CHAPTER XV

CORPUS DELICTI

Reference. Par. 140*a*, MCM.

1. General. Paragraph 140*a*, MCM, provides that "a court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone." The evidence which is required to thus corroborate a confession or admission must establish the corpus delicti of the offense concerned. The corpus delicti need only be attached by substantial evidence. "[I]t should be remembered that we deal with probabilities rather than proof beyond a reasonable doubt in determining whether a confession is sufficiently corroborated." (*United States v. Young*, 12 USCMA 211, 214, 30 CMR 211, 214 (1961)).

2. The military rule. *a. General.* The foregoing provision of the Manual has been interpreted by the Court of Military Appeals to mean that the corpus delicti must extend to every element of the offense as opposed to the Federal rule which requires only corroboration of the particular incriminating statements made by the accused.

b. Illustrative cases.

(1) *United States v. Isenberg*, 2 USCMA 349, 356, 8 CMR 149, 156 (1953). Evidence of a 10 day period of AWOL in Korea is not sufficient to corroborate a confession of desertion. The prevailing Federal rule is that the corroborating evidence must touch upon every element of the offense. The 1928 and 1949 Manuals for Courts-Martial each provided that the corpus delicti need not "cover every element of the charge." However, this qualification does not appear in the 1951 Manual for Courts-Martial and must have been deleted for some purpose. ". . . evidence of a short absence without leave does not show that the offense of desertion has probably been committed. There is a total absence of facts or circumstances from which an intent not to return to the service may be inferred. Before we could meet the requirements of the Manual and say it is probable the offense charged has been committed, we must find some evidence to support an inference of intent to abandon the service permanently. Mere unauthorized absence of short duration without more is not sufficient for the purpose."

(2) *United States v. Villasenor*, 6 USCMA 3, 6, 19 CMR 129, 132 (1955). The holding in *Opper v. United States*, 348 U.S. 84 (1954) that corroboration need only tend to establish the trustworthiness of the statement and disapproving the contrary views expressed by some circuit courts does not require reappraisal of the military rule as laid down in *Isenberg*. *Isenberg* did not hold that the Federal rule is to be applied in courts-martial but rather was based upon the specific provisions of paragraph 140*a*, MCM. "In compliance with that provision, we held that in military law a confession or admission must be corroborated by some evidence, direct or circumstantial bearing on each element of the crime alleged, save only the identity of the perpetrator. That conclusion we believed to be the only one permissible under the language of the Manual, and we have steadfastly adhered to this view." (Per Latimer, J., and Brosman, J. Quinn, C. J., in dissent would apply the Federal rule.) In *United States v. Smith*, 13 USCMA 105, 32 CMR 105 (1962), Judges Kilday and Ferguson joined to reaffirm the holding in *Villasenor* and reject the present Federal rule. Quinn, C. J., dissented.

3. Special rules. *a. General.* Specific rules pertaining to the requirement of corroboration as found in certain situations are indicated below

b. Other confessions or admissions. Corroboration may not consist of other confessions or admissions of the accused except when such statements were made prior to or during the commission of the wrongful act alleged.

Illustrative cases.

(1) CM 370711, *Moore*, 22 CMR 409, 411 (1956). Where the only corroboration of a confession to a 2½ year desertion was a morning report entry prepared upon the accused's return and based entirely upon information supplied by the accused at that time, there was an improper attempt to corroborate a confession with a confession. "The morning report entry is merely a paraphrase of the statements made by the accused to the morning report officer. Hence, it is in reality a document recording the accused's confession. As such it cannot corroborate a separate confession and must itself be corroborated."

(2) *United States v. Takafuji*, 8 USCMA 623, 626, 25 CMR 127, 130 (1958). The Court will not speculate that the sole source of the information incorporated in a morning report was a pretrial statement of the accused. If the defense wants to attack the morning report on this basis the record must show the underlying facts. "To engage in such speculation is, in

effect, to add to the record of trial. This we cannot do. We must take the record of trial as we find it."

(3) *United States v. Villasenor*, 6 USCMA 3, 19 CMR 129 (1955). The accused was charged with embezzlement of money from a fund of which he was custodian. The only evidence of the amount of the loss, other than his confession, was a notation made by him as custodian on the envelope in which he had left the cash. Although the notation was an admission on his part it could be used as a business entry to corroborate his confession. Furthermore, since statements made during the course of an offense can be used to convict without corroboration (see par. 5, below), such statements may certainly serve as corroboration. "In looking to the reasons for the Manual rule, we find that a confession or admission cannot alone support a conviction because it may not be trustworthy. With truthfulness present, it is high on the scale of desirable proof. But because of the pressures that may be used to extort a statement, there is a fair risk that a person might confess to a crime he did not commit. The same possibility of untrustworthiness undoubtedly denies the use of one confession or admission to support another. . . . There is no reason why book entries which also are admissions should be treated with the same degree of caution as is extended to writings which are admissions or confessions and nothing more." (at p. 10, 136) "Having concluded that a statement made prior to or contemporaneous with the act itself, even though used as an admission, is sufficient for conviction, we are certain that such an admission may also be used to establish the elements of the corpus delicti. When used to convict, their quality must be such as to establish the relevant evidence beyond a reasonable doubt. Their weight when used to establish the probability that an offense has been committed may be much less." (At p. 12, 138.)

e. Joint offenses. Where two or more accused are charged with having jointly committed an offense "common intent" is not an element for corpus delicti purposes.

United States v. Dolliole, 3 USCMA 101, 11 CMR 101 (1953). Evidence that A and B were present and accompanying C and D while the latter committed robbery and aggravated assault is sufficient to corroborate the confessions of the former and independent evidence that the crimes were committed "in pursuance of a common intent" as alleged in the specification is not required. This allegation does not create a separate element but is merely a method of permitting a joint trial.

d. Multiple offenses. The same evidence may supply corroboration for confessions to more than one offense. The only requirement is that the record as a whole show the probability that each was committed.

United States v. Stribling, 5 USCMA 531, 18 CMR 155 (1955). Evidence of an aggregate shortage of $2,400 in the funds of which the accused was custodian is sufficient to corroborate a confession to two separate embezzlements of $200 and $2,200, respectively, offered to show two separate larcenies.

e. Narcotic cases. The corpus delicti for narcotics *use* must be connected with the accused.

United States v. Mims, 8 USCMA 316, 318, 24 CMR 126, 128 (1957). The accused was a patient in a tubercular ward of a service hospital. Each bed on the ward was in a separate cubicle and B's bed, on the same ward, was six cubicles distant from the accused. The only evidence to corroborate the accused's confession to having used heroin on the previous day was the finding of an eye dropper and two hypodermic needles in B's bed table and some needle marks on the accused's arm. A doctor testified that the latter could have resulted from routine blood sampling conducted by the hospital. "While the rule states that there must be evidence in the record that the offense charged has probably been committed by someone, when the specification alleges use of narcotics that someone must, of necessity, be the accused. Otherwise no corpus delicti is made out and an accused could be convicted on his uncorroborated confession. Certainly, proof that one airman possessed equipment to administer narcotics would not, standing alone, corroborate a confession by any third party that he, too, was a user. We must, therefore, scan the record to determine if there is other evidence which more closely connects the accused with the use of heroin. . . . In summation, we have possession of contraband equipment by a third person and hypodermic needle marks which the record shows could have been made in the normal treatment of the accused. We find these inadequate to show a probability that the accused used a drug, or in the alternative that they corroborate his confession. (Per Latimer, J. Ferguson, J. concurred "in the result" and Quinn, C. J., dissented.)

Note. In *United States* v. *Rhodes*, 11 USCMA 735, 20 CMR 551 (1960), the Court refused to extend the *Mims* case to require proof of identity of the accused as a conspirator under a conspiracy charge. The following language from the unanimous opinion written by Quinn, C. J., indicates that the *Mims* opinion will be limited strictly to its unique facts. "We there [in *Mims*] held that evidence of possession of narcotic instruments by one person does not provide the required independent evidence of *use* of narcotics by another to support the pretrial admission of *use* by the latter." (At p. 738, 554.)

4. Examples of corpus delicti. *a. Larceny.*

United States v. Evans, 1 USCMA 217, 219, 2 CMR 113, 115 (1952). "Here there is no specific proof that cigarettes of quantity alleged to be stolen were missing from the Army warehouse. There is, however, the evidence from which the necessary inferences may be drawn. The circumstances of the employment of the soldiers in a position where they had access to great quantities of cigarettes thus furnishing opportunity to perpetrate the offense charged; their furtive removal of the boxes from the warehouse; their concealment of the boxes in a Japanese house; and their conversation concerning a black market operation prior to the offense, provide a chain of evidence that leaves little doubt as to the criminal scheme in which petitioner was engaged. That this evidence is mostly circumstantial is not material. The corpus delicti may, and often must, be proved by circumstantial evidence and reasonable inferences which may be drawn therefrom."

b. Premeditated murder.

United States v. Goodman, 1 USCMA 170, 2 CMR 76 (1952). Evidence that the deceased was found with a bullet hole in the back of his head in an area in Korea where there was no armed conflict or guerrilla activity is sufficient to corroborate a confession to premeditated murder in accordance with the MCM provision that evidence of death under circumstances indicating a probable unlawful killing is a sufficient corpus delicti for homicide.

c. Forgery.

(1) *United States v. Manuel*, 3 USCMA 739, 14 CMR 157 (1954). Evidence that at the time of cashing the allegedly forged money order the accused asserted that the endorsement thereon had been made by the payee (another soldier) together with the fact that a comparison of such endorsement with a specimen of the accused's handwriting indicated the probability that the same person made both writings is sufficient to corroborate a confession to forgery.

(2) *United States v. McFerrin*, 11 USCMA 31, 35, 28 CMR 255, 259 (1959). In order to corroborate an accused's confession that he forged his wife's name to an allotment check the Government must "show the probability that the accused did not have the authority to sign his wife's name on the instrument in question."

d. Receiving stolen property.

United States v. Petty, 3 USCMA 87, 11 CMR 87 (1953). Evidence that the stolen outboard motor was delivered to the accused after a secretive conversation with the prior possessor and that two other stolen outboard motors were found in his possession is sufficient to establish the probability that the accused was aware of the nature of the property when he took possession of it.

e. Use of narcotics.

United States v. Payne, 6 USCMA 225, 19 CMR 51 (1955). The testimony of the toxicologist who conducted an analysis of the accused's urine that his tests demonstrated a probability that it contained morphine is sufficient to corroborate the accused's confession, despite the fact that the expert was unable to state with assurance that the urine did contain the drug.

f. Burglary.

(1) *United States v. Morris*, 6 USCMA 108, 19 CMR 234 (1955). Evidence of an unauthorized entry into nurses quarters at night is sufficient to corroborate a confession of burglary with intent to steal since the intent may be inferred from the circumstances.

(2) *United States v. Parker*, 6 USCMA 274, 19 CMR 400 (1955). Evidence of an unauthorized entry into a dwelling place at night is sufficient to corroborate a confession of burglary despite the fact that after entering the accused attempted to commit a sexual offense upon a female resident of the dwelling. The existence of a sexual intent after the entry is not inconsistent with his having earlier had the requisite larcenous intent.

g. Attempted robbery.

