

A No, sir, I don't just remember.

Q Did he have his hands up or down low?

A I don't know just how it was, sir. I think he made some kind of a motion to try and get the rifle off.

Q Over his head, high or low?

A I can't remember just now, sir.

Q That is, you don't recall very accurately just how the rifle--- in what position the rifle was in when he was shot?

A No, sir.

Q He was fooling with the rifle some way when he was shot?

A Trying to get it off.

Q Did you hear him say anything to the lieutenant?

A No, sir, he didn't say anything before he was shot. After he was shot he said, "Lieutenant, you have done shot me!"

Q How soon after did he fall?

A As soon as he was shot. As soon as the shot was fired, he fell right on his knees then.

Q You had a good place to see that?

A Yes, sir.

Q You could see that as soon as the shot was fired he fell on his knees?

A Yes, sir.

Q Will you say again just what the sergeant said when you got into town?

A What the sergeant said?

Q Yes.

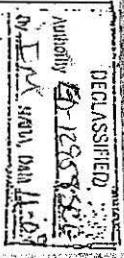
A The sergeant never said anything. The sergeant walked across the road and put up his hands.

Q He didn't give anybody any orders then?

A No, sir.

Q You were close enough to have heard it if he had?

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A No, sir, we were about twenty-five steps away when he put up his hand.

Q How soon did he drop it?

A As soon as he got across the road.

Q You didn't hear any order to halt given then?

A Not from the sergeant.

Q Just as a signal he put up his hand?

A Yes, sir, as a signal.

Q Are you in Co.F of the 369th?

A Yes, sir.

Q Did you know Whittaker pretty well?

A Yes, sir.

Q You weren't his "bunkie" or anything of that sort?

A Sir?

Q You were not his tent-mate? He a good friend of yours?

A No, sir, we were not so good friends, sir. I know him pretty well, though, sir.

Q How long have you been in the regiment?

A I have been in the regiment about a year and nearly six months.

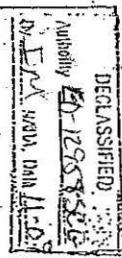
Q Do you ever remember any other trouble in the regiment that Whittaker has ever had?

Prosecution: I must object to that. It is entirely irrelevant.

Unless counsel can show relevancy---

Defense: I will state to the court that I am trying to bring out by testimony of previous acts of violence by the deceased, and will leave it to the court as to whether or not I may be allowed to introduce them. There is an incident in which the man Whittaker was involved, which I am trying to bring out and which will have considerable bearing on the case, concerning Whittaker's actions on

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the day he was shot. I am not certain---

The court: Did the lieutenant know of the former connections? Did he know them?

The Defense: No, sir, he did not.

The court: Your object is to show him as a dangerous man?

The defense: That he was a dangerous man.

The prosecution: It appears to me, sir, in order to make that relevant, it must be shown that that was the general reputation of the deceased in the regiment, <sup>as</sup> not showing by way of evidence the specific conduct of the deceased on prior occasions.

The defense: That is just my idea.

The prosecution: Well, as I recall, that is not the way the question was framed. I see no objection in asking what was the deceased's reputation in his company.

The court: Can you cover it?

The defense: I can cover the point by another witness. I will withdraw that question.

Questions by defense:

Q Was Whittaker a quarrelsome man, to your knowledge?

Prosecution objects.

Question withdrawn,

Q What was Private Whittaker's reputation among the men of the company? Was he a pretty rough customer or not?

A He was a very good fellow, sir.

Questions by prosecution:

Q How many men were in that detail that went to town?

A I think it was six of us.

Q That counting the sergeant?

A Seven with the sergeant, sir.

Q Tell us whether the sergeant in your hearing gave any orders to the members of the provost guard as the cart drew near.

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A No, sir, he didn't give them any orders to my knowledge, sir.

Questions by court:

Q Did Whittaker give the order to halt?

