when a party claims that a witness will not consider himself bound by an oath or affirmation, the burden is on such party to show incompetency. (In connection with general competency.) "Since the trial judge . . . is in a peculiar position to observe the infant's conduct, and to determine whether he possesses or lacks the requisite intelligence, it is equally well settled that it is the duty of the trial court to ascertain whether the infant is competent to be a witness, rather than that of an appellate tribunal with only the record of trial before it. . . . Although the determination of competency vel non rests with the trial court it does not follow that the judge . . . must be the sole agency to handle the interrogation. The record before us disclosed that both the law member and trial counsel participated in the preliminary questioning of the witness here. This was not at all out of order. . . . Moreover, it has been held that the scheme or system of conducting the examination, as well as the extent thereof, are largely within the trial court's discretion. . . . We think this is as it should be. Certainly no procedural strait jacket should be provided for an examination into the aptitude, capacity, understanding, or intelligence of a witness." In response to the argument that the witness' use of language of a technical, physiological nature and her apparent ignorance of the meaning of some of the technical terms render her incompetent, it is sufficient to state that such evidence of "coaching" affects the weight of her testimony and not her competency as a witness.

(3) *United States v. Hunter*, 2 USCMA 37, 43 6 CMR 37, 43 (1952). When a ten year old Korean rape victim is sworn without any objection by defense counsel to her competency, it will be assumed that the law officer found her to be competent. "She testified . . . that she had attended four years of school. Her replies to the interrogation regarding the events of the night of April 12 were clear, responsible and intelligent. There is no indication that she failed to understand the meaning of the questions propounded or that she failed to comprehend her obligation to tell the truth. The story told by her was not contradicted by any other witness, but was corroborated by the testimony of several. After observing her demeanor on the witness stand and after listening to her relate her version of the offense, defense counsel raised no issues as to her competency. This contention was asserted for the first time on appeal. The determination of the child's competency to testify is within the discretion of the law officer."

3. Mental infirmity. The fact that a witness is suffering from some mental infirmity does not render him incompetent to testify so long as he possesses the requisite moral and mental capacity.

4. Conviction of crime. The old common law disqualification of witnesses who had been convicted of certain crimes no longer exists. The only remaining vestige of this disqualification is the rule permitting the impeachment of witnesses by a showing of convictions of crimes involving moral turpitude.

5. Interest or bias. *a. General.* The fact that a witness has an interest, however substantial, in the outcome of the case or is biased for or against either the accused, the Government, or other witnesses in the case does not render him incompetent to testify. Such matters may affect the credibility of the witness but not the admissibility of his testimony.

b. Illustrative cases.

(1) CM 317327, *Durant*, 66 BR 277 (1947). The mere fact that a witness is a former, active member of the Nazi party does not render him incompetent to testify against the accused WAC officer in a prosecution for stealing the "Hesse grand jewels" in Germany.

(2) CM 335632, *Reed*, 2 BR–JC 183 (1949). Where the accused attacked the voluntariness of his confession by testifying that he made it in reliance upon a promise to have his wife released by the civilian authorities, it was reversible error for the law member to rule that the presence of the wife as a spectator throughout the trial rendered her incompetent to testify as a defense witness on the voluntariness issue. Her prior presence affects only the weight to be given her testimony and not its admissibility.

6. Husband and wife. *a. General.* The mere existence of the marital relationship does not make one spouse incompetent to testify either for or against the other. However, both spouses are entitled to a privilege prohibiting the use of either as a witness against the other. This privilege is to be distinguished from the privilege respecting interspousal communications. The former operates, when properly invoked, to keep the witness-spouse off the stand altogether, whereas the latter operates only to bar testimony as to certain matters. The limitations to which the testimonial privilege is subject are set forth below.

b. Validity of marriage. The privilege does not exist unless there is a valid, subsisting relationship of husband and wife between the accused and the prospective witness. It does not arise from a spurious or bigamous "marriage" but it can be founded upon a valid common law marriage.

Illustrative cases.

(1) *Lutwak v. United States*, 344 U.S. 604 (1953). Under a charge of conspiracy where the parties executed sham marriages for the sole purpose of gaining admission to the United States under the War Brides Act with the understanding that the marriages would not be consummated by cohabitation and would be followed by divorce, the ostensible wives are competent to testify against their "husbands." "In a sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule."

(2) *United States v. Richardson*, 1 USCMA 558, 4 CMR 150 (1952). The parties to a common law marriage, valid in the jurisdiction where contracted, are entitled to the privilege respecting the testimony of one spouse against another.

c. Injured-party exception. When the witness-spouse is the individual injured by the offense with which the accused is charged, the accused no longer has a privilege to object to her becoming a witness against him. In such a case, the witness probably can be compelled to testify and even if she does retain *her* privilege, despite being the injured party, the accused cannot complain of any error in overruling a claim by her of such privilege. Where the witness is the injured party as to less than all of several offenses charged, the injured-party exception would permit her to testify only as to those offenses by which she was injured. However, such testimony could also be considered in connection with any other offenses as to which it would be relevant.

(1) *Nature of the "injury" required.*

(*a*) *United States v. Strand*, 6 USCMA 297, 304, 20 CMR 13, 20 (1955). When an accused is charged with wrongfully using the mails to defraud his spouse of "marital benefits," she is an injured party and may testify against him over his objection. "Paragraph 148*e* of the Manual sets out a number of situations in which a testifying spouse is injured by an offense committed by an accused. '. . . as in a prosecution for an assault upon one spouse by the other, for bigamy, polygamy, unlawful cohabitation, abandonment of wife or children or failure to support them, for using or transporting the wife for white slavery or other immoral purposes, or for forgery by one spouse of the signature of the other. . . .' Plainly, the enumeration is illustrative, not exclusive. It is also clear that injury to a testifying spouse is not confined to physical wrong but includes injury to personal rights . . . . The Manual does not define

the full scope of the exception, and neither need we mark out its metes and bounds . . . . The substance of the scheme was to induce the accused's wife to believe him dead. These allegations seem to us to be sufficient to establish an abandonment, and thereby bring the case within the exception. Of course, the actual offense with which the accused is charged is misuse of the mails. However, the individual rights of the wife are nevertheless affected."

(*b*) *United States v. Leach*, 7 USCMA 388, 22 CMR 178 (1956). Adultery is an offense which constitutes the wife of the accused an injured party so as to deny to him the benefit of the testimonial privilege. (Per Latimer, J., and Ferguson, J. Quinn, C. J. dissenting.)

(*c*) CM 401537, *Benn*, 28 CMR 423 (1959). Although the offense of carnal knowledge would constitute the wife of the offender an injured party, the offense of *attempted* carnal knowledge, however, "disgraceful, disgusting and degrading" the wife might consider it, does not do sufficient harm to the marital relationship so as to remove the accused's privilege not to have his wife testify against him.

(*d*) *United States v. Woolridge*, 10 USCMA 510, 515, 28 CMR 76, 81 (1959). The mere fact that the accused is charged with forging his wife's name to a Class Q allotment check does not make her an "injured party" within the meaning of the Manual. There must also be some showing of actual injury to the wife by the offense, as for example, evidence that the proceeds of the check were not used to support the family. ". . . there is insufficient evidence to show that the accused's action . . . resulted in injury to her. In the absence of such a showing, the wife's testimony is inadmissible even under the broad provisions of the Manual . . . ." (Per Quinn, C. J.) The fact that the service member contributes a portion of the allotment and that the remainder represents an allowance to quarters to which he is entitled plus the fact that he is held responsible to the Government for any overpayments gives him "such a property interest in a Class Q allotment check . . . that the endorsement thereon of his wife's signature does not constitute an injury to her upon which the competency of her testimony over his objection may be predicated." (Per Ferguson, J.)

(*e*) *United States v. Wise*, 10 USCMA 539, 28 CMR 105 (1959). Evidence that the accused's wife had refused to live with him and had renounced all interest in her future Class Q allotment checks clearly establishes that she was not "in-

jured" by his subsequent alleged forgery of her name to such checks. However, she was an injured-party as to the offense of bigamy and could testify thereto over his objection.

(*f*) *Wyatt v. United States*, 362 U.S. 525 (1960). The fact the defendant's wife was the woman transported for purposes of prostitution by the Mann Act violation charged makes her an "injured party" so as to enable her to testify over her husband's objection.

(2) *Pre-marital offenses.*

Wyatt v. United States, 362 U.S. 525 (1960). The Mann Act indicates a Congressional intent to protect "women who were weak from men who were bad." Therefore, the fact that the defendant married the woman, whom he had prostituted, *after* the Mann Act violation charged had taken place does not make her any less an "injured party" since he could have compelled the marriage by the same power over her which permitted the prostitution. ". . . we deal here only with a Mann Act prosecution, and intimate no view on the applicability of the privilege of either a party or a witness similarly circumstanced in other situations."

(3) *The privilege of the injured party.*

(*a*) *Wyatt v. United States*, 362 U.S. 525 (1960). The testimonial spousal privilege runs to both the witness-spouse and the defendant-spouse. Either spouse may assert it even though the other is silent. "As Wigmore puts it . . . [§ 2241] '[W]hile the defendant-husband is entitled to be protected against condemnation through the wife's testimony, the witness-wife is also entitled to be protected against becoming the instrument of that condemnation—the sentiment in each case being equal in degree and yet different in quality.' . . . Neither can we hold that whenever the privilege is unavailable to the party, it is ipso facto lost to the witness as well. It is a question in each case, or in each category of cases, whether, in light of the reason which has led to a refusal to recognize the party's privilege, the witness should be held compellable. Certainly, we would not be justified in laying down a general rule that both privileges stand or fall together." The underlying purpose of the Mann Act, to protect weak willed women, dictates the conclusion that when the witness is the party injured by the violation of the Act, she should not retain the privilege of not testifying against the individual who had subjugated her.

(*b*) *United States v. Leach*, 7 USCMA 388, 22 CMR 178 (1956). In an adultery case, the wife of the accused was compelled, over *her* objection, to testify as a witness for the prosecution to the continuation of her marriage to the accused. Judge Latimer would hold that she may be compelled to testify. Assuming that the injured spouse retains *her* privilege ". . . it is personal to her, and the accused is not in a position to complain if it is violated. He is not entitled to object to the introduction of testimony unless his privilege is impaired. The wife may feel aggrieved by the law officer's ruling, but in this case she yielded and her right to complain forms no basis for granting relief to him." (At p. 397, p. 187.) As to the privilege of the injured spouse ". . . I encounter little difficulty in construing the language of the Manual. The paragraph deals only with competency and privilege. It makes each spouse a competent witness for or against the other, but it goes on to provide that both are entitled to a privilege prohibiting the use of one of them as a witness against the other. The privilege therein described is single and individual, but it may be exercised by either the party-spouse, the witness-spouse, or both. The provision then goes on to say that in those cases where the wife is the injured party there is no privilege. If there is no privilege, I fail to understand how either party has the right to claim one. A construction to that effect would ignore the plain meaning of the words used. There is no mention of any exception for either spouse, and a construction which would grant a privilege to the witness-spouse would be judicial legislation contrary to the well-expressed intent of the military legislators and in direct conflict with the canons of statutory construction." (At p. 398, 188.) "True it is the wife who has been injured, and the argument is advanced that if she is willing to forgive the Government should not be concerned. That agreement overlooks the fact that the desire of a witness should not prevent the forward advance of the truth. Many witnesses are compelled to testify when they would like to avoid the ordeal, and certainly father, mother, brothers and others do not benefit from any privilege." (At p. 400, p. 190.)

Judge Ferguson finds it unnecessary to decide whether the injured-party witness may be compelled to testify over *her* objection and would hold that even if it was error to compel her to testify such error violated only *her* rights

and "the accused is certainly in no position to claim prejudice." (At p. 404, 194.)