United States v. Spencer, 9 USCMA 341, 342, 26 CMR 121, 122 (1958). The following evidence is sufficient to establish the corpus delicti of attempted robbery. About July 1 the accused saw the victim counting some money and requested and was denied a loan. On the night of July 7 the victim, a night fireman, was struck on the head with a blunt object by an unidentified assailant; the victim was stunned by the blow but managed to run away before his assailant could take any further action. "Outside the confession, four facts are shown: lying in wait, an assault in a darkened boiler room, the need for money a week prior to the assault, and knowledge that the victim possessed the same. In addition, there is the circumstance that no other motive is remotely suggested. From these facts and circumstances, was it reasonable to infer that the accused intended to assault and rob his victim? We answer in the affirmative for it is perfectly proper to establish the corpus delicti by circumstantial evidence . . . it is not unreasonable to infer that a larcenous intent was present."

h. Desertion.

United States v. Bonds, 6 USCMA 231, 235, 19 CMR 357, 361 (1955). In a desertion case, the corroboration of the intent to remain absent permanently can consist of circumstantial evidence from which the *probable* existence of such intent reasonably may be inferred. "Certainly when an enlisted man whose duty station is located

some 500 odd miles from where he is seen, is observed with regularity for a long period of time, dressed in civilian clothes . . . and accepting civilian employment, there is a probability that he has abandoned the service. From the entire evidential structure, aside from the confession, it appears probable to us that the abandonment occurred when he was first observed to have reverted to civilian traits. . . . The accused lived, worked, and acted as though his military career had been forsaken for all time, and he was returned to the service involuntarily."

i. Lewd and lascivious acts.

United States v. Fioco, 10 USCMA 198, 27 CMR 272 (1959). The following evidence is sufficient corroboration of a confession to having committed lewd acts upon a six year old girl. The accused and three other marines were guests in the victim's home; the accused took a glass of water to the victim in her bedroom, returned to the living room and announced that he would tell the child a "bedtime story;" the child's mother noticed that the bedroom door was closed and found it blocked by a toy; the accused was standing by the bed, his fly was open and he was going through the "motions of putting back his penis."

j. Conspiracy.

United States v. Rhodes, 11 USCMA 735, 739, 29 CMR 551, 555, (1960). Independent evidence of the accused's connection with a particular conspiracy is not required to corroborate his confession to being involved in it. "A number of Federal cases clearly indicate the general rule, that independent proof of the identity of the perpetrator is not required, applies to a conspiracy prosecution. . . . We are not persuaded that it is either necessary or appropriate to carve out a special rule, requiring independent evidence of identity of a conspirator, as a predicate for the admission of a pretrial confession by him of his participation in the conspiracy."

5. Exceptions to the corpus delicti rule. *a. General.* The rule requiring corroboration of a confession or admission of an accused does not apply to statements made by an accused before the court during his trial nor does it apply to statements made prior to or in pursuance of the wrongful act concerned.

b. Illustrative cases.

(1) *Warszower v. United States*, 312 U.S. 342, 347 (1941). In a passport fraud prosecution, evidence of statements made by the defendant prior to the alleged fraudulent misrepresentation and inconsistent therewith are admissible without corroboration to show the falsity of the later statements. "The rule requiring corroboration of confessions protects the administration of the criminal law against error in convic-

tions based upon untrue confessions alone. Where the consistent statement was made prior to the crime the danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact."

(2) *United States v. Villasenor*, 6 USCMA 3, 12, 19 CMR 129, 138 (1955). "We have stated previously that, as a basic premise, no man can be convicted upon evidence that he has twice admitted an offense, and therefore other corroboration is necessary; but the departure from that concept by both the Manual and the Federal courts is bottomed upon a sound logical basis. As we understand the basis, it is simply this: If an accused subsequent to the time of the commission of an offense, makes an admission which is later used against him to establish criminality, there is danger that an agency of prosecution, the maliciousness of an enemy, or the aberration or weakness of the accused under the strain of suspicion led him to make the statement regardless of its truth or falsity. However, when the admissions were made before or contemporaneously with the offense, those forces could not have influenced the acknowledgment as at that time no crime was known or suspected by anyone but the accused."

6. Procedural aspects. *a. Provisional admission.* As a general rule, the prosecution must establish the corpus delicti before it offers the accused's statements. However, the law officer may, in his sound discretion, admit the statement provisionally subject to a later showing of sufficient corroboration. If the prosecution fails to establish the corroboration, the statement must be stricken and disregarded and a conviction cannot be sustained. If there is insufficient evidence to show the *probability* that the offense was committed, *a fortiori*, there will be insufficient evidence to sustain a finding of guilty after the confession has been stricken. However, a conviction may be sustained despite the erroneous admission of an uncorroborated statement if the defense thereafter puts in evidence which supplies the missing elements in the prosecution's case.

Illustrative case.

CM 400544, *Abner*, 27 CMR 805, 809 (1958). Despite the failure of the prosecution to establish the probable illegality of a shortage in the funds of which the accused was custodian, the law officer admitted evidence of his admission to having wrongfully taken a certain amount for use in gambling. The accused then took the stand and testified to substantially the same matters embraced by his pretrial admission. The law officer's erroneous ruling was cured by the

accused's testimony. "The error . . . did not so prejudice the case as to 'force' accused to take the stand in order to explain the circumstances or to minimize the adverse effect of the inadmissible evidence."

b. Functions of law officer and court. The Manual is silent as to whether the existence of the corpus delicti is a matter to be finally decided by the law officer or must be resubmitted to the court under appropriate instructions. The Court of Military Appeals has not as yet ruled on this matter but there has been some expression of opinion thereon by way of *obiter dicta*. In *Mallett*, *infra*, an Army Board of Review has taken a stand which is supported by a well-reasoned opinion.

(1) *United States v. Manuel*, 3 USCMA 739, 745, 14 CMR 157, 163 (1954). "We have not been conscious, I believe, of any necessity of any overt recognition of the presence of this evidence [corpus delicti] on the part of the court-martial. . . . Indeed, so far as verbalization and judicial conduct are concerned, it might appear that, under the law of this Court at least, the idea of corpus delicti is one which addresses itself solely to the judge and not the jury—to the law dispenser rather than to the fact finder." (Separate opinion of Brosman, J.)

(2) *United States v. Landrum*, 4 USCMA 707, 712, 16 CMR 281, 286 (1954). On appeal the accused contended that the law officer erred, *inter alia*, in refusing to charge the court that it could not consider the confession unless it first found sufficient corroboration thereof. "A number of state courts have held that, when the evidence of the corput delicti is not substantial, the trial judge must instruct the jury that it must find probability of the commission of the offense before it can consider the accused's pretrial statements. . . . This principle also is regarded with favor in the Federal courts. . . . To the extent that it is consistent with military law and necessity, this Court has followed Federal civilian precedents. . . . We have considered the general requirement of corroboration in a number of cases. Although we have never directly ruled upon the necessity for a cautionary instruction on the subject, it has been suggested that our cases point to the conclusion that the 'idea of *corpus delicti* is one which addresses itself solely to the judge and not the jury.' . . . However, we need not decide whether the Federal courts have actually adopted the instructional requirement with such directness as to make their decisions persuasive precedents. Neither need we decide whether the military rule is, or should be, different from the civilian. Because of other deficiencies in

the instructions, it is unnecessary to decide these questions in this case." (Per Quinn, C.J.)

(3) CM 393047, *Mallett*, 22 CMR 572, 574 (1956). "We are mindful that where there is no substantial question of fact regarding the evidence comprising the corpus delicti, which evidence is clear, uncontroverted, unimpeached and not improbable, the question of the sufficiency of the corroboration of a confession is a question of law for determination by the law officer. . . . [Citing *Manuel* and *Landrum*, *supra*.] However, in the instant case, although there had been some evidence in corroboration of the accused's complicity in this incident in the testimony of one of the Korean participants, the testimony of this Korean witness had been impeached by evidence of prior inconsistent statements, and had been contradicted in the testimony of another Korean participant. We think that where the evidence in corroboration of an accused's confession is ambiguous, impeached or contradicted, the court should be instructed that, in order to find the accused guilty, they must find it worthy of belief. Accordingly, we conclude that the evidence in this case required an instruction upon corroboration, and that the refusal of the request of trial defense counsel therefor constituted error."

7. Hypothetical problem. *a.* In a prosecution for possessing marihuana, the trial counsel established that at the time the accused delivered a package to another soldier, the accused said, "Here is the marihuana." This is the only evidence, apart from the accused's written confession, tending to show the nature of the substance in the package. The defense objects to the receipt of the written confession on the ground that there is insufficient corroboration since an admission of the accused cannot be used to corroborate his confession. How should the law officer rule?

b. The accused is charged with conspiring with B and C to commit larceny. In order to corroborate the accused's confession the prosecution established the preparations made by the accused and the overt act alleged. The defense contends that the confession is inadmissible without some independent evidence of the combination of the accused with B and C, and their common intent. How should the law officer rule?

c. The evidence establishing the corpus delicti is somewhat conflicting and the defense has presented some contrary evidence therein. The defense counsel requests an instruction that a member may not vote for a finding of guilty unless he is convinced beyond a reasonable doubt that the confession has been corroborated. How should the law officer instruct?

d. In order to corroborate a confession to sodomy upon a young child the prosecution offers as a "spontaneous exclamation" evidence that the child shortly after the alleged incident, had "blurted out" to his mother a statement to the effect that the accused had done the act alleged. Under the rules pertaining to "spontaneous exclamations" independent evidence of the startling event which provoked the exclamation is required. Can the accused's confession be used to establish the startling event?

CHAPTER XVI

ACTS AND STATEMENTS OF CONSPIRATORS AND ACCOMPLICES

References. Pars. 140*b*, 160, MCM.

1. General. The statement of someone other than the accused when offered for the truth of the matters stated therein is, of course, hearsay and inadmissible unless one of the recognized exceptions to the hearsay rule is applicable. The confession and admission exception does not authorize the use of a statement of someone other than the accused. However, in the case of certain acts and statements of certain persons, as in the case of statements of an accused, the latter will not be heard to claim that he has been denied the right to cross-examine the persons making the statements. When the accused joins in criminal activities with other persons he is deemed to have created a type of agency relationship with them sufficient to authorize them to speak and act on his behalf in furtherance of the joint enterprise. Therefore, statements made by such other persons during the existence of the common purpose and in furtherance of it are treated, for the purpose of the hearsay rule, as though they had been made by the accused himself. This extension of the confession and admission exception to the hearsay rule applies to both fellow conspirators and accomplices of the accused and a sufficient foundation for the application of the rule is laid by showing the existence of the unlawful joint enterprise and that the proffered statement was made during its existence and in furtherance of it. It is not necessary that the specifications at issue allege a conspirator or accomplice relationship between the declarant and the accused.

2. Determination of admissibility. *a. General.* Whether a particular statement was made during the existence and in pursuance of a conspiracy or joint purpose is a question of fact to be decided in light of all the surrounding circumstances.

b. Illustrative cases.

(1) *United States v. Borner*, 3 USCMA 306, 12 CMR 62 (1953). Where A, B, and C have been arrested on suspicion of murder, evidence of the conduct of A in thereafter attempting to bribe an investigator to help A in any way possible is not admissible against B and C.

