ld have been very wrong if he had directed his chauffeur to put on
l speed and dash by the examining post. The orders
ther directed that the credentials of every enlisted man off the
369th Infantry should be investigated, and the enlisted men in the
cart proclaimed by the color of their skins that they were members of
the 369th, the only colored organization in that vicinity, so far as
appears, and the deceased was doing his duty in holding up the cart
to examine their credentials. The deceased was not technically a
sentry, but by his act the officer must have known that he was analogous to a
sentry. It was, I think, what might be called a guard patrol, or
rather a patrol of which he was a member. It had been sent out by the
officer of the day. It is well known that no part of a guard takes
orders from or is relieved by anyone but the commanding officer, the
officer of the day, and officer or non-commissioned officer of the
guard. It has been testified to by the commanding officer of the
post that these men were not technically a part of the guard. That might
well be true; ~~in the field duty~~. but they had been sent out and given their
instructions in the first place by the officer of the day and may well have assumed that they
were part of the guard and were not obliged to take orders from any one
else. However, the question never got that far, because the accused
never undertook to relieve them, or to give them orders other than to
force his way past them. A sentry, as the court knows, and as is ex-
pressly set out in the manual of interior guard duty, has authority to
fire and to fire to kill, or to make use of any weapon which he has to
prevent the escape of a prisoner, after having once summoned him to
halt with the words, "Halt, or I fire!" or something of that sort. The
Manual for Courts-Martial, on page 249, says as follows: "The right and
duty of a sentinel over a prisoner in his charge in case of attempted
escape is discussed in the Manual of Interior Guard Duty, 1914." That
discussion is that to which I have just referred. Then there is con-
densed in small type a memorandum by the judge advocate, I think of the
Pacific Division or Department, that a sentry is justified in firing

after challenging "Halt, or I fire," in order to prevent the escape of a prisoner in his charge. This was not exactly a case of arrest, but it was a case of halting. There was no challenge by the deceased ib words, but the action of the sergeant in holding up his hand, and the action of the deceased himself in grasping the bridle was a challenge in act though not in words. I have here also a copy of a decision, or rather an abstract of a decision by the judge advocate general of the army, which appeared in the digest of opinions of the judge advocate general of the army, 1912, page 584, which reads as follows: "Respect for the person and the office of a sentinel "is as strictly enjoined by military law as that required to be paid "to an officer. As it is expressed in the Army Regulations 'all "persons of whatever rank in the service are required to observe re-"spect toward sentinels.' Invested, as the private soldier frequent-"ly is while on his post, with a grave responsibility, it is proper "that he should be fully protected in the discharge of his duty. To "permit any one, of whatever rank, to molest or interfere with him "while thus employed, without becoming liable to a severe penalty, "would obviously establish a precedent highly prejudicial to the in-"terests of the service. So where, in time of war, a lieutenant "ordered a soldier of his regiment, who had been placed on duty as a "sentry by superior authority, to feed and take care of his horse, "and, upon the latter respectfully declining to leave his post for "the purpose, assailed him with abusive language -- held that a sen-"tence of dismissal imposed by a court-martial upon such officer, on "his conviction of this offense, was fully justified by the require-"ments of military discipline."

Instead of showing respect to this soldier on this patrol when halted, the accused undertook to force his way past, and it appears to me that the patrol was justified in using whatever force was necessary to halt this cart and to inspect the credentials of the

persons within it. The accused knew that a provost guard was in this town. He was going to town for the very purpose of relieving them and arresting them, and while he may not have possibly known these particular soldiers were that guard, yet he ought to at least have stopped to find out, and the fact that they bore arms might indicate they had some authority. Therefore, the prosecution submits that the position of the deceased was analagous to that of a sentry, that he had never been relieved. The accused himself made no effort to relieve him, and that being so, he had authority to stop this cart; was justified in so doing, that at least in the absense of explanation by the accused, ~~for purposes of his own,~~ the deceased was justified in what he actually did, as testified by the witnesses; that he was merely carrying out his orders and was killed in so doing.