Chief Judge Quinn, in dissent, disagrees with both of his colleagues and would hold that the injury to the wife destroys only the accused's privilege and leaves the wife's undiminished and that the accused has standing to assert *her* privilege in this situation (at p. 404, 194).

d. Waiver. Since the testimonial privilege inures to the benefit of both spouses, any waiver of the privilege must be bilateral and must be founded on the consent, express or implied of both spouses to the use of one as a witness against the other. In cases where the accused is represented by legally trained counsel such consent could readily be implied from the mere failure to claim the privilege. Where the spouse testifies as a defense witness a waiver will be implied, as a matter of law, as to all matters within the scope of proper cross-examination including those affecting the credibility of the witness. Furthermore, if the accused elects to himself testify to conversations or transactions between himself and his wife, which would otherwise be privileged, he waives his right to object to the wife being called as a rebuttal witness on the same matter by the prosecution.

Illustrative case.

United States v. Trudeau, 8 USCMA 222, 231, 23 CMR 246, 247 (1957). When the accused in an effort to convince the court of his innocence, testifies as to a certain conversation which he had with his wife he ". . . cannot deny the Government the right to challenge his credibility on it" by calling her as a witness to testify that the conversation differed from the account thereof given by him.

e. Termination of privilege. The testimonial privilege is grounded upon the existence of the marital status and terminates along with the status. Thus a divorced spouse may be compelled to testify against an accused over his objection. Furthermore, although the law on this particular point is uncertain, it is arguable that a legal separation should be treated in like manner as a divorce for this purpose. (See Wigmore, Evidence, § 2237.) It is the status existing at the time the witness is called to the stand that controls and not the status which existed at the time of the occurrence of the events about which the witness testifies. Thus, the privilege may be claimed as to testimony of a wife concerning events which transpired before the marriage but not as to testimony of a former wife as to events which occurred during the marriage.

7. The accused. The accused is at his own request, but not otherwise, a competent witness.

8. Accomplices and co-conspirators. Accomplices and co-conspirators of the accused are competent witnesses for either the prosecu-

tion or the defense. However, such an individual who is being tried with the accused in a joint or common trial may not be called to the witness stand except at his own request. The fact that an individual has agreed to testify and not invoke his privilege against self-incrimination because of a promise of immunity from prosecution does not render him incompetent to testify.

9. Hypothetical problems. *a.* A prosecution witness is an inmate of a mental institution. The doctor in charge of his case testifies that, although the witness at most times lacks testimonial capacity due of his mental condition, he is presently in a period of remission and is able to understand the moral necessity of telling the truth and to accurately describe the events at issue, which occurred prior to his becoming inflicted. On cross-examination the doctor also testifies that this period of remission may end suddenly without any prior warning. The defense objects to the competency of the witness. How should the law officer rule?

b. In a manslaughter by motor vehicle case one of the crucial issues is the color being shown by a traffic light at a given moment. A defense witness is called and asked to state the color. The trial counsel objects that the witness is color blind and cannot distinguish green from red. The defense counsel argues that this is a matter for cross-examination. The trial counsel contends it goes to competency of the testimony and not merely its weight. How should the law officer rule?

c. In the same manslaughter case, the prosecution offers the testimony of an eyewitness that immediately after the accident the accused's wife, who was a passenger in his car, while in a state of shock caused by the accident, said to the accused, "why didn't you stop for the red light?" The defense counsel objects on the ground that the testimony in effect makes the wife a witness against her husband. How should the law officer rule?

d. H is being tried for making a false claim for quarters allowance by falsely representing X to be his wife. The prosecution establishes that H filed a certificate of entitlement for quarters in which he stated that X was his wife. The trial counsel then calls W as a witness to testify that on the date in question she was H's wife. The defense objects on the ground that the Government is contending that W is H's wife and, therefore, that the testimonial privilege applies. What action should the law officer take? Would the result be different if W claimed the privilege?

e. H is charged with forging the indorsement of W, his wife, to a salary check which she had received as an employee of the Post Exchange. When W is called as a prosecution witness she claims her privilege not to testify against her husband. She contends that she

knows her huband did not commit the forgery and, therefore, that she is not an "injured party." How should the law officer rule?

f. In a desertion case, the defense calls the wife of the accused as a witness. She immediately states that she wishes to claim her privilege not to be compelled to testify in a criminal proceeding involving her husband. What action should the law officer take?

CHAPTER XXXIV

CREDIBILITY OF WITNESSES

References. Pars. 140*b*, 153*a*, MCM.

1. Credibility. Paragraph 153*a*, MCM, states that the credibility of a witness is his worthiness of belief and adds that it "may be determined by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, his general manner in giving evidence, his relation to the matter at issue, his appearance and deportment, his friendship and prejudices, and his character as to truth and veracity, by comparison of his testimony with other statements made by him and with the testimony of others, and by other evidence bearing upon his veracity." It will be noted that this usage of the term "credibility" blends two distinct factors, *viz.*, the veracity of the witness and the objective accuracy of his testimony. That these two factors are in fact separate is easily illustrated by pointing out that a witness, fully believing himself to be telling the truth, can testify as to non-existent facts. In such a case the court may be convinced of his subjective veracity and yet choose not to accept the facts as narrated by him. This distinction is important in connection with the principles involved in the impeachment of the credibility of a witness, to be considered in chapter XXXV, *infra*, in which area "credibility" refers only to veracity.

2. Bolstering credibility. *a. General.* In order to avoid an undue consumption of time during a trial there exists the general rule that a party may not bolster the credibility of his own witness by showing matters merely bearing on his veracity in order to convince the court of the truthfulness of the testimony. This rule is frequently reflected in the statement that all witnesses are to be considered equally truthful until an attack on truthfulness is made. "Bolstering" is a term of art used in connection with reinforcing the veracity of a witness before it has been attacked; "rehabilitation" is used to describe the process of rebutting such an attack. The principles governing rehabilitation will be discussed in chapter XXXVI, *infra*.

Illustrative case.

CM 395606, *Ortiz-Vergara*, 24 CMR 315, 318 (1957). It is improper for a witness, acting under the advice of the counsel calling him, when pressed on cross-examination as to his veracity, to deliberately make reference to the fact that lie detector tests had indicated the truthfulness of his testimony. ". . . we categorically state that we

disapprove of advising a witness that he may bolster his credibility by bringing in inadmissible testimony if 'the proper occasion' arises. . . . Rogers' testimony of having previously lied under oath in a pretrial statement together with his initial failure to mention the accused's presence at the time of the incident, coupled with his further admission that he would never have reported the incident had it not come to light from other sources could not have failed to weaken seriously his credibility as a witness. To have such a witness improperly bolstered by references to the fact that a lie detector examination had indicated that he was finally telling the truth about what had occurred on the night in question, in our opinion, constituted prejudicial error, notwithstanding the law officer's prompt and proper instructions that such testimony was to be stricken and disregarded by the court."

b. Corroboration of identification. As an exception to the general rule prohibiting the bolstering of an unimpeached witness, the testimony of a witness who during the course of his testimony has identified a person may be corroborated by showing that the witness has made a similar identification on a prior occasion. Such corroboration may consist of the testimony of the witness himself or any other competent evidence.

Illustrative case.

United States v. Tobita, 3 USCMA 267, 12 CMR 23 (1953). The provision of paragraph 153*a*, MCM, permitting the corroboration of the testimony of an unimpeached witness as to the identification of the accused is merely illustrative and also permits such corroboration of testimony identifying the victim of the offense charged.

c. Corroboration of sex offense victims. The rule permitting evidence of a fresh complaint in sex offenses, see chapter XX, *supra*, to corroborate the testimony of the victim of such an offense is another exception to the rule forbidding bolstering of unimpeached witnesses.

3. Credibility and weight. *a. General.* As a general rule, the finders of fact may draw their own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant. However, certain rules of law exist as to the credibility to which certain categories of testimony are entitled. In cases in which these rules are applicable the law officer has a duty to instruct the court as to their effect when requested to do so by counsel.

b. Self-contradictory testimony. Paragraph 153*a* provides that a conviction cannot be sustained *solely* on the self-contradictory testimony of a particular witness if the contradiction is not adequately explained by the witness' testimony as a whole. However, this limitation may not apply when the witness is hostile to the prosecution.

Illustrative cases.

(1) *United States v. Polak*, 10 USCMA 13, 14, 27 CMR 87, 88 (1958). Inconsistencies in the testimony of an eyewitness to a barracks sodomy do not render his testimony incredible as a matter of law when most of the inconsistencies are explained by the witness and his version of the matters embraced by the others is corroborated. "Without reciting all of the alleged variations, we can categorically state that, collectively, the inconsistencies do not reach a level where it can be said as a matter of law, the witness's testimony was inherently incredible or unworthy of belief. For the purpose of this point, we will assume that the witness was impeached on some portions of his testimony, but in each instance he either explained his inconsistencies or was corroborated by other testimony. . . . All of the claimed inconsistencies were argued and exploited before both the court-martial and at intermediate appellate levels. They found against the accused and this Court is concerned solely with evidentiary sufficiency as a matter of law."

(2) *United States v. Armstrong*, 4 USCMA 248, 253, 15 CMR 248, 253 (1954). Inconsistencies in the testimony of the principal prosecution witness consisting largely of varying degrees of "positiveness" as to his identification of the accused, a personal friend of the witness, as the individual seen by him at the scene of the crime can be largely overlooked in assessing the credibility of such witness when he is obviously hostile to the prosecution. The authorization of the use of leading questions on direct examination of a hostile witness in itself is a recognition of the fact that some contradictions and inconsistencies are to be expected in this situation ". . . when hostile witnesses are used, elements of self-contradiction almost necessarily lurk in their testimony."

c. Testimony of sex victims and accomplices.

(1) *General.* The fact that sex offenses are rarely witnessed and that accusations thereof are easily made and difficult to disprove has resulted in the evolution of special rules as to the credibility of victims of such offenses. Accomplice testimony is subject to special rules because of the existence of obvious motives to misrepresent the truth. These rules relate generally to the credibility of the uncorroborated testimony of these categories of witnesses and to the instructions to be given to the court thereon. In this connection it must be noted that the Court of Military Appeals has expressed the opinion that whether or not given testimony is corroborated may be a question of law to be decided by the law officer alone.

(2) *Sex victims.* Paragraph 153*a*, MCM, provides that a conviction cannot be based upon the uncorroborated testimony of an alleged victim of a sex offense if such testimony is self-contradictory, uncertain or improbable. In other words, such testimony is incredible as a matter of law. It is not the lack of corroboration alone which achieves this result. The testimony must *also* be of dubious credibility in and of itself.

Illustrative cases.

(*a*) *United States v. Washington*, 2 USCMA 177, 179, 7 CMR 53, 55 (1953). The failure of an alleged rape victim to complain about the incident to a sentinel who came upon the scene does not necessarily destroy her credibility. Her testimony that she failed to do so out of fear that he was a friend of her attacker is not unreasonable. The MCM proviso ". . . can have no application here—for the testimony of this prosecutrix was neither self-contradictory, uncertain, nor improbable."

(*b*) *United States v. Bennington*, 12 USCMA 565, 569, 31 CMR 151, 155 (1961). Where the only competent evidence to corroborate the testimony of the accused's self-confessed partner to an act of sodomy consisted of a showing that the two men had been seen together in a parked car, the nature of the "victim's" testimony made it incredible as a matter of law. "Without belaboring the point, suffice it to state that on cross-examination, the alleged victim made several self-contradictory statements concerning what had transpired in accused's car. Likewise, there were elements of uncertainty as to some details, and an aura of improbability to his story. And in many instances he replied weakly that he did not remember." (*Note.* The Court also held that as a willing participant in the alleged act, the "victim" was also an "accomplice" for purposes of evaluating his testimony.)

(3) *Accomplices.* The self-contradictory, uncertain, or improbable testimony of a purported accomplice which is *also* uncorroborated is unworthy of belief and cannot support a conviction. Furthermore, the uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution. Self-contradictory, uncertain or improbable accomplice testimony, even though corroborated, is to be given like effect. Whether or not a given witness is an accomplice depends not upon whether he is formally charged as such but whether he in fact

acted as an accomplice to the offense with which the accused is charged.

Illustrative cases.