(2) *United States v. Taylor*, 6 USCMA 289, 293, 20 CMR 5, 9 (1955). Where the accused, a Provost Marshal was charged

with the larceny of a ring which he had originally acquired as evidence and which he had given to Sergeant S, one of his investigators, evidence that Sergeant S had attempted to bribe the real owner of the ring to tell the investigators that Sergeant S had purchased the ring was admissible against the accused. Although, for this purpose, it cannot be said that every conspiracy has a secondary purpose of concealment of the crime, if it appears that a specific attempted concealment was in fact in furtherance of the conspiracy, evidence of such an attempt is admissible against all co-conspirators. "Federal authorities are legion which hold that statements made by a conspirator, once the common enterprise has reached its end, are inadmissible against co-conspirators. . . . However, not infrequently the commission of a criminal offense is followed immediately by an active attempt to conceal it. Thus, a rule has arisen to the effect that the declarations of a conspirator are admissible against a co-conspirator not only when they are made during the perpetration of the offense; but also when expressed during the course of a subsequent attempt to conceal the crime and relating to it. . . . It is thus apparent that evidence—wholly independent of the statements made by Santini to third persons—fully established the existence of a plan conceived by the accused and the Sergeant to retain control of the ring and to silence all claims of prior owners. In such a setting the extrajudicial declarations—made by Santini in pursuance of the common intent to conceal the larceny—were admissible in evidence against the accused."

3. Effect of withdrawal from the conspiracy. Once an accused has effectively withdrawn from the conspiracy and thereby disassociated himself from the further activities of his former partners in crime, their subsequent actions and statements are no longer imputable to him.

Illustrative case.

United States v. Miasel, 8 USCMA 374, 378, 24 CMR 184, 188 (1957). A group of stockade prisoners, including the accused, were involved in the alleged forcible commission of anal sodomy upon another prisoner in the barracks. The accused, charged with assault with intent to commit sodomy, denied having the intent at issue. The prosecution established that following the barracks incident, three of the group, not including the accused, took the victim to another building where each of them committed anal sodomy upon him. The board of review held this evidence to be inadmissible and was upheld by the Court of Military Appeals. "In order to permit the evidence concerning the in-

cident which occurred after the group departed the barracks to be admissible against the accused, it must be shown that he had continued to associate himself and be connected with the common enterprise or venture. For once a joint enterprise has ended, either as a result of accomplishment of the objective, abandonment, or withdrawal of any of the members of the group, subsequent acts or declarations can affect only the actor or declarant. . . . Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. . . . Likewise, a withdrawal from a conspiracy may be shown by any evidence indicating conduct 'wholly inconsistent with the theory of continuing adherence.' . . . Here, however, the board found that the accused had fully terminated his participation in the group's conduct before a portion of the group had left the barracks with the victim, after which the various acts of sodomy were committed. The failure of the accused to accompany the group when they left the barracks is indicative of an affirmative act on his part to effect a withdrawal, and constitutes conduct wholly inconsistent with the theory of continuing adherence. The evidence of record amply supports the board's finding in this matter."

4. Functions of law officer and court. Whether or not a statement of an accomplice or conspirator is admissible under the subject exception to the hearsay rule is a matter for the determination of the law officer. However, in the event a conspiracy is charged it would be necessary for the law officer to instruct the court that it must disregard his preliminary determination made in connection with the admissibility of the evidence.

5. Instructions. Paragraph 140*b*, MCM, provides that if, in a common or joint trial, the confession or admission of one accused is received in evidence against him alone, the law officer should instruct the court not to consider it with respect to any other accused.

Illustrative cases.

a. CM 351645, *Morris*, 4 CMR 300 (1952). At the joint trial of three accused for unlawful use of an Army truck, when the evidence of the guilt of B and C was weak, it was prejudicial error for the law officer to fail to instruct the court that it could consider A's pretrial statement, which inculpated B and C, only against A.

b. United States v. Borner, 3 USCMA 306, 311, 12 CMR 62, 67 (1953). In a joint trial for murder it was not error, under the circumstances, for the law officer to fail to specifically inform the court to consider evidence of an attempted bribery by A of an investigator against A only and not against B and C. "Unquestionably, when evidence of admissions is received at a joint trial, limiting instructions should be given by the law officer. In the instant case, the law officer explicitly instructed the court to this effect on five occasions when the pretrial

statements of each of the accused were received. The last such instruction was given immediately prior to the receipt of this evidence. The court members therefore were well aware of the law relating to admissions and of their responsibility under the circumstances. We cannot assume that they disregarded their instructions when considering the effect of this admission."

6. Hypothetical problems. *a.* At the trial of A for receiving stolen goods, the prosecution offers evidence that B, the person who gave the goods to A, has been convicted, upon a plea of guilty, of larceny of these goods. Is this evidence admissible?

b. At the trial of A for larceny of money from a post exchange, the prosecution shows that B and C actually took the money and then offers evidence of the following matters: on the night after the larceny while B and C were in a booth in a tavern, B took some money from his pocket, divided it into three piles and gave one to C saying, "I'll give A his share of this PX dough when he comes in."; C replied, "He sure earned it. We never could have pulled it off if he hadn't given us that key. I'm sure glad he picked us for the job." Shortly thereafter, A came in, sat down at the booth and when B pushed one of the piles of money over to him, pocketed it. When the defense objects, the trial counsel states that he is offering this evidence only to show the existence of a common enterprise between the three men. Is this evidence admissible? Assuming that the law officer admits it, trial counsel then moves that it be accepted for the truth of the matters stated therein. How should the law officer rule?

CHAPTER XVII

STATEMENTS MADE THROUGH INTERPRETERS

References. Pars. 50, 141, MCM.

1. General. Any witness may, of course, testify as to any competent statement made by anyone which he has personally heard. However, an additional factor is introduced when the statement was made in a language which the witness did not understand and a third party translated the statement into a language understandable by the witness. Let us consider the following situation. F, a French national, made a statement in the presence of W, an American, under such circumstances that F's statement is admissible as non-hearsay or as an exception to the hearsay rule. The statement was made in French, and was not understood by W but a third party, I, who was also present and who apparently understood French told W what F had said. Under these circumstances the only matter as to which W has first hand knowledge is that F said "something" in a foreign tongue. W cannot testify to what that "something" was unless some exception to the hearsay rule permits W to testify to *what I told him* F had said. The fact that the particular statement made by F is admissible does not remove the need that it be proved by competent evidence.

2. Extra-judicial statements. *a. General.* In the preceding chapter we discussed the hearsay exception which permits the use against the accused of statements made under certain circumstances by his co-conspirators or accomplices. This exception is based upon the agency relationship with the declarants which the accused voluntarily assumes. A similar rationale applies to statements made through an interpreter by the accused or his co-conspirator when the interpreter has been voluntarily selected to act as such by the speaker. In this situation the statement, if otherwise admissible, can be proved by evidence of the interpreter's translation and the accused will not be heard to complain of being deprived of the opportunity to cross-examine his own "agent," the interpreter, as to the accuracy of the translation. This exception, however, does not permit a witness to testify to the translation of an oral statement unless he personally heard both the original statement and the translation. It would not permit him, for example, to testify that he met the interpreter and the interpreter told him that the declarant had earlier made a certain

statement to a third party. A written statement made through an interpreter would be admissible upon a showing by competent evidence that the declarant had acknowledged it or otherwise adopted or accepted it as being an accurate translation.

The agency rationale discussed above also permits either party to prove a pre-trial statement made by a witness through an interpreter by evidence of the interpreter's translation when the witness had voluntarily selected the interpreter through whom he spoke and the statement is being offered *solely* for the purpose of impeaching the credibility of the witness and not on the question of the guilt or innocence of the accused.

b. Agent-interpreter. If the declarant had the opportunity to reject the services of the interpreter or in any manner assented to his acting as an interpreter or to the accuracy of the translation, the interpreter will be deemed to have acted as the agent of the declarant.

Illustrative case.

United States v. Day, 2 USCMA 416, 426, 9 CMR 46, 56 (1953). After an unsuccessful attempt to force his attentions upon a Korean woman, the accused departed and subsequently returned carrying a gun and accompanied by a Korean who spoke English. Through the interpreter, the accused demanded that the woman go into another room with him. "A better case for application of the rule than the one on hand would be difficult to conceive. The accused was under no compulsion to choose the person he did to act as his interpreter. The selection was made by the accused and perhaps the interpreter was an unwilling agent. He certainly could not be charged against the victim. The accused stood over him with a gun, and it is unlikely that the interpreter would carry on any conversation except that directed by the accused. The ever-present threat of a gun assures veracity of the translation."

3. Testimony. *a. General.* A witness who is unable to understand or express himself in the English language may testify through an interpreter. In such a case the interpreter must be sworn and in many respects is considered to be himself a witness. As such he is subject to impeachment like any other witness.

Illustrative case.

United States v. Rayas, 6 USCMA 479, 482, 20 CMR 195, 198 (1955). A concession by defense counsel of the qualifications of a Japanese interpreter does not deprive the defense of the right to attack the accuracy of any particular translation and the law officer abused his discretion in refusing to allow the defense to use another interpreter to challenge the accuracy of the translations as they occurred and to testify that they were incorrect. "Essentially, an interpreter is a witness, and one whose conduct must be subjected to the

most careful scrutiny. . . . The accuracy of his translation of testimonial questions and answers is in the nature of a question of fact for the jury and may, therefore, be the subject of impeachment. . . . The right to challenge translative accuracy may be exercised either through cross-examination of the interpreter, or by means of calling other witnesses to test the interpretation. . . . Not only may the general incompetence of an interpreter be shown but there appears also to be a right "to impeach the correctness of his rendition of testimony in particular cases.' . . . In order to protect the accused's right to a fair and impartial testimonial interpretation civilian courts have frequently permitted accused persons to rely on counter-interpreters sitting during the trial as advisors."

b. Former testimony. As will be seen in chapter XXIX there is an exception to the hearsay rule which permits the use, under certain conditions, of testimony given by witnesses at a former trial when such witnesses are unavailable. In the case of such testimony given through an interpreter, it is necessary that both the witness and the interpreter be unavailable since, for this purpose, the interpreter is also deemed to be a witness. If the witness is available, he must be called. If he is not available, but the interpreter is, the latter must be called. In such a case he could, if necessary, use the record of the former testimony to refresh his memory or as past recollection recorded provided that a proper foundation for using these procedures was laid.

4. Hypothetical problems. *a.* A is charged with larceny of a car from V, a German national. V testifies as follows: A entered his house accompanied by I, also a German national, spoke certain words to I in English, a language which V does not understand, and I then told V, in German, "This soldier wants to know if that's your car out in front." There was a noise in the street and A dashed out of the house. A then called to I from the street and I left the house. Shortly thereafter I reentered the house and said that A wanted the keys to the car. V then gave the keys to I. The prosecution has established that prior to the above events A had approached I in a tavern and had hired him to act as his interpreter on that night as A was desirous of renting a private car. Is V's testimony admissible over the defense objection that it is hearsay?

b. At a rehearing, the prosecution establishes the death of a witness who testified through an interpreter at the original trial of the accused. This interpreter then testifies that he is unable to recall the testimony of the deceased, that the record of such testimony does not refresh his memory, and that it does not represent a record of his past recollection. Is there any way in which the trial counsel can introduce the former testimony into evidence?

c. In a rape case, a Japanese national testifies that he was present in a Tokyo bar three days after the alleged rape when the accused was present and that the victim, a Japanese woman entered, saw the accused, and said to him in Japanese, "Why did you rape me?" The accused did not reply but turned and hurriedly left the bar. Is this testimony admissible over an objection that it is hearsay?

