(1) *In order to abridge the proceedings*, a witness may be led at once to the matters as to which he is to testify. However, this exception may never be used to justify leading the witness as to matters which are in controversy. The permissible introductory leading must always stop short of disputed, material facts. The actual extent to which such leading may be employed depends to large extent upon both the good faith of the examiner and the willingness of the adversary to allow the witness to be brought quickly to the matter at issue in the case.

(2) *When a witness is obviously hostile* to the party calling him or is otherwise manifestly evasive and unwilling to testify as to certain matters, the law officer, upon request by the examiner or on his own motion, may authorize the use of leading questions to the extent deemed necessary to overcome the hostility or unwillingness of the witness.

(3) *When it appears that the witness has inadvertently made an erroneous statement* due to a slip of the tongue, lack of comprehension of a question, inattention or similar causes, the examiner may use a leading question to direct his attention to the error and afford him the opportunity to correct it, if he so desires.

(4) *When it appears that from the very nature of the matter under inquiry* the attention of the witness cannot be directed to it without specifying such matter, the witness may be led to the extent necessary to secure his testimony.

(5) *In addition to the foregoing, a witness may be led whenever it appears that his testimony can be obtained only if leading questions are permitted.* Such leading is frequently required in the case of victims of sex offenses whose embarrassment makes them reluctant to testify and timid, or child witnesses, and witnesses of low intelligence or with slight command of the English language. Here, again, the rule demanding limitation of leading questions to the extent reasonably necessary to overcome the obstacle to securing testimony applies.

(6) The use of memoranda either to refresh the memory of a witness or as past recollection recorded, discussed in chapter XXX, necessarily requires the use of leading questions.

3. Ambiguous and misleading questions. A question which is so phrased as to mislead the witness into making an unintentional misstatement or as to mislead the court into misconstruing his answer is unfair and should not be permitted on either direct or cross-examination. A question should always be so worded as to accomplish the primary purpose of both direct and cross-examination, *viz.*, the com-

munication of information by the witness to the court. Accurate communication is rendered impossible unless both the witness and the court have substantially the same comprehension of the question. It is for this reason that the so-called "double question" of the "are you still beating your wife" variety is objectionable. It is arguable that if both the witness and the court are mentally alert an affirmative answer can be construed as extending to every element of the question. However, it is plain that a negative answer is inherently ambiguous.

4. Insinuating questions. Questions asked for the purpose of suggesting matters known not to exist or which are clearly inadmissible under the laws of evidence are completely improper. The use of insinuating questions under the guise of attempted impeachment of a witness is considered below in subparagraph *6d*(2).

5. Direct examination. Other than the general prohibition against the use of leading questions on direct examination, there are no special rules pertaining to the conducting of direct examination. The purpose of direct examination is to have the witness relate to the court whatever relevant and competent information he may possess. Any form of question calculated to accomplish this purpose is proper and the type of questioning to be used in any given situation rests within the discretion of the examiner. He may, if he wishes, seek to elicit the testimony piecemeal by utilizing questions designed to produce one item of information at a time or he may "set the stage," so to speak and then merely ask the witness to tell his story in narrative form, or he may use a combination of these two methods. His opponent does not have the right to demand that any of these methods be used to the exclusion of the others. However, if a witness gives his testimony in narrative form and it includes much irrelevant or incompetent matter, the opponent may request the law officer to direct the examiner to so conduct his examination as to ensure that such extraneous matter is excluded.

6. Cross-examination. *a. General.* Cross-examination of a witness is a matter of right and, generally speaking, the denial of the *opportunity* to exercise that right will necessitate the striking from the record of the direct examination. In general, cross-examination should be limited to the matters covered on the direct examination and matters affecting the credibility of the witness. Special rules dealing with the scope of cross-examination of the accused will be discussed in paragraph 7, *infra.*

b. Self-incrimination and self-degradation. Generally speaking, a witness by testifying on direct examination without invoking his privilege against compulsory self-incrimination, if it is applicable, waives his right to invoke the privilege on cross-examination on the matters as to which he has testified. (See par. 7, ch. XII.) However,

this waiver does not extend to matters merely affecting his credibility and he may invoke his privilege as to such matters, for example, as his prior acts of misconduct when sought to be elicited merely for impeachment purposes. He may also invoke the privilege as to matters clearly beyond the scope of the direct examination. A witness may refuse to answer a question on the ground that the answer thereto might tend to degrade him only when such answer would not be material to any issue in the case. For this purpose, matters affecting credibility are deemed to be material.

o. Exceeding scope of the direct. Cross-examination, as such, normally should be limited to matters fairly within the scope of the direct examination. However, this rule is often difficult of application. Since cross-examination frequently is exploratory in nature, the examiner must of necessity often find himself in areas not covered by the direct. The question then arises as to whether he should be permitted to probe further into such fields. Furthermore, there is the quite difficult question of whether a witness called by one party may be used by the adversary, on cross-examination, to develop the adversary's case. It is held that the answer to both of these questions rests in the sound discretion of the law officer who must reconcile two conflicting policy factors. On the one hand is the possible unfairness in permitting a party to develop his own case under the relaxed rules of examination by leading question and exploration permitted on cross-examination. If the cross-examiner is denied permission to exceed the scope of the direct, no harm to his case is done so long as he is informed or is otherwise aware of his right to recall the witness as his own. However, forcing him to take such action may render the conduct of the trial awkward and consume unnecessary time. Another solution is to permit the examination to continue provided that the examiner at that point adopts the witness as his own. Thereafter, he may not lead the witness as to the new matter and, at the discretion of the law officer, may be forbidden to impeach the witness except under those conditions which permit a party to impeach his own witness. Furthermore, the party originally calling the witness may be permitted to cross-examine him on new matter which is clearly outside the scope of the direct examination.

Illustrative case.

United States v. Heims, 3 USCMA 418, 422, 12 CMR 174, 178 (1953). The sergeant who had given the order which the accused allegedly disobeyed, testified as to the giving of the order (to tie sandbags) and the accused's refusal to obey it. On cross-examination, defense counsel probed into the possibility of physical inability to obey the order and whether the witness was aware of an injury to the accused's hand occurring a few days before the offense. "At this

point trial counsel objected on the ground of immateriality. The law officer observed that defense counsel had exceeded the scope of direct examination, and required that he abandon the line of questioning then being followed. It is to be noted, however, that the law officer at the time carefully advised defense counsel that it was open to him to call the sergeant subsequently as his own witness. The permissible scope of cross-examination has been the subject of frequent judicial expression. . . . Inevitably, conflict and confusion has resulted in generous degree, but a definite trend of decision and thinking is clear. Viewed functionally, the basic rule, in essential form, must of necessity be that cross-examination is limited to the scope of the direct. That is to say, on cross-examination a witness may not be questioned with respect to matters not brought out—opened up—upon direct. Applied too strictly, this approach has often resulted in unnecessary reversals, and has developed needless delays and inconvenience at trial, not infrequently hampering the primary purpose of the hearing—the development and testing of all relevant facts. At the other swing of the pendulum is the rule—followed today in a sharply limited number of jurisdictions, but frequently advocated by text writers—that the cross-examiner should be allowed the widest possible latitude in questioning—even to the point of permitting the introduction of one's own case during the testing period. However, this view, in seeking to remedy the 'scope-of-the-direct' rule, has itself often led to abuse, and—although administratively defensible—is certainly dubious as a matter of theory. As is so frequently the case, the most desirable rule, we believe, lies somewhere between the two poles—and is the very one made manifest in the better reasoned Federal decisions and in paragraph 149*b* of the Manual . . . 'The extent of cross-examination with respect to a legitimate subject of inquiry is *within the sound discretion of the court* . . .' (Emphasis supplied.) . . . That the extent of cross-examination is a matter resting largely within the sound discretion of the trial judge is now widely accepted among those jurisdictions following the 'scope-of-the-direct' rule. . . . Through it, we believe, there may be achieved the soundest solution to the problem which is, in the last analysis, principally one of trial administration. The trial judge—or the law officer in the military scene—is present personally at the *nisi prius* hearing. He is aware of the need for an orderly procedure, and also of the convenience of the parties, plus the practical and juristic demands of the particular situation . . . If the exercise of sound discretion means anything, the law officer here did not err."

d. Credibility.