(*a*) *United States v. Bey*, 4 USCMA 665, 671, 16 CMR 239, 245 (1954). Where the accused is charged with taking money from a trainee in exchange for a pass, the offense charged is analogous to that of bribery where both the giver and the taker of the bribe are principals and the trainee will be deemed an accomplice. Furthermore, the law officer erred in not instructing the court, upon request, that accomplice testimony (herein corroborated) is of "doubtful integrity and is to be considered with great caution." ". . . the law officer must, when requested, instruct on accomplice testimony. . . . An instruction on accomplice testimony was not only relevant on the facts of this case, but all-important to the accused's defense. Nelson was the only witness to the transaction. Clearly, if his testimony had been disbelieved, the accused would have been acquitted. Here, it was certainly as important to the accused to have the benefit of an instruction on accomplice testimony, as it was to the accused in *United States v. Phillips*, supra, to have an instruction on the effect of character evidence. If it is prejudicial error to refuse a proper request to instruct in the first instance, it is also prejudicial error in the other. To hold otherwise would destroy the very purpose of the rule on accomplice testimony."

(*b*) *United States v. Allums*, 5 USCMA 435, 438, 18 CMR 59, 62 (1955). The individual to whom the accused allegedly sold marihuana is an accomplice and the law officer erred in not instructing that his testimony was to be viewed with caution. The fact that the defense requested an instruction as to uncorroborated accomplice testimony and that this testimony was corroborated does not excuse the error. The law officer was put on notice that an appropriate instruction was desired. ". . . we are unsure that the reference in the Manual's paragraph 153*a* to the 'uncorroborated testimony of a purported accomplice' was directed to the *members* of a court-martial—or is to be applied by them. It has been suggested, indeed, that matters in the nature of the corroboration of an accomplice's testimony involve problems of legal sufficiency solely, and that legal sufficiency was meant by the Code and Manual's draftsmen to be handled by the *law officer* at the trial—and thereafter, of course, by appellate bodies. Under this view, the members of any court would be concerned with corroboration only

in connection with their right to overrule a law officer's action on a motion for findings of not guilty. . . . In support of this position, it must be recognized that corroboration is a technical concept—one which, like admissibility, is difficult of application by a court-martial, and usually beyond the expertise of its members. To introduce problems of corroboration into a court's deliberations on guilt or innocence—it has been further urged—serves only to confuse the triers of fact. . . . Moreover, the safeguard furnished by rules requiring corroboration can be maintained adequately by the law officer, who is better positioned and trained to apply the concept. Under this approach, of course, the members of the court-martial would pass on the issue of guilt or innocence solely in the light of the standard of reasonable doubt, with appropriate instructions from the law officer concerning matters peculiarly pertinent to credibility. Also, under this view, a law officer would at no time be required to instruct that a conviction cannot be founded on the uncorroborated or vague testimony of a purported accomplice. If he discovered a want of corroboration, he would simply instruct the court that, as a matter of law, its members may not convict. However, if he found that corroboration was present, the case would go to the court for findings. Thereafter, the correctness of the law officer's view with respect to corroboration would be tested by reviewing authorities. On this whole suggested approach we also need not pass at this time."

(*c*) *United States v. Scales*, 10 USCMA 326, 328, 27 CMR 400, 402 (1959). No opinion is expressed as to whether the court must be instructed as to the need for corroboration of accomplice testimony. "Some states, by statute, require the trial judge to instruct the jury on the necessity of corroboration, as part of an instruction on accomplice testimony. . . . The Federal courts are apparently divided on the necessity for a separate general instruction on accomplice testimony. . . . Also, it appears, that if a cautionary instruction is given, it need not include the statement on corroboration. . . . It is unnecessary to search the question here." (Since the instruction given, viewed as a whole, did cover the requirement for corroboration.)

(*d*) *United States v. Schreiber*, 5 USCMA 602, 18 CMR 226 (1955). When the testimony of an accomplice to the alleged murder is largely cumulative, the law officer is not required to instruct *sua sponte* on the credibility of accomplice testimony.

(*e*) CM 381826, *Robinson*, 20 CMR 424 (1955). Although the Manual does not provide that accomplice testimony, even though corroborated, is to be viewed with caution, the Court of Military Appeals has held that an instruction to this effect is required, when requested, even though the specific wording of the requested instruction is defective. However, in the absence of any request at all on this matter no instruction is required.

d. "*Falsus in uno, falsus in omnibus.*" The foregoing maxim does not embody a mandatory rule of evidence but merely recognizes the quite logical conclusion which *may* be drawn from the appearance of proven falsehoods in a witness's testimony. Therefore, it is not required that the court members be instructed with respect to this inference that a witness who lies on one matter may be deemed also to have lied as to others.

Illustrative case.

United States v. Baldwin, 10 USCMA 193, 27 CMR 267 (1959). Where the defense requested that the law officer instruct with reference to the testimony of the victim of the alleged rape "if the court finds that any witness has falsely testified to a material matter, the court may disregard the entire testimony of said witness" and the law officer ruled that he would so instruct but neglected to do so, no error was committed. "Dean Wigmore . . . expresses his view of the rule in the following language: 'It may be said, once for all, that the maxim is in itself worthless;—first, in point of validity, because in one form it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the others it is absolutely false as a maxim of life; and secondly, in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore it is a superfluous form of words. It is also in practice pernicious, first, because there is frequently a misunderstanding of its proper force, and secondly, because it has become in the hands of many counsel a mere instrument for obtaining new trials upon points wholly unimportant in themselves.'

"We need not accept Dean Wigmore's evaluation in toto as we use his views merely to reflect that the rule is subject to criticism. So far as decided cases are concerned, there appears to be a division of authorities as to the necessity of a court using the maxim as a basis for instruction. . . . we choose to express our views by quoting from the well-accepted cases which in essence hold that it is not error to give or withhold the instruction. . . . The rationale of that case [*U.S. v Polak*, 10 USCMA 13, 27 CMR 87] leads us to overrule the present assignment of error. If, as we there said, the principle embodies a permissible inference which the court may draw and is not

a mandatory rule of evidence, then the law officer would not have erred had he refused to submit the theory to the court. A fortiori he did not err when he neglected to do so."

e. Instructions on credibility. Upon request the law officer has a duty to instruct the court as to the credibility of witnesses in general or as to specific matters affecting credibility which have been raised by the evidence. (See *Illustrative cases* in subpar. *c, supra*). The failure to request such specific instructions will probably be deemed a waiver of any objection which might be raised to the failure of the law officer to instruct on these matters, provided that the court is otherwise adequately informed that it is the sole judge of credibility. Specific instructions may also be given with respect to the credibility of an accused who has taken the stand as a witness. However, they should not be so worded as to indicate that there are special principles applicable to the accused *qua* accused in this connection.

Illustrative cases.

(1) *United States v. Polak*, 10 USCMA 13, 15, 27 CMR 87, 89 (1958). The law officer is not required to instruct *sua sponte* on the credibility of a sex victim. ". . . the point is raised for the first time on appeal and therefore, we must determine the duty of the law officer to instruct *sua sponte*. That officer gave the court-martial members the general instruction that they were the sole judges of the credibility of the witnesses and, under the state of the record, that is sufficient to meet minimal standards. Here, when afforded an opportunity to do so, trial counsel for the accused—civilian and military—failed to ask for a more specific and detailed instruction on that aspect of the case. Moreover, they affirmatively stated that they did not desire further instructions and had no objection to those given."

(2) *United States v. Nash*, 5 USCMA 550, 555, 18 CMR 174, 179 (1955). "After instructing generally on the credibility of witnesses, the law officer stated: '. . . The defendant is permitted to become a witness in his own behalf, but in weighing his testimony you have a right to consider that he is a highly interested witness and very much interested in the outcome of the case.' . . . An accused, when he elects to take the stand, . . . is to be regarded in the same light as that of any other witness. . . . In instructing the jury concerning credibility of witnesses, the judge may state that the interest of any witness in the outcome of the case may be taken into consideration in assessing the reliability of his testimony and this rule applies to the accused in a criminal case. . . . Of course, it is necessary that the court members be informed

that the principle is applicable to an accused and this requires that he be specifically mentioned. However, he ought not to be singled out by comments which indicate that because he has an interest in the outcome of a case, the court-martial members should disregard his testimony. Neither should the law officer submit an instruction which is so one-sided against him that it destroys the privilege of being a witness in his own behalf. . . . Perhaps the most appropriate way for the law officer to proceed is to give a general instruction on the effect of any interest or bias on the testimony of witnesses and then inform the court-martial that the rule as announced applies with equal force to the accused. However, most jurisdictions permit an instruction similar to the one given here and if the language used by the law officer had not been so unduly emphatic about the nature of an accused's interest, we would not have granted review in this issue." Although the wording of the subject instruction is objectionable, it is doubtful that it misled the court in this case and no prejudice appears.

4. Hypothetical problem. The testimony of an accomplice, containing many unexplained inconsistencies, as to the involvement of the accused in the offense charged is corroborated only by the testimony of X. However, the testimony of X is contradicted on several highly material matters by the testimony of a defense witness. Furthermore, the defense has established that X has been convicted in the past of perjury. The defense requests an instruction to the effect that if the court finds the accomplice testimony to be uncorroborated it must reject it as being unworthy of belief. The trial counsel objects to such an instruction. How should the law officer instruct on this matter?

CHAPTER XXXV

IMPEACHMENT OF WITNESSES

References. Pars. 138*f*, 138*g*, 149*b*, 153*b*, MCM.

1. General. Impeachment is the process of attempting to diminish the credibility of a witness by convincing the court that his testimony may not be truthful. The mere contradiction of the testimony of one witness by that of another is not considered to be impeachment. Impeachment always consists of an attack on veracity, as such, and normally takes the form of attempting to show that the testimony of the witness is to be discredited because of his bad character or the fact that he has at one time told a different story than he has at the trial or because he has a motive to misrepresent the truth. Any witness, including an accused who has taken the stand, is subject to impeachment by the adverse party. On the other hand, a party may seek to impeach his own witness only under a few limited circumstances. However, witnesses called by the court may be impeached by either the prosecution or the defense. The various methods of impeachment are discussed below.

Illustrative case.

United States v. Kauth, 11 USCMA 261, 265, 29 CMR 77, 81 (1960). The term "impeachment" ". . . as applied to a witness in a legal proceeding means an attack on his credibility as a witness. It is a diminishing of his trustworthiness by the opposing side and by some means other than presenting conflicting testimony. Generally speaking, the method employed is to show the accused [or other witness] is unworthy of belief because of some personal act which is discrediting and which is distinct from the commission of the offense being tried, or by showing facts from which it may be inferred the witness has some personal interest in or bias toward the accused or the criminal act."

2. Character as to truth and veracity. Evidence that a witness has a bad character as to truth and veracity may be shown for the purposes of impeachment. The methods of proving such character are discussed in chapter VI, *supra*. A witness who has given his opinion of the character as to truth and veracity of the individual concerned or who has testified as to his reputation in this regard may also be asked if he would believe the testimony of such individual given under oath.

3. Conviction of crime. *a. General.* A witness may be impeached by showing that he has been convicted by a civil or military court of a crime which involves moral turpitude or is such as otherwise to affect his credibility.

b. Types of offenses. In *United States v. Moore, infra*, the Court of Military Appeals laid down definite tests, based largely upon the maximum punishment imposable, for determining the kinds of offenses which may be shown for the purpose of attaching credibility. However, subsequent pronouncements of the Court indicate that not every offense which qualifies as a "felony" under the *Moore* case may be shown for impeachment purposes. The offenses must *also* be of such a nature as logically to cast some doubt upon the veracity of the witness.

Illustrative cases.

