenable in such cases (Dig. Op. JAG, 1912-40, Sec. 454 (82) ). Any presumption to the contrary would appear to be inconsistent with the basic presumption of innocence in criminal cases (MCM, 1928, par. 112a).

Ltr, AJAG to SJA, 1st Armd Div, 29 May 44.

SELF-INJURY - Presumption of Negligence from Incidental Failure to Obey Order.

The incidental violation of a division order forbidding the possession of loaded firearms would not impute gross negligence or intentional misconduct to self-injury through accident or mere carelessness. A person is sometimes deemed criminally liable for the unintended consequences of his act if in doing an unlawful act he inflicts an unforeseen injury, but this rule applies only if the intended act is malum in se as distinguished from malum prohibitum. An example is involuntary manslaughter in the commission of an unlawful act, as defined by the eighth subparagraph of Paragraph 148a of the Manual for Courts-Martial. Possession of a loaded firearm by a soldier is obviously not malum in se - evil in itself - although it may lawfully be prohibited.

Ltr, AJAG to SJA, 1st Armd Div, 29 May 44.

SELF - INJURY - Punishments.

Discharge of a firearm through carelessness is recognized as a military offense violative of Article of War 96 (MCM, 1928, Form 135, App. 4). Careless discharge of a weapon resulting in self-injury would likewise be a military offense and, if the carelessness amounted only to simple negligence, would be punishable with at least equal severity (MCM, 1928, par. 104c). If the carelessness were of a degree amounting to "culpable negligence" or recklessness, and were so pleaded, the offense would be closely related to assault and battery resulting from negligence (MCM, 1928, par. 149 1, p. 178), punishable by a

maximum term of confinement at hard labor for six months and corresponding partial forfeitures (MCM, 1928, par. 104c). If the negligence were of such gross degree that willfulness or intentional wrongdoing might be imputed, and were so pleaded, the offense would be closely related to assault with intent to do bodily harm with a dangerous weapon, punishable by dishonorable discharge, total forfeitures and confinement at hard labor for five years (MCM, 1928, par. 104c); and, if malice were inferable (MCM, 1928, par. 149b), the offense might be punishable as for mayhem.

Ltr, AJAG to SJA, 1st Armd Div, 29 May 44.

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SELF-MAIMING - To Avoid Hazardous Duty - Punishment.

Accused was found guilty of self-maiming with intent to avoid hazardous duty in violation of Article of War 96. The offense was committed in an active combat zone. Accused was sentenced to dishonorable discharge and confinement for twenty years. Held: The record was legally sufficient to support the findings and sentence. The Table of Maximum Punishments (MCM, 1928, par. 104c) does not list the offense of self-maiming but it has been held, by reference to Section 22-506, Code of the District of Columbia (1940 Ed.) (act of 3 March 1901, 31 Stat. 1322, c. 854, sec. 807), that the maximum punishment which may be imposed for self-maiming (or for mayhem) is dishonorable discharge, total forfeitures and confinement for ten years (SPJGJ 1942/2425, 9 June 1942). The specification in the instant case charged that the self-maiming was committed with intent to avoid hazardous duty. With this alleged specific intent, the offense contained an element not necessarily included in that of self-maiming. An offense of graver aspect was here involved. No limit of punishment is prescribed.

NATO 464, McKenzie.

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SENTENCES - Inclusion of Forfeitures in Sentence of Dishonorable Discharge and Confinement Is Discretionary.

Accused was found guilty of murder, in violation of Article of War 92, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge and confinement at hard labor for the term of the natural life of accused. Held: The disapproval of that portion of the sentence adjudging forfeiture of all pay and allowances due or to become due was unnecessary. The inclusion of total forfeitures in the sentence was not, however, legally essential.

NATO 2443, Simmons.

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TRIAL - Reopening after Findings.

After accused had been found guilty and the court had heard evidence as to previous service and convictions, the court recalled accused's company commander and asked him if he would "like to retain accused in his organization". The witness answered "No I would not". The court then sentenced accused. The calling of the witness after findings were reached was irregular and the substance of the testimony was improper as accused had not offered evidence of his own good military character. The findings of guilty were not affected by the error. The justifiable inferences adverse to accused which might be drawn from the testimony were not of markedly serious import. The substantial rights of accused were not, under the special circumstances of the case, injuriously affected within the meaning of Article of War 37.

NATO 1502, Biggs (MJ).

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TRIAL - Reopening after Sentence Announced.