(1) *General.* A witness may be cross-examined on any matters which are germane to his credibility. It is within the sound

discretion of the court to decide whether the relationship of the particular matter to the credibility of the witeness is so remote or farfetched that the examination constitutes unreasonable harassment, annoyance or humiliation of the witness. Thus, cross-examination of a witness may extend to all matters reasonably bearing on his worthiness of belief, such as his relationship to the parties or the issues of the case, his interests, motives and inclinations, his way of life, affiliations, associations, acts of misconduct, habits and prejudices, and his ability to have observed and to recall and describe the events as to which he has testified, including his power of discernment, memory and description, and his physical and mental capacities and defects.

Illustrative case.

CM 362664, *Jeffery*, 12 CMR 337, 346 (1953). "A witness who testified to the license number of the car apparently involved in the accident was asked by the defense counsel what the license number of his own car was on the same date. The law officer sustained an objection to the question. Although some discretion is permitted in this field this ruling was in error as the question propounded was clearly and directly a test of the witness' memory and source of knowledge, and thus properly an attack on his credibility. If he did not know the number of his own car it may have indicated to the court that the license number he testified to was based on suggestions from others previous to the trial, or merely that he might have gotten one or two digits wrong although he thought he was correct."

(2) *Form of questions.* Cross-examination of a witness on matters merely affecting credibility, even more than on the substance of the witness' testimony, must of necessity often be largely probing in nature. For this reason the cross-examiner must be given great leeway in the form and subject matter of his questions. However, the witness and the adversary are entitled to be protected against the question which is so phrased that no matter what answer is given the court may draw an inference adverse to the witness' credibility. Therefore, it may be said as a general rule that questions which insinuate the existence of facts not known to exist are objectionable. A different situation exists, however, where the examiner has good reason to believe in the existence of impeaching facts but is prohibited by the laws of evidence from proving them, as in the case where he possesses evidence that the witness committed a certain offense affecting credi-

bility but is unable to prove a conviction thereof. In such a situation, the examiner cannot be accused of attempting to unfairly insinuate the existence of non-existent facts but, rather, is asking a question in the honest expectation of receiving a truthful reply thereto. Therefore, in reason, there should be no objection to a specific question being asked in this situation. On the other hand, an examiner who is merely "fishing" should be restricted to general questions such as "have you ever committed a felony?" The ultimate objective of the scrunity of so-called insinuating questions in this area is to strike a balance between the right of the examiner to question a witness for impeachment purposes, whether on a fishing expedition or with a definite object in view, and the right of the adversary not to have his witness improperly impeached by insinuation, innuendo and suggestion. The matter rests largely within the discretion of the law officer who in all questionable cases should satisfy himself that there is a reasonable basis for the specific question asked. This does not mean, however, that the examiner must have legally competent evidence of the matters involved. It is only required that there be sufficient evidence to indicate good faith on the part of the examiner.

Illustrative cases.

(*a*) *United States v. Russell*, 3 USCMA 696, 702, 14 CMR 114, 120 (1954). In a prosecution for negligent homicide the accused took the stand and denied guilt. On cross-examination he was asked "Isn't it a fact that you were convicted of highway robbery as a civilian?" The form of the question was improper. Further, since independent proof of *convictions* affecting credibility is admissible for impeachment purposes, the failure of trial counsel to prove such conviction when the accused denied it, was error. (The error was cured by the instruction of the law officer to disregard "any comment about highway robbery.) " . . . it has been held that an accused may be asked whether he has ever been convicted of a felony. . . . In such a case, the prosecution is bound by the answer, unless evidence to the contrary is produced. . . . In the case at bar, the accused was not asked a general question concerning conviction of a felony. The question was put to the accused in such a manner as to suggest that the trial counsel was in possession of damaging information concerning him. It was, therefore, an affirmative statement not simply an interrogation. The harm implicit in this question

was ameliorated somewhat by the accused's immediate denial, by the failure of the prosecution to produce evidence to the contrary, and by the law officer's direction to the court to disregard the subject entirely. The only remaining danger of harm was the bare possibility that the question made such an indelible impression upon the court that its effect could not be erased. . . . Certainly evidence of a conviction of highway robbery was admissible, if the trial counsel had in his possession reliable information of such a conviction, and was prepared at the proper time to present such proof to the court. However, he should have in his possession an admissible record thereof to prevent all question of error should the conviction be denied by the accused. A denial here, uncontradicted, actually tended to discredit the position of the Government and to weaken its case, instead of affecting adversely the interest of the accused."

(*b*) *United States v. Hubbard*, 5 USCMA 525, 529, 18 CMR 149, 153 (1955). In a narcotics prosecution it was improper for the trial counsel to ask the accused the following questions on cross-examination under the guise of attacking his credibility: "Private Hubbard, do you know if you have ever been suspected of using narcotics by Captain Peterson?"; "Private Hubbard, have you ever been apprehended before by the CID?" ". . . there is no justification for the questions asked in the cross-examination of the accused. No act of misconduct affecting the accused's credibility was presented. On the contrary the cross-examination consists only of 'repeated innuendoes' and insinuations' resulting from a 'fishing expedition.' . . . The accused was asked if his commanding officer 'suspected' him of using narcotics. Objection to his question was sustained, but it was immediately followed by a series of questions touching upon the circumstances of his arrest by Criminal Investigation Division agents. Questions of that nature are condemned by those Federal courts which allow cross-examination on acts of misconduct not resulting in conviction as much as by those following the more restricted rule." Under the circumstances of this case there was a reasonable probability that the improper questioning influenced the findings of guilty. "The probability of the risk is heightened by the failure of the law officer to instruct the court on the limited purpose for which it could consider the evidence."

(c) *United States v. Berthiaume*, 5 USCMA 669, 18 CMR 293 (1955). Defense counsel asked prosecution witnesses the following questions on cross-examination: "Haven't you recently confessed to stealing a radio?"; "Isn't it a fact that in civilian life you were convicted of a crime involving moral turpitude?" The improper form of the questions, masking allegations, justified the ruling of the law officer in sustaining prosecution objections thereto but he erred in leading defense counsel to believe that the entire area involved was to be avoided unless the defense was prepared to prove prior convictions upon the witness' denial and, in view of the posture of the evidence in the case, such error was prejudicial to the accused. "The law officer here apparently worked from the premise that, to inquire whether Nottingham had been previously convicted, defense counsel must have possessed definite information that this was the case." (At p. 679, p. 303.) "To apply this restriction to such a general question as 'Will you tell the court whether you were ever convicted of a felony?' or 'Have you ever been convicted of a crime involving moral turpitude?' is palpably unnecessary. Any necessary content of insinuation in such a question is remote indeed. It is hard to see how the juror, or court member, would be improperly affected in any way by the question if the witness denied the conviction, and if the inquiry were not repeated. The discomfort to the witness from such a question—phrased or voiced without insinuation—will normally be quite mild. Moreover, to require positive information as a basis for such a general nonaccusatory query would decrease markedly the leeway to which a cross-examiner is normally deemed entitled. That the questioner must be accorded latitude to probe into such matters—even those about which he lacks definite knowledge—is a principle deducible from the Manual . . . (Par. 149*b*(1))." (At p. 680, p. 304.) "It must be evident that the military lawyer needs the liberty to explore a witness' background, including possible previous convictions, fully as much as does his counterpart in the civilian scene. . . . Actually a cross-examiner who knows of the existence of a prior conviction, and has at hand admissible proof of it, will have little reason to inquire of the witness concerning it—as an alternative, of course, to putting the record thereof in evidence. To be sure, there may result the dramatic effect of the witness' admission of criminality, or the possibility that he may deny the prior conviction and thereafter be trapped