(1) *United States v. Moore*, 5 USCMA 687, 695, 18 CMR 311, 319 (1955). The fact that a punishment of dishonorable discharge and confinement for three years is authorized for the offense of using a false pass with intent to deceive renders proof of conviction of such an offense admissible for impeachment purposes. "If a witness has been convicted by a Federal civilian court of a crime characterized as a felony that conviction may be used to impeach testimony forthcoming from him. If he has been convicted by court-martial of an offense for which confinement in excess of one year, or a dishonorable discharge is imposable, that offense, too, can be used for an impeachment purpose. . . . We entertain no doubt that an offense serious enough to bear the stigma of a dishonorable discharge possesses the seriousness of felony, and as well bears a heavy content of moral turpitude. . . . [as to state court convictions] if the conviction has to do with an offense like larceny or forgery, which in paragraph 128*b* of the Manual for Courts-Martial is specifically denounced as involving moral turpitude, no distinction should lie which is based on whether under the local law, the crime is a felony . . . or a misdemeanor. . . . If, under local law, the prior conviction is regarded as a felony, we also deem it admissible for an impeachment use. . . . If . . . the offense is closely analogous to a crime made punishable by the United States Code as a felony, we would be willing to equate the state offense to a felony for the present purpose. It may be suggested that for the fluidity of the concept of 'moral turpitude' we are substituting a series of rules based on the penalty imposable for an offense. Such a comment does not deter us, however—for we have no hesitation in adopting the quantum

of punishment imposable as a rule-of-thumb for determining an offense's gravity."

(2) *United States v. Gibson*, 5 USCMA 699, 703, 18 CMR 323, 327 (1955). Convictions by court-martial for the offenses of disrespect and failure to obey an order may not be used for impeachment purposes. "It is quite evident that the offenses by which the prosecution sought to impeach the accused's credibility did not involve moral turpitude. Disrespect and failure to obey are peculiarly military offenses, with no exact or approximate counterparts either in the moral or civil order under ordinary rules of interpretation. Moreover, the penalties provided for them by the Table of Maximum Punishments are insufficient to raise them to the level of felonies. . . . Finally, we perceive in the misdeeds . . . nothing tending to create an inference that the accused is unworthy of belief." Furthermore, the very nature of the offenses involved militates against their having impeachment value since "one so unbridled in speech and conduct is considerably less likely to lie than one whose conduct is more controlled."

(3) *United States v. Nicholson*, 8 USCMA 499, 502, 25 CMR 3, 6, (1957). "It is, of course, proper to question a witness concerning convictions of crimes or acts of misconduct that are relevant and material. . . . But every departure from normal human behavior may not be shown on the pretext that it affects credibility. Bad men are not always liars. Acts shown must demonstrate characteristics that lessen the likelihood that the accused is telling the truth. Competent evidence of conviction of any crime involving moral turpitude would invariably attain such a goal. . . . The material brought out in cross-examination was not within allowable limits with regard to its relevance to the worthiness of belief of the accused. It had only an extremely tenuous connection with the question of veracity. That connection exists only through the probability that 'bad men' are mendacious."

c. Type of court. The type of court in which the conviction was adjudged is immaterial. If the offense is the kind which may be proved for impeachment purposes, a conviction by any court-martial, whether it be general, special or summary, is admissible. (*United States v. Moore*, supra.)

d. Time limitations. There is no requirement that the conviction have been adjudged within a certain period of time prior to the attempted impeachment. Ordinarily, the length of elapsed time since the conviction will affect its weight for impeachment purposes and not its admissibility. However, it is possible for the prior offense to

be so remote in time as to destroy any inference of moral turpitude on the part of the witness at the time he gives his testimony.

e. Method of proof. The prior convictions can be elicited through cross-examination of the witness *or* evidence thereof may be introduced in the form of the original or an admissible copy of the record of trial, an admissible copy of the order promulgating the result of trial, or the service record of the accused or an admissible copy or extract thereof. If cross-examination is utilized, an admission by the witness of his conviction renders further proof of it unnecessary. If he denies it, evidence thereof would not only impeach his veracity but would directly refute his denial. The witness has the right to offer an explanation of the prior conviction if he so desires. The provision of paragraph 149*b*(1), MCM, which authorizes cross-examination of a witness "as to any matter touching upon his worthiness of belief, including . . . acts of misconduct" does not serve to relax any of the rules concerning the types of prior convictions which may be used for impeachment purposes.

Illustrative cases.

(1) *United States v. Shipman*, 9 USCMA 665, 667, 26 CMR 445, 447 (1958). Testimony of a justice of the peace that he had found the accused guilty of larceny was not competent evidence of such a conviction for impeachment purposes. Civilian courts allow such impeachment "only by the testimony of the accused himself or by the use of properly authenticated court-records." Paragraphs 75*b*(2) and 153*b*(2)(*b*), MCM, indicate that official records must be used for such purpose. ". . . since the evidence was not presented by properly authenticated record, it was inadmissible."

(2) *United States v. Moore*, 5 USCMA 687, 698, 18 CMR 311, 322 (1955). Although the language of paragraph 153*b*(2) fails to include the provision of its predecessor granting a witness the right to explain a prior conviction, this revision resulted from the change which removed the former necessity of questioning a witness as a condition precedent to showing the prior conviction and the right to explain the conviction remains. "We prefer . . . the view taken . . . in *United States v. Boyer*, 150 F.2d 595: '. . . it is unfair to the witness to permit no explanation, particularly when he is at the same time a defendant in a criminal case and the prior conviction, though permitted solely for the purpose of affecting the credibility of the defendant, may have some tendency in the minds of the jury to prove his guilt of the offense for which he is then on trial . . . we think the witness should

be allowed either to extenuate his guilt or to assert his innocence.'"

(3) *United States v. Gibson*, 5 USCMA 699, 703, 18 CMR 323, 327 (1955). A prior conviction which is not provable for impeachment purposes because not for a "felony" may not be used as "an act of misconduct" for cross-examination purposes. ". . . although there appears to be some conflict between the two Manual provisions, as far as previous convictions are concerned, the restrictions of paragraph 153*b*(2)(*b*), supra, are not relaxed by those of paragraph 149*b*. Both make it clear that the 'conviction' or 'acts of misconduct' must involve moral turpitude or be such 'as otherwise to affect his credibility.'"

f. Impeachment of the accused. When the credibility of the accused as a witness is impeached by showing prior convictions the same considerations apply as in the case of evidence of other acts of misconduct of the accused (see Ch. VII). The law officer should on request advise the court as to the limited purpose for which the evidence was received and any attempt by trial counsel to argue to the court that they should find the accused guilty because he has committed other offenses is improper.

Illustrative cases.

(1) *United States v. Moore*, 5 USCMA 687, 691, 18 CMR 311, 315 (1955). The accused who takes the stand as a witness may be impeached like any other witness by showing prior convictions affecting his credibility. "The only palliative for whatever harshness may inhere in this rule would seem to lie in an instruction by the law officer to the effect that evidence of prior offenses on the part of an accused is limited to an impeachment purpose, and can in no wise be regarded as evidence of guilt. The law officer may also wish to inform the court . . . that a showing of past offenses does not necessarily and of itself require the conclusion that the witness' testimony before the court is false."

(2) *United States v. Gibson*, 5 USCMA 699, 704, 18 CMR 323, 328 (1955). Where the trial counsel at the time of offering evidence of prior convictions (held inadmissible by CMA) argued that such evidence was relevant to the guilt of the accused, he violated the fundamental rule forbidding drawing an inference of guilt from the commission by the accused of other misdeeds and, under the circumstances, this violation requires reversal. "Evidence received for impeachment purposes cannot be twisted into affirmative proof of guilt without doing violence to this fundamental precept."

4. Acts of misconduct. *a. General.* Any witness, including the accused, may be impeached by showing that he has committed an act of misconduct such as to affect his credibility. However, in those instances where the adverse party lacks competent evidence of conviction for such an act, the showing is limited to adducing the matter on cross-examination of the witness and independent evidence of the offense is *not* admissible, even though the witness denies committing the act. Whether or not the act affects credibility is to be tested by the same standards as apply in the case of prior convictions. As in the case of prior convictions, evidence of prior acts of misconduct of the accused may not be used, directly or indirectly, to support an inference of guilt.

b. Nature of misconduct.

Illustrative cases.

(1) *United States v. Berthiaume*, 5 USCMA 669, 678, 18 CMR 293, 302 (1955). A witness can be asked, on cross-examination, if he has not "recently confessed to stealing a radio." Under military law, as expounded in the Manual, a witness can be questioned for impeachment purpose concerning acts of misconduct even though such acts have not resulted in a conviction. For this purpose, asking a witness if he has "confessed" is equivalent to asking him if he committed the act. "Larceny is certainly a crime involving moral turpitude. . . . A conviction of an offense involving moral turpitude may clearly be used to impeach a witness. . . . If, within the later context, larceny is thought to impair credibility, we are sure that it falls within the purview of 'acts of misconduct' which also affect credibility."

(2) *United States v. Hutchins*, 6 USCMA 17, 19, 19 CMR 143, 145 (1955). On cross-examination of the accused who had taken the stand and denied being guilty of the embezzlement charged, the prosecution could properly question him concerning his unrelated acts in cashing his worthless personal checks with funds of which he had been custodian several months prior to the alleged embezzlement. "We have made clear that military law permits cross-examination calculated to bring out acts of misconduct on the part of a witness, although these have not resulted in conviction. . . . The test is simply one of whether the act of misconduct is a 'matter touching upon his [the witness'] worthiness of belief. . . .' To a considerable extent, of course, the administration of the matter must be left to the sound discretion of the law officer, and the Court will usually intervene only when it believes

that it would be unreasonable to conclude that the act of misconduct in question would serve to affect credibility."

(3) *United States v. Nicholson*, 8 USCMA 499, 502, 25 CMR 3, 6 (1957). Testimony elicited solely for impeachment purposes on cross-examination of the accused, charged with rape, that while in pretrial confinement he had been forced to defend himself when "jumped" by another prisoner during a disturbance exceeds the bounds of permissible impeachment.

"It is, of course, proper to question a witness concerning convictions of crimes or acts of misconduct that are relevant and material. But every departure from normal human behavior may not be shown on the pretext that it affects credibility. Bad men are not always liars. Acts shown must demonstrate characteristics that lessen the likelihood that the accused is telling the truth. . . . The material brought out in cross-examination was not within allowable limits with regard to its relevance to the worthiness of belief of the accused. It had only an extreme tenous connection with the question of veracity."

(4) *United States v. Long*, 2 USCMA 60, 70, 6 CMR 60, 70 (1952). The accused WAC was charged with assaulting W, another WAC, because W had testified as a witness at the court-martial of a friend of the accused. The law officer refused to allow the defense, on cross-examination of W, to ask her if she "had ever been in her bed under blankets with another WAC." "The law officer's ruling on the objection . . . was that a witness might not be questioned about misconduct unless his acts would tend to impair his veracity, and that if the defense counsel had in mind some specific act or acts which would accomplish that purpose they could cross-examine in that field. Counsel for petitioners did not indicate that they had any misconduct in mind other than suspicious circumstances suggesting homosexual traits and so the law officer ruled that, upon the showing then made, the question was improper. . . . Every departure from the norm of human behavior may not be shown on the pretext that it affects credibility. The question asked by defense counsel carried veiled insinuations of impropriety, but when the law officer afforded him an opportunity to cross-examine on acts of misconduct which would be of sufficient gravity to impair the witness' credibility the matter was not pursued. Had the law officer permitted the fishing expedition to continue without requiring a showing that counsel was seeking an objective founded on relevant facts, he would have per-

mitted the cross-examiner artfully to impair the credibility of a witness by repeated innuendos and insinuations rather than by accepted methods of cross-examination. It is not an abuse of discretion to so confine counsel."

(5) *United States v. Waller*, 11 USCMA 295, 298, 29 CMR 111, 114 (1960). The law officer did not abuse his discretion in refusing to allow defense counsel to cross-examine the victim of the rape charge concerning a possibly unfounded complaint made by her at another station accusing a soldier of having forcibly attempted to kiss her. ". . . a law officer does not abuse his discretion when he bars cross-examination on prior acts which have no reasonable tendency to impair the credibility of a witness except by innuendos and insinuations. . . . The potentialities for confusion are certainly rampant . . . [in this situation] . . . had the cross-examination been permitted, it would have elicited evidence of a collateral act which could not possibly be connected up with any misbehavior. Had the law officer opened up that avenue of approach to lack of credibility, nothing of a discrediting nature could have been shown and a diversionary dispute of no relevancy to the witness' veracity would have been the result."

c. Independent proof forbidden.

Illustrative case.