If this contention of the prosecution should not be upheld, if the court should be unable to follow me so far, then consider the situation from the point of view of the accused, giving him every advantage that comes from the errend or mission on which he was sent. He was given orders by his proper commanding officer to subdue the disorder in this town. He was authorized to use all force necessary and proper to carry out these orders. But such a command did not give him authobity to slay without warning, or to take human life except where there was no other practicable means of carrying out his orders. The question, therefore, becomes, was there any other practicable means of carrying out his orders? Did he use unnecessary force? An officer, in subduing riot or disorder amongst his troop, may, if he can do no otherwise, take human life. But if he can restore order without taking human life, he is bound to do so. In the Manual for Courts-Martial, on page 253, under the heading of Manslaughter, it is stated:"To use an immoderate amount of force in "suppressing a mutiny is an unlawful act,and if death is caused

"thereby the one using such force is guilty of manslaughter at least."

The accused came to town on this cart. It has been testified to by several witnesses that the sergeant held up his hand. The accused does not remember having observed that act, but he says several members of the guard ran into the road which certainly indicated they wanted him to halt, whether they said anything or not, and the deceased went over to stop the horse by grasping the reins. At that moment why was it that the only thing the accused could say was, "Let go that horse?" Why could he not have clearly stated, "You are under arrest?" "Who are you?" "Why are you stopping that horse?" "Where is the non-commissioned officer in charge of this party?" Any one of those inquiries would have prevented, would have avoided the homicide, which followed. Why could not he have said, "You are relieved from duty as provost guard?" Why could he not have said, to his detail, "Get out and seize that man?" Why did he not inquire where Major Knight's headquarters was? Instead of that he leaped from the cart and seized his own pistol. Several of the witnesses for the prosecution all say it was out as he leaped from the cart. He says he did not draw it until the deceased assumed a threatening attitude. But still he made no inquiries. Still he gave no orders that the provost guard was relieved, when a word of almost any sort would have cleared up the situation. He did not even do that which the Manual of Interior Guard Duty requires, which is required of a sentry, namely, to challenge, "Halt, or I fire!" which would have been the natural challenge, or its equivalent, "Drop that gun, or I fire!" "Hands up, or I fire!" or simply, "Hands up!" He did none of those things, and there is nothing to indicate but what such a challenge given in a determined way, which I believe the accused could have given it, would have caused the deceased to drop the gun. He had not even raised it to a firing position. A gun is not

ordinarily fired from the position of guard bayonet. So I submit that even in the situation most favorable for the accused, namely, giving him every benefit which can follow from the orders which he received, from the position he occupied, his conduct was hasty and the homicide unnecessary, avoidable.

If the prosecution is right in this contention, the next question which presents itself to the court is, was the homicide murder or manslaughter? In the Manual for Courts-Martial, on page 249, "Murder is the unlawful killing of a human being with malice aforethought," and on pages 250 and 251 it defines malice aforethought as follows: "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused," and I will consider these four states here enumerated, separately:

"(a) An intention to cause the death of, or grievous bodily harm "to, any person, whether such person is the person actually killed or "not (except when death is inflicted in the heat of a sudden passion, "caused by adequate provocation)." Did that state of mind exist in the accused? It is submitted that it did. He fired with a deadly weapon, ashe has stated, believing that his life was in danger. There can be no doubt that he intended to cause grievous bodily harm to the deceased. When he draws a deadly weapon he can hardly be heard to maintain otherwise. We have already considered the question of justification, but if the court finds that the accused was not justified, it is submitted that it must find that he had the intention here spoken of in the Manual which defines malice aforethought. But to this last statement I must make one qualification, "unless death is inflicted in the heat of sudden passion caused by adequate provocation." If such existed, the crime is manslaughter.

"(b) Knowledge that the act which causes the death will probably "cause the death of, or grievous bodily harm to, any person whether "such person is the person actually killed or not, although such "knowledge is accompanied by indifference whether death or grievous "bodily harm is caused or not, or by a wish that it may not be "caused." That paragraph has reference to a different sort of case than the present. Such a case as where a man fires regardless into a crowd, not knowing or not caring whether he hits any particular person or not.

"(c) intent to commit any felony." That also refers to an entirely different sort of case, a burglar who kills while carrying out his burglary, or something of that sort.

"(d) an intent to oppose force to an officer or other person "lawfully engaged in the duty of arresting, keeping in custody, or "imprisoning any person, or the duty of keeping the peace, or dis-"bursing an unlawfull assembly, provided the offender has notice "that the person killed is such officer or other person so employed." I submit that that also covers the present case; that the deceased was a person on the duty of keeping the peace; that the accused must, from the place where he found the deceased, from his actions, from the errand on which he was going, have known that this was the patrol. He may not have known it as the cart drew near, but he certainly knew immediately after from what followed, from what was said and done.