A He tried to grab the reins, sir. The lieutenant told him to turn the horse loose.

Q At the same time he was saying "Halt?"

A He said something, sir. I don't know exactly what he said.

Q You don't know whether he said "Halt," or not?

A No, sir.

Q Was that right after he took hold of the horse, or before?

A After he took hold of the horse.

Q There is a carbine right before you. Can you show the court the position that that rifle was in when Whittaker was shot?

A No, sir, I can't.

Q When he went over there by the side of the building, when he was taking off the rifle, did he advance or did he stop?

A He stood right there.

Q He didn't make any advance either forward or back?

A No, sir..

Q But as I understood you to say he had taken off one rifle before he was shot and was taking off the other one when he was shot?

A Yes, sir.

Q Was he facing the lieutenant at the time he was shot?

A Yes, sir.

Q In what position was the muzzle of the carbine when he was shot?

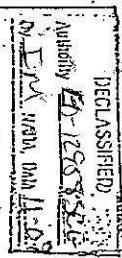
Did you notice whether it was pointing at the lieutenant?

A No, sir, it was not pointing at the lieutenant.

Q It was not?

A No, sir.

Q Did you hear the lieutenant order him to take off the rifle?



A No, sir.

Q You don't know why he was taking the rifles off?

A No, sir.

Prosecution: The prosecution rests.

At 3:50 P.M. a recess was taken for ten minutes.

~~At 4 P.M. the members of the court, the Judge Advocate, the Asst. Judge Advocate, the accused, his counsel and the reporter resumed their seats.~~ *OK*

~~Jacques Alexandre Fouché, French automobilist, a witness for the defense, was sworn and testified as follows, through Paul Pouet, previously sworn as interpreter:~~

Question by prosecution:

Q Do you know the accused? *as* A No.

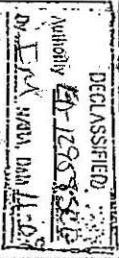
The Court: Mr. Judge Advocate, may I ask if the counsel for the defense wishes to make a statement?

The Defense: I intended to make it after, but I will make it now.

Judge Advocate: We don't care to press you, major.

The defense: I wish to make one now. The defense intends to submit evidence to the court to the effect that the accused proceeded to Dommartin-la-Planchette under competent orders for the purpose of arresting the guard at that place. Lieutenant Cochran was informed by the authority who sent him there that those soldiers were drunk, disorderly and rioting. The defense intends to present evidence that immediately on entering the village, the man who was shot, acted in a manner which would indicate to him that there was or had been rioting, and that it was reasonable to suppose that the actions of the man who was shot were a part of this riotous conduct. The defense further intends to submit evidence that the man who was shot did not challenge in a military manner, did not act as a sentry would act, and presented a rifle in a manner which would reasonably lead the lieutenant to believe that he was in danger and that he did not make any active defense against this movement until he

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believed that any further delay might be dangerous to his own life, and that there was no time to inquire into whether or not the gun was loaded. The defense further intends to present evidence that there could have been no further delay for the lieutenant if he took reasonable precautions in his own self-defense. The defense further intends to present evidence that there was no intention by the accused to kill this soldier, and that he did not believe that he had killed him, and further, that he intended and believed that he had merely disabled the man in his own self-defense.

The judge advocate: I remind the witness and interpreter that they are under oath.

Questions by defense:

Q Please ask the witness if he remembers the shooting of a Negro soldier about one month ago in Dommartin-la-Planchette.

A Very well.

Q Where was the witness when this shooting took place?

A I was sitting on a bench with a comrade.

Q Ask the witness if he had a good view of the act of the shooting.

A I was about five, six or seven metres from it.

Q Did the witness see all the circumstances of the shooting?

A I have seen the black soldier who took the horse by the bridle---

Q No, just the general act?

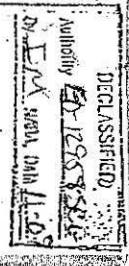
A Yes.