United States v. Shepherd, 9 USCMA 90, 94, 25 CMR 352, 356 (1958). Although trial counsel may question the accused as to prior acts of misconduct involving larceny for the purposes of impeachment, he is bound by the accused's denial of such acts and may not pursue the matter further. "In the absence of a conviction, the evidence of misconduct can be adduced only by cross-examination. . . . Counsel must also realize that he is bound by the witness' denial of wrongdoing, unless he has evidence of an admissible conviction. . . . Here, trial counsel was unaware of, or deliberately disregarded, these strict limitations on his right to impeach the accused. When objection was made to his initial question, it was improper for him to declare before the court members that, if the accused denied the crime, he would 'show that there was an offense.' It was also error for him to go into the matter again after explicit denials by the accused. In our opinion his erroneous actions improperly depicted the accused as 'a despicable character' unworthy of belief by the court-martial."

d. Impeachment of the accused. Because of the real danger that serious prejudice to the accused may result from improperly informing the court of his prior acts of misconduct, trial counsel should exercise extreme caution in attempting to impeach the accused, either

by prior convictions or by acts of misconduct. Impeachment should not be attempted unless the trial counsel is positive that it is legally permissible.

Illustrative case.

United States v. Moreno, 10 USCMA 406, 409, 27 CMR 480, 483 (1959). Although it is proper to cross-examine an accused concerning an offense of such a nature that proof of conviction thereof would be admissible under *United States v. Moore* (par. 3*b*, *supra*), trial counsel should refrain from such cross-examination when "the inflammatory nature of the attempted impeachment far outweighed the necessity therefor." Herein, cross-examination as to the accused having made obscene telephone calls some eight years earlier could easily prejudice him with respect to the charge of taking indecent liberties with a young girl. "We . . . recommend generally that prosecutors would do well to exercise more discrimination in attempted impeachment, particularly when, as in the instant proceeding, the advantages to the Government's case are so slim, when weighed against the dangers. . . ."

e. Impeachment by suspicion or accusation forbidden. The fact that a person has been suspected or even formally accused of committing an offense involving moral turpitude is not a proper subject for impeachment. The witness may be cross-examined about *acts* of misconduct which he may have committed but not as to the suspicions or beliefs of others as to his activities.

Illustrative cases.

(1) *United States v. Hubbard*, 5 USCMA 525, 529, 18 CMR 149, 153 (1955). The trial counsel exceeded the bounds of permissible impeachment when, on cross-examination of the accused, he queried him as to whether he had ever before been arrested for or suspected of using narcotics and, in view of the fact that the accused was being tried for possession of narcotics, the error was prejudicial. Suspicion of misconduct is not the equivalent of "act of misconduct." "All that appears in this case is suspicion. Suspicion of wrongdoing cannot be substituted for the fact of wrongdoing as a basis for impeachment."

(2) *United States v. Hill*, 9 USCMA 659, 663, 26 CMR 349, 443 (1958). The law officer properly sustained trial counsel's objection to defense counsel's attempt to impeach a prosecution witness by asking him: "You are being tried for a larceny which occurred on that date?" "The fact that charges have been preferred against an individual standing alone, is no indication that his credibility is affected. A mere charge carries with it no implication of guilt."

f. Form of questions. The impeachment of a witness by cross-examination as to prior acts of misconduct often involves troublesome questions as to the form of the questions which may be employed for this purpose. These problems are discussed in paragraph 6*d*, chapter XXXVII, The Examination of Witnesses.

5. Juvenile offenses. *a. General.* It has been held by the Court of Military Appeals that acts of misconduct which have resulted in the offender being adjudicated a youthful offender. or the like, may not be used for impeachment purposes.

b. Illustrative cases.

(1) *United States v. Roark*, 8 USCMA 279, 285, 24 CMR 89, 95 (1957). In the case of an accused who at the age of fourteen had been adjudicated a juvenile offender for numerous offenses of larceny and breaking and entering, the provision of the state law that such an adjudication shall not be "denominated a conviction" prevents its being used as a conviction for impeachment purposes. Furthermore, the underlying offenses committed prior to the legal age of enlistment may not be utilized as acts of misconduct for impeachment purposes. The policy behind youthful offender and similar statutes which prohibit the use as convictions of adjudication thereunder is designed to grant to the youths the opportunity to begin their adult lives without the stigma of criminal records. In the case of minors, the policy in favor of protecting the minor outweighs the necessity of impeaching his veracity in a subsequent criminal prosecution. ". . . the immaturity of a fourteen and one-half year old boy argues against using his early predilection in a criminal proceeding after he reaches an age when society must charge him with the judgment, sense and discretion of one who has reached his majority. If minors who have offended against the laws of society afterward outgrow their divergency, it may, in some small measure, be chargeable to the chance of starting anew which the juvenile deliquency laws espouse. Some of these boys will one day enter the military service and a sound policy recognized in many states should not be completely discarded when and if the boy, now a man, in the eyes of the military, becomes an accused in a trial by court-martial. Remoteness and policy can both be touchstones of inadmissibility without serious injury to the system. . . . Once it is concluded the rule of inadmissibility is sound, we would not abide in the spirit which prompted such legislation if we permitted the same evidence to be brought out by cross-examination. It is said that if we support the contentions

of the accused, we will make the law difficult of application, for each State statute may have different conditions. We recognize that there will be differences in the enactments, but they pose no insurmountable obstacles. It might be that in military courts, the line of demarcation between admissibility and inadmissibility of prior acts of misconduct is the age at which the services can enlist a member, or it may be that the state laws on infancy will become uniform. Those are matters which may concern us in the future, but they are not important in this setting."

(2) *United States v. Shaughnessy*, 8 USCMA 416, 418, 24 CMR 226, 228 (1957). It was improper for trial counsel to question the accused as to a robbery of which the accused had been convicted at the age of fourteen. "The defense . . . takes the position that the accused's juvenile derelictions are not the proper subject of cross-examination. An identical issue was recently considered in *United States v. Roark*, . . . where it was held to be error to cross-examine an accused pertaining to a juvenile conviction. Our holding in that case is applicable here." (*Note:* In *Roark*, the Court's decision turned specifically on the construction of the Virginia statute involved. In *Shaughnessy* there is no mention whatsoever of the state statute.)

(3) *United States v. Cary*, 9 USCMA 348, 351, 26 CMR 128, 131 (1958). Although juvenile proceedings may not be used for impeachment purposes, evidence of such proceedings may be used to contradict the direct testimony of the accused. "In *United States v. Roark*, . . . we held that juvenile proceedings could not be used as evidence against an accused. Of course this does not mean that an accused can pervert the public policy that underlies the rule to protect himself against contradiction of his testimonial untruths." (Separate opinion of Quinn, C.J.)

6. Victim of sex crimes. In a prosecution for any sexual offense, whether or not lack of consent is an element, any competent evidence tending to show the unchaste character of the victim is admissible, after she has testified as a witness, for the purpose of impeaching her credibility. Such evidence may show her lewd repute, habits, ways of life, or associations and specific acts of illicit sexual intercourse or other lascivious acts with the accused or with others. This evidence may pertain to events occurring before or after the offense alleged with no limitation as to time, subject only to the discretionary authority of the law officer to exclude evidence which is so remote as to be without legitimate probative value. (*Note:* This kind of evidence is also admissible in prosecutions for any sex offense in

which lack of consent is an element as being relevant to the issue of whether the victim did consent, regardless of whether or not the victim testifies in the case.)

Illustrative case.

CM 324987, *Whaley*, 74 BR 43 (1947). In a rape case, the court did not abuse its discretion in refusing to allow the defense to ask the prosecutrix, a middle aged spinster, if she had *ever* committed an act of fornication prior to the alleged rape. The question, as phrased, was far too broad and certain answers to it, even though affirmative, would be immaterial.

7. Inconsistent statements. *a. General.* If a witness testifies at the trial that a certain event occurred, the fact that on some other prior occasion he made a statement that it did not occur clearly has logical probative value as tending to show either that on one of the two occasions he lied or that his recollection of the event is not trustworthy. Either of these alternatives affects his credibility. For this reason, it is proper to attempt to discredit a witness by showing that he has made a prior statement inconsistent with his testimony.

b. Foundation. The initiatory step toward making use of a prior inconsistent statement consists of directing the attention of the witness to the occasion on which the statement was made, identifying it with sufficient particularity as to time, place and persons present as to fairly ensure that he can recognize it. The witness is then asked whether on that occasion he made the particular statement, which is either summarized or set forth verbatim in the question as put to the witness. *E.g.* "Did you at that time tell Sergeant Jones that the traffic light was green? This procedure may be used even though the prior statement is in writing. However, in such a case the examiner *may* if he so desires, merely display the writing to the witness and ask him if he made it.

Illustrative cases.

(1) *United States v. Freeman*, 4 USCMA 76, 82, 15 CMR 76, 82 (1954). In a rape case in which defense counsel sought to impeach the testimony of the victim's husband, the law officer properly sustained a prosecution objection to the following questions: "Did you make the statement which appeared in the German press: 'The soldiers were absolutely sober'!"; "Did you ever make a statement that one of the soldiers had knocked you down with a bottle that he had kept hidden?" The law officer advised the defense counsel that "if he would fix the approximate date of, the place where, and persons to whom, the prior inconsistent statements had been made, he would overrule the objection," and defense counsel, after a short recess, pursued the matter no

further. The ruling and advice of the law officer was quite proper in that he was merely requiring counsel to lay the necessary foundation as provided in the Manual.

(2) *United States v. Gandy*, 5 USCMA 761, 767, 19 CMR 57, 63 (1955). In a narcotics case, the fact that the accused denied making the statement and the prosecution out of an overabundance of caution did not prove it did not alter the fact that it had been proper for the trial counsel in laying his foundation to read the statement in its entirety, including a reference therein to the accused being a homosexual. The accused, like any other withness ". . . may be cross-examined about his statements out of court if they are in any way material and conflict with his testimony given in court . . . before they [inconsistent statements] may be used, a proper foundation must be laid in order to permit a witness to explain, deny, or admit them. To lay the predicate, the witness must first be confronted with the impeaching statement, quoted as accurately as possible so that he will be afforded a fair opportunity to make an honest and intelligent answer and a reasonable explanation. If that is not done, the witness is placed in an unfair position. A judge in a civilian court, and a law officer in a military court, have some discretion as to the completeness and substantive content necessary to lay the proper foundation. When dealing with a verbal statement, it is the better practice to give the time, the date, the place, the person to whom the statement was made, and a verbatim account of the statement, if possible. If it is not possible to quote word for word the statement as given, then it is a satisfactory substitute to give the substance and effect of the statement claimed to have been made. In this instance, trial counsel gave the full substance of the purported prior statement. Can it then be said that because the accused, in his admission, had mentioned an undesirable trait of character trial counsel was duty bound to delete the self-deprecating portion of the statement? As a general proposition, we can say it might be advisable to delete degrading information if the statement is divisible and the debasing portion is of little materiality. However, as previously indicated, we are operating in an area of some discretion. Much will depend on the demeanor and attitude of the witness and the possibility of prejudice flowing from an unnecessary reference to his own admission of defects in character. Assuming arguendo, that as a general rule a prior statement should be policed before being repeated, a witness who is contumacious, quibbles, hedges, does not remember, or is apt to seize on an

omission of part of the statement as a basis for denial, cannot raise error if the cross-examiner is more exact in quoting the base for his impeachment questions. In this instance, the accused had denied his written statement and at least one other oral statement heard by three officers. Each time he explained his answers, he varied his version of what he had stated to the third parties, and he categorically denied having made more than one statement to Burdick. The cross-examiner was, therefore, entitled to pin him down to the precise language used in the particular statement."

c. Witness admits to making prior statement. If the witness admits the prior inconsistency, no other proof that he made the prior statement is admissible. The cross-examiner may not then put the prior statement in evidence. The sole purpose of this method of impeachment is to cast doubt on the witness' credibility by informing the court members that he has given two different versions of the same matter. Once the witness admits to having made a prior statement which is on its face inconsistent with his testimony, this purpose has been accomplished and no legitimate purpose is served by permitting the examiner to introduce independent evidence of the prior statement.

Illustrative cases.