If the court agrees with the contention of the prosecution that the deceased was in a position analagous to that of a sentry or policeman, and that the accused had notice of that fact, then it is submitted that under this heading "d" malice aforethought was present and the crime was murder.

I will next turn to the question of manslaughter. Manslaughter, according to the Manual for Courts-Martial, page 253, "is unlawful homicide without malice aforethought, and is either voluntary or involuntary." Involuntary manslaughter is not the question here.

It is a sort of a case where a railroad crossing tender negligently fails to display his red flag and somebody is killed in consequence, or the negligent playing with firearms, causing the death of someone. The only question is, was the homicide without malice aforethought? In other words, it is an unjustifiable or inexcusable homicide where the court finds no justification in self-defense, or, in the necessity of enforcing discipline, but does not believe that malice aforethought, namely, one of the states of mind I have described, is present. If the court reaches that conclusion, then it is its duty to find the accused not guilty of murder, but guilty of manslaughter. The term of voluntary manslaughter is that about which I mentioned a moment ago, "when death is involved in the heat of sudden passion caused by adequate provocation." The Manual on the page I last referred to, says: "Instances of adequate provocation are: Assault "and battery, inflicting actual bodily harm or a gross insult; an "unlawful imprisonment; and the sight by a husband of an act of "adultery committed by his wife." The first instance is assault and battery. If the deceased, in the opinion of the court, was not justified in taking up the position of guard bayonet, the court may find that this constituted an assault on the accused, and it may find that such assault was provocation, reducing the crime to manslaughter. An assault as distinguished from battery does not necessarily require bodily harm to the person assaulted, but assault implies the holding up in a menacing position of any weapon, or even of the fist. Of course an assault does not exist where a person using a weapon is justified in doing so. To find the accused guilty of manslaughter rather than murder, the court should be of the opinion, it is submitted, that the assault, if it was one, raised in the mind of the accused a sudden heat and in that heat he fired.

That heat does not have to be so great as to deprive the accused of mind or reason.

I now pass to the question of the proper form of the findings of the court, and the sentence. If the court should find the accused guilty of murder, I submit this in order that there may be no irregularities in the record, its findings should be guilty of the specification and guilty of the charge, Under the 92nd Article of War, which is that under which the charge is laid, there are but two lawful punishments, death, or imprisonment for life. The proper form for the former, in such a case as this, is to be hanged by the neck until dead, and for the latter, in the case of an officer, to be dismissed the service and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The court may not, I submit, properly find the accused not guilty or guilty of the lesser offense, such as manslaughter, merely because it deems the punishment required by that Article of War too great under the circumstances, too severe under the circumstances. It is, however, permissable for the members of the court, of all of them, or some of them, or one of them acting individually, and not as a court, to sign a paper which goes with the record, though not as a part of it, recommending the accused to clemency, for such reasons as they may set out in that paper.

If the court should be of the opinion that the accused is guilty of manslaughter, the findings should be, of the specification guilty, except the words, "with malice aforethought" and "with premeditation", of the excepted words "not guilty" and on the charge its findings should be not guilty of violation of the 92d Article of War, but guilty of violation of the 93rd Article of War; and the sentence in the case of manslaughter is wholly within the discretion of the court, except that the death penalty may not be imposed. If the court should award confinement at hard labor, it is proper that such sentence should be accompanied with a sentence of dismissal.

The judge advocate states the several findings as hypotheses, and not as asking the court for any particular sentence. The accused is, of course, entitled to the benefit of a reasonable doubt, and if, after considering all the evidence, the members of the court retain in their minds a reasonable doubt as to his guilt, he is entitled to an acquittal. I believe there is nothing more for the judge advocate to add.

The court at 10:40 A.M. took a recess for fifteen minutes.

The court at 10:55 A.M. reconvened, and the members of the court, the Judge Advocate, the Asst. Judge Advocate, the accused, his counsel and the reporter took their seats.

Counsel for defense: The defense wishes to divide the time between himself and the assistant counsel.

The court: I see no objection.

The Judge advocate: I have no objection.