Q Tell the witness to tell in as few words as possible the circumstances of the shooting, and translate every sentence. Not too long, so that you will not forget it, and speak slowly.

A I have seen the officer get down from the wagon, a small wagon. I have seen the officer get down from the small wagon.

Q Ask the witness to go back a little to the time before the officer descended from the wagon. What happened just before the officer descended from the wagon?

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A The soldier took the horse by the bridle and made him turn back.

Q Ask the witness if he heard the black soldier say anything to the officer.

A No.

Q Tell the witness to tell the story slowly. Now what happened?

A We were two, I with a comrade on a bench reading a newspaper when the thing happened. I have seen the soldier <sup>at</sup> rush at the head of the horse and oblige the horse to turn back. During a small interval I saw the soldier, not the officer, because on account of the wagon being in the way because of the small interval. Then I saw the soldier make a motion with his rifle. At the same time the officer put his hand here on the side.

Q Just a moment. Ask the automobilist to describe as nearly as possible the position <sup>at</sup> of the black soldier and the motions he made with the rifle. There is a rifle.

(Witness indicates with rifle)

Q Was it high up or back on his shoulder?

A As it now was. I saw the soldier in that position (indicating).

Q Ask him did the black soldier advance toward the officer at all? Does he remember?

A He was in the middle of the road when he turned the horse back, and afterwards the soldier withdrew on the sidewalk.

Q Did he see the soldier lay anything down on the sidewalk before he took the gun off his shoulder?

A No.

Q Did he see the soldier have two guns or one gun?

A He cannot tell.

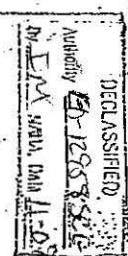
Q Ask him if he saw plainly the officer draw a pistol?

A Yes.

Q Did he see him take it out of the pouch?

A Yes.

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Q How soon after drawing the pistol from the pouch did he fire?

A Very little time.

Q Was the rifle in the position which the automobilist illustrated before the officer drew the pistol? Be very careful about that question, it is very important.

A My opinion is that the officer took out his pistol at the same time when the soldier made that motion with his rifle. It was about the same time.

Q Ask the witness if, in his opinion, the motion made by the black soldier with the rifle was a threatening motion, or a menace toward the officer?

A He has no opinion about it.

Q Ask the witness if, in his opinion, the black soldier could have fired the rifle at the officer from the position it was in.

A I have no exact opinion about it. At least for me, if I wished to fire, I would not have taken the position.

Q That is not quite the question. Please make it very plain to him that I wish to know if in his opinion it would be possible for the black soldier to have fired from that position. I am asking if the rifle could have been fired from that position.

A It was the position of cross bayonet.

Q Ask the witness to please take the position of cross bayonet.

(Witness takes position with rifle)

Q Now suppose that gun were loaded, could he fire that gun?

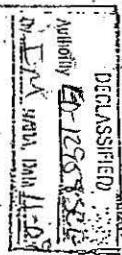
A I can always put my hand on the trigger.

Q That is the question that he could fire it, could he not?

A It is not difficult to do it.

Q Ask the witness if he is exactly sure as to the height of the muzzle.

A A little more or a little less.



Q Please tell him to put it a little more up. It may have been  
possible that---

(Witness elevates gun)

A It has been so quickly done, in my opinion it was this way. It may have been this way a little more or a little less, because it was so quickly done.

**Questions by prosecution:**

Q Did the officer put his hand on the butt of his pistol before or after the soldier took the position which you have shown?

A I have seen both actions at the same time.

Q Did you hear either the officer or the soldier say anything to one another before the officer got down from the cart?

A If they had been speaking to one another I could not understand, because I know nothing of English.

Q I appreciate that you do not understand English, but did you hear either speak to the other?

A I don't remember.

Q Did you hear them speak to one another after the officer got down from the cart?

A No.