CHAPTER XVIII

DYING DECLARATIONS

Reference. Par. 142*a*, MCM.

1. General. In trials for homicide the dying declaration of the alleged victim concerning the circumstances leading to his dying condition including the identity of the person who caused such condition is admissible, as an exception to the hearsay rule, to prove the truth of the matters declared. The solemnity of the occasion is deemed a sufficient guarantee of truthfulness and the accuracy of the matters stated can be evaluated in the light of the known circumstances surrounding the declaration. As is the case with many of the exceptions to the hearsay rule, this one exists to make available important evidence which, because of the very nature of the situation, might otherwise be unavailable. A dying declaration is admissible for or against the accused.

2. State of mind of declarant. *a. General.* The declaration must have been made while the victim was aware of his impending death but death need not follow immediately thereafter. A temporary recovery will not render the declaration inadmissible if the declarant had no hope of such recovery when it was made. The fact that the victim believed his death to be imminent may be shown by his own statement or otherwise.

b. Illustrative cases

(1) CM 343576, *Clark*, 12 BR–JC 1 (1950). When the victim of a robbery who had been wounded severely by repeated knife thrusts and left on the street crawled into a nearby vacant house and while there all alone wrote a statement about the stabbing, the circumstances indicated his belief that he was dying. Furthermore, his oral declaration made seven hours later in a hospital was also admissible despite the absence of any specific statement by him that he believed his death to be imminent.

(2) *Shepard v. United States*, 290 U.S. 96, 99 (1933). An accusation by the deceased, the allegedly poisoned wife of the defendant, could not qualify as a dying declaration because of the lack of a showing that she believed herself to be dying. "To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. The record furnishes no proof of that in-

dispendable condition. . . . Her illness began on May 20. She was found in a state of collapse, delirious, in pain, the pupils of her eyes dilated, and the retina suffused with blood. The conversation with the nurse occurred two days later At that time her mind had cleared up, and her speech was rational and orderly. There was as yet no thought by any of the physicians that she was dangerously ill, still less that her case was hopeless. To all seeming she had greatly improved, and was moving forward to recovery. There had been no diagnosis of poison as the cause of her distress. Not till about a week afterwards was there a relapse. . . . Nothing in the condition of the patient on May 22 gives fair support to the conclusion that hope had been lost. She may have thought she was going to die and have said so to her nurse, but this was consistent with hope, which could not have been put aside without more to quench it. Indeed, a fortnight later she said to one of her physicians, though her condition was then grave, 'You will get me well, won't you?' Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be a 'settled hopeless expectation' . . . that death is near at hand, and what is said must have been spoken in the hush of its impending presence. . . . Despair of recovery may, indeed, be gathered from the circumstances if the facts support the inference. . . . There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered though the period of survival outruns the bounds of expectation. . . . What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom. What was said by this patient was not spoken in that mood. There was no warning to her in the circumstances that her words would be repeated and accepted as those of a dying wife, charging murder to her husband, and charging it deliberately and solemnly as a fact within her knowledge. . . . She did not speak as one dying, announcing to the survivor a definitive conviction, a legacy of knowledge on which the world might act when she had gone."

3. Competency of declaration. *a. General.* The declaration must be one which the declarant could have made from the witness stand if he had survived. This requires both that the declarant have been competent as a witness and that the substance of the declaration would have been admissible. For this latter reason, a purported dying

declaration which expresses a mere opinion, as opposed to factual knowledge, is inadmissible.

b. Illustrative cases.

(1) *Brown v. United States*, 152 F.2d 138 (1945). A "dying declaration" by a four year old child would not be admissible because of the lack of competency of the declarant as a witness.

(2) *Shepard v. United States*, 290 U.S. 96, 101 (1933). A dying declaration such as "X poisoned me" may or may not be admissible, depending upon whether it is an expression of knowledge or surmise. "Homicide may not be imputed to a defendant on the basis of mere suspicions, though they are the suspicions of the dying. To let the declaration in the inference must be permissible that there was knowledge or the opportunity for knowledge as to the acts that are declared. . . . The form is not decisive, though it be that of a conclusion, a statement of the result with the antecedent steps omitted. . . . 'He murdered me,' does not cease to be competent as a dying declaration because in the statement of the act there is also an appraisal of the crime. . . . One does not hold the dying to the observance of all the niceties of speech to which conformity is extracted from a witness on the stand. What is decisive is something deeper and more fundamental than any difference of form. The declaration is kept out if the setting of the occasion satisfies the judge, or in reason ought to satisfy him, that the speaker is giving expression to suspicion or conjecture, and not to known facts. The difficulty is not so much in respect of the governing principle as in its application to varying and equivocal conditions."

(3) CM 313684, *Davis*, 63 BR 215 (1947). When the dying victim of a stabbing was asked why he was assaulted by the accused and he replied that the accused wanted to rob him, this portion of the dying declaration was inadmissible because the other evidence in the case indicated that this latter statement was nothing but sheer speculation on the part of the victim.

(4) *United States v. De Carlo*, 1 USCMA 90, 93, 1 CMR 90, 93 (1951). When the deceased, a Korean boy, was shot by the accused during what appeared to be a mock-argument over some candy during which the accused pointed his carbine at the boy and said, "I'll shoot you," the dying declaration of the boy that the shooting was accidental is not inadmissible as opinion and the law officer erred in striking it from the record. "If the statement in question is conjecture only, or an inference based on collateral facts, then it should certainly

be excluded. But where the statement is based on facts properly before the court, and where it constitutes but a shorthand summary of circumstances known to the declarant, it is, in our view, admissible in evidence. Applying this test to the case before us, it is clear that this Korean boy had the most intimate knowledge of the circumstances surrounding his death. He was engaged in conversation with the accused, watched his every action, and may well have observed a slip or motion which might have caused the accidental discharge of the carbine. The testimony of the other witnesses establishes that his conclusion was not an improbable one. In the face of impending death, he would have no reason to tell an untruth. His testimony, though certainly not conclusive, should have been before the court to assist them in evaluating what was a difficult question of fact. The evidence was ambiguous, and this testimony would have lent some weight to a possible conclusion that the shooting was accidental . . . we hold that the statement . . . was not simply conjecture. As a collective statement of fact, based on his personal observations, it was admissible as not violative of the opinion rule."

4. Hypothetical problems. *a.* In a murder prosecution of A, W testifies that as he was standing on a bridge over a fast-running stream about fifty yards up river from a 50 feet high waterfall he saw a canoe pass under the bridge. The victim, personally known to him, was lying in the canoe with his hands and feet tied. As the canoe momentarily caught on a piling, the victim shouted up to him, "I'm going over the falls. A did this to me." The canoe then pulled loose and was swept over the falls. The remains of the canoe were found down river but the body was never found. A was found guilty only of aggravated assault. Can the dying declaration be considered in determining the sufficiency of the evidence to support the findings on review of the case?

b. The accused is charged with two specifications of felony murder. The victims were found on the same night in a city park in places about one mile apart and each had his throat slashed and his pockets turned out and emptied. The dying declaration of one victim, naming the accused as his assailant, is admitted in evidence. May it be considered as evidence with regard to the murder of the other victim?

CHAPTER XIX

SPONTANEOUS EXCLAMATIONS

Reference. Par. 142*b*, MCM.

1. General. Paragraph 142*b*, MCM, provides that "An utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as a spontaneous and instinctive outcome of the event, and not as a result of deliberation or design, is admissible as an exception to the hearsay rule to prove the truth of the matters stated." The spontaneity of the remark is deemed a sufficient guarantee of truthfulness to compensate for the denial of cross-examination and its accuracy can be evaluated in light of the proved surrounding circumstances.

2. Spontaneity. *a. General.* A proper foundation for the admissibility of a spontaneous exclamation consists of showing the occurrence of a startling event and circumstances indicating that it provoked the exclamation. The startling event must be shown by independent evidence and the exclamation itself cannot be used for this purpose. The startling event can be established by any competent evidence, including the testimony of the person who made the alleged spontaneous exclamation. The interval between the event and the exclamation is merely one circumstance to be considered in deciding whether it was spontaneous and a lengthy period does not necessarily destroy spontaneity. Similarly, the fact that the statement was made in response to interrogation does not necessarily destroy a direct causal connection between the event and the statement.

b. Illustrative cases.

(1) *United States v. Mounts*, 1 USCMA 114, 119, 2 CMR 20, 25 (1952). In a prosecution for sodomy upon a young child, where the only evidence, apart from the accused's confession, of the act of sodomy is contained in the spontaneous exclamation of the child concerning the crime, the exclamation is not admissible. Furthermore, the fact that the statement was made in a calm manner to the child's mother several hours after the incident and in response to her interrogation, undertaken by her as a result of information supplied by the child's brother, eliminates the element of spontaneity. "Dean Wigmore sets out three limitations on, or requirements for, the admissibility of utterances of this nature. These are:

(a) a startling occasion, (b), a statement made before time to fabricate, (c) a relationship of the statement to the circumstances of the occurrence. . . . There must be some independent evidence of the exciting, startling, or surprising event which circumstantially guarantees the offered hearsay utterance before it may be accepted by the court. It would be faulty and circuitous reasoning with a vengeance to permit the questioned declaration itself to furnish the essential basis for its own guaranty. To allow this would, indeed, be to allow an item of evidence to raise itself to the level of admissibility by its own bootstraps . . . [further] it must appear that the utterance was made under the stress of nervous excitement. The declaration, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instinctive,' or 'generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate.' It is generally inadmissible if it is 'calm and uncomplaining,' 'deliberative,' or 'involuntary' or if the defendant is 'mentally composed'—and the utterance is usually regarded as dubious per se if made in response to questions."

(2) *Beausoleil v. United States*, 107 F. 2d 292 (1939). When a six year old girl had been taken by taxicab to meet her mother in a department store, the mother's testimony that she questioned the child upon the latter's arrival because of a "peculiar expression" on the girl's face was adequate proof of an exciting event to qualify the child's reply as a spontaneous exclamation concerning an indecent assault upon her by the taxi driver.

(3) *Brown v. United States*, 152 F. 2d 138 (1945). When a four year old girl while seated at the dinner table calmly recounts the days events when asked what she had done at school that day and includes a remark that the school janitor had fondled her, the statement does not qualify as a spontaneous exclamation.