in an obvious falsehood. . . . With an eye to the latitude intended for the cross-examiner, together with the difficulty of investigating the backgrounds of prospective witnesses, we must hold that in military law the former may inquire—by questions which do not mask an allegation—into the possible prior conviction of a witness of an offense involving moral turpitude, or otherwise affecting credibility, regardless of a want of definite information concerning the witness' past record. Of course, a denial of such a conviction is binding on the examiner—unless the latter is able to produce admissible evidence of a judicial determination of guilt. . . . Our inquiry, though, cannot terminate at this point—in view of the style of the questions used . . . the query in reality amounted to an allegation." (At p. 681, p. 305.) "The questions were . . . objectionable from this standpoint. . . . In light of the authority vested in a trial judge, or a law officer, to protect a witness from abuse, the law officer here was, in our opinion, fully justified in requiring, as a prelude to admitting the question . . . in an accusatory form, that the cross-examiner have available admissible evidence of a prior conviction, for introduction in case of a denial. . . . In short, we have no doubt that the law officer could appropriately have rejected the two questions objected to by trial counsel in the form in which they were offered." (At p. 682, p. 306.)

(*d*) *United States v. Britt*, 10 USCMA 557, 560, 28 CMR 123, 126 (1959). On cross-examination of the accused, charged with receiving stolen automobile tires, trial counsel asked 30 questions, out of a total of 57, which were designed to impeach by showing acts of misconduct. The questions were all specific in nature, *e.g.*, whether he had stolen wheels from a certain car on a certain date, or stolen a spotlight from a fire engine or fender skirts from a certain car, and all involved "stripping" cars. The absence of any indication of any reasonable basis for the questions shows "that they were at best no more than allegations of wrongdoing" and improper. " . . . impeachment must be predicated upon the possession of facts 'which support a genuine conviction' that the witness committed an act involving moral turpitude or affecting his credibility."

7. Cross-examination of the accused. *a. General.* It is essential to an understanding of the principles and problems involved in the cross-examination of an accused to recognize the existence and interplay of two distinct factors in this area, *viz.* the accused's right

against compulsory self-incrimination and the permissible scope of cross-examination of an accused.

b. Self-incrimination. Par. 149*b*(1), MCM, provides that when an accused voluntarily testifies about an offense for which he is being tried, "he thereby, with respect to cross-examination concerning that offense, waives the privilege against self-incrimination, and any matter relevant to the issue of his guilt or innocence of such offense is properly the subject of cross-examination." Although the civilian authorities are in agreement that the act of the accused in taking the stand as a witness is a complete waiver of the privilege as to all matters relevant to guilt or innocence, they are not in similar accord as to whether the waiver also extends to matters merely affecting the credibility of the accused as a witness such as prior acts of misconduct having no independent relevance to the merits of the case. The prevailing view is that it does not and the failure of the Manual provision to make specific mention of this area together with its explicit statement that the waiver extends to "any matter relevant to the issue of his guilt or innocence" indicates that this prevailing view is applicable in courts-martial although the matter has not as yet been litigated in the appellate courts. This restrictive view appears more consonant with justice and fair play than the broader rule. It is certainly not unjust to require an accused who wishes to himself take the stand and tell his side of the story to submit himself to cross-examination on anything relevant to the offense at issue. To hold otherwise would clearly be unfair to the prosecution. However, it would be quite unfair to tell an accused that he could testify on his own behalf only at the price of being forced to make damaging admissions about other offenses, not relevant to the one at issue, which admissions could be used against him in another proceeding. Such a rule would in many instances make it impossible, as a practical matter, for the accused to testify. It must be noted, however, that the right of the accused-witness to invoke his privilege as to matters merely affecting credibility would not extend to prior convictions, for the reason that the privilege cannot be claimed as to offenses for which trial is barred. Furthermore, the non-waiver of the privilege with respect to matters merely affecting credibility does not mean that the accused may not be questioned on such matters. Having voluntarily taken the stand, he is in the same position as any other witness and must claim his privilege as to each question to which he contends it applies. However, his original privilege as an accused otherwise remains in full force and effect as to matters not within the scope of proper cross-examination and it is deemed violative of that privilege to ask him a question which is beyond the bounds of proper cross-examination.

o. Scope of cross-examination.

(1) *General.* It may be said that, with the exception of the special rule pertaining to cross-examination on credibility, the accused's waiver of his privilege against self-incrimination, inherent in his taking the stand as a witness, is coterminous with the permissible scope of his cross-examination. The scope of cross-examination of an accused is somewhat greater than that of the ordinary witness. The cross-examination of the ordinary witness is restricted to those matters as to which he has testified on his direct examination. No obstacle to the ascertainment of the truth results from this restriction for the reason that the adversary may always call the witness as his own and thus inquire into any relevant matters whatsoever. In the case of the accused, the situation is quite different. He, of course, may not be recalled as a prosecution witness and to limit his cross-examination to the matters covered on his direct would permit him, by carefully restricting his direct testimony, to testify on one narrow issue relevant to guilt or innocence and avoid cross-examination on any other matters, no matter how crucial. Therefore, an accused who testifies on any matter relevant to his guilt or innocence of an offense may be cross-examined on all other matters relevant to the same issues. The special problems created by the accused exercising his right to testify on interlocutory matters or on the question of his guilt or innocence of only one of several offenses will be discussed below.

Illustrative cases.

(*a*) *United States v. Kelly*, 7 USCMA 218, 220, 22 CMR 8, 10 (1956). Where an accused testifying in explanation of an apparent larceny mentions certain matters, the fact that cross-examination on such matters brings out details of a separate offense does not render the cross-examination improper. " . . . it might be well to distinguish between cross-examination which violates the privilege against self-incrimination and cross-examination which exceeds the scope of direct examination. According to Wigmore, the two types of cross-examination are separate and distinct, although they do merge in some instances. The latter limitation was originally prescribed to facilitate the order of presenting evidence because in most jurisdictions one is not permitted to put in his case by cross-examination of an opponent's witnesses. ' . . . in the usual phrase, the *cross-examination must be confined* in its material, to the *subject of the direct examination.*' This rule, in its effect upon

the examination of the accused is palpably unfair to the prosecution; for, since the prosecution would presumably have neither the right nor the desire to recall the accused as its own witness, that which was intended merely as a prohibition against obtaining certain facts on his cross-examination becomes in effect a prohibition against obtaining them from him at all . . . '(Wigmore, Evidence, 3d ed, § 2278) . . . the cross-examination of an accused which requires him to limit, explain or modify his direct testimony is proper. . . . Counsel for the accused undoubtedly realized that when his client took the stand, he could not help trespassing in this area. However, this is the risk which the accused knowingly incurred when he took the stand. For us to hold the prosecution could not probe into this area of the accused's behavior would mean a practical abolition of the Government's right of cross-examination with respect to the larceny charged."