Q Did the soldier, when he took the position you have shown, have his finger on the trigger?

A I cannot tell that.

Q You have spoken of the cart hiding your view for a moment. Could you see the officer and the soldier both at the moment the officer fired?

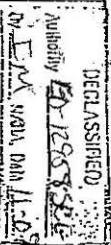
A. Yes.

Q You could see the soldier well at that moment?

A Yes.

Q Did you observe anything in the conduct of the soldier that made you think he was drunk?

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A I don't know their ways. I don't know the ways of these people.

Q Had you observed this soldier before the cart arrived?

A I had seen many soldiers going up and down the street, but I couldn't tell them one from the other.

Q You did not remark this soldier as drunk, however?

A No, I cannot tell that. I could not tell the soldier if I were to see him.

Questions by court:

Q I would like to ask the witness if you are sure that the barrel was turned to the right or left, or was it turned up?

(Witness indicates)

Q Was the barrel that way, or was it turned out that way?

A He says he cannot remember.

Counsel for defense: Before the witness is dismissed I would like to ask the opinion of the court on one point. The comrade of this witness was sitting with him and saw the same thing, and he is sick in the hospital. In order to expedite the case the judge advocate has agreed to admit that the comrade of this man would testify to the same thing, the same evidence.

The court: That would be cumulative evidence, if it is the same?

Counsel for defense: Yes, sir. As a matter of fact, from a previous examination to all intent I think it would be, and I am perfectly willing to take the judge advocate's decision on that, if the judge advocate is willing to admit.

The judge advocate: The judge advocate states <sup>as</sup> that immediately on arriving here and learning that this witness <sup>as</sup> and the second witness had been ordered away from the neighborhood, he caused them to be summoned; that the present witness, when he arrived, informed us that his comrade was sick and he did not know when he could get <sup>as</sup> here. The judge advocate telegraphed to inquire the condition, but had no answer. I confirm what the counsel has said, and I will admit

on the record that the comrade who is known as Dourin, if present, would testify the same as has been testified by the witness Fouché.

The court: Can you refer the court to some section in the Manual of Courts Martial whereby we can admit, or have the record that such action will admit same? This is presumably true in civil courts.

The judge advocate: It is presumably true in civil courts. I do not know of any express terms in the courts martial manual and particularly for the defense, and when consented to by the counsel for the defense, I cannot see any possible objection to it, but I have known of similar admissions being made in military court practice.

The court: I would like some section that we can admit. In the meantime we can go ahead and take up other witnesses.

The defense: I have examined the witness in question and found one little thing which I think is a little more favorable for this accused. It is a small point, but I am willing to waive it.

The court: With reference to the testimony of the other witness who cannot be here?

Counsel for defense: Yes. I am willing to waive.

The court: The question arises as to whether it is <sup>admissible in</sup> a criminal action. If you could admit <sup>it for</sup> either side it would be for <sup>the</sup> defense and not for the prosecution. However, the section of the article has reference to depositions.

Counsel for defense: But the substance of the law says in capital cases the accused has a right to be confronted by his witnesses, but if he waives that right I see no necessity---

The court: The evidence isn't here, but cannot we expedite matters by looking up this matter?

The judge advocate: I should like to say with reference to suggestion recently made, the accused, as I understand, cannot waive the right to be confronted by witnesses, but no testimony or evidence that may be taken in capital cases by deposition. It is not usually

required by either side that every witness may be called. It is simply stated that there is another witness who might be called, but we do not regard his testimony as indispensable, either one of us, and we are willing to state to the court that if the witness were present he would testify the same as the witness who has already testified,

The Court: We understand that.

Counsel for defense: I have a deposition of that other witness, but it is not an authenticated paper. I have a translation. It is merely cumulative. The defense is willing to dispense with the testimony of the other witness as it would merely be cumulative.

The court: What about that deposition? Is that satisfactory to the judge advocate?