(1) *United States v. Brown*, 7 USCMA 251, 259, 22 CMR 41, 49 (1956). The defense counsel made certain notes as to his pretrial interview of a prosecution witness and the witness signed the notes. Subsequently, after conferring with the trial counsel, the witness struck out his signature and added a statement disavowing the substance of the note. "At trial, Sergeant Kuntz admitted on cross-examination that he had made a prior inconsistent statement to the assistant defense counsel, and that the statement was included in defense counsel's notes. When defense counsel offered the notes . . . as an exhibit for impeachment purposes, the law officer refused to admit them. . . . Paragraph 153*b* of the Manual . . . provides 'If the witness admits making the inconsistent statement, no other proof that he made it is admissible.' Here the prior inconsistency which was at issue was brought before the court and the witness admitted both that he had made it, and that it was true when made. Therefore, no other proof of the inconsistency was proper and the law officer's ruling was correct."

(2) *United States v. Hooper*, 9 USCMA 637, 646, 26 CMR 417, 426 (1958). A prosecution witness testified as to having participated in three acts of sodomy with the accused. "Un-

der cross-examination, he acknowledged he had been granted immunity from prosecution for perjury committed at the pretrial investigation. After admitting his pretrial exculpation of the accused to be a lie, further cross-examination developed the admission that such testimony amounted to perjury. The defense counsel then sought to retrace each of the statements made, but the law officer sustained a prosecution objection, declaring the matters had been covered adequately. . . . In the instant case, the law officer's ruling . . . was a proper exercise of his discretion. The witness had admitted that his pretrial statement exculpating the accused was perjury. To permit counsel to recite each and every portion of that statement would serve no useful purpose, for the optimum of impeachment had already been obtained."

d. Denial or equivalent. If the witness denies making the prior statement, the examiner may then prove the statement by any competent evidence. The same result is reached when the witness testifies that he does not remember whether he made the statement or refuses to testify as to whether he made it. The mere fact that the statement is contained in a writing does not bring the best evidence rule into play. It is only if the examiner attempts to utilize a writing as a medium of proof that the best evidence rule applies. If a writing is used, the examiner may prove its authorship by cross-examination of the witness or by any other competent evidence.

e. Right of witness to explain. The witness who has been impeached by proof of a prior inconsistent statement has the right to explain the inconsistencies if he so desires and the party calling him as a witness has the right to attempt to secure such an explanation on redirect examination.

f. Statement not inconsistent. If the proffered impeaching statement is not in fact inconsistent with the testimony of the witness there is, of course, nothing to impeach and the prior statement may not be proved. Thus, if *in his direct testimony*, the witness has claimed privilege on the matters contained in the statement or has testified to a lack of recollection on such matter, there is no testimony to be impeached. In this latter situation, of course, the examiner might be able to use the statement to refresh the memory of the witness.

g. Prior statement is not substantive evidence. A statement proved solely for impeaching purposes as a prior inconsistent statement, and not offered and accepted under one of the exceptions to the hearsay rule, is accepted only to show the fact that it was made and not for the truth of its contents, and the court should be instructed as to the limited purpose for which it may be used. Therefore, its maximum

legitimate probative value is to cancel the direct testimony of the witness on the point at issue and it may not be considered as substantive evidence of guilt or innocence. However if the witness should testify that the prior statement is true he would thereby adopt it as part of his testimony and it would then become substantive evidence.

Illustrative case.

United States v. Zeigler, 12 USCMA 604, 608, 31 CMR 190, 194 (1962). After the law officer instructed the court "There was some evidence admitted regarding prior inconsistent statements by the witnesses . . . [names]. You are instructed that this evidence was admitted for the purpose of showing prior inconsistent statements and is not to be considered for the purpose of establishing the truth of the matter asserted in prior statements," the president of the court asked him to repeat the instruction and the law officer did so, verbatim. This instruction was defective in that it "failed to inform the court-martial meaningfully of the purpose for which such statements might properly be utilized" and failed "to link these pretrial declarations with the effect which they had on the witness' credibility."

8. Prior inconsistent conduct. Paragraph 153*b*(2)(*c*) provides that a witness may be impeached by evidence that he made a statement "or engaged in other conduct" inconsistent with his testimony. An example of such inconsistent conduct appears in paragraph 3*b*, chapter XI, supra, wherein is discussed the impeaching effect upon the accused's testimony of evidence of his pretrial silence. The foundation for proof of prior inconsistent conduct is laid in like manner as for a prior inconsistent statement. Since it may consume far more time to prove conduct than a statement and since conduct is frequently more equivocal than words, the law officer may exclude independent proof of such conduct unless it is *clearly* inconsistent with the testimony of the witness. In those situations where prior conduct is tantamount to a statement by actions, it might qualify as a prior inconsistent statement.

9. Prejudice and bias. *a. General.* In order to impeach a witness it may be shown that he has a motive to misrepresent the truth. This showing may be through cross-examination of the witness or by any other competent evidence. Prejudice, bias, friendship, former quarrels, and similar matters affecting the relationship between the witness and an interested party and the existence of an interest in the outcome of the case are illustrative of the kind of matters which may tend to show a motive to falsify.

b. Illustrative cases.

(1) *Alford v. United States*, 282 U.S. 687 (1931). Where a former employee of the accused testified against him in a

mail fraud case, the judge committed prejudicial error in sustaining a prosecution objection to the following questions put to the witness on cross-examination: "Where do you live?", "Are you practicing accounting?" The offer of proof showed that the defense wished to establish that the witness was confined in a Federal penitentiary and such fact would clearly be admissible as tending to show that his testimony might have been affected "by fear or favor growing out of his detention."

(2) *United States v. Sledge*, 6 USCMA 567, 20 CMR 283 (1953). The vendee of the narcotics which the accused was charged with selling could be impeached by the defense by showing that the witness' sentence to confinement resulting from his own conviction for the subject offense had been suspended after he served only one week and that the witness had not yet been reduced in grade. This evidence reasonably tends to impute to the witness a motive to testify falsely.

(3) *United States v. Hill*, 9 USCMA 659, 663, 26 CMR 439, 443 (1958). In a larceny case it would be proper impeachment to ask a prosecution witness, on cross-examination, whether he had himself been charged with a larceny arising out of the same transaction as the larceny with which the accused was charged. " . . . when a witness is under indictment for the same offense, or an offense closely related to that concerning which he testifies, his testimony may be colored by that fact."

(4) ACM S-6457, *Whitaker*, 11 CMR 854 (1953). Where the accused was charged with disobeying the order of his first sergeant, it was proper to cross-examine the latter as to whether he had made any personal threats against the accused. Furthermore, such threats could be proved by the testimony of the accused himself, even though the witness denied making them. Matters showing prejudice and bias are never regarded as collateral and may be proved by any competent evidence.

10. Collateral matters. *a. General.* The statement is frequently made that a party is bound by the answers of a witness given on collateral matters. This is merely a restatement of the general rule which prohibits the contradiction of a witness on so-called immaterial issues. For impeachment purposes, this means that a party cannot attack the credibility of a witness by proving, other than by cross-examination of the witness, that he has testified falsely on a collateral matter. A matter is deemed to be collateral if it has no relevance apart from its purported impeachment value *and* there is no specific rule of evidence, such as that pertaining to bias or prior convictions

affecting credibility, which permits such matters to be proved other than by cross-examination of the witness. There exists the practical necessity of placing some restriction on the factual issues to be litigated in a particular case and this rule is based upon the premise that the amount of time which would be expanded in exploring such collateral matters is not compensated by the slight probative value thereof. However, the rule does not forbid the drawing of a logical inference as to the credibility of a witness when there is before the court evidence which contradicts his testimony even though such evidence would have been excluded if offered solely for impeachment purposes.

Illustrative cases.

(1) *United States v. Haimson*, 5 USCMA 208, 230, 17 CMR 208, 230 (1954). Where an accused denies committing a certain act of misconduct such as could not be proved by other evidence for impeachment purposes, and proof of such act is independently relevant as tending to show a criminal plan or design of the accused, the evidence of the act may *also* be considered by the court as bearing on the accused's credibility as a witness. "Normally a witness—even an accused—may not be impeached by extrinsic evidence on a collateral point. However, the incident reported by . . . the rebuttal witnesses was not collateral, since . . . it tends to show an overriding criminal plan of which the crimes alleged against Captain Haimson were a part. Thus, the members of the court were entitled to weigh the incident as impeaching the accused's veracity."

(2) *United States v. Boyd*, 7 USCMA 380, 385, 22 CMR 170, 175, (1956). In a larceny case in which the stolen camera had been found in a certain pawnshop, the fact that the accused had pawned other items at the same shop was independently relevant, and, therefore, the fact that the accused, on cross-examination, denied such prior pawnings did not foreclose proof thereof by the prosecution. Since the matter was independently relevant the issue was not collateral. ". . . an accused who elects to testify can be impeached on any material matter, and impeachment evidence may serve more than one purpose if it is otherwise relevant."

(3) CM 365691, *Smith*, 12 CMR 519, 526 (1953). Although the unchaste character of a rape victim may be shown by proof of prior acts, there is no rule of law permitting similar impeachment of a witness who testifies to such prior acts and whether the impeaching witness has committed lewd acts is a collateral issue. "The defense sought to show that Miss Kuhn was a woman of loose morals and that she, therefore,

consented to sexual intercourse with the accused. In this connection, Else Opitz testified to an alleged act of sexual promiscuity on the part of Miss Kuhn. During cross-examination of Else, the trial counsel asked her if she currently associated with American soldiers, and elicited the reply that she did not. After close of the defense's case, the trial counsel introduced a rebuttal witness . . . who was allowed to testify over objection that Else did currently associate with American soldiers. The question of whether Else Opitz associated with American soldiers was clearly collateral to the issues in this case and her testimony on cross-examination with respect thereto was not subject to impeachment."

b. Accused's direct testimony. As an exception to the rule prohibiting proof of collateral matters for impeachment purposes, the testimony of the accused given on his own *direct* examination is subject to contradiction even though the matters concerned are otherwise collateral, provided only that these matters have some logical relevancy to the issues in the case. If the accused considers the matter of sufficient importance to the outcome of the case to warrant his bringing it to the attention of the court, he cannot be heard to complain that it is collateral when the Government attempts to prove the facts otherwise.

(1) *Walder v. United States*, 347 U.S. 62, 65 (1954). Where the accused, charged with a narcotics violation, testified on direct examination, "I have never sold narcotics to anyone in my life," and, on cross-examination, denied possession of heroin two years prior to the offense charged, the Government could prove such prior possession in rebuttal. "Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics, . . . there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."

(2) *United States v. Brown*, 6 USCMA 237, 241, 19 CMR 363, 367 (1955). In a narcotics prosecution the act of the accused in taking the stand and on his own direct examination denying that he had *ever* used narcotics opened the door to rebuttal evidence by the prosecution that he had used narcotics on a date four days *subsequent* to the date of the offense charged. The instructions to the court that the impeaching evidence could be used only to evaluate the accused's credibility as a witness gave the accused ample protection against

possible misuse of the evidence by the court. "Of course, if the accused had been asked such a question for the first time on cross-examination and had responded in a similar vein, then we are not sure that this result would follow. . . . However, we *are* sure that, when an accused willingly gambles on his ability to convince a court-martial that his chararcter is clinically clean, he must run the risk that theretofore hidden impurities may be brought to light by the prosecution. . . . It is anomalous that an accused should be permitted to forsake his right to remain silent, to place his credibility in issue, and yet be able to testify at will without fear of contradiction. Our conclusion is undisturbed by reason of the fact that the specific act of misconduct shown here occurred *subsequent* to the time of the offense charged. Since the accused chose to testify that he had *never* used narcotics, it is obvious that he wished to convey to the court-martial an impression of starry-eyed innocence, which would weigh heavily against the damaging evidence introduced earlier by the Government. If the members of the court had believed that he had consumed narcotics knowingly at no time during his life, and if this assertion had stood uncontested, it is an understatement to suggest that the accused's odds of obtaining acquittal would have been enhanced immeasurably."