(4) *United States v. Anderson*, 10 USCMA 200, 204, 27 CMR 274, 278 (1959). At 1000 hours on a Sunday V, a four year old girl, went out to play. Shortly thereafter her mother looked for her without success until 1100 hours when V was seen apparently leaving the house next door where the accused was visiting. V's mother then brought her home and made her sit in a chair for thirty minutes as punishment for not coming in when first called. During this time the child said or did nothing unusual. Upon being allowed to leave the chair she approached her father and "touched or patted" the front of his trousers and said "Do you have a big wee-wee

like that man does?" This remark led to further statements by V and A's trial for taking indecent liberties with a minor. These circumstances do not establish an exciting event so as to qualify V's remarks as spontaneous exclamations. "Prior to the statements made by the infant to her parents, there was nothing in her appearance or demeanor which aroused suspicion of foul play. . . While there was testimony that her dress was wrinkled, we can find nothing striking or unusual in this fact since the child had been playing out of doors with her companions and was carrying a dog when first seen. . . . [S]he was not mentally upset when she was first observed; and her demeanor for over one-half an hour in no way alerted her parents to any unusual incident. . . . Even if we were to assume that [evidence showed V to have been in A's house] . . . we cannot say it tends to establish a shocking or startling event." (Per Latimer, J., and Ferguson, J.) Quinn, C.J. dissents on the ground that in offenses of this type there rarely are physical signs of the act and "that evidence of mental disturbance on the part of the child satisfies the independent evidence requirement" and finds such evidence in the remarks themselves which "can reasonably be construed as the impulsive expression of a mind excited by what had happened, and not the calm and reflective narrative of a past occurrence. It is, as it were, the event speaking through the child, rather than the child speaking for herself." (At p. 205, 279.)

(5) *United States v. Knight*, 12 USCMA 229, 232, 30 CMR 229, 232 (1961). The following circumstances form a sufficient foundation for the admissibility of a spontaneous exclamation by the alleged victim of indecent liberties. Accused was present at a bar in Germany when an eight year old girl who lived in an apartment over the bar came to the service window and ordered two bottles of beer. The child appeared friendly and happy at the time. She took the beer and left. About ten minutes later the child came out of the men's restroom "excited and crying and had flushed red cheeks." The accused came out of the restroom shortly thereafter. A waitress asked the child "what the strange man had done" and the child then made the statements at issue. ". . . [T]he child and accused—who was a stranger to her—were indeed closeted in such a place as their presence together would be wholly unexpected in the course of ordinary events. And additionally, the record portrays a cheerful laughing girl who was transformed into such a highly upset and excited young child that the first person to observe was unqualifiedly

convinced that something unnatural had transpired. In that regard, it is to be remembered that the transformation occurred in a period of only a few minutes—during which time the child was known to have been with accused in a place from which she would ordinarily be barred. Surely this showing is sufficient to establish that the mental disturbance arose and the child volunteered her utterance under conditions which guarantee that it was related to an unusual event and that it was spontaneous, without reflection, and not the product of her imagination. . . . [these factors] point toward an unusual incident and the young girl's demeanor as she came out of the men's restroom—wholly apart from the statement she then made—fixes with some degree of certainty the occurrence of a startling event." (Per Latimer, J., and Quinn, C.J.) Ferguson, J., in dissent, would hold that the necessary foundation requires "that the exciting event must be the one to which the exclamation related" (at p. 234) and finds an insufficient foundation herein.

(6) *United States v. Gaskin*, 12 USCMA 419, 31 CMR 5 (1961). A sufficient foundation for admissibility of a spontaneous exclamation of a four year old boy concerning the accused having performed certain indecent acts upon him is established by evidence of the following matters. The child had been playing in the accused's bed while the accused was in it; the child suddenly ran back to his own apartment next door; at the time he was clad only in underwear and on his shorts there was a wet stain "which appeared to be semen"; according to the child's father, the child appeared "proud" and "unusual." (Per Ferguson, J., and Quinn, C.J.)

(7) ACM 13118, *Carte*, 23 CMR 779, 784 (1956), *pet. denied* 23 CMR 421 (1957). Where the accused was charged with rape of the 4½ year old daughter of a neighbor, the statements of the victim were admissible as a spontaneous exclamation when made under the following circumstances: the victim came home after a visit to the neighbor's house "crying" and acting "embarrassed." In response to her mother's question she stated that the accused had done certain things to her and expounded these "things" upon further questioning; about 15 minutes later after this interrogation when the girl was quite calm she volunteered the information that "he spilled milk on her leg." "It is common knowledge that children of tender years have not developed their sensibilities to such an extent as to permit the inflexible application of such words as 'excitement,' 'shock' or 'surprise' as characteristic of their reaction to all startling events.'

State courts recognize that very young children possess no understanding of the sexual act, yet they will complain and cry when hurt or injured. In such cases, their mothers have been permitted to testify concerning the spontaneous exclamations uttered immediately after the commission of the crime." The exciting event was adequately established by the evidence that the victim refused to again visit the neighbor, that her hymen was injured and the presence of what might be semen on her leg and on the accused's shorts and in his urine.

(8) *United States v. Nastro*, 7 USCMA 373, 22 CMR 163 (1956). In a case of attempted rape where the accused dragged a ten year old girl from her bed, the complaint made by the girl to a housemaid as soon as she escaped from the accused was admissible as a spontaneous exclamation despite the fact that it was made in response to questions asked by the maid. Furthermore, the child's testimony could supply the proof of the exciting event.

(9) ACM 7084, *Coleman*, 11 CMR 850 (1953). Where the commission of an apparent rape was frustrated by the intervention of two air policemen, evidence that the victim stated that her assailant had tried to rape her was admissible despite the fact that she made the statement quite calmly in response to a question by one of the policemen as to what had occurred. Her reply was apparently made in a moment of "stunned calmness" and her nervous strain is shown by the evidence that she became hysterical immediately afterwards.

(10) CM 351606, *Riggins*, 8 CMR 496, 509 (1952) *aff'd* 2 USCMA 451, 9 CMR 81 (1953). In a murder case the statements of the victim were not inadmissible merely because they were were made 36 hours after the assault. ". . . we think that Langley's statements to his discoverers and to the patrolmen were admissible. The record shows that he had been brutally beaten and seriously injured; that he wandered about in this condition until he was found some 36 hours later; that the examining physician and a noted pathologist found him to be in a state of severe shock as a result of his injuries, which state was pierced only by short intervals of lucidity. To declare what had occurred to those who found him, although hours subsequent to the startling event which produced the condition, appears as a natural consequence of the prolonged state of mental and physical shock from which the victim was suffering. The same applies to his statements to the police officer at the hospital. There is no indication in the record that, within three hours after he was found, the

nervous excitement had died away and his memory of events restored to the point where he was capable of reflective thinking. . . . That fact that the statements to the patrolman were made in response to an inquiry does not negate spontaneity, especially since the officer's questions were in no way leading or suggestive."

3. Competency of the declarant. *a. General.* Unlike dying declarations, a spontaneous exclamation is admissible even though the declarant is or would have been incompetent to testify as a witness in the case. However, if the declarant was the spouse of the accused at the time of the exclamation and the testimonial husband and wife privilege is applicable, the exclamation is inadmissible.

b. Illustrative case.

Brown v. United States, 152 F. 2d 138 (1945). A spontaneous exclamation made by a four year old child is not rendered inadmissible merely because the child would be incompetent to testify as a witness.

4. Competency of the statement. *a. General.* In order to qualify as a spontaneous exclamation the statement must pertain to the exciting event which produced it. The occurrence of a startling event does not render admissible statements, no matter how "spontaneous," concerning other events which transpired prior to the startling event. However, the startling event need not be the act with which the accused is charged. Furthermore, the content of the statement must be such that the declarant could have given substantially the same testimony from the witness stand. A statement which is not based upon the firsthand knowledge of the declarant would be inadmissible for this reason.

b. Illustrative case.

United States v. Mounts, 1 USCMA 114, 2 CMR 20 (1952). Where F, a young boy, makes a spontaneous exclamation to his mother concerning an indecent act committed upon his twin brother, B, the exclamation is not admissible unless F's knowledge of the act is based upon his personal observation thereof.

5. Hypothetical problems. *a.* In a robbery case, the prosecution offers evidence of a spontaneous exclamation made by the victim naming the accused as his assailant. The defense concedes that the exclamation qualifies as "spontaneous" but objects to its receipt in evidence on the ground that the victim is available to appear as a witness. How should the law officer rule?

b. In an aggravated assault case, the victim testifies and describes the incident in great detail. The defense presents some evidence tending to show that the victim was the aggressor. The victim testifies, in rebuttal, that the accused struck the first blow and then adds that when a policeman arrived on the scene, the victim blurted out, "He hit me first." The defense concedes the "spontaneity" of the exclama-

tion but objects to the prosecution being permitted to have its own witness bolster his testimony in this fashion. How should the law officer rule?

c. V was held up and robbed on a street late at night. While on his way to the police station to report the robbery he was run down by a car and seriously injured. He recovered consciousness in the ambulance on the way to the hospital and while obviously in great pain told the orderly about the robbery. Is this statement admissible in a subsequent prosecution for the robbery?

d. A hotel detective heard loud cries for help coming from a room. He opened the door with his pass key and found the accused and a girl, both of whom were nude. The girl was crying and almost hysterical. She exclaimed that she had been raped and for the next 30 minutes related the occurrences of the evening including full details of the rape. At the trial the victim testified as to the assault and penetration without her consent. However, the prosecution was unable to elicit detailed testimony from her. The trial counsel then called the hotel detective and offered his testimony as to the details of the rape as related to him by the victim. Is this testimony admissible?

CHAPTER XX

FRESH COMPLAINT

References. Pars. 142*c*, 153*a*, MCM.

1. General. In prosecutions for sexual offenses, such as rape, carnal knowledge, sodomy, and indecent assaults, evidence that the alleged victim made a complaint thereof within a short time after the commission of the alleged offense is admissible under certain circumstances, This evidence is admissible not to establish the truth of the matters set forth in the complaint but merely to show the fact that it was made and, therefore, does not come in under an exception to the hearsay rule but rather, as non-hearsay. The fact that the complaint was made is relevant for the purpose of corroborating the testimony of the victim and comes in as an exception to the general rule which prohibits bolstering the testimony of a witness by showing prior consistent statements or conduct. This exception is warranted by the very nature of sexual offenses which normally do not take place in the presence of witnesses, thereby making it desirable that all logically relevant evidence bearing on the credibility of the victim be placed before the court.

Illustrative cases.

a. United States v. Mantooth, 6 USCMA 251, 254, 19 CMR 377, 380 (1955). "Regardless of the rationale employed, it seems true that 'evidence of the complaint is admitted on the theory that the natural instinct of a female thus outraged and injured [by the rape] prompts her to disclose the occurrence at the earliest opportunity to the relative or friend who naturally has the deepest interest in her welfare, and it is deemed relevant on the ground that it corroborates her statement that she was assaulted.' "

b. United States v. Bennington, 12 USCMA 565, 571, 31 CMR 151, 157 (1961). Lt. A was charged with having committed sodomy upon Pvt. V, a member of his company, in A's car following a company "beer bust." To corroborate V's testimony as to the act, the prosecution established that when V returned to his barracks after the incident, he awoke his cubicle mate and told him what had happened. Under the circumstances this "report" by V "just does not measure up to a complaint." There is no showing that it "was occasioned by shock, outrage, resentment or even disgust." "The reports . . . seem to constitute no more than ordinary barracks gossip at best or, at the other end of the scale—as defense counsel implied—malicious bragging

over implicating a respected officer with a disgusting and degrading charge."