Counsel for defense: I wish to call attention to a few things first, before the assistant counsel speaks. The argument of the judge advocate was, I think, eminently fair in his position, but there are one or two points to which I wish to draw the attention of the court. The arguments of the judge advocate were almost purely of civil cases. While I know that the law does not differ particularly, yet in some sense in time of war and at the front there is a considerable difference in the procedure which can be done by an officer or soldier than in the time of peace. Take for instance the first point as to whether ot not it was self-defense. I know that the civil law states that a man must make an absolute trial to retire as far as he can, as far as possible. Now, it is self-evident that if an officer on duty, which the judge advocate said was necessary, threatened by a deadly weapon, retreated, it would naturally affect that officer's usefulness in this army or any other army, and especially in this regiment, especially where the weapon was not a club, when merely a person pressing a finger on the trigger of a gun pointed at him and at such distance that it would be impossible to miss, might, must preclude the possibility of retiring or doing anything ekse except to defend himself.

On the point brought up by the judge advocate as to the

deceased being a sentry in the execution of his office, I have never yet seen a sentry, in some ten years in the army, show himself, when he is properly posted, around the street in a more or less unconventional attitude, among a group of men simply standing around in the middle of the street with a gun slung over his shoulder, stop anything, anything that he is ordered to stop, generals' automobiles, or anyone else, except in a proper manner, as a sentry challenging, and I know of no authority given to any sentry, without challenging or trying to accomplish his purpose in a quiet way, to grab a horse by the head which was going slow, which could be caught and turned around without undue force. There was nothing in the conduct of the deceased to indicate that he was a sentry. There was no challenging and the sergeant in charge of the detail who was present, has testified that he never gave any order to stop. He has testified, and it is in the record, that he merely held up one hand before he recognized the officer, and as soon as he saw the officer dropped his hand and stepped back to a respectful distance. He also stated that he did not understand that he had to stop officers. The act of Whittaker was purely voluntary on his part, and the conflicting testimony of the other witnesses, for instance the testimony of Shields who was particularly under the influence of liquor during the day and even claimed remaining under the influence of liquor, that he recognized the officer, and even in his condition he would not have stopped him himself. Whittaker was nearer than Shields and had a better opportunity to recognize the officer. The conflicting testimony of the other man, Perry, says that the sergeant gave him a direct order, calling his name, and he was further away than Whittaker was, and that Whittaker obeyed the order for him. If Perry received the order, why did Whittaker obey? It was not his duty after the sergeant gave another man the order. There is another

an who says that the sergeant called Whittaker's name, that the sergeant told Whittaker to stop the horse, but the sergeant says that he did not say anything. The lieutenant under oath and testifying as a witness, testifies that he did not hear the order. The French soldier did not hear any order given. One of the witnesses testifies that he saw the lieutenant get down, and goes into great detail of getting the pistol out and putting a cartridge into it on the ground. The French soldier testifies that he did not have the pistol out of his holster until he fired and that it was too quick for him to measure the time. The lieutenant testifies to that fact also. One of the witnesses in the patrol very significantly stated, "I am going to tell the truth," and he testified to a threatening motion, although it was not exactly the same testified by the French soldier. He emphasized, "I am going to tell the truth," and said that there was a threatening motion. Now, the testimony goes to show that the horse was stopped, and the lieutenant dismounted from the wagon. Thereafter the threatening motion was made. The prosecution has made a point that the lieutenant did not obey the sentry. Now, in fact the time was so short there was no opportunity for obedience. The horse was stopped whether he willed it or not, and then he dismounted, not with the drawn pistol, as the most competent testimony shows. There was no threat to this man Whittaker, yet Whittaker unslung his rifle and advanced toward the lieutenant in a position from which he could have shot him. The next thing to consider is what the lieutenant could have immediately expected. He testified that he knew of considerable shooting, promiscuous shooting among this particular regiment, and knew that this particular company had had cases of it, and that it was a troublesome company. He also knew that the guard which he brought with him was of the same company and would sympathize with that provost guard, if that were the provost guard. There

was no challenge given and the whole thing occurred very quickly. There was no time for conversation. The prosecution has stated that the lieutenant could have started to explain what he came there for in one word. That one word at that time, so far as he knew, could be the difference between the lieutenant being the deceased and Whittaker being the deceased. As far as the rifle being loaded, that has, to my mind, no bearing on the case at all. You cannot conduct an investigation as to whether a rifle is loaded when it is pointed at you. The prosecution states that rifles are very seldom fired from the position of guard bayonet, or from the hip. I disagree considerably with that, especially in street encounters and rows among soldiers and civilians, especially in close quarters.