Accused was found guilty of sodomy in violation of Article of War 93, and sentenced. Two weeks later the court convened at the request of the accused, and with the apparent approval of the reviewing authority. The reporter, court and personnel of the prosecution were again sworn. Evidence offered by the defense was received. The court also called further witnesses. The evidence received at the second hearing was supplementary and in part contradictory to that received at the first hearing. At the conclusion of the testimony the court again reached findings of guilty and adjudged a sentence similar to that previously adjudged. There was no authority for consideration of the new evidence after findings had been reached and a sentence had been adjudged and announced. The reception of evidence and consideration thereof were tantamount to a new trial or rehearing.

NATO 1661, Berkowitz.

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VALUE - Proof.

Upon trial of accused for wrongful sales of distinctive issue clothing and equipment in violation of Article of War 94, the "black-market" prices at which the articles were sold were shown to be considerably in excess of the published list prices. The determinative values of the articles sold were the published list prices rather than the so-called local market values.

NATO 452, Reed.

VARIANCE - In Name of Deceased in Homicide Case.

Accused was found guilty of murder in violation of Article of War 92. The person killed by accused was described as "Private John W. Brockman, One hundred and twelfth Military Police, Prisoner of War Detachment". Witnesses to the shooting described him as Private John Brockman, 112th Military Police Prisoner of War Detachment; and the medical officer who performed the autopsy testified that the body bore identification tags of "John H. Brockman", a "member of the Military Police". The variances were not material. The evidence sufficiently showed that a Private John Brockman of the unit described in the specification was killed by accused, and the entire record left no doubt but that one person only was killed and that he was the person described in the specification. Error in proof of the middle name or in the initials of a deceased is not material (30 C.J. 94,95). The variance could not operate to prevent the successful pleading of double jeopardy in a subsequent prosecution for homicide at the time and place here alleged (NATO 861, Guy).

NATO 2880, Watson.

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WILLFUL DISOBEDIENCE - Proof.

Accused was ordered by his company commander to get a certain pair of shoes concerning which a serious difficulty had arisen. Accused started to comply, but did not do so and told the officer, in effect, that he would not get the shoes. He forthwith assaulted another soldier involved in the matter. When the company commander thereupon ordered accused into arrest, he went for the shoes before the arrest was effected. Accused was properly found guilty of willful disobedience of the order in violation of Article of War 64. Although mere delay or reluctance in obeying a command is not willful disobedience where the command is in fact complied with, here there was a positive and deliberate refusal to obey and a deliberate omission to obey at the time obedience was required. Accused's words and acts demonstrated that intentional defiance of authority which is the essence of the offense. As the offense had been completed, it was no excuse that accused had a change of heart and did later obey the order.

NATO 1318, Stephenson (MJ).

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WITNESS - Competency of Accused as Witness for Prosecution.

In a trial of several accused for conspiracy to commit a riot, the trial judge advocate, without prior knowledge of the defense

counsel, called one of the accused, Wright, as a witness for the prosecution. Wright was advised of his rights under Article of War 24 and after stating that he understood its meaning was sworn and testified. An accused Drummond was likewise called for the prosecution, but refused to be sworn when advised of his rights under Article of War 24. The court then recalled Wright, who testified that he had not previously understood his rights. His prior testimony was expunged from the record. Later in the proceedings, the trial judge advocate expressed his willingness to call accused Wright, Drummond, and two others if they had any desire to testify for the prosecution. All declined except Drummond, who was sworn and answered affirmatively the question of the president of the court: "Do you understand what you are doing . . . that you don't have to do it unless you want to?" Drummond then testified, implicating several other accused and making self-incriminating statements. After the prosecution rested and defense counsel announced that he had advised the accused of their rights, the court asked the accused if they fully understood. Drummond then stated that he had not understood, that he thought he was required to testify. The court declined to expunge his earlier testimony. Held: It may be assumed that the accused understood their rights with respect to self-incrimination, but their competency was another matter. The purpose of the law being to preserve to the accused their right to remain silent without prejudice, it was clearly improper for the prosecution to call them as witnesses without a previously expressed request on their part. An accused is a competent witness upon his own request but not otherwise. The record, however, contained competent evidence amply sufficient to support the findings of guilty. The substantial rights of none of the accused were injuriously affected by the error.

NATO 534, Bishop et al.

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WITNESS - Competency of Accused as Witness for Prosecution.