(*b*) *United States v. Wannenwetsch*, 12 USCMA 64, 67, 30 CMR 64, 67 (1960). Defense evidence bearing on the accused's mental condition at the time of the offenses charged included, *inter alia*, two apparent suicide notes written by the accused. A certain defense witness proved unable to authenticate one of these notes, whereupon defense counsel called the accused as a witness "for the limited purpose of testifying as to the authenticity" of the letter. The accused then identified the letter as one he had written and placed in his locker on the night preceding his attempted suicide. Over the objection of defense counsel, the trial counsel then cross-examined the accused concerning the details of the offenses charged. This cross-examination was proper. "It is true the accused's testimony dealt largely with qualifying a document for admission into evidence but the result was to make an out-of-court statement of the accused direct evidence of his mental condition at the time he offended. . . . Once the accused sought to bolster his defense from the witness stand he became a witness for the purpose of establishing his lack of criminal intent. . . . Here, the accused placed his mental responsibility in issue and thus trial counsel was within his rights to develop testimony which rebutted, was inconsistent with, or raised doubts about the testimony offered by the accused. The cross-examination went directly into that area as trial counsel asked specific questions as to the accused's activity prior to, during, and after the commission of the offenses." This is not like the situation wherein

an accused testifies that his confession was coerced in support of a motion to exclude it. "Here the accused was not seeking to keep adverse testimony out of the record, he was seeking to bring before the court-martial testimony which would and did rebut the prosecution's evidence on intent. In the former instance, the testimony of an accused does not reach the merits but in the case at bar the contrary is true. Here the accused voluntarily and definitely introduced evidence which would have an impact on his guilt or innocence. It was that evidence which the trial counsel rightly sought to weaken."

(*o*) NCM 5502427, *Worthen*, 19 CMR 556, 558 (1955). Testimony by the accused as to his military record, offered by the defense prior to findings "not as to the merits of the case" would open the door to full cross-examination on the offense of desertion charged. ". . . once the accused testified to his military record such testimony would tend to rebut the issue of intent and would be relevant to his guilt or innocence of the offense of desertion."

(*d*) ACM 8303, *Bryant*, 15 CMR 601, 607 (1954), *pet. denied*, 15 CMR 431 (1954). Where the defense counsel puts the accused on the stand and conducts no direct examination whatsoever stating "I don't have any questions of the accused. I would just like to allow the court to ask any questions they would like to have verified," the accused is subject to complete cross-examination by trial counsel and the court members as to all matters relevant to his guilt or innocence. "Research fails to reveal previous judicial opinion or legal treatise on the identical situation of the instant case. However, we note a substantial body of authority treating of the proposition that an accused's waiver of his right against testimonial self-incrimination with respect to his innocence or guilt of an offense is not partial but is without reservation in a legal system such as that of courts-martial and Federal courts, wherein the rule prevails that an accused who takes the stand on the merits of an offense becomes subject to cross-examination on the general issue of his innocence or guilt of that offense . . . . we construe under the circumstances of the instant case his voluntary and intelligent election to take the stand and offering himself for examination on the merits of the offenses to be equivalent to having testified on direct examination upon the general issues of his innocence or guilt. Any other view would be an unjustified adherence to form over substance."

(2) *Multiple offenses.* "When an accused is on trial for a number of offenses and on direct examination has testified only about one or some of them, he may not be cross-examined with respect to the offense or offenses about which he has not testified." (Par. 149*b*(1), MCM). This right of the accused to limit his cross-examination to less than all of the offenses with which he is charged ordinarily poses no substantial problem in the situation where such offenses are so factually unrelated that his testimony on one offense cannot be relevant to another. However, it is possible for certain testimony of the accused, such as testimony as to his own good character, to be relevant to more than one offense. In such a siutation it would seem that he has testified as to *all* offenses to which his character testimony is relevant and may be cross-examined accordingly.

Where the offenses are factually connected, close scrutiny of the direct testimony is required in order to determine whether he has, in fact, testified about more than one offense. In this connection it must be noted that although the accused's professed intention to testify only as to a certain offense must be considered as bearing on this determination, it is not conclusive. The test would appear to be that if, on direct examination, he has testified to a fact which, if believed by the court, would tend to show his innocence of more than one offense, he has, in fact, testified to the additional offense and, in the interests of justice, should be subject to full cross-examination thereon. However, it sometimes happens that in testifying as to one offense the accused will touch upon a fact which although relevant to another offense, in no manner tends to show his innocence of it. In such a situation, the door is not open to cross-examination as to the other offense merely because of such testimony.

The right of the accused to testify as to less than all of several offenses charged can in some situations be exercised so as to abridge the right of the trial counsel to cross-examine him fully as to an offense concerning which he does testify. Let us suppose that the accused is charged with offenses I and II and elects to testify only as to offense I. Fact X is relevant to offense I and ordinarily would be open to cross-examination whether or not he had himself touched upon it in his direct testimony. However, X also tends to establish guilt of offense II. If accused does not mention X in his direct testimony which is otherwise factually limited to offense I, he may not be cross-examined as to X. To hold otherwise, would effectively deny him his right to testify as

to only the one offense by requiring him to supply evidence to the prosecution as to the other offense *despite the fact that he had not touched upon it in any manner in his direct examination.*

Illustrative cases.

(*a*) *United States v. Kelly*, 7 USCMA 218, 222, 22 CMR 8, 12 (1956). The accused was apprehended by the military police on Fort Knox for driving a car without post tags and thereafter escaped from the military police station. At his trial on charges of larceny of the car and escape from custody he elected to testify only as to the larceny charge. He testified that he took the car in Louisville, Kentucky in order to return to his duty station at Fort Knox. In the course of his testimony he stated that at a given date and time he started back to Louisville for the purpose of attempting to locate the owner of the car. The date and time given by the accused coincided with the date and time of the alleged escape from custody. Over defense objection, trial counsel questioned the accused with reference to the escape and established that the accused ran out of the police station when he heard the desk sergeant make reference to a "stolen vehicle." This cross-examination was proper since the accused's direct testimony opened the door to the issue of when, how and why he left the police station. ". . . [The Manual] restricts the cross-examination of an accused to the offense or offenses about which he has testified. Differently stated, the accused cannot be cross-examined 'with respect to the offense or offenses about which he has not testified.' An examination of this language compels the conclusion that a condition precedent to the privilege's protection is that the accused succeed in restricting his testimony; otherwise the privilege is waived. . . . Of course, the accused does not have to take the stand and if he does not, no adverse inferences will be drawn; however, if he elects to take the stand, he must take the bitter with the sweet. If he opens up a relevant subject matter, he may be cross-examined thereon. . . . 'The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying . . . are of course vastly different. . . . His voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts*, because of the necessary connection between all.' . . . In view of the accused's testimony on direct, it would appear that the trial counsel's questions were relevant as to the

former's intent to steal. For us to hold that trial counsel was prohibited from exploring this area would, for all intents and purposes, negate or make futile his cross-examination of the accused."

(*b*) NCM 5502427, *Worthen*, 19 CMR 556, 557 (1955). In a case where the accused was charged with desertion, AWOL and failure to obey an order, the defense counsel stated: "Now the evidence that the defense will offer is of a peculiar nature. It's quite acceptable. And it is through this evidence that we will rebut any evidence whatever which the prosecution may have introduced as to an intent to desert. Now the accused has been informed of his rights to remain silent, or to take the stand, and he elects to take the stand and offer sworn testimony as to . . . not as to the merits of the case, but as to his military record." Trial counsel maintained and the law officer ruled that if the accused "took the stand and testified as to his character, he would be subject to cross-examination on the merits of all the offenses for which he was standing trial or on any specific offense to which his testimony related." The accused did not take the stand. The ruling of the law officer was proper.