2. Types of offenses. Paragraph 142*c*, MCM, provides that evidence of a fresh complaint is admissible in cases of sexual offenses "such as rape, carnal knowledge, sodomy, attempts to commit such offenses, assault with intent to commit rape or sodomy, and indecent assaults." It will be noted that this listing includes sodomy and carnal knowledge in both of which the alleged victim may well have been a willing participant and thus have no motive to make a complaint. However, as will be indicated in paragraph 4, *infra*, this circumstance, however it might affect the weight to be given the evidence, does not render it inadmissible.

3. Testimony of the victim required. Inasmuch as the fact that a complaint was made has legitimate evidentiary value only to corroborate the testimony of the alleged victim, evidence of the complaint may be received *only* after the victim has testified as a witness in the case.

Illustrative case.

United States v. Mounts, 1 USCMA 114, 2 CMR 20 (1952). Where the alleged victim of an act of sodomy did not testify at the trial of the accused, evidence that the victim reported the incident to his mother is not admissible as a fresh complaint.

4. Evidence of the lack of a complaint. *a. General.* The same considerations which ascribe evidentiary value to the fact that a fresh complaint was made also give like value to the fact that the victim did not make a complaint when afforded an opportunity to do so. Furthermore, it would seem that such evidence would be admissible wholly apart from the fresh complaint rule, under the rules dealing with the impeachment of witnesses by showing prior inconsistent statements or conduct. However, there is one area where the failure to make a fresh complaint would probably not be inconsistent with the victim's testimony and yet evidence of such a failure is admissible under the fresh complaint rule. This area includes those sexual offenses such as sodomy and carnal knowledge in which the lack of consent of the victim is not an element and where the "victim" may or may not be an unwilling partner to the act. If the "victim" was a willing participant, her failure to make a "fresh complaint" would hardly be deemed to cast doubt on her testimony as to her participation. However, evidence of such a failure would be admissible, for whatever weight the court might choose to give it, under the fresh complaint rule.

b. Illustrative case.

United States v. Mantooth, 6 USCMA 251, 254, 19 CMR 377, 380 (1955). In a prosecution for having carnal knowledge of a thirteen

year old girl, evidence that the girl did not complain of the alleged offense is admissible to impeach her testimony that the offense occurred. "Just as a promptly made report affords valuable corroboration of the testimony of a prosecutrix in a rape case, so the absence of such a complaint may aid in defense efforts to impeach her testimony. . . . Yet there exist sorts of sexual offenses following which any variety of fresh complaint would be extraordinary—at least unexpected. Voluntary sodomy would, for example, scarcely evoke a complaint from one of the willing participants; nor would incest under some circumstances. Concerning the victim of a statutory rape . . . one court has commented incisely that 'the natural bent of her mind thereafter would be to enable her immoral associate to escape the consequences of his criminal act—to shield rather than to aid in punishing him.' . . . Moreover, in so far as evidence of fresh complaint is admissible because it tends to establish a want of consent, it would seem to be superfluous in cases where an absence of consent constitutes no element of the crime. Accordingly, doubt has been expressed in such cases that a showing of fresh complaint is admissible. . . . It is clear, though, that the framers of the Manual did not accept these differentiations, for they authorized proof of fresh complaint 'in prosecutions for sexual offenses.' . . . We are sure, too, that, in those instances in which evidence of fresh complaint is accepted a showing of the absence of such a report should be regarded as equally admissible."

5. Instructions to the court. *a. Fresh complaint.* The law officer should, on request, instruct the court that evidence of a fresh complaint is accepted not to show the truth of the matters stated therein but merely the fact that a complaint was made as bearing on the credibility of the victim as a witness.

b. Lack of a fresh complaint. On request, the law officer should instruct the court as to the evidentiary significance of proof of the absence of a fresh complaint. However, in cases where the "victim" was a willing participant in the offense alleged, the failure to make a complaint has so little probative value that no instructions whatsoever thereon are required.

United States v. Mantooth, 6 USCMA 251, 257, 19 CMR 377, 383 (1955). In a carnal knowledge case the law officer did not err in refusing to grant the defense request that the court be instructed as to the significance of evidence that the victim did not make a fresh complaint. Although in a case such as rape, involving the non-consent of the victim, the law officer should, on request, instruct the court as to the impeaching significance of evidence of lack of a fresh complaint, he is not required to do so in a case where the victim is one only in law and not in fact. "Since in a consensual sex crime there is little basis for anticipating a fresh complaint, we are of the opinion that it

would be highly misleading to charge the trier of fact that the absence of such a report should be taken into account in weighing a witness' credibility. Certainly in a situation in which no claim is made the accused used force or violence, we must accede to the civilian precedents which hold no such instruction necessary, even following a defense request."

6. Fresh complaint and spontaneous exclamations. Although evidence of a fresh complaint, as such, must be limited to showing that the complaint was made without reference to the details thereof, it is quite possible that the "complaint" may have been made under such circumstances as to qualify it as a spontaneous exclamation. In such event, upon the laying of the proper foundation, evidence of the statements of the victim would be admissible as tending to show the truth of the matters therein stated.

7. Hypothetical problems. *a.* In a rape prosecution, the trial counsel introduced evidence of a spontaneous exclamation made by the victim to a passing motorist whom she hailed shortly after the rape, viz. "Sergeant Jones raped me." The victim had died, of independent causes, prior to trial. The defense introduced evidence tending to show extreme hatred of the accused by the victim, arising prior to the alleged rape, as manifested by threats to "get him good some day." The prosecution then offered evidence that when the victim returned to her home on the night of the alleged rape, she made a "fresh complaint" to her mother about the rape. Is this evidence admissible?

b. In a carnal knowledge case, after the victim had testified that she voluntarily had had sexual intercourse with the accused, the prosecution offered evidence that on the morning following the incident the victim complained to her mother that Willie Williams, the accused, had deflowered her. The defense established that the complaint was made only after the mother confronted the girl and demanded an explanation of certain blood spots on the clothing worn by the girl on the previous night and then moved that the "fresh complaint" be stricken as being neither "fresh" nor a "complaint" and, furthermore, that, in any event, so much of the complaint as named the accused be stricken. How should the law officer rule?

CHAPTER XXI

STATEMENTS OF MOTIVE, INTENT, STATE OF MIND OR BODY

Reference. Par. 142*d*, MCM.

1. General. Whenever the motive, intent or state of mind or body of a person is relevant, evidence of a statement made by such person under circumstances not indicative of insincerity and disclosing the relevant state of mind or body is admissible for the purpose of proving such condition. This rule exists for the purpose of making available what frequently is the most credible evidence of the condition at issue.

Illustrative cases.

a. Mutual Life Insurance Company v. Hillmon, 145 U.S. 285 (1892). In an action by a beneficiary on a life insurance policy, where the insurer contended that the body concerned was that of W and not the insured, it was error to refuse to permit the insurer to introduce letters written by W in which he stated that he intended to go west with the insured. The letters tended to show W's intention of going to the place where the body was found and from this evidence it could be inferred that he did take the trip.

b. United States v. Jester, 4 USCMA 660, 663, 16 CMR 234, 237 (1954). At a rehearing where the prosecution seeks to offer the former testimony of a witness on the theory that the witness presumably is still in Korea, the place of the original hearing, the testimony of the accused that he had heard the witness state that he, the witness, had been held in Korea past his normal rotation date in order to testify was admissible to show the state of mind of the witness at the time of his statement. "Insofar as this testimony indicated an intention on the Sergeant's part to leave Korea, we must consider the testimony admissible. . . . The evidence of Abel's *state of mind*—as revealed by his utterances—would demonstrate that he wished to return to the United States as quickly as possible, and would not, therefore, request an extension of his tour of duty in Korea, even though his objective in this regard would necessarily be conditioned by the order of military superiors."

2. Cannot constitute accusation. Evidence of the statement of someone other than the accused cannot be received under this rule when the statement amounts to an accusation that the act charged has been committed by the accused or anyone else.

Illustrative case.

Shepard v. United States, 290 U.S. 96, 104 (1933). In a murder case, where the defense attempts to show a suicidal intent on the part of the victim her state of mind becomes relevant but the prosecution may not show that she stated "Dr. Shepard poisoned me" for the purpose of disproving a suicidal frame of mind. "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of these accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in consideration of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

3. Statements by an accused. It would never be necessary to invoke this rule to permit the use *against* the accused of any statements made by him. Any relevant statement whatsoever made by an accused is admissible against him under the rules pertaining to confessions or admissions. However, a different problem is presented when the defense offers evidence of statements made by the accused to show the state of mind or body of the accused. Although there is an unfortunate tendency on the part of some courts to call such statements "self-serving," there is no rule of law which excludes evidence merely because it helps the person offering it. The fact that a party to the trial made the statement may diminish the weight to be given to the evidence but it does not affect admissibility.

Illustrative case.

United States v. Bowen, 10 USCMA 74, 76, 27 CMR 148, 150 (1958). In a desertion case testimony of a defense witness that prior to the absence the accused told the witness "that his grandmother died and that his mother was sick in the hospital" was admissible to show the accused's state of mind as bearing on the intent with which he absented himself. However, ". . . the error made by the law officer in ordering the testimony of the witness stricken" was cured by the action of the convening authority in disapproving the findings of guilty of desertion.

4. Rule applicable only when statements are hearsay. The subject rule has no application when evidence of the statement is offered merely to show the fact that it was made and such fact is relevant. In such a case the statement is "non-hearsay" and no exception to the hearsay rule is required to render it admissible.

5. Hypothetical problems. *a.* In a desertion case, the accused testifies and denies having had an intent to remain absent perma-

nently. He also testifies that on three occasions during the two year absence involved he told different people that he intended to return to military service and also that he told the FBI agent who apprehended him that he had planned to surrender himself on the very next day. The prosecution objects that this testimony as to what the accused told other people is hearsay. How should the law officer rule?

b. In a larceny by false pretenses case the prosecution introduced evidence tending to show that the accused had presented himself at V's door, told her he was from the local TV repair shop and had been directed by V's husband to pick up the TV set for an overhaul. The prosecution offered the testimony of V's husband that she had told him that evening that the man from the TV shop had taken the set away. The defense objected that this testimony was hearsay. How should the law officer rule?

CHAPTER XXII

OFFICIAL RECORDS

Reference. Par. 144, MCM.

1. General. The mere fact that a certain document is an official writing or report does not make it any the less hearsay if offered to prove the truth of the matters stated therein. However, as an exception to the hearsay rule an official statement in writing made as a record of a fact or event by an individual acting in the performance of an official duty, imposed upon him by law, regulation or custom, to know or ascertain through appropriate and trustworthy channels of information the truth of the matter and to record it is admissible to prove the truth of such matter. This rule of evidence, known as the "official records" rule exists as a matter of necessity. In many cases it would be impossible to locate and call as witnesses the individuals who made the entries or supplied the recorded information. Furthermore, even if called, the witnesses frequently would have no present memory of the data recorded. When a record is offered in evidence under this rule, every relevant entry contained therein must qualify as an "official record." Any entry not so qualifying should be deleted if there is any chance whatsoever of the members of the court making use of the information recorded in such inadmissible entry. Furthermore, the entries which are admitted must also satisfy normal requirements of relevancy and competency.

Illustrative case.