11. Impeachment of own witness. *a. General.* Inasmuch as the maximun legitimate effect of impeachment is the cancellation of the testimony of the witness, a general rule which permitted a party to impeach his own witness would be illogical. There would be no point whatsoever in permitting a party to call a witness merely for the sake of thereafter attempting to cancel his testimony. Therefore, with but three exceptions, a party may not impeach his own witness. For this purpose, the contradiction of one witness by the testimony of another is not deemed to constitute impeachment.

b. Indispensable witnesses. An indispensable witness is one whom a party is compelled to call because the law or the circumstances of the case make it impossible to present the case without the testimony of such witness.

Illustrative cases.

(1) *United States v. Isbell*, 1 USCMA 131, 136, 2 CMR 37, 42 (1952). "We believe Mrs. Jensen was a subject for impeachment. . . . The specification . . . alleged that the accused . . . procured her to make a false official statement to the effect that she had loaned him $30.00. Under the circumstances of this case, only two persons were able to testify

regarding that occurrence. They were the accused and Mrs. Jensen. He could not be required to testify against himself and therefore Mrs. Jensen's testimony was essential to support the additional charge. Within . . . the principles of impeachment, she was an indispensable witness."

(2) *United States v. Reid*, 8 USCMA 4, 8, 23 CMR 228, 232 (1957). One of the three passengers in the car which the accused was driving when he allegedly struck a nun on a bicycle is not rendered "indispensable" merely because she was involved in the accident. "The witness was not essential to the proof of the case. It is undisputed that the accused was the driver of the vehicle which ran into and injured the cyclist and that he did not stop after the accident. . . . The law, of course, does not make this particular witness indispensable by its own requirement. Furthermore, we do not accept the Government proposition that the President intended to adopt the so-called *res gestae* rule, which requires the prosecution to call all available witnesses. . . . It is apparent, therefore, that the witness in this case was not rendered indispensable either by the law or the circumstances of this case."

c. Unexpectedly hostile witnesses. A witness is deemed to be unexpectedly hostile when he surprises the party calling him by giving testimony *adverse* to such party. The surprise must be actual, and not feigned, in the sense that the testimony must vary from that honestly expected. Although a party may in good faith expect a witness to testify as he has done during the pretrial investigation, he may not in good faith otherwise rely upon the representation of a third party that the witness will testify in a certain manner.

Illustrative cases.

(1) *Thomas v. United States*, 287 F.2d 527 (5th Cir. 1961). At defendant's trial for the robbery of bank B, the prosecution called as a witness an individual who had at his own trial, pleaded guilty to having joined with the defendant in the robbery. After the usual preliminary questions, the prosecutor asked the witness if he had participated in the robbery of bank B on the date in question. When the witness answered that he had not, the prosecutor claimed "surprise" and proceeded to question him in detail about several prior admissions contained in the witness' pretrial confession. This impeachment was improper. Although the prosecutor may have been genuinely surprised by the failure of the witness to supply expected testimony, the witness had given no testimony harmful to the prosecution and, therefore, there was no testimony which required impeachment. Under these

circumstances, the prosecutor's only proper course of action would have been to withdraw the witness.

(2) *United States v. Narens*, 7 USCMA 176, 21 CMR 302 (1956). Where trial counsel had also been trial counsel at the earlier trial of an accomplice of the accused at which the victim of the assault charged testified that he could not identify his assailants, the trial counsel could not honestly claim to be surprised when the same witness testified to like effect in the instant case.

(3) *United States v. Reid*, 8 USCMA 4, 7, 23 CMR 228, 231 (1957). When the statement of a Government witness taken immediately after the alleged auto accident contained certain matters highly material to the case, the complete omission of such matters from the witness' testimony at the Article 32 investigation was sufficient to support the law officer's ruling that the trial counsel could not claim "surprise" when the witness testified otherwise than she had in her first statement. Before a party may impeach his own witness on the grounds of surprise "the courts have usually required first, that the party seeking to impeach show that he has been surprised, and, second, that the testimony given has been harmful to his case."

d. Cross-examination beyond scope of direct. When cross-examination of a witness elecits new matter not within the scope of the direct testimony and not relevant to the witness' credibility (see par. 6*c*, ch. XXXVII for scope of cross-examination), the party who originally called the witness may impeach him by prior statements inconsistent with the new matter thus elicited by the cros-examiner.

Illustrative case.

CM 402139 *Sisbarro*, 28 CMR 516 (1959). When the accused is charged with being a principal to a robbery at which he was not physically present and trial counsel's direct examination of one of the actual assailants is limited to the details of the assault, cross-examination of the witness by defense counsel as to whether the accused had prior knowledge of the planned robbery opens the door for trial counsel to examine the witness as to a pretrial statement made by the witness, inconsistent with his testimony that the accused had no prior guilty knowledge of the crime.

e. Method of impeachment. An indispensable witness may be impeached in like manner as though the witness had been called by the opposing side. Thus, such a witness may be impeached by showing his bad character for truth and veracity as well as by prior inconsistent statements. However, an unexpectedly hostile witness may be impeached *only* by proof of prior inconsistent statements. Inasmuch

as the maximum legitimate accomplishment of proof of a prior inconsistent statement is the *cancellation* of the witness' testimony, appellate courts view with a jaundiced eye apparent attempts to put a witness on the stand for the express purpose of thereafter showing a prior inconsistent statement and may find reversible error in such situations. A witness who has been cross-examined beyond the scope of the direct may be impeached only by proof of prior inconsistent statements which are inconsistent with that portion of the testimony which was so beyond the scope.

Illustrative cases.

(1) *United States v. Narens*, 7 USCMA 176, 180, 21 CMR 302, 306 (1956). Where a prosecution witness who had observed the assaults with which the accused was charged, testified that he did not recognize the assailants and was impeached by showing a prior statement wherein he identified the accused as one of the attackers, the fact that the trial counsel knew in advance of the adverse testimony renders the impeachment improper and requires reversal. "It is arguable, therefore, that Turner was improperly called as a prosecution witness for the sole purpose of impeaching him by means of his prior inconsistent statement. . . . 'It is never permitted to make of the rule an artifice by which inadmissible matter may be gotten to a jury through the device of offering a witness, whose testimony is known to be adverse, in order, under the guise of impeachment, to get before the jury for its weighing, favorable ex parte statements the witness has made.' . . . Impeachment is permitted to enable a party to eliminate, as far as possible, the adverse effect of the witness' testimony. Its function, therefore, is to annul harmful testimony, not to present independent, substantive evidence. . . . The Government was plainly not surprised by Turner's testimony. . . . Therefore, it could not use his previous statement to impeach him. The erroneous admission of the statement presents a fair risk that the court-martial was improperly influenced by it in reaching its findings."

(2) *United States v. Reid*, 8 USCMA 4, 9, 23 CMR 228, 233 (1957). Prejudice resulting from the improper impeachment of a prosecution witness, neither indispensable nor unexpectedly hostile, by proof of a prior inconsistent statement may be cured by proper limiting instructions. "In the instant case the law officer specifically limited the effect of the evidence to its probative value relative to truth and veracity only. It did not have substantive value and we can presume that the court-martial followed its instruction cor-

rectly. We believe, therefore, that considering the instructions of the law officer and placing the challenged testimony in its proper place that there was no fair risk of material prejudice accruing to the accused."

12. Court witnesses. Witnesses for the court are witnesses for neither the prosecution nor the defense and may be impeached by either side.

13. Effect of impeachment. Impeachment is the process of attacking the credibility of a witness. Whether such an attack has been successful and the extent to which it has diminished or destroyed credibility is a question of fact to be decided by the finders of fact. Therefore, unlike the situation where the law officer may find testimony to be incompentent as a matter of law and strike it from the record, a party is not entitled to secure a ruling from the law officer as to the effect of impeachment upon certain testimony and to have it stricken.

Illustrative case.

United States v. Albright, 9 USCMA 628, 631, 26 CMR 408, 411 (1958). A showing that a witness has a strong motive to misrepresent the truth does not render his testimony incredible as a matter of law. "We have long adhered to the judicial principle of appellate review that it is not our proper function to reweigh the credibility of a witness and to determine independently the credence to be afforded the testimony of each witness . . . . It is apparent the court members chose to believe the witness, Cates, when he implicated the accused in the acts [rape and sodomy]. It was additionally argued that some pressure was exercised against Cates in the form of a promise of a lighter sentence in return for his testimony against the accused. We have no doubt such a promise would influence a prospective witness to speak out, but that is not to say the testimony of the witness would completely lack truthfulness as a matter of law. . . . This information was placed before the court and was part of the evidence to be taken into consideration by it in judging his credibility."

14. Hypothetical problems. *a.* In a desertion case in 1958 the accused testifies and denies having had an intent to desert. The trial counsel then offers evidence of three prior convictions of the accused by summary court-martial, each for a two day period of AWOL occurring in Japan in 1951, as bearing on the accused's credibility. The defense objects that the offenses are minor and the prosecution states that at the time and place they occurred they were punishable by life imprisonment. The defense replies that nevertheless they are obviously so minor as not to affect credibility. The defense also argues that they are too remote in time. How should the law officer rule?

b. The wife of the accused testifies as a defense witness that fact X occurred. On cross-examination she is asked if on a given date she did not write a letter to the accused in which she stated that X did not occur. She claims that the letter constituted a confidential communication and refuses to answer the question. The prosecution then offers in evidence the letter which had been found on the accused's person when he was arrested. Is the letter admissible?

c. In an assault case the trial counsel asks a defense witness "I've heard your testimony about the fight. Didn't you tell a different story to your First Sergeant on the day after the fight?" The witness replied, "Yes, I did." The trial counsel calls the First Sergeant to the stand to have him testify as to the "different story." Defense counsel objects. How should the law officer rule?

d. In a larceny case, a prosecution witness testifies that he had a certain sum of money taken from his clothing in the barracks on the night in question. On cross-examination he is asked if he was present at a certain company formation several days later when the company commander informed the men that he had heard of several thefts from the barracks and told all men who had losses to report them to the orderly room. The witness denies having been present. The defense then wishes to offer independent proof that the witness was present, heard the announcement and did not report any loss. The trial counsel objects that this is a collateral matter. How should the law officer rule?

e. Trial counsel claims surprise when a prosecution witness gives certain testimony unfavorable to the prosecution and attempts to impeach the witness by proving a prior inconsistent statement made to the Article 32 investigating officer by the witness. The defense counsel objects and states that on the day before trial he informed the trial counsel that the witness' testimony would be as given at the trial. Trial counsel replies that he is entitled to rely upon the written statement and had not interviewed the witness before trial. How should the law officer rule?

f. During closing argument the defense lays great stress upon the failure of the prosecution to call a certain witness who, according to the testimony of other witnesses, was present during the alleged assault by the accused. The trial counsel then requests that he be permitted to reopen and call the witness as an indispensable witness or, in the alternative, that the court call the witness. At side-bar, the law officer is informed that the witness will deny that the accused struck the victim but that the trial counsel can prove that the witness made a prior statement inconsistent with such testimony. How should the law officer rule?

CHAPTER XXXVI

REHABILITATION OF WITNESSES

Reference. Par. 153, MCM.

1. General. Although a party is not permitted to bolster the credibility of his own witness in the first instance, once the opponent has attempted to diminish the witness' credibility by attacking his veracity, the party originally calling the witness may then take certain measures to offset the attempted impeaching evidence and thereby rehabilitate his witness. The kind of measures which may be taken may be classified generally into three categories and depend upon the form in which the attack was made. In this connection it must be noted that the mere contradiction of one witness by the testimony of another is not treated as an attack on the credibility of the former for rehabilitation purposes.

2. Prior consistent statements. *a. General.* Evidence that a witness made a prior statement consistent with his testimony at the trial is forbidden as constituting improper bolstering unless the testimony of the witness has been attacked by showing a prior inconsistent statement or by showing a motive to misrepresent. In either case, the prior consistent statement must have been made prior to the allegedly impeaching event.

Illustrative case.