In the third place, on the point which the prosecution has made a considerable point as to the lieutenant not showing respect to the sentry, according to the orders which he was sent there under, those men had violated their standing as sentries, and it was reasonable for him to suppose that they were not able or willing to perform their duties. He was sent there by the direct orders of the commanding officer of the regiment, the commanding officer of all those guards, to arrest that guard. The incident happened so quickly that there was no opportunity for him to question as to whether they were or were not the guard. This action of the man was certainly not that of a man doing his duty properly. As far as a man having a rifle on his shoulder, if I stopped my automobile every time I approached a soldier with a rifle on his shoulder I never would get anywhere, and the act of the man, without challenging or signalling in any way, simply grabbing the horse's head, where there was an officer which he could not fail to recognize if he was sober, is not the act of a sentry and would not be considered so by any officer that I can think of.

Now, the lieutenant came to this town under instructions that

these men were drunk, disorderly and rioting, and if, on immediately getting to the town, a soldier runs out and grabs the horse's head without respect to the officer who is sitting on the front seat in plain sight in an uncovered cart, with no shades to hide, runs out and grabs the horse's head and stops you with violence, I think it is very reasonable to suppose that there was disorder and that that is the proof of an active riot. I, myself, had transmitted the information to the commanding officer that these men were disorderly, the whole lot of them, during the day. That has nothing to do particularly with this case except that that is the information testified to as given to the lieutenant as to disorder, rioting and drunkenness.

Now I think that anyone who delays taking any measures he considered necessary against a drunken armed soldier, who commits, I might say, the almost unknown act of pointing a weapon at an officer, especially of his own regiment, who had committed no overt act against him beyond telling him to let go the horse, I think the man who would neglect, or start in parleying with a man whom he had reason to suppose was drunk and rioting, would be very, very inexperienced, or very foolish, and especially as this officer has been with the regiment a very short time, had been serving with white troops and knew nothing of the characteristics of these men, which everyone knows are considerably different from those of white troops, and especially a man from the South, as the accused is, he understands more or less of the Negro character.

I do not intend to argue upon the points of law or states of mind. I believe that this case must be considered in a somewhat different light than a civil case in time of peace, away from conditions undwr which this case came. To the best of my recollection this regiment was in and out of the front line continuously for a long time, and these men were very much out of hand when they came

out of the trenches. That is the reason for which they had to post a provost guard in this town. There had been considerable trouble which caused the posting of these provost guards.

I, myself, had an experience of being threatened with a pistol by one of this same regiment in Dommartin. I would like to ask the judge advocate if it is proper in this speech to relate an incident bearing on that?

The judge advocate: I don't see that it is strictly relevant, unless it appears it was known to the accused.

Counsel for defense: I wish to illustrate one of the reasons for the necessity of posting these guards.

The judge advocate: Strictly, I don't see that it is relevant, but I see no objection.

Counsel for defense (continuing) I was awakened, before this shooting, in my room, by a lot of loud swearing, cursing and yelling in front of my office building about twelve o'clock at night. After getting out of bed I went to the front window, it was a moonlight night, and told these men, soldiers from the 369th, I knew them, because I could see them very plainly. and heard some of them speaking of the 369th, or the 15th, which is the old number. I told them to get on, get out of the town, quit making noise. I told them I was an officer. They argued back that they were not making any noise, "We have got a right to go through this town." So I said, "Go on, get out of this town and do it quick!" Then one man turned and said, "Jim, give me that gun! Some son-of-a-bitch says I must get out. I will show him whether I can or not!" after I had told him I was an officer, and he could see me. It was plain, and it was in a building in which none but an officer would be. That is the kind of a thing you are up against. Now I got my gun and if Jim had given him the gun, it would have been one or the other of us, for I would not have hesitated to shoot the slightest second. The colonel of my regiment at Auve had to complain to the colonel of this regiment