Privates V, C, and W, and another soldier, were tried jointly for conspiracy wrongfully to sell government gasoline, in violation of Article of War 96. V and W pleaded guilty and C pleaded not guilty. All were found guilty. In the course of presentation of its case, the prosecution called V and W as its witnesses "against \* \* \* C \* \* \*". The record recites that V and W each stated he "understood his rights as to self-incrimination" The defense made a motion for findings of not guilty as to C at the close of the prosecution's case. The motion was denied. The accused were not competent witnesses under the circumstances shown. An accused is "at his own request, but not otherwise, a competent witness" (MCM, 1928, par. 120d). Acquainting an accused with his rights with respect to self-incrimination is manifestly not the equivalent of a request on his part that he become a witness (NATO 534, Bishop et al). Resort by the prosecution to testimony of an accomplice is normal only upon considerations of necessity, to supply proof which cannot otherwise be obtained. In such instances, the usual and proper practice, in the absence of an unequivocal request to testify, is to make a special disposition of the charge against the prospective

witness. A promise of immunity, for instance, has the sanction of law in court-martial proceedings (Dig. Op. JAG, 1912-40, Sec. 395 (57) ). Aside from the incompetent testimony of V and W, the prosecution did not introduce any evidence to connect C with the alleged conspiracy. However, C became a witness in his own behalf and sufficiently established his guilt by his own testimony. No fatal error was committed. Record legally sufficient to support the findings of guilty as to each accused.

MTO 5432, Vickers et al (MJ) (Ltr, AJAG, 10 Mar 45).

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WITNESSES - Cross-Examination of Accused.

After accused had testified as to his version of a disturbance he was asked if he had had a weapon. This specific subject had not been covered in direct examination. An objection was overruled. The scope of cross-examination of an accused rested within the sound discretion of the court and greater latitude than in other cases might be properly allowed. No error.

NATO 778, Tallent.

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WITNESSES - Expert.

The law member refused to permit a medical officer to express his opinion as to the drunkenness of accused, based upon a blood alcohol test. This witness had not had laboratory experience with alcohol blood tests and testified that he placed more credence on physical symptoms than on the blood tests in such cases. It was within the province of the court to determine the qualifications of the witness. The court had broad legal discretion in determining whether a supposed expert possessed the required qualifications. The court's determination could not be held erroneous unless palpably unreasonable. Error was not committed.

NATO 213, Smith.

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WITNESSES - Impeachment by Proof of Inconsistent Statement.

The prosecution, taken by surprise, was allowed to impeach one of its own witnesses by proving a prior statement inconsistent with the witness' testimony. The inconsistent statement was to the effect that witness saw accused commit the offense involved in the charges.

# PROPERTY OF U. S. GOVERNMENT

Having been introduced only for the purposes of impeachment the statement was not for consideration as bearing upon the issue of guilt.

NATO 372, Brown.

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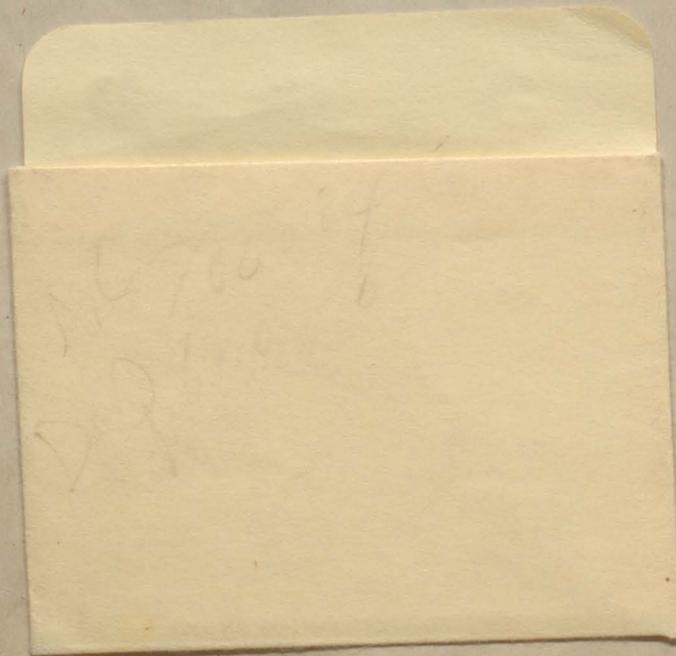
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WITNESSES - Infant - Competency.

The court permitted an assaulted child, seven years of age, to testify. Prior to testifying she was questioned and the court determined, over objection by the defense, that she was a competent witness. This was proper. The competency of children as witnesses is not dependent upon their age but upon their apparent sense and understanding of the moral importance of telling the truth. There appeared to have been no abuse of discretion.

NATO 910, Hudgins.

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