(*c*) *United States v. Johnson*, 11 USCMA 113, 115, 28 CMR 337, 339 (1960). The accused, charged with desertion and failure to obey a "straggler order" to report to his unit at its new station, pleaded guilty to AWOL under the desertion charge and not guilty otherwise. He elected to testify only as to the disobedience offense and on his direct testimony related how he returned to station and discovered that his unit had moved, was given the straggler order, remained overnight and "went over the hill again the next day." (The day on which the AWOL to which he had pleaded guilty commenced). Without objection by defense counsel, trial counsel cross-examined him as to his reasons for absenting himself and remaining away which were relevant to the offense of desertion. ". . . [T]he record makes it crystal clear that accused's statement [quoted, supra] was intended only as a part of his testimony relating to the charge of failure to obey the straggler order. This was not the situation presented in *United States v. Kelly* . . . [par. *a*, *supra*] wherein we unanimously approved the cross-examination of an accused who had expressly limited his testimony to one offense but deliberately chose to recount some of the circumstances surrounding another offense in an effort to explain

away the first delict. Here, the accused's comment was no more than an incidental and natural reference to his second absence in connection with the offense concerning which he had elected to testify. We hardly believe it was sufficient to confer upon the Government the right to initiate an inquiry . . . into the other offense." The error was not waived by the act of defense counsel in exploring the same matters on redirect. He merely "faced the practical realities of the situation and sought at the trial to salvage something from the wreckage."

(*d*) *United States v. Marymont*, 11 USCMA 745, 751, 29 CMR, 561, 567 (1960). The accused, charged with premeditated murder of his wife and adultery, elected to testify only as to the murder and his direct testimony touched solely upon whether he had ever possessed arsenic or administered it to his wife and the fact that on the day after the death he requested an extension of his overseas tour. Upon cross-examination, over the objection that it exceeded the permissible scope of cross-examination, he was required to admit to having had sexual relations with the individual and on the date named in the adultery charge, as to which he had not testified on direct examination. Although this cross-examination would have been quite proper if the adultery had not been charged, as tending to show a possible motive for the killing, ". . . the relationship which the Government claims to have constituted accused's motive was in fact made the basis of a separate count. While the joinder of criminal charges is permissible . . . the process may also have the effect of limiting the rights which the Government might otherwise possess. [The Government's] . . . contention means that accused's right to remain silent with respect to one or more of the offenses charged vanishes upon the showing of an incidental connection between it and the crime concerning which he desires to speak . . . . We do not believe that the Government's privilege extends so far. Where it has chosen to make the motive for the murder the subject of a separate count, it must be held to have foregone its right to cross-examination with respect to that count unless, of course, the accused voluntarily extends his testimony to its allegations." The law officer's instructions not to consider this evidence as to the adultery offense were ineffective to prevent prejudice as to it and the conviction of adultery must be set aside. However, the error does not affect the murder conviction

since the cross-examination would have been proper had that offense alone been charged.

(3) *Limited purpose testimony.* "If the accused testifies on direct examination only as to matters not bearing upon the issue of his guilt or innocence of any offense for which he is being tried, he may not be cross-examined on the issue of his guilt or innocence. (Par. 149*b*(1), MCM). This provision is a necessary corollary of the other provisions of military law recognizing the right of the accused to testify on certain matters, collateral to the merits of the case, such as preliminary motions and the admissibility of evidence. The right of an accused to contest the admissibility of an allegedly coerced confession would be of slight avail if it could be exercised only at the price of being required on cross-examination to state whether or not the confession were true. Therefore, cross-examination of an accused who has testified for a limited purpose, not bearing on guilt or innocence, must be limited by the scope of his direct.

There are two situations in which cross-examination on matters relevant to guilt or innocence is proper, even in the face of an avowed intention to testify only on a collateral matter. If the accused during his self-styled "limited testimony" expressly affirms his innocence or denies his guilt of an offense at issue, the door is, of course, open to complete cross-examination on guilt or innocence. It would be unconscionable to permit him to proclaim his innocence to the court under oath and yet hold him immune from questioning thereon. Furthermore, if legitimate exploration on cross-examination of the matters as to which he has testified travels into areas which are *also* material to the issue of guilt or innocence, he cannot complain. To hold otherwise would be to deny effective cross-examination to the prosecution. This is not to say, however, that this authorized entry of the cross-examiner into fields which are relevant to *both* the limited purpose for which the accused testified and the merits of an offense permits a further venture into any and all matters bearing on the merits. The permissible scope of cross-examination must be maintained within the narrow bounds of the factual issues raised on direct and to matters affecting the credibility of the witness.

The foregoing principles have no application where the accused's testimony is given at a hearing held out of the presence of the members of the court. In such a situation the accused's limited purpose testimony, even if relevant to

the question of guilt or innocence, is unknown to the court and there is no need to permit cross-examination on issues not germane to the purpose of the closed hearing.

Illustrative cases.

(*a*) *United States v. Webb*, 1 USCMA 219, 223, 2 CMR 125, 129 (1952). When an accused testifies that certain improper inducements motivated his confession and the prosecution contends that the inducements were made *after* he confessed, he may be asked on cross-examination whether and when he first admitted his guilt of the offense charged. "When an accused takes the stand . . . he should be prepared for elaborate and searching cross-examination—not, of course, exceeding the scope of the direct. The very purpose of the legal device of cross-examination is to develop the truth—to probe out inconsistencies, contradictions, and falsehood. . . . As we read the record, the cross-examination in this case did not exceed the scope of the preceding direct. At no time did the prosecution attempt to inquire whether the accused did in fact commit the offense charged. Every aspect of the cross-examination interrogation was directed to whether and when he admitted guilt to Petersavage. These are vastly different questions. The first would have been improper. The second was not only proper but essential to effective cross-examination testimony in the setting of this case."

(*b*) *United States v. Hatchett*, 2 USCMA 482, 486, 9 CMR 112, 116 (1953). The accused, charged with misappropriation of a privately owned car, attempted to attack the voluntariness of his confession by testifying that he was promised that he could return to his unit if he talked and that he was so sleepy that he didn't know what he was doing. The law officer cross-examined him and elicited testimony that the accused was arrested at a given hour at the installation gate together with four other soldiers who were in the car with him and that he was the first one to be interrogated about thirty minutes later. Although this testimony placed the accused in the wrongfully taken car, it was proper cross-examination as the short interval of time between the apprehension and the interrogation tended to refute the accused's claim of drowsiness and the fact that he, after being interrogated, waited for his comrades tended to refute his claim that he talked in order to return to the barracks. "It is difficult to mark with precision the area of legitimate cross-examination when a witness is testi-

fying generally, but it is more difficult when called for a limited purpose. Sometimes questions which have a legitimate tendency to test credibility bring out facts and circumstances which may raise questions concerning incrimination. Even though an accused testified for a limited purpose this does not preclude the cross-examiner from probing into fields which may weaken or destroy his evidence. It may be that in certain instances the answers might indirectly tend to connect the accused with the crime or to identify him as being a possible perpetrator of an offense, but if they are relevant to test his credibility, the questions are proper and must be answered. An accused voluntarily elects to take the witness stand and in so doing he is subject to being cross-examined on those matters which he testified about on direct examination and to other matters which affect his credibility as a witness."

(*c*) *United States v. Jackson*, 3 USCMA 646, 650, 14 CMR 64, 68 (1954). The accused, charged with larceny of a pair of shoes, attacked the voluntariness of his confession by testifying, *inter alia*, that shortly after his apprehension the shoes which he had been wearing were taken from him and he was required to remain barefooted throughout the night. A member of the court pointed to Prosecution Exhibit 1, a pair of shoes previously identified as belonging to the victim of the larceny, and asked the accused "Are the shoes they took away from you those?" and the accused answered "Yes." The question was proper. If the shoes taken from the accused were the stolen ones ". . . it would be reasonable to conclude that accused's shoes were not taken for the purpose of harassing him but for the purpose of preserving them as evidence or returning them to the owner. . . . The court-martial member who asked the question inveighed against could have been seeking to establish that basic fact. While the answer given to the question asked might tend to strengthen the prosecution case on the merits, it also tended to weaken the evidence given by the accused on the collateral issue. We, therefore, conclude that the question asked by the court-martial member was not improper."