that the men were raising disturbance and rioting at Auve. Three or four of that regiment became angry because the adjutant of the regiment told them to keep away from the kitchens of the headquarters detachment and met him on the street demanding why they couldn't stay there, they had as much right as anybody and assumed threatening gestures toward him, and he was alone and unarmed in broad daylight. The colonel of a French regiment in a village about two miles away had to complain that the men were firing pistols promiscuously around the streets in any direction. The protests of the colonel of my regiment and the French caused the placing of those provost guards. There are a number of instances which could be brought up to show why provost guards were put out, and why it is very dangerous to depend on these men when they are under the influence of liquor. I think that the lieutenant did all that could be reasonably expected of him. When this man grabbed his horse and stopped it, he naturally told him to let go. When the man did not challenge first, or in any way indicate who he was, he exhibited no respect for the officer. Now, the prosecution has dwelt considerably on the sanctity of a sentry. That is perfectly right and should be carried out if the man is conducting himself as a sentry. On the other hand it is incumbant upon a sentry that he cannot lay down simply because he is on provost guard. Merely because he is an armed man in a town is no indication at all that he is a sentry unless he is on post or is walking his post or acts as a sentry should.

There has been testimony here from one man who says that--- in fact all the men testified that Whittaker drank. Shields testified that only he and Whittaker drank. I do not consider the drinking had very much to do with this case, or I could have introduced more testimony, but I didn't care to bring in the drinking, for that really has nothing to do with it, except that the lieutenant got over there under directions, official directions which stated to him that the men were drinking and disorderly, and the action of Whittaker, when he got into town would confirm that, to my mind, if I were on the same duty that he was.

The assistant counsel will take up some other points in the case, but I ask the court to consider the reliability of the various witnesses, the perfectly straigh-forward, voluntary testimony of the accused under oath, the testimony of the French automobilist and the discrepancy of the testimony of the soldiers of the 369th.

I want to emphasize one other point, that from one of the guard, the provost guard who was there, they didn't agree on the number of guns, but there is one thing they were agreed on and that is that they would notnhave stopped an officer. There is no question about it, they all say they would not have stopped an officer. Why did Whittaker think he was doing such a lawful act? Why did he stop without even inquiring? The sergeant of the guard was there. If he was in doubt he could have asked the sergeant. Another thing, those men were put there to arrest stragglers, men absent without leave. I think that everything goes to show that the lieutenant had a perfect right to go to that village anticipating trouble, and that the first act, when he got to the village would reasonably indicate that the information was right, that these men were drinking, and it is a well-known fact that the colored man is ordinarily rather uncertain when he is under the influence of liquor, and the action of Whittaker would reasonably indicate that his information would be correct. I personally knowthat I would not care to be unarmed in the face of an armed Negro under the influence, and I would consider anything justifiable, and I believe the lieutenant was right that this Negro was drunk and had been rioting, under the influence of liquor, and that he was entirely uncertain what that man might do, and that he took the only proper means of protecting himself, and in doing so, he was acting in the line of duty, in the discharge of his orders.

The assistant counsel for defense: May it please the honorable members of the court, I do not intend to take up much of the court's time, but in the first place we shall pass over the fact that it is a part of the record of this case, the charges, the information, the original investigation, the indorsements upon the charges that the charges cannot be sustained, and its reference to the court. We shall pass over the fact that it is admitted in the evidence that this guard was drinking at the time they were serving on guard duty. Furthermore, I think it should be taken into consideration in having in the evidence that two of the members of that guard are now in the regimental guard house. I intend to use my time in arguing this case in the general outline the judge advocate has argued.

First, the question of murder or mansluaghter. If he is not guilty of murder, he is thereby guilty of manslaughter. I must say that while the judge advocate was preeminently fair, he was not justified in the way he used theevidence of the case; that he thereby considers the case weak, only for the simple reason as to the definition of manslaughter, that it is unlawful to take the life of a human being in the heat of a sudden passion. I submit that there is not one iota of evidence to the effect that the accused here was in the heat of passion. In fact, one of the witnesses testified that he was not expecting any shooting. That is the sort of argument of the judge advocateas he tries to bolster up his case by stating that there is absolutely no evidence to indicate that the accused was as calm as he could be. So I will pass that side of the case by, because I consider it an established fact, that he could not by any possible evidence be guilty of manslaughter, and will get down to what I consider the real case, as to whether the accused could be guilty of murder under the 92d Article of War. That resolves itself down to the fact, as the judge advocate has said, as to who was wrong.