Counsel for defense: It is not authenticated. It is a statement made to the gendarmes immediately after the affair. I am unable to state if there is any way to get this back as those gendarmes have gone away with the 8th Corps.

The court: We don't want to keep out anything that is permissible.

Court closed at 4:50 P.M.

~~as~~ Court opened at 4:55 P.M., in the presence of the ~~as~~  
~~as~~ accused and his counsel.

The judge advocate: Counsel says he will not ask for the introduction of it.

Major Lorillard Spencer, 369th U.S. Inf., a witness for the defense was sworn, and testified as follows:

Questions by judge advocate:

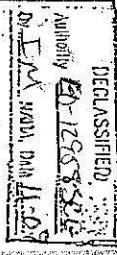
Q Do you know the accused, if so, state who he is?

A Lieutenant Cochran of the 369th U.S. Infantry.

Questions by defense:

Q Major Spencer, what orders, if any, did you receive on or about the 21st day of August with reference to disturbance among the men of your regiment?

G.P.



A I was camp commander at Camp Les Maigneux and had sent during the day a patrol of men to apprehend absent-without-leave soldiers from the regiment, particularly at Dommartin-la-Planchette. During the afternoon I received a note from the lieutenant-colonel commanding the regiment, who was at Somme Bionne, stating that the patrol had become disorderly and caused disturbances, and, as I remember it, some of them were drunk, and I also remember that the equipment was left around indiscriminately on the sidewalk, being one of the statements in his note. I tried to find the note but could not. I immediately ordered Lieutenant Cochran, being senior in command of the post, to proceed by wagon to Dommartin and return with those men. From the <sup>wc</sup> information I had they were probably pretty rough and I told him to use every means to get them and not allow them to disgrace the regiment any further. And the lieutenant proceeded with those instructions.

Q What definite position has been assigned to you in the regiment with reference to provost guards? Provost marshal?

A Oh no, no.

Q Did you assign and regulate the provost guards of the regiment?

A Personally?

Q Yes?

A Those that came from my own camp. I was camp commander and had two battalions and the guard from that camp went out from my order.

Q Did you send Lieutenant Cochran on this duty expecting and believing that trouble might ensue?

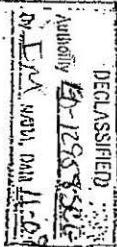
A Yes, sir, I did.

Q Did you knowingly speak to him, attempt to convey the idea to him knowingly that he might expect trouble?

A Yes.

Q Is it reasonable in your opinion that any demonstration by these men on his arrival at Dommartin would require stringent measures to suppress?

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A It is quite possible.

Q What were the instructions received by you from the commanding officer of the regiment to the effect that there was or had been rioting in this town by those men?

A That is my impression--I haven't got the note. That is my recollection or impression I got at the time that the men were in pretty bad shape. I think I warned the lieutenant to be careful, that he would probably have to use pretty stringent measures.

Q Did you consider that the orders you gave to the lieutenant, pursuant to the orders you received from the commanding officer of the regiment, placed the lieutenant on an official status such that it would be his duty to suppress any trouble that should arise with those men?

A Absolutely.

Q Was it your intention when you detailed this officer, or did you convey, or intend to convey to him that such stringent measures as he considered necessary to suppress any trouble with those men would be in the execution of his office?

A I intended so to convey that impression, because I remember my instructions were to bring them in. I think I told him to go armed, too.

Q Would you consider this officer would be acting in the execution of his office in using any reasonable repressive measures against these men?

A I would.

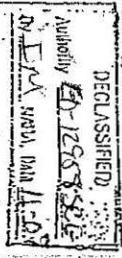
Questions by prosecution:

Q Did you give any written orders, instructions or credentials to the accused?

A No, sir.

Q This patrol or provost guard had been posted or sent out in the first place by the officer of the day, had it not?

A Yes, sir.



Q The accused was not the officer of the day, was he?

A No, sir.