(*d*) *United States v. Haygood*, 12 USCMA 481, 483, 31 CMR 67, 69 (1961). Testimony by the accused that he confessed because his interrogator told him he would not be released "until he told the truth" does not open the door to cross-examination on the truth or falsity of the confession. "We believe that the Government errs when it gleans from the

accused's direct examination a protestation of innocence. Rather, the thrust of his testimony was that he did not admit guilt until, in a fatigued state, his will was overborne by the refusal of the interrogating agent to terminate the interview unless he told the 'truth.' The Government misapprehends the import of a contention that coercive measures were employed to obtain a statement when it believes that it implies that the resultant confession was false. In such a situation, the statement may either be true or false. What is material are the measures which were used to obtain it. . . . In short, testimony that an accused denied guilt until the tactics of an investigator caused him to admit it does not in anywise go beyond an admission that he made a statement and the motivation for that action. It neither admits or denies his guilt of the offense charged."

(*e*) CM 355969, *Fumai*, 7 CMR 151, 154 (1952). Where the accused in testifying on the voluntariness of the confession described his interrogation and made the statement "He [the investigator] kept pacing the floor and went out and then came back in and says are you going to make a statement or aren't you, *I don't know nothing about it*," the emphasized remark will be interpreted as referring to what the accused told the investigator and not as amounting to a disclaimer of knowledge about the crime involved and did not justify an inquiry of the accused by a court member as to whether the confession was true. ". . . where there is so much doubt as to whether this testimony 'opened the door' the question must be resolved in favor of the accused. When, as here, there is substantial possibility of a violation of the privilege of self-incrimination, we see no reason for speculation." Furthermore, testimony by the accused, on the same issue, "He told me about some WACS *but I don't know anything about any WACS or what happened at a certain place*," will also be treated, not as a testimonial disclaimer, of knowledge, but as a statement of what the accused told the investigator.

(4) *Effect of violations.* Improper cross-examination of the accused beyond the permissible scope of cross-examination is treated as a violation of his privilege against self-incrimination. The appellate review of such violations is treated in chapter XIV, *supra.*

8. Hypothetical problems. *a.* Trial counsel has in his possession a letter from a district attorney informing him that a certain defense witness committed armed robbery at a certain time and place but that

charges were dropped because the only evidence thereof was obtained through an illegal search and seizure. At the trial, trial counsel asks the witness, on cross-examination, if he has ever committed a felony and the witness replies "No." What, if anything, can trial counsel do to impeach the credibility of the witness? Assume that defense counsel makes appropriate objections.

b. The accused is charged with larceny of a car and making a false claim against the government. The defense introduces the testimony of several witnesses as to the accused's character for honesty. The accused elects to testify only as to the larceny and denies guilt thereof. He also testifies that "all my friends know I'm honest and would never steal anything." Trial counsel requests a ruling from the law officer that the accused may be cross-examined on both offenses. How should the law officer rule?

c. The accused is charged with committing a burglary in a town 50 miles from his home station on a certain Saturday night. He defends on the theory of alibi and, in support thereof, testifies only that he was on the installation for the entire week end, recounting in detail his activities during that period. Is he subject to cross-examination on the details of the alleged crime? Assuming that he was charged with the same burglary and also with an unrelated robbery occurring in the town adjoining the installation a few hours later on the same night and he elected to testify only as to the burglary and testified to the same alibi. What would be the permissible extent of cross-examination?

d. The accused is charged with wrongful appropriation of a government truck and manslaughter by running down a pedestrian with the same truck on the same day. He testifies only as to the manslaughter charge and admits to driving the vehicle at the time of the fatal accident but claims that the brakes on the truck failed and that he was not driving at an excessive speed. May he be cross-examined on the wrongful appropriation?

e. The accused testifies on the voluntariness of his alleged confession and denies making it. On cross-examination trial counsel reminds him of the testimony of the investigator to the contrary and asks him if the investigator lied on the witness stand. The accused in an apparent emotional outburst retorts "Of course he did. How could I confess to something I didn't do?" The trial counsel immediately turns to the law officer and says "I believe the door is open to cross-examination on the merits." Defense counsel objects on the ground that the trial counsel deliberately goaded the accused into going beyond the issues as to which he had testified on direct. How should the law officer rule?

CHAPTER XXXVIII

STIPULATIONS

Reference. Par. 154*b*, MCM.

1. General. A stipulation is a concession by both parties to the existence or non-existence of a fact, to the contents of a document or to the testimony of a witness. A stipulation may be either oral or written and ordinarily is employed to expedite the trial when there is mutual agreement as to the matters stipulated and both parties are willing to dispense with actual proof of such matters.

2. Stipulated facts. A stipulation as to a fact authorizes the court to find the existence of such a fact and base their findings of guilt or innocence thereon without any further proof of such fact. However, the court is not bound to accept the fact as being true and may find to the contrary if they are so persuaded by other evidence or find it to be inherently improbable.

Illustrative case.

CM 399955, *Campbell*, 27 CMR 519, 521 (1958). A stipulation, in an embezzlement case, that the accused took certain money for the purpose of reimbursing himself for personal expenses incurred on behalf of the fund which he was charged with victimizing, was not binding on the court and it could find the facts to be otherwise. "It is well settled that [only] the parties to a stipulation are bound by the provisions of the stipulation. To hold that the court also is bound thereby would be to deprive the court of its primary function to weigh the evidence presented and to determine the facts."

3. Stipulated testimony. Stipulated testimony amounts to nothing more than a mutual agreement by both parties that if a certain person were present in court as a witness he would testify under oath in the manner specified. Such a stipulation does not concede the truth of the indicated testimony nor does it add anything unique to its weight. The testimony is subject to contradiction and impeachment in like manner as though the named witness had actually testified and is otherwise subject to all rules of evidence.

Illustrative case.

GCM NCM 60–00961, *Williams*, 30 CMR 650, 659 (1960). Those portions of stipulated testimony which were hearsay in nature may not be considered as competent evidence of the matters stated therein. "The stipulations in the case at bar purported to be stipulations of

testimony. What an absent witness may testify to were he present and on the stand is receivable only if the testimony is relevant and competent. No live witness would be heard to testify in a criminal proceeding to facts which the hearsay rule would exclude unless the testimony falls within some clearly defined exception thereto. *A fortiori*, the rule applies with equal force to an absent witness."

4. Limitations upon use of stipulations. *a. General.* A stipulation as to facts which amounts to a complete concession by the defense of the prosecution's case would be inconsistent with a plea of not guilty and should not be permitted while such a plea stands. However, this principle does not prohibit the acceptance of a stipulation as to easily proved, non-debatable, facts even though such facts may constitute the major part of the prosecution's case. A stipulation as to a fact which amounts to a complete defense to an offense charged is inconsistent with the referral of case for trial and should not be accepted. If the Government is willing to concede the existence of a complete and valid defense, the appropriate procedure would be to dismiss or withdraw the charge to which such defense pertains. The foregoing limitations do not apply to stipulated testimony for the reason that such a stipulation does not involve the inconsistencies mentioned above. Conceding that a witness would testify that fact F occurred is by no means the equivalent of conceding the existence of F.