To start with, Major Spencer ordered the accused down to this town, telling him that the men there were rioting, disorderly and drunk, and directed him to take adequate measures to prepare for any trouble. It is admitted that the accused had a right to go to the town. It is also admitted in the evidence that on the other hand that the other parties were not right. In the first place they directly violated the orders issued, to the effect that every single man was armed, that the sergeant of the guard stated that he had read the orders to them and explained them to the men; that every man had either a rifle or a gun. Therefore, in the first place, they were not legally within the orders, and in the second place were drinking on duty, which furthermore, put them out of their legal rights as sentinels. In the third place, when the accused arrived upon the scene, they did not bring themselves within the scope of sentinels on guard duty, because they neither challenegd, nor was anyone walking his post in a military manner, and the judge advocate admits that there was no challenge or information that they were the guards. He never halted the accused; that he halted the accused by grabbing the reins of his horse. Now, I submit that according to the Manual of Interior Guard Duty, and it is the law of the Medes and Persians in not changing one iota, that there is no way to halt a person who persists in passing except one way, and that is by challenging" Halt, who goes there?" If the person advances he has the right to stop him. But no military law, he was arguing under military law, permits a sentry to halt, according to military law, by grabbing the reins of a horse, and there is no place it is found in the prescribed regulations. I claim that in this case there can be no dispute that the accused was clearly right and that the man, the deceased was clearly wrong, for the reasons I have outlined, and this, after having been ordered by the accused to turn the horse loose, according to his testimony, at least three times, and according to one witness,

perhaps four or five times, although it is admitted in the evidence that it was light at the time and the officer's insignia could be distinguished, and although the sergeant recognized him as an officer and stepped aside to allow him to pass, but although the sergeant says that he did not give any one an order to stop him. The deceased refused to obey the order of the accused until he repeated it three or four times, and then he jumps to the side of the road, and the officer evidently anticipating trouble, jumps out of the cart. The only witness that we can take in this trial who is absolutely unbiased, who, it may be said does not regard the case from a point of interest, is the French soldier who witnessed the happenings of the case from a bench on the side of the road, and his evidence is that he saw this man grab the bridle of the horse and stop him; that he saw the deceased unsling his rifle and take up ~~xxxx~~ his position and saw the officer fire. But may it please the members of this court, I claim it is absolutely immaterial whether that rifle had one cartridge in it or a million! The sole question is, was the accused acting in self-defense, and did he have a reasonable right to believe that he was in imminent danger of death or great bodily harm?

The accused testified directly upon the stand when asked the question, "How long did you wait?" He said, "I waited until I considered another second would be dangerous to my life." That is the most direct evidence in the whole argument, upon the question whether he was in actual danger. It showed also, and the judge advocate will admit also, as a matter of law, whether the accused was in actual danger. It is absolutely immaterial to this case, but still the question is, was he in such a position at that time that he had a reasonable right to believe that he was in actual danger? I think the question clearly shows it. Furthremore, I don't think there is any question but that the deceased by that time must have

recognized the accused was an officer. Witnesses for the prosecution differ, but the deceased had the unbounded insolence to say, "Do you mean to draw a weapon upon me!" I think all the facts of this case combined, and this alleged remark of the deceased which I have just recited, bring to the members of the court that Perry, who was then a private but later was promoted to a corporal, also showed such marked insubordination, when the attenpt was made to take up their weapons, this Private Perry refused to relinquish his rifle, because, he alleges, he didn't see why he should have to give up his rifle. I think that all the evidence which is in this record, will be passed upon by this court, and by the reviewing authority, is significant in itself, suggestive of the mental state of affairs at that timr, the state of discipline which existed among these men. I do not intend to consume any more time of the court with arguing this case, because, as I say, I do not see the argument as to manslaughter, and I do not believe the court sees it. It is clear that that unless the accused is guilty of murder, he is unanswerable for any crime whatever, and I sumit my statement upon that point.

The court: Is it not proper for the accused to make a statement if he wishes? I call your attention to caragraph 293, page 241.

The judge advocate: Any accused, in civil or military court has the right to make an argument in his proper person rather than by the mouth of counsel.

The court: It isn't usual, but it is entirely within his power.

The court to the accused: Do you wish to make a statement?

The accused: I just want to call the court's attention to the very short time to which I was held by this man, the time I had to act, to make known my mission to this man in the town. That is all I have to say, sir.