United States v. Schaible, 11 USCMA 107, 110, 28 CMR 331, 334, (1960). The mere fact that pertinent regulations required a morning report entry to show, *inter alia*, that during the accused's unauthorized absence he was convicted of petty larceny and given a jail sentence, does not make the entry admissible. The rule prohibiting evidence of other acts of misconduct of the accused applies to exclude it. "True it is that we have held an official record is admissible in evidence when it is made in accordance with regulations by an officer charged with the duty of preparing the same. . . . However, we have also held that merely because a document is official, does not render everything recorded therein admissible. . . . Materiality, competency and relevancy are essential before testimony should be placed before members of the court."

2. Record must be "official." *a. General.* When a particular document or entry therein is offered as an official record the first mat-

ter to be determined is whether it is "official," that is, whether this particular report or entry is required by law, regulation or custom and, if so, has it been recorded in the manner required. For this purpose the court may take judicial notice of the pertinent Army Regulation or custom, as stated in paragraph 147*a*, MCM.

b. Report must be required. Unless the particular entry is required to be made by law, regulation, or custom, it cannot qualify as an official record.

Illustrative cases.

(1) *United States v. Bennett*, 4 USCMA 309, 15 CMR 309 (1954). When Marine Corps regulations in effect at the time a certain entry was made in the accused's records did not require a recording of the manner in which a period of AWOL was terminated, such an entry which purported to show that the accused had been apprehended was not admissible as an official record to show the fact of apprehension.

(2) CM 358777, *Washington*, 7 CMR 346 (1952). Morning report entries reflecting an absence of the accused beginning and ending on the same day cannot qualify as official records when the pertinent regulation clearly provided that morning reports would not record such an absence.

(3) *United States v. McNamara*, 7 USCMA 575, 23 CMR 39 (1957). A service record entry offered by the defense to establish that the accused qualified as a marksman on a given date during the period of absence alleged was not admissible as an official record where existing regulations would *require* an entry only if he had qualified as an expert.

(4) *United States v. Hall*, 10 USCMA 136, 138, 27 CMR 210, 212 (1959). A Navy regulation requiring a report to include the "circumstances of return" of an absentee does not qualify as an official record an entry reciting that during the period of absence the accused was convicted of vagrancy by a civilian court and sentenced to pay a fine of $100 or serve one year in jail. "Although this Court has declined to limit the 'circumstances of return' entry to a simple statement of apprehension or surrender, see *United States v. Coates*, 2 USCMA 625, 10 CMR 123 [par. 5*b*(1), *infra*], we are not disposed to allow recitations of events occurring during an absence to be admitted in violation of the rules of evidence under the guise of official entries. A statement of conviction by civil authorities forms no part of the 'circumstances of return.' The portion of the entry dealing with the vagrancy conviction is nothing more than hearsay."

(5) CM 385989, *Baldwin*, 20 CMR 479 (1956). A purported delayed morning report showing an assignment to a unit which was not in existence at the time of the entry has no probative value whatsoever. A so-called delayed morning report may not be used to affect a retroactive assignment and is not an "official record" for such a purpose.

(6) CM 397819, *Newcomb*, 25 CMR 555 (1958), *pet. denied*, 26 CMR 516 (1958). The accused failed to report to an Overseas Replacement Station on 4 June as scheduled. Pursuant to existing local policy he was assigned on 5 June to Company T, a unit to which all such stragglers were assigned. A company T delayed entry prepared on 20 June showed him AWOL as of 4 June. Under these circumstances the entry does not qualify as an official record since the commanding officer of Company T had no official duty to ascertain the accused's status prior to 5 June, the date on which the latter was assigned to his organization.

c. Report must be recorded properly. The record must, on its face, have been prepared in the manner required by regulations and if the controlling regulation requires a specific manner of preparation the failure to comply with such a requirement will be fatal.

Illustrative cases.

(1) *United States v. Parlier*, 1 USCMA 433, 4 CMR 25 (1952). An extract copy of a purported morning report entry certified by the custodian of the original to contain all signatures appearing on the original is rendered inadmissible as an official record by the absence of any signature to the purported entry in view of the requirement of the morning report regulation that all such entries be signed. On its face, this record had not been kept as required by the regulation.

(2) *United States v. Henry*, 7 USCMA, 663, 23 CMR 127 (1957). A purported morning report in which the relevant entry is initialled and not signed has not been prepared in compliance with the requirement that such entries be signed and cannot qualify as an official record.

(3) ACM S–19316, *Pernell*, 30 CMR 766 (1960). When pertinent Air Force regulations clearly required that entries in individual personnel records be made and signed by *officers*, an entry signed by an airman first class cannot qualify as an official record.

3. Fact or event. The official record rule requires that the particular entry concerned pertain to a "fact or event." Paragraph 144*d*, MCM, provides that for this purpose an opinion is not a "fact" and states "it is often difficult as a practical matter to draw the line between

what is opinion and what is fact." In this connection, it is arguable that many entries frequently used as evidence such as "AWOL," "escape from confinement," "apprehension," "breach of arrest," etc., are opinions, and not facts, in the sense that, at the very least, they are legal conclusions. However, there is not a single reported case in which it has been held that an entry *specifically* required by regulations is inadmissible as an opinion. For this reason the fact-opinion dichotomy may be of little practical import in this connection. If the regulation requires the entry it will be presumed, as indicated in paragraph 4, *infra* that the individual preparing it ascertained the facts necessary to support the conclusion as incorporated in the entry.

Illustrative case.

United States v. Johnson, 9 USCMA 178, 180, 25 CMR 440, 442 (1958). An entry in an official guard report book showing that the Officer of the Day had found the accused fast asleep in the cab of a truck on his post may qualify as a statement of fact. "We believe the principles underlying the general rule of limitations on conclusions in official documents set forth in paragraph 144*d* of the Manual casts light on this issue. That paragraph provides: [the opinion then quotes the MCM discussion on 'fact or event']. . . . It may well be then an opinion entry which states a sentry was asleep so closely approximates a statement of fact as to permit its use in an official document, but that is a matter we need not decide in this case . . ." since the OD testified as a witness and the subject entry is merely cumulative evidence. (Per Latimer, J. and Quin, C.J. Judge Ferguson would hold the entry "no more than a statement of opinion and inadmissible under the hearsay rule.")

4. Presumptions. *a. General.* Given a duly authenticated document, or admissible copy thereof, which on its face appears to satisfy the requirements of an official record, it will be presumed prima facie, that the record was made by a person required to do so and that such person performed his duty properly. These presumptions are sufficiently strong to render a record admissible even in the face of contrary evidence which, if believed, casts doubt thereon and the record will be stripped of its "officiality" only when the contrary evidence is undisputed and thus completely destroys the presumptions.

b. Record prepared by proper person. In the absence of proof to the contrary it will be presumed that any action necessary under regulations to authorize the individual preparing the report to do so has been taken and that he is not an interloper.

Illustrative cases.

(1) *United States v. Masusock*, 1 USCMA 32, 37, 1 CMR 32, 37 (1951). When then existing regulations provided that an individual other than a commanding officer could sign morning

reports only if authorized to do so by the commanding officer, a morning report signed by a personnel officer is not rendered inadmissible by the absence of any showing of such authorization. "We must presume that the commanding officer adopted a preferred practice and designated the personnel officer; or, that the latter arrogated to himself the duties belonging to another officer. As between the two, we believe the former in keeping with and the latter contrary to ordinary standards of conduct. Such being the case, the presumption of regularity attends and if petitioner seeks to overcome the presumption he must introduce some evidence to it."

(2) *United States v. Moore*, 8 USCMA 116, 23 CMR 340 (1957). The presumption that an officer signing an official record has authority to do so applies even though the officer concerned is a legal officer whose duties do not normally include the maintenance of personnel records. The prosecution need not show affirmatively that the officer had been delegated authority to maintain the records at issue.

(3) ACM 12908, *Leach*, 23 CMR 732 (1956). The presumption of regularity attending a morning report is destroyed by evidence that the officer signing the report, who was not authorized by regulations to sign such reports, did so because he had been directed to sign it by another officer who himself was not so authorized. Although a proper delegation of authority may be presumed until contrary evidence appears, the regulations would not authorize such a delegation by one who himself had only delegated authority.

c. Duty performed properly.

(1) *General.* In the absence of proof to the contrary it will be presumed that the individual charged with the duty to prepare a particular record performed that duty properly in the sense that he knew, or ascertained through appropriate and trustworthy channels of information, the truth of the matter recorded and accurately recorded such matter. This presumption survives, for admissibility purposes, a showing that the entry was made a substantial period of time after the event, or that a different entry was made originally and thereafter changed, or that the entry is inconsistent with other entries in official records. Such matters may affect the weight to be given the record but they do not render it inadmissible. The problem as to whether any weight can be given as a matter of law to an entry which is inconsistent with another entry has been avoided by the expedient of always giving the accused the benefit of any such inconsistency. In every reported case involving this factor, either in the court, in its

findings, or the convening authority, in his action, has treated the entry most favorable to the accused as being the correct one.

(2) *Delayed entries.*

(*a*) *United States v. Barrett*, 3 USCMA 294, 296, 12 CMR 50, 52 (1953). A navy service record showing that the accused broke arrest is admissible to establish both the breach of arrest and the unauthorized absence thereby initiated despite the fact that the entries were not made until 46 days after the occurrence of the events recorded. "While the lapse of time . . . may have some bearing upon the weight to be accorded the entry, this factor does not affect its admissibility where, as here, permissible time limits were not exceeded."

(*b*) *United States v. Hagan*, 2 USCMA 324, 325, 8 CMR 124, 125 (1953). A Marine Corps service record is admissible to establish the date on which an absence began despite the fact that the entry was made 89 days thereafter and 27 days after the absence terminated. The failure to make an entry within the period specified by pertinent regulations is not fatal. The official records rule does not require that the entry be made within any specified time. "This is not to say at all, however, that the time when a morning report or service record entry is made is totally irrelevant—for, of course, numerous legal analogies, as well as the dictates of common sense, require that it be made within a reasonable time. In the very nature of the problem no more precise yardstick may be furnished. Suffice it to say that the time lag involved in the instant case did not exceed permissible limits. We should also observe that the lapse of time between the happening of an event, and the execution of a record concerning it, may be considered as bearing in numerous ways on the credibility of the latter."

(3) *Corrected entries.*

(*a*) *United States v. Williams*, 1 USCMA 186, 2 CMR 92 (1952). On 2 January 1951 a morning report entry was made listing the accused as missing in action on 30 November 1950; on 9 May 1951, after the accused's return to military control, a corrected entry was made showing him AWOL as of 30 November 1950. Neither the delay in making the correction nor the conflict between the entries renders the corrected entry inadmissible.

(*b*) *United States v. Wilson*, 4 USCMA 3, 5, 15 CMR 3, 5 (1954). On 21 August 1951 a morning report entry listed the accused as transferred to a certain unit; 13 months later

this entry was corrected to show him as escaped from confinement and AWOL, effective 5 February 1951. The lapse of 19 months between the escape and the recording thereof does not show non-compliance with the requirement of the regulations that such an event be reported "immediately after ascertainment of the absence or escape." "We are aware of no limitation of time governing the making of a corrective entry, and none has been called to our attention. In fact, the necessity for such a correction would seem properly to bring it within the popular precept 'better late than never.' It must not be overlooked that morning reports serve numerous purposes in the military services. They furnish significant historical information of value in personnel accounting and in related management and planning. In addition, they afford data often used in connection with the adjudication of substantial claims against the Government and with critical determinations by the Veterans' Administration. Because of these varied and important uses, some extending into a period long after the events recorded, it seems unthinkable that the Government would not demand the correction or deletion of a statement determined to be erroneous—no matter when the original entry had been made. . . . Accordingly, we must reject any defense assertion that because of the time factor, no official duty prompted the preparation of the entries now before us, or that they were not made in accordance with regulations."