Q Are you not familiar with the provisions of the manual for guard duty that members of the guard take orders and are relieved only by the commanding officer, the officer of the day, and officer and non-commissioned officers of the guard?

A These men were not the regular guard and had been posted in the absence of the adjutant.

~~A~~ Q They were not the regular guard, but provost guard sent out?

A Nothing to do with it.

Q Or was it a fact that they had never been posted?

A They had been sent out. They had been told to go on duty as provost guard as customary in the regiment.

Q Lieutenant Cochran, when he went to town under your instructions, however, had nothing except his commission and his uniform by way of authority in the premises?

A That is all he had.

Questions by defense:

Q Do not the guard regulations distinctly say, in general orders, that the guard, that sentries will be relieved by the commanding officer, officer of the day or officer or non-commissioned officers of the guard only?

A That is my recollection.

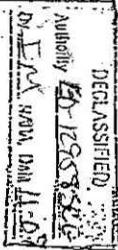
Q Was not Lieutenant Cochran acting directly under the orders of the commanding officer transmitted through you?

A He was.

Questions by prosecution:

Q But he had nothing except his own word, if he gave it, to prove that?

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A. That's all. It is not customary for our officers to go armed, excepting on guard.

Q. What instructions did you give at the time when you sent out this detail with reference to arms of the enlisted men of the detail?

A. The arms of the enlisted men?

Q. I don't mean the first detail; the detail under the accused?

A. I don't recall giving any instructions about their arms. If I did it was they should carry clubs and that the accused should go armed. I remember that the accused should be armed, because that was a general order I received from higher authority that the officers and non-commissioned officer in charge of a detail should be armed, and particularly this patrol.

Q. The orders to which you refer are those from the regulations which have been introduced in evidence as Exhibit A. They are the ones, are they not (showing witness Exhibit A)?

A. Yes, they are.

Questions by court:

Q. What did you say with reference to the officer being armed?

A. I said that the patrol officer should go armed and the patrol should go with clubs.

Q. This was the detail you sent out under the accused?

A. This was the patrol sent out to bring in the patrol sent out in the morning.

Questions by prosecution:

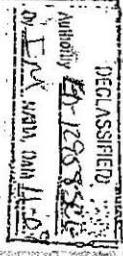
Q. This order, Exhibit A, refers to the mere form or character of patrols, rather than to the one detailed under the accused?

A. I think, as I recall it now, I told the lieutenant to do anything he thought necessary to accomplish his purpose.

Q. But you didn't refer to this order?

A. No, sir, I didn't think it was necessary.

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Q Is it not in War Department orders that any officer in command of troops on duty shall wear side arms?

A I understand the Sam Browne belt takes the place of side arms.

Q Nevertheless the War Department order still stands; it has not been revoked?

A Not as I know of, but this was superceded. It is hazy in my mind, but we have been operating under that order right along.

Q Did you consider that this detail which you sent out under the lieutenant was a patrol in the same sense as the other patrol?

A No, sir. They were sent out for a specific purpose. The other was a general patrol to bring in absent-without-leave men and men disturbing the peace.

Q You considered under the circumstances you were perfectly justified in having the lieutenant armed?

A Absolutely.

Questions by court:

Q In that connection did you direct him to go armed?

A I think I did, sir, I can't recall.

Q Who was the officer of the day?

A Lieutenant Berry. He was the officer of the day the night before. I am not sure whether he had been relieved at the time the lieutenant went out or not.

Questions by prosecution:

Q It had been customary for the officers of the regiment to wear Sam Browne belts and not side arms?

A Except when the men were on combat, in combat formation for patrols and things like that, or if an officer was to take a detail, a commissioned officer, he would not necessarily wear his pistol, but the Sam Browne belt would be sufficient.

Captain John H. Clark, Jr., 369th U.S. Inf., a witness for the defense, was sworn and testified as follows:

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Question by prosecution:

Q Do you know the accused, if so, state who he is?