(1) *United States v. Colbert*, 2 USCMA 3, 8, 6 CMR 3, 8 (1952). Where as to one offense the testimony of a key prosecution witness was stipulated and other offenses were proved almost entirely by stipulations as to testimony, the act of the accused in so stipulating and at the same time pleading not guilty was not so inconsistent as to indicate an ignorance on his part of the meaning and effect of the stipulation. "True it is that stipulations should be scrutinized with extreme caution by defense counsel. In this case it appears—at least on the face of things—that there was a rather extensive resort to their use. However, we do not find in the agreement to the stipulations used in this case, sufficient evidence to warrant a conclusion that defense counsel 'stipulated away' petitioner's case. With a single minor exception, they related to testimony not facts. . . . The one stipulation of fact, namely, that as to the nonexistence of a bank account in petitioner's name, we regard of little consequence. The existence or nonexistence of such a fact—because it can be established both definitely and easily—is precisely the sort of matter in which the use of stipulations is contemplated. Were the stipulations concerned with matters of debatable fact, the case might take on a different complexion. We fully recognize, too, that, as a practical matter, stipulations may be defensive tactical instruments of no little

importance. What counsel for petitioner had in mind when he entered into the stipulation in question, we cannot, of course, know. However, he may well have thought, and not unreasonably, that he could thereby avoid the danger of an adverse psychological effect produced by a parade of prosecution witnesses."

(2) *United States v. Swigert*, 8 USCMA 468, 470, 24 CMR 278, 280 (1957). In a larceny case the prosecution case consisted entirely of a stipulation as to the testimony of the victim and a stipulation that an investigator would testify that after being fully warned of his rights the accused made a complete oral confession to the larceny. "We find nothing in the record which suggests remotely that accused was ill-advised. The prosecution had in its hands a deposition wherein the victim testified to the theft of $60. Also, there was a pretrial confession signed by the accused which, while admitting the crime charged, presented other admissions which would have been extremely detrimental to the accused. By stipulating as he did, counsel kept much damaging evidence hidden from the eyes of the court-martial. One does not require the wisdom of Solomon to conclude that by this stratagem counsel placed the accused in the most favorable light which the evidence would permit."

b. Joint trials. Since a stipulation is binding only upon the parties to it, one accused is not bound by the stipulation of another. Therefore, the government may not, at a joint trial, offer a stipulation unless it is joined in by all accused to whose alleged offenses it is relevant. However, one of the accused may offer his own stipulation in his own defense even though it is incriminating to another accused. The court must then be instructed that the stipuation may be considered only as to the accused who made it. However, if its incriminating effect on another accused is so great that the limiting instructions are inffective to prevent misuse by the court, reversal as to such other accused may be required.

Illustrative case.

United States v. Thompson, 11 USCMA 252, 256, 29 CMR 68, 72 (1960). A and B were tried jointly on charges of larceny of a quantity of copper wire from a government warehouse. Trial counsel and B stipulated that a certain witness present at the time of the theft would testify that shortly after the crime he made positive identification of A as a participant but was doubtful as to B. This stipulation was offered in evidence by B and was accepted over A's objection. "Certainly one accused may not, without another's express consent, stipulate facts incriminating the latter." However, this evidence

was crucial to B's defense as it was necessary to show the positiveness of the identification of A in order to draw the favorable inference from the uncertainty with which B was identified. In a joint trial each accused is entitled to his own defense. Herein, the incrimination of A by B's evidence is an unavoidable consequence of this right. If the impact upon A was so great as not to be curable by limiting instructions, "severance may be required." In this case, the impact upon A was negligible in view of the other evidence of A having been at the scene of the crime and the limiting instructions will be deemed effective.

5. Procedure. *a. Form and content.* There is no prescribed form for making a stipulation. It is only necessary that it clearly appear that the parties intend to mutually agree as to the matters stipulated. The stipulation will be so construed as to effectuate the intent of the parties.

Illustrative cases.

(1) *United States v. Harris*, 1 USCMA 420, 4 CMR 22 (1952). In a desertion case, where trial counsel announces his intention to introduce certain service record entries and defense counsel states "We admit everything. The only thing we will contest is the charge of desertion and admit everything else. . . . I won't object to anything in the service record if you want to admit it, that's all right." the conduct of the defense counsel constituted a stipulation as to the truth of the matters contained in the proffered records.

(2) *United States v. Cambridge*, 3 USCMA 377, 384, 12 CMR 133, 140 (1953). Where, at a rehearing, the parties stipulate as to the nonavailability of certain witnesses and that if they were present they would testify as at the former trial and thereafter the former testimony is read into the record by both parties without objection by either, it is apparent that the parties also intended to stipulate that the purported testimony which was read was in fact the former testimony of the absent witnesses. "A stipulation should be so construed as to effectuate the apparent intention of the parties and be in harmony with the requisites of a fair trial upon the merits rather than in a narrow and technical sense which would defeat the purpose of its execution. . . . In case of doubt, an appellate court should adopt a construction that accords with that at the trial level. . . . The parties unquestionably intended, under the stipulation, to put into evidence the questions and answers read by both counsel, which purported to be the former testimony of the various witnesses."

(3) *United States v. Nickaboine*, 3 USCMA 152, 156, 11 CMR 152, 156 (1953). Where, in a desertion case, the parties stipulated that a certain civilian policeman would *testify* that he "apprehended" the accused, the term "apprehended" is inherently ambiguous and will not support a finding that the desertion was terminated by apprehension since in the latter context the word is a term of art having a precise legal meaning. "So far as the terms of the stipulated testimony are concerned, there is distinct and considerable ambiguity. . . . As we view it, the evidence pointing to and away from apprehension is in virtual equipoise. If this is true, the stipulation can only provide a basis for 'suspicion, conjecture, and speculation,' an insufficient basis for fact finding action. . . . Certainly, a reasonable inference of termination by means other than apprehension may be drawn from the evidence. In such a case this Court should reject the conclusion of apprehension."

b. Assent of the accused. The law officer should not accept a stipulation unless he is satisfied that the accused understands its nature and effect and assents thereto. However, it is not necessary that the accused personally indicate his assent at the trial and such assent ordinarily may be inferred from his remaining silent when it is offered. It is good practice, though, to advise the accused of the legal consequences of the stipulation and thereby afford him an opportunity to object thereto if he so desires. However, in so doing extreme caution must be exercised to avoid asking the accused if the stipulation is true as such inquiry might violate the accused's privilege against self-incrimination.

Illustrative cases.

(1) *United States v. Collier*, 1 USCMA 575, 577, 5 CMR 3, 5 (1952). In questioning the accused to ascertain his understanding of the effect of a proffered stipulation of testimony bearing on the accused's apprehension, the law officer asked him "and you agree that everything in the stipulation is true?" and the accused replied "Yes, sir." Under all the circumstances, including the context in which the question was asked, the fact that the stipulation contains some matter favorable to the defense, and the absence of objection to the question, there was no compulsory self-incrimination. "A reading of the record suggests that the law officer was not seeking to compel the accused to testify against himself. Rather, he was interrogating him to determine his understanding of the nature and extent of the stipulation as required by the foregoing section [Par. 154*e*. MCM]. The

law officer, undoubtedly, used an ill-chosen phrase when he asked if the contents of the stipulation were true, but the words used must be interpreted in the light of existing conditions. The background before, and the facts and circumstances attending the incident must be considered in determining whether the answers were exacted by compulsion or coercion. . . . [under all the circumstances] whatever error found its way into the record was not so flagrant as to deny to the accused the right granted to him by the Code."