(*c*) *United States v. Takafuji*, 8 USCMA 623, 25 CMR 127 (1958). A corrected morning report entry made on 25 January 1956 to show the accused AWOL on 5 May 1952 is admissible. The delay of over 3½ years in making the correction does not destroy the presumption that the entry is accurate but affects only its weight.

(4) *Conflicting entries.*

(*a*) *United States v. Phillips*, 3 USCMA 557, 562, 13 CMR 113, 118 (1953). The accused was charged with desertion with intent to shirk important service on 25 June 1952 and the prosecution introduced a morning report showing him AWOL on that date and another morning report showing that he was "dropped from the rolls" on 25 July and was then still AWOL. The defense then introduced a special order assigning him to the reporting unit on 30 June. He was found guilty as charged and the convening authority approved only so much of the findings as showed an absence commencing 30 June. An Army board of review

disapproved the findings and The Judge Advocate General certified the case to the Court of Military Appeals, which reversed the board of review and held that the "dropped from the rolls" entry could be used to establish an AWOL commencing on 25 July. "The board of review cast out entirely the first entry showing absence because of inaccuracy and then proceeded to hold that subsequent ones were of no relevancy for the reason that they perpetuated the error. The rationale . . . seems to be that the entry . . . was incompetent because the effective date of the dropping entry was five days earlier than was directed by regulations, and therefore, the morning report was not made pursuant to law. Stated somewhat differently the opinion seems to state that an official has a duty to prepare an accurate report and if he fails to do so the record is not official. We had not understood the law to be to the effect that the duty depended upon accuracy and we cannot adopt that concept. The duty to make entries in morning reports is created and controlled by regulations and if the duty is performed the document is official regardless of its degree of accuracy. . . . It is intended that the accounting be accurate but mistakes creep in. That possibility, however, does not eliminate the necessity for accounting. . . . While the special order casts doubt on the accuracy of the date when the absence was recorded, it does not reflect upon the correctness of the status shown therein." (*i.e.*, in the dropped from the rolls entry of 25 July.)

(*b*) *United States v. Anderten*, 4 USCMA 354, 15 CMR 354 (1954). Where the prosecution introduced three separate morning reports showing the accused AWOL as of 31 May, 6 June and 9 June, respectively, the inconsistency affects only the weight of the entries, not their admissibility, and the records together with other evidence explaining the inconsistencies is sufficient to sustain a finding that he absented himself on 9 June. Furthermore, the failure to mark the later entries as "corrected entries" is not fatal as it will be assumed that the later ones were in fact corrected entries.

5. Source of information. *a. General.* An official record is not rendered inadmissible merely because it is shown to have been based entirely upon hearsay. This circumstance goes only to the weight to be accorded the evidence. However, it is possible for the party opponent to establish that the source of the information was unreliable

and thereby effectively destroy the presumption that the entry was based upon trustworthy information and is accurate.

b. Illustrative cases.

(1) *United States v. Coates*, 2 USCMA 625, 629, 10 CMR 123, 127 (1953). Where existing Navy regulations provided that when an absentee returned to a base other than that from which he had absented himself an entry would be made in his service record to show the "circumstances of his return," an entry which recited the following facts was admissible to prove two periods of AWOL and escape from confinement: The accused absented himself from Naval Base A on 9 January; he was apprehended in civilian clothes by civilian authorities on 9 April and delivered by them to Air Force Base B; he was confined at B and escaped therefrom; he was apprehended by civilian authorities and again delivered to B on 14 April; he was delivered to a Navy recruiting station on 16 April and then transferred to Navy Base C where the report was made. The fact that many of these events occurred at an Air Force Base does not destroy the presumption that they were recorded accurately. "If it can be shown that the data reported are inaccurate, or even that the source of the reporting officer's information was not 'reliable,' these are matters for the defense to bring forward."

(2) *United States v. Simone*, 6 USCMA 146, 19 CMR 272 (1955). Where the controlling Army regulation required that a morning report showing the return of an absentee to military control also show whether he surrendered or was apprehended, an entry showing apprehension is not only admissible to show that fact but also is sufficient to sustain a finding that the accused was apprehended. In the absence of evidence to the contrary it may be presumed that the officer preparing the entry performed his duty properly.

(3) *United States v. McNamara*, 7 USCMA 575, 23 CMR 39 (1957). An indorsement forwarding the accused's service record to The Adjutant General pursuant to regulations after he had been dropped from the rolls on a given date as AWOL is admissible to establish his status as being AWOL on such date despite the fact that the indorsement may have been based upon a morning report entry which, due to its being unsigned, could not itself qualify as an official record.

(4) *United States v. Anderten*, 4 USCMA 354, 15 CMR 354 (1954). When the evidence indicates that certain morning report entries were made by the personnel officer at the instigation of the base legal officer and that the latter actually

decided what entries should be made, as opposed to merely giving legal advice as to the status of the accused, the presumption of regularity is destroyed. The base legal officer is not an "appropriate source of information" as to the matters to be reported in morning reports. (Per separate opinion of Brosman, p. 363, and dissenting opinion of Quinn, p. 368.)

6. Records made for purposes of prosecution. *a. General.* A record made *principally* with a view to prosecution, or other disciplinary or legal action, as a record of, or during the course of an investigation into, alleged unlawful or improper conduct is not admissible under the official record exception to the hearsay rule. However, if a legitimate purpose exists for recording the information concerned, wholly apart from any criminal investigation, this limitation does not apply—assuming, of course, that all other attributes of an official record are present. Thus, as is stated in paragraph 144*d*, MCM, entries in morning reports, service records and similar personnel records as to absence without leave and escape from confinement are admissible because these entries are made for the legitimate purpose of personnel accounting. The fact that they may *also* be used as evidence before a court-martial does not render them inadmissible.

b. Illustrative cases.

(1) *United States v. Williams*, 1 USCMA 186, 2 CMR 92 (1952). The fact that a corrected morning report entry was made 6 months after the original entry for the purpose of furnishing evidence for the prosecution does not render it inadmissible where the corrected entry was made in accordance with regulations.

(2) *United States v. Krause*, 8 USCMA 746, 748, 25 CMR 250, 252 (1958). In construing the meaning of the change to Army Regulations requiring that the manner of termination of a period of AWOL be reported, consideration will be given to the background of the amendment which indicates quite plainly that it was made "to enable the Army to avail itself of our holding in *United States v. Coates* . . . that an official record entry showing such circumstances was admissible in evidence." Furthermore, the amendment will be so construed as to accomplish the planned result.

(3) CM 346993, *Brown*, 1 CMR 199 (1951), *pet. denied*, 1 CMR 98 (1951). A military police "blotter" entry is admissible to show that on a given date the accused returned to military control. However, any additional data probably would be inadmissible as recorded principally with a view to prosecution.

7. Evidence of lack of entries. Paragraph 143*a*, MCM, provides that where law, regulation, or custom requires that a certain fact or event be recorded, proof that such a fact or event is not recorded in appropriate official records is admissible to show that the fact or event did not occur. This provision is, of course, a logical extension of the presumption of regularity. It is presumed that the individual responsible for recording such a fact would have done so had it occurred.

8. Official records of vital statistics. In the case of duly authenticated foreign or domestic records reflecting events of a kind generally recorded by public officials of civilized states and nations, such as births, deaths, and marriages, it may be presumed that the records were made by persons having an official duty to ascertain and accurately record such events.

9. Defects not waivable. A purported official record which does not, in fact, qualify as such, is not admissible under the official record rule to prove the truth of any matter recorded therein, despite the absence of any objection thereto at the trial. It remains inadmissible hearsay. However, a defective "official record" may qualify as a "business entry" if the proper foundation therefor is established.

10. Hypothetical problems. *a.* Assuming that an existing departmental regulation requires that after an individual has been AWOL for 30 days he will be reported as "dropped from the rolls as a deserter," would such an entry be admissible to establish his status as being a deserter on the date thereof?

b. In a prosecution for desertion, the prosecution offers morning reports showing the inception and termination of the period of AWOL. The defense objects to the latter entry and calls the trial counsel as a witness. He testifies that when he examined the file in the case he noticed the absence of any entry showing the date of return and brought this discrepancy to the attention of the accused's personnel officer "for appropriate action." On further examination, he admits that his sole purpose in so doing was to obtain evidence for the prosecution of the case. Is this entry admissible?

c. An installation commander publishes a post regulation dealing with the local safety program. This regulation requires, *inter alia*, that a report be submitted to the Post Safety Officer of all motor vehicle accidents occurring on the post for the express purpose of adopting appropriate traffic control measures to avoid accidents. Pursuant to this directive, a report is submitted showing that an accident in which the accused was involved occurred because the accused drove past a "yield right of way" sign without first ascertaining that the way was clear. Is this report admissible as an official record to establish (1) the fact that the accident occurred; (2) that it was caused as stated?

d. A morning report entry showing that the accused's absence was terminated by apprehension by the civilian authorities if offered in evidence. The defense objects and calls as a witness the officer who prepared the report. He testifies that he obtained this information from the Mess Sergeant who told him that he had overheard some of the other enlisted men of the Company talking in the chow line about the incident and one of them stated that the accused had been "picked up by the cops downtown." Is this entry admissible to show apprehension?

CHAPTER XXIII

BUSINESS ENTRIES

References. Par. 144*c*, *d*, MCM.

1. General. Any writing or record made as a memorandum or record of an act or event is admissible as evidence of such fact or event if made in the regular course of business at the time of such fact or event or within a reasonable time thereafter. The fact that the person making the entry may have lacked personal knowledge of the matters recorded affects only the weight of the evidence and not its admissibility. This exception to the hearsay rule is based upon practical necessity. In our modern complex society and mercantile world such records are frequently the only evidence available as to many matters recorded in the books of a business or profession.

2. Regular course of business. *a. General.* The mere fact that an entry appears in the records or books regularly kept by a certain business or undertaking does not qualify it as a business entry. The particular entry must also have been made in the regular course of business. It must be so connected with the business that it can be said the regular operations of the business were furthered by the entry.

b. Illustrative cases.

(1) *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943). A statement executed by the engineer of a train involved in a grade-crossing collision for submission to the State Public Utility Commission in accordance with a longstanding custom of the railroad in such cases does not qualify as a business entry. The filing of statements of employees as to the causes of accidents has no relation to the operation of the railroad for this purpose. A business entry must be "a record made for the systematic conduct of the business as a business."

(2) *United States v. Villasenor*, 6 USCMA 3, 7, 19 CMR 129, 133 (1955). Where a custodian of certain funds had, for a period of nine months, complied with informal instructions to the effect that any cash not deposited in the bank should be placed in a sealed envelope, marked to show the name of the fund and the amount of cash, and placed in a safe, such a notation was admissible as a business entry to establish the amount of money placed in the envelope. "A comparison of the Manual language [par. 144*c*] with the appropriate subsisting Federal statute discloses that, save for a short