A Second Lieutenant Emmett Cochran, U.S.A.

Questions by defense:

Q Captain Clark, did you know a man in your company by the name of Whittaker, who was shot on or about the 21st of August, 1918?

A Yes, sir.

Q What was the general character of that man?

A Why, his behaviour was usually all right. I had very little trouble with him. He was rather unusually loud in time of stress, payday, something like that. He would be one of the men who would go A.W.O.L., and get drunk like the rest of them.

Q Was he of a quarrelsome disposition?

A No.

Q Did you ever know of any former trouble he was in?

The prosecution: I should like to object to that question. It appears the proper line would be as to his general reputation, and not as to specific or prior offenses.

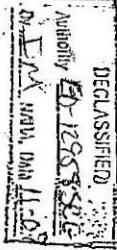
The defense: I will answer the question. I believe I can show by that question that this man was of a quarrelsome disposition. His general reputation was not good. Some question has been raised that it was good. I want to know if he has been in more trouble before. I fail to see where the question is not relevant.

The court: The question is raised whether you want to impeach your own witness.

The defense: I wish to let the question stand.

The prosecution: I request my objection to stand. The question may relate to the reputation of the person. His reputation has not---

The defense: On the contrary, I wish to question the reputation of the deceased. It has been stated he has given very little



trouble. I wish to bring out that he has.

The court was closed, and on being opened the president announced in the presence of the accused and his counsel that: the court holds that individual instances could not be taken up, but the general reputation could as to his being a dangerous man.

The defense: I will change the question and put it in another way.

Q Did Whittaker have a reputation, or, of your knowledge, was he likely to be quarrelsome, especially if under the influence of liquor?

The prosecution: I think the words, "of your knowledge" should be left out.

Questions by defense:

Q Did Whittaker have a reputation, or, was he likely to be quarrelsome, especially if under the influence of liquor?

A I should say not.

Q Did Whittaker have any reputation for being quarrelsome before he left the United States, while around New York, for instance?

A No, he did not.

Q Captain, did you ever make any statement to the accused concerning Whittaker, subsequent to the shooting?

A Yes, sir.

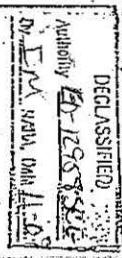
Q Could you remember what that statement was?

The prosecution: I should like to object to that statement. I cannot see any relevancy in any such statement made to the accused after the shooting.

The defense: That is a perfectly plain question for me to ask the witness, if he made any statement relative to the deceased. I fail to see the slightest ground for the objection of the judge advocate.

The court: Will you state the grounds?

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The prosecution: The objection, sir, is relevancy, as I understand the question. If I can correctly understand the question, it is, did the witness make any statement to the accused about Whittaker after the shooting? Suppose he did! What materiality has the statement made by this witness to the accused about Whittaker after this event to do with the justification of the accused for the homicide?

The defense: I am perfectly willing to submit the question to the court. The idea is this. My idea is in asking this question is the fact that the remark which the witness has stated that he did make to the accused, if he can remember, bears on the reputation, the very general reputation of the man who was shot, and as this witness is a witness for the defense, I fail to see where the judge advocate has any grounds to object to my asking my own witness as to what remarks he made to the accused. The judge advocate doesn't know and can have no previous idea as to what that remark was and as to whether or not it is relevant.

The prosecution: If counsel will enlighten us in what manner it would be relevant, it is possible my objection can be cleared up, but at present I am unable to conceive that any statement made to the accused after the offense in which we are inquiring can be relevant.

The defense: I can state this: that it has reference to the reputation of the deceased when he has been drunk. There has been plenty of testimony <sup>about his</sup> having had something to do about drink during the day.

The prosecution: Counsel has already questioned the witness with reference to the reputation of the deceased at considerable length. He can ask further questions along that line, as to what was the reputation of the deceased, provided they are not repetition of previous questions, but this question as now put is not a

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