(2) *United States v. Cambridge*, 3 USCMA 377, 382, 12 CMR 133, 138 (1953). A stipulation is not inadmissible merely because the *personal* assent thereto by the accused does not appear affirmatively in the record. "Stipulations of fact or testimony intended to avoid delay, trouble, or expense in the trial are well-recognized and accepted substitutes for other competent sources of proof or the direct testimony of witnesses. Ordinarily, statements made by defense counsel will bind the accused as effectively as though the accused himself had made them. This is particularly true if the statement is made by counsel in the progress of the trial and acquiesced in by the accused through his silence. . . . Consequently, in the absence of any special provisions applicable to trial by court-martial, we hold, without hesitation, that an accused is bound by stipulations entered into by his counsel even though he did not personally and expressly join in them. . . . However, Appendix 8*a*, Manual, . . . provides that prior to the acceptance of a stipulation the law officer 'should determine that the accused joins in it.' . . . Considering the provision itself, we do not regard it as a mandatory direction that the accused be made to stand up in open court and give his express, personal assent before a stipulation can be accepted for consideration by the court, and to have that fact shown in the record of trial. Its plain intendment is one of caution. The law officer . . . is asked to assure himself that the accused joined in the stipulation. The methods of ascertaining the assent of the accused are not described. Surely, if the record shows that prior to the acceptance of a stipulation the law officer, in open court, requested the defense counsel to confer with the accused concerning a stipulation offered by the prosecution, and after such conference it was announced by defense counsel that the stipulation was accepted [sic], not even a person with the most meticulous regard for technical niceties would deny that there was a reasonable basis for concluding that the law officer had determined that the accused joined in the stipulation. Yet, in that instance the personal assent

of the accused would not be reflected in the record. On the other hand, we can readily imagine situations in which it would be appropriate to inquire of the accused personally whether he joined in the stipulation and have it appear of record that he did. Thus, if a written stipulation entered into between trial and defense counsel before trial, is offered, and the signature of the accused does not appear therein, in the interest of certainty of consent and to avoid any question of inadvertence or mistake, it would be proper to ask the accused if he joined in the stipulation. In other words, the acceptance of a stipulation is not dependent upon the express, personal assent of the accused, but upon the exercise of sound discretion by the law officer in the acceptance of the stipulation. His determination that the accused joined in the stipulation may be predicated upon a number of factors, rather than by the exclusive process of specifically asking the accused. In fact, it need only rest upon the implied authority of defense counsel to act for the accused in all matters of procedure."

(3) GCM NCM 60–00961, *Williams*, 30 CMR 650, 658 (1960). After the court convened, appointed defense counsel sought and was granted a continuance so that the accused could retain civilian counsel. Civilian counsel was retained and began to prepare for trial but later withdrew because the accused failed to pay the agreed retainer. Meanwhile the accused had absented himself without leave. The court then reconvened and the trial was held with accused absent. The appointed defense counsel represented the accused and entered into stipulations as to the testimony of prosecution witnesses. "Receiving the stipulations without the actual consent of the accused and in the absence of a showing of actual agency between the accused and the *appointed* defense counsel constituted in our view, a grave abuse of discretion. . . . The government's argument that the defense counsel had the authority to enter into these stipulations presupposes that the attorney at trial, who was appointed to protect the rights of the accused, was an agent of the accused for the purpose of making stipulations. . . . We find no evidence to sustain that position."

c. Withdrawal of stipulations. A stipulation may be withdrawn at any time and, if so withdrawn, it ceases to be effective for any purpose. However, the withdrawal of a stipulation would certainly form a reasonable basis for a continuance in order to present evidence to the court of the matters formerly embraced by the stipulation.

d. Rehearings. Whether or not a stipulation entered into at the original trial may be withdrawn at a rehearing has not as yet been decided by the Court of Military Appeals. In *Daniels, infra*, the Court held that a stipulation entered into incident to a plea of guilty which is later held to have been improperly induced may not be used at a rehearing over the objection of the defense. Judge Latimer's opinion, concurred in generally by Judge Ferguson, quotes with approval portions of the Board of Review opinion, including dictum to the effect that stipulations as to *facts* generally are binding at retrials. It is believed that this principle will apply in cases where the original stipulation is not "tainted" by coercion, improper inducement, ignorance, or the like.

As to stipulated *testimony*, whether or not the stipulation may be withdrawn at the rehearing should turn on whether or not the witness concerned is "unavailable" as that term is used with respect to former testimony. (See par. 4, ch. XXIX, supra.) Since the witness presumably would have testified, either by deposition or in person, if the stipulation had not been accepted, it can be said that but for the stipulation there would be available at the rehearing the "former testimony" of the witness. Therefore, the stipulated testimony should be available for use in like manner and under like conditions as former testimony.

Illustrative case.

United States v. Daniels, 11 USCMA 22, 28, 28 CMR 276, 282 (1959). A conviction pursuant to a negotiated plea of guilty was set aside for improper command influence which affected the plea. At the rehearing, after the accused had testified and denied guilt, trial counsel questioned him concerning his prior incriminating admission as found in a stipulation as to facts accepted in evidence at the original trial. These facts had been "agreed upon by the parties solely for the purpose of processing a plea of guilty." The same considerations that preclude the use at a rehearing under a plea of not guilty of evidence of a plea of guilty at a former trial apply to a stipulation which is an integral part of a plea of guilty. The right to withdraw the prior plea would be nullified otherwise. "I quote and adopt the following portion of its [the Board of Review's] opinion: '. . . the prevailing rule is that a previous plea of guilty subsequently withdrawn, is not admissible upon a retrial as an admission. . . . On the other hand, a stipulation or an agreed statement of facts in one trial is generally binding upon a party in a subsequent retrial.' . . . [The Board then holds that in this case the stipulation may not be used]." (Per Latimer, J., Ferguson, J., concurs "unreservedly in his conclusion that stipulations so made may not be used subsequently to destroy

an accused's credibility.") (At p. 25, 279.) (Quinn, C. J., expresses no opinion on this matter.)

e. Forced stipulation. Paragraph 58*f*, MCM, states that an application for a continuance based upon the absence of a witness may be denied if the opposite party is willing to stipulate that the absent witness will testify as stated in the application. Insofar as material defense witnesses are concerned, the implication that the defense counsel can thus be forced to join in a stipulation is improper. (See cases in par. 3, ch. XXVIII, *supra.*)

6. Hypothetical problem. In an embezzlement case, the prosecution offers a stipulation, bearing the purported signatures of defense counsel and the accused, that on a given date the accused was the duly appointed custodian of a certain fund. The law officer asks the accused if he understands the meaning and effect of the stipulation and if that is his signature thereon. The accused replies in the affirmative and the stipulation is accepted by the law officer. Subsequently, an issue arises as to who signed a certain receipt for payment received from the fund for goods furnished. The prosecution then offers the accused's signature on the stipulation as a proved specimen of his handwriting for purposes of comparison with that on the receipt. The defense objects. How should the law officer rule?

CHAPTER XXXIX

TABLE OF CASES

1. USCMA citations are to the official reports of the United States Court of Military Appeals.

2. Board of Review citations are to CMR (Court-Martial Reports), BR (Board of Review Decisions) or BR–JC (Army Board of Review and Judicial Counsel Decisions). The particular service in which the case arose is indicated by the insertion immediately following the name of the accused of one of the following symbols:

CM.....Army
NCM.....Navy
ACM.....Air Force
CGCM.....Coast Guard

3. All references are to pages in the text.

BY ORDER OF THE SECRETARY OF THE ARMY

G. H. DECKER,
General, United States Army,
Chief of Staff.

Official:

J. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

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MDW (25)	PG (1)
Armies (25)	GENDEP (2)
Corps (15)	Sup Sec, GENDEP (2)
Div (5)	Dep (2)
USMA (25)	Arsenals (2)
Svc Colleges (5)	Plants & Works (1)
Br Svc Sch (5) except TJAGSA (6,000)	DB (2)
	FAOUSA (2)
PMS Cr Div Units (1)	Proc Dist (1)
Instl (5)	Engr Comd (2)
Army Hosp (2)	USA Corps (Res) (1)
USAH (2)	

NG: None.

USAR: None.

For explanation of abbreviations used, see AR 320-50.

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