United States v. Kellum, 1 USCMA 482, 485, 4 CMR 74, 77 (1952). Cross-examination of a witness on his credibility plus the offering of testimony of other witnesses which contradicts his testimony does not open the door to rehabilitation by showing a prior consistent statement. " 'The general rule announced in practically all states . . . is that the testimony of a witness cannot be bolstered up or supported by showing that the witness had made statements out of court similar to and in harmony with his testimony on the witness stand. . . .' There are, however, instances where exceptions to the general rule are recognized. Some of these are: (1) Where the testimony of the witness is assailed as a recent fabrication; (2) where the witness has been impeached by prior inconsistent statements; and (3) where the witness' testimony is discredited by an imputation of bias, prejudice, or motive to testify falsely arising after the date of the prior statement. The authorities generally hold that when the posture of the evidence is such that a witness has been discredited by one of the previous methods, then prior consistent statements may for certain purposes be

admitted. However, in no instance is the statement admissible as substantive or independent supporting evidence. The sole purpose for permitting it in evidence is to refute the impeachment of the witness. . . . Moses was cross-examined as to the truthfulness of his testimony concerning accused's possession [of morphine], and accused and other witnesses for the defense denied the story told by him. However, this is not enough to justify the admission of the questioned testimony. Although in some cases it has been held that the assailing of a witness' testimony on cross-examination plus contrary evidence, makes the admission of prior consistent statements proper in rebuttal, the better rule seems to be otherwise."

b. Rebuttal of inconsistent statements. If the credibility of a witness is attacked on the ground that he has made a prior statement inconsistent with his testimony, the party calling the witness may, for the purpose of offsetting the attack, show that at a time prior to the making of the inconsistent statement the witness made a statement consistent with his testimony. A consistent statement made *after* the inconsistent statement is excluded as being of dubious rehabilitative value by reason of the ease with which such a subsequent statement could be made for the express purpose of attempting to nullify the inconsistent one.

Illustrative case.

Elliott v. Pearl, 35 U.S. 412 (1836). When a witness testifies as to the boundaries of a certain parcel of land the title to which is in dispute and is impeached by showing that on a certain date he made statements inconsistent with his testimony, the door is not open to show that on a *subsequent* date he made other statements inconsistent with the earlier ones and consistent with his testimony.

c. Rebuttal of motive to falsify. If the credibility of a witness is attacked by showing that the witness had a motive to falsify his testimony, such as bias, collusion or corruption, he may be rehabilitated by showing that at some time prior to the occurrence of the event allegedly giving rise to the motive to falsify he made a statement consistent with his testimony. A statement made after such event would of course be excluded as being of slight, if any, rehabilitative value. The mere fact that an accused is on trial does not allow his rehabilitation as a witness under this rule.

Illustrative cases.

(1) *United States v. Sledge*, 6 USCMA 567, 568, 20 CMR 283, 284 (1955). Where the defense attempts to impeach the credibility of a prosecution witness, the vendee of the marihuana which the accused was charged with possessing, by showing that the witness had been shown extreme clemency by the convening authority after his own trial and

conviction, the trial counsel could, in rebuttal, prove that prior to the witness' trial he had made a statement consistent with his testimony. "Prior consistent statements by a witness which corroborate his trial testimony are ordinarily inadmissible . . . . However, certain well-defined exceptions exist . . . . The clear purpose behind defense counsel's questioning was to impute to Sergeant Toler a motive to testify falsely . . . . This is not a case in which the prosecution has attempted to impeach its own witness as a subterfuge for the introduction of an antecedent corroborative statement. The attempt to discredit Toler's testimony originated with the defense. Because of this attempt, the prosecution could properly rehabilitate the witness by means of a prior consistent statement."

(2) *United States v. Kauth*, 11 USCMA 261, 267, 29 CMR 77, 83 (1960). The mere fact that the accused is on trial is not deemed to give him a motive to falsify his testimony and thereby allow the defense to bolster his veracity by showing that he made prior statements consistent with his testimony. "The person being tried for the commission of an offense is undoubtedly biased and prejudiced in his own favor, and he may have a motive to testify falsely, but the impeachment contemplated by this exception must be found in a diminishing of the accused's worthiness of belief by the prosecution and this record is devoid of any evidence developed by the Government which would have that effect. . . . Our review of the authorities touching on this facet of the problem [rehabilitation of the accused as a witness] indicates this exception to the rule is applied principally in cases where bribery, reward, bias, prejudice, motive or some other personal influence discrediting to the witness could be inferred from facts and circumstances developed by the prosecution extraneous to those necessary to establish the offense."

3. Character for truth and veracity. A party may not seek to rehabilitate his own witness by showing his good character for truth and veracity unless the opposing party has attacked the veracity of the witness by attempting to show that the witness has a bad character as to truth and veracity, or has committed acts of misconduct such as to affect credibility or, in the case of a victim of a sex offense who has testified, has an unchaste character. When such an attack is made, proof that the witness has a good character as to truth and veracity may be shown in rebuttal.

Illustrative case.

CM 220643, *Knight*, 13 BR 27, 31, (1942). When the accused, charged with being drunk and disorderly, testifies in his own behalf and the prosecution makes no attempt to impeach him as a witness, the defense may not introduce evidence as to his good character for truth and veracity. "The proffered testimony was designed to bolster accused as a witness. The rule for courts-martial is that evidence favorable to the general reputation of a witness for truth and veracity may not be introduced unless he is impeached, and that mere contradiction of his testimony does not constitute impeachment for this purpose. . . . After impeaching evidence has been introduced, evidence that a witness' reputation for truth and veracity is good may be used in rebuttal. . . . The broad authority given to an accused to introduce evidence of his good character to establish his innocence does not embrace authority to bolster his credibility when he becomes a witness."

4. Discrediting impeaching evidence. The third general method of rehabilitation consists of attempting to discredit the impeaching evidence either by explanation or contrary proof of the matters contained therein or by attacking the credibility of the impeaching witness. However, this method of rehabilitation is subject to the general rule which gives the law officer discretion to prohibit the contradiction of witnesses on collateral matters.

5. Hypothetical problem. The accused, charged with making a false official statement, takes the stand and denies his guilt. The prosecution does not attempt to impeach him as a witness. The defense then offers the testimony of an individual, well acquainted with the accused, that the accused has a good character for truth and veracity. The prosecution objects. How should the law officer rule?

CHAPTER XXXVII

EXAMINATION OF WITNESSES

References. Pars. 149, 150, MCM.

1. General. *a. Types of examination.* The examination of a witness normally consists of direct examination, cross-examination, redirect examination, recross-examination, and examination by the court. Cross-examination is normally limited to the issues covered on direct examination and matters bearing on the witness' credibility. Redirect is usually limited to a further exploration of matters brought out on cross-examination but *may* extend to any relevant matters. Recross-examination should be limited to matters covered on redirect examination. The court may ask any question of a witness which could properly be asked by either side except in the case of the accused who may be questioned by the court only as on cross-examination. If a question asked by a court member is one which clearly is in the nature of either direct examination or cross-examination it is subject to the same rules respecting leading questions as would be examination by either side. If new matter is developed through examination by the court, both the prosecution and defense should be permitted to cross-examine on such new matters.

b. Answers must be responsive. The testimony of a witness must be responsive to the questions asked. Ordinarily, he should not be required to answer questions by a simple "Yes" or "No" unless the import of the question is clearly such that the simple affirmative or negative reply is a complete response to the question. However, a witness who has been required to give such a reply may, as a matter of right, amplify or otherwise explain his answer. This right of a witness to explain his testimony, if he so desires, is not limited to the forced simple reply but embraces all of his testimony.

Only the party conducting the examination of a witness has standing to object to answer on the grounds that they are not responsive to the questions to which they are addressed and request that they be stricken from the record. The adversary has no such standing because if the nonresponsive testimony is relevant and competent he has suffered no harm; if it is not relevant or competent an objection can be based on either of these grounds and not on the nonresponsive nature of the answer. However, the repeated giving of nonresponsive answers by a witness may form the basis for a request by the adversary that the witness be instructed to limit his replies within the scope of

the question in order that the adversary not be unfairly deprived of his right to object to excursions into forbidden fields *before* they occur.

Defense counsel must be aware of the possibility that non-responsive answer to questions put by him may open the door to exploration of matters that might otherwise be forbidden. If a witness gives a non-responsive answer to defense counsel and the answer refers to matters which the defense does not wish placed in issue, he should move promptly to strike the answer as being non-responsive or run the risk of a ruling permitting the trial counsel to introduce evidence on these matters.

Illustrative case.

United States v. Sellers, 12 USCMA 262, 273, 30 CMR 262, 273 (1961). A defense witness was called to testify as to accused's reputation for veracity and the following testimony was given on his direct examination. "*Q.* Now during this period were you in a position to form some conclusions concerning his character for truth and veracity? *A.* Yes. I had an ample opportunity to observe Captain Sellers and form an opinion as to his —— *Q.* Have you reached a conclusion concerning his character? *A.* Captain Sellers *is a superior officer* as far as his work for me was concerned. He was a truthful officer. *Q.* You consider him truthful? *A.* Yes, I do. *Q.* Would you believe him under oath? *A.* Yes, I would" (Emphasis added). Another defense witness testified as to accused's veracity and the court then recessed. Two hours later when the court reconvened, defense counsel stated that "upon reflection" he desired to have the non-responsive answer concerning accused being a "superior officer" stricken from the record. The ruling of the law officer denying the request and permitting trial counsel to introduce rebuttal evidence of accused's inefficiency was not an abuse of discretion. "The question of efficiency was brought into the case upon direct examination of a defense witness, and regardless of whether the testimony had been elicited inadvertently through an unresponsive answer, it is crystal clear defense counsel did not express any concern at that point. Instead, he left testimony favorable to his client in the record, called yet another witness . . . [and waited over two hours before objecting to the answer]. Thus, while the law officer might have chosen to accede to defense counsel's request it is also obvious that it would not be unfair for him to reason that the defense, whether it had intended to raise the issue initially or not, was willing to let the answer stand until defense counsel learned, during the recess, that the prosecution intended to offer rebuttal testimony, and only then and for that reason asked the law officer to act . . . [C]riminal trials are not guessing games, and in our view there is nothing arbitrary or capricious about refusing to allow a party to gamble upon the retention of favorable testimony until such time as he discovers it will be rebutted and then ask that it be taken from the court." (Per Latimer, J., and Quinn,

C.J., Ferguson, J., in dissent "cannot see how the lapse of time between the answer and the motion can justify the arbitrary refusal of the law officer to eliminate the unwanted material." At p. 269.)

2. Leading questions. *a. General.* A leading question may be defined as one which either suggests the desired answer or which embodies a material fact not as yet testified to by the witness and is susceptible of a simple affirmative or negative reply. There is no hard and fast rule for determining whether a given form of phrasing a question makes it "leading." It is not the wording of the question which controls but its probable result. If, in light of all the circumstances, the law officer is of the opinion that the examiner is attempting to put words into the mouth of the witness, or inviting the witness to shape his testimony to conform to the apparent desires of the examiner, the question is leading.

b. Prohibition. The use of leading questions on direct or redirect examination is, with certain exceptions discussed in the succeeding subparagraphs, forbidden and the adversary has the right to object to questions on this basis. However, the objection goes to the form of the question and not to the answer and a motion to strike the answer on the ground that it was elicited by a leading question will not be granted. It is apparent that an objection that a question is leading, even though sustained, does not alter the fact that the witness has already been "led" as to the specific question asked and a rephrasing of the question cannot obviate this result. Therefore, the adversary may deem it desirable to couple with his objection a request that the examiner be instructed not to again attempt to lead the witness. This action is clearly appropriate where the examiner has demonstrated a tendency to lead during his examination of the witness on the stand or prior witnesses. Inasmuch as the express purpose of cross-examination is to attempt to discredit the testimony of the witness, leading questions may be used during both cross and recross-examination. However, in the rare instance where it appears that a witness is clearly favorable to the cross-examiner to the extent that there exists a real danger of the witness shaping his testimony to meet the desires of his examiner, the law officer may, upon objection by the party calling the witness or on his own motion, instruct the cross-examiner to cease using leading questions.

c. Exceptions. Following are the situations in which leading questions may be used on direct examination. It must be noted that in none of these instances is the examiner to be given an unbridled right to lead his witness. Each of these instances is based upon a certain necessity and the right to lead is given only to the extent reasonably required to meet the necessity, and no further. In no event is the examiner to be permitted to shape the testimony of the witness.