The judge advocate: May it please the court: The learned counsel for the defense have told, both of them, at considerable length, of the misdeeds of this provost guard; that they had been drinking; one of them was drunk; that they were not walking their regular beat; that their manner was not military; that they didn't have the regulation arms, according to the order under which they were acting. It need hardly be stated that we are not trying at present any member of that guard for improper conduct while on duty. It is true that two of them are in the guard house awaiting trial on charges of improper conduct on this guard, but they are presumed innocent until they are proven guilty, and even if they are already proven guilty, it has nothing to to with the case. There has not been any evidence in the case to indicate that the member of the guard with whom we are particularly concerned was drunk, or that he was guilty of any misconduct at least prior to the event in which we are particularly interested, but even if the guard in general, or Whittaker in particular, had been guilty of misconduct on duty, their status as a guard remained, continued, until they were properly relieved.

It has been stated by the counsel in his address to the court that they had forfeited their standing as sentinels. I deny that absolutely, as by the military law and regulations, a member remains a member of the guard until he is relieved. A sentry remains a sentry until he is relieved, even though he is so drunk that he cannot walk. We all know that on the occasion when a member of the guard does misconduct himself, the first thing that the officer of the day or the commander of the guard says, is, "Take off your belt!" It indicates that he is relieved as a member of the guard; that he is no longer a member of the guard. But he still wears his

belt, and he properly wears his belt until he is relieved by one of the persons authorized in the Manual of Interior Guard Duty to relieve him, and he still has authority to carry out whatever orders may have been given him.

It has been said on behalf of the accused that there was no time for parleying. The accused had time to repeat three or four times the words, "Leave go that horse!" or similar words. He could have just as well said in place any one of a dozen things, which would have cleared up the situation, such as I have suggested: "Where is your sergeant?" "You are under arrest;" "You are relieved as guard;" "Hands up, or I fire."

It has been said that there is but one proper way to challenge. I cannot agree with that statement. The normal or usual way is to challenge, "Halt, who is there?" But circumstances may require otherwise. I spoke, when I addressed the court before, of times or instances of general officers being stopped at examining posts. I have known of such occasions when the challenge was at night, It would have been impossible for the sentry to have been where he could challenge by word of mouth, thus in the approaching of an automobile, on account of the noise of the engine, and such being the case he had to challenge in an effective way by the waving of a lantern in the middle of the road, but that was a challenge just as much as "Halt, who is there?". Similarly with a horse trotting along ~~the side of~~ a hard road. It is doubtful if the challenge could be heard by word of mouth. The sensible, natural way is to hold up the hand, as the sergeant challenged.

It is said that Whittaker, the deceased, did not see or hear any orders given. It is the part of a good soldier to obey an order given even by sign, indicating the will of his superior. When

the sergeant held up his hand, that was an indication of his desire that the cart should stop. The deceased did no more than the act of a good soldier when carrying out the order thus given by sign, he seized the bridle.

It has been asked on behalf of the accused why was it necessary to use violence to stop the cart? It was necessary because the officer would not stopuntil and unless violence was used. He seemed determined to pass, whether or no, without word of explanation and all he could find to say was, "Leave go that horse!"

Reference has been made to the conduct of other members of the regiment in this town on other occasions, and in other towns in the vicinity. Such conduct is very much to be regretted, but what has it to do with the present case, save, as perhaps, to put the accused on notice of a possibility of trouble? He had had that notice already from Major Spencer..

Whittaker, so far as appears, bore a good reputation on the testimony of his commanding officer. He does not appear to have been drunk on this occasion. He did nothing save carry out the wishes of the sergeant in charge of his guard, and he should not be made to suffer death for misdeeds or omissions in his regiment on other occasions. The only respect in which these misdeeds can be taken into account is by putting the accused on notice of the possibility of trouble, and that was done more definitely by the orders of his commanding officer.

Reference has been made to the opinions of Major Spencer, the investigating officer, and the commanding officer, as to the guilt or innocence of the accused. They have nothing to do with the case, and I submit, should not have been read. The court is the judge of the guilt or innocence of the accused, and these preliminary steps are for the information and review of the convening authority, only, and the court will make up its mind on the evidence which has been brought before it, and not on extraneous matters.

The court was closed and finds the accused of the specification not guilty of the charge not guilty

The court acquits the accused.

The court at 12 05 P.M. adjourned to meet at 1 30 P.M.

James J. Crossley, Major, J.A.
President.

Archibald King, 1st Lieutenant 161st Inf.
Judge Advocate.

I certify that I have delivered a copy of the record, less findings sentence and exhibit, to the accused.

1st Lieut, 161st Inf. Judge Advocate.