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Volume I

including

CM 187168 to CM 192530

(1929-1930)

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F O R E W O R D

The Board of Review was first established in 1918 by The Judge Advocate General (Office Memo. JAG 321.4, 6 Aug. 1918), and received statutory recognition and authority in 1920 (Article of War 50½; act of 4 June 1920, 41 Stat. 797). Digests of selected holdings and opinions of the Board of Review appear in the Digest of Opinions of The Judge Advocate General of the Army 1912-1940, as well as in the 1912-1930 compilation, and are currently being published in the monthly Bulletin of The Judge Advocate General of the Army. The present collection contains the holdings, opinions and reviews rendered since July 1929, and is primarily for the use and convenience of the Boards of Review in Washington and abroad. The first indorsement of The Judge Advocate General is included only where there is a difference of opinion or some material addition to the Board of Review's discussion. "Short holdings" which find the record of trial legally sufficient to support the findings of guilty and the sentence, without any discussion of the facts or arguments, are not included. An index and tables covering the materials from 1929 through 1943 will be added to this first collection. Continuation volumes and periodical indexes will follow from time to time as the materials accumulate.

Myron C. Cramer.
MYRON C. CRAMER,
Major General,
The Judge Advocate General

CONTENTS OF VOLUME I

CM No.	Accused	Date	Page
187168	Greene	10 Jul 1929	1
187175	Genuso, Applebaum, Argabright, Cunningham	24 Jul 1929	7
187200	Morris	28 Jul 1929	15
187252	Hudson	29 Jul 1929	19
187316	Hensley	11 Jul 1929	23
187319	Line	7 Aug 1929	25
187322	Dowell	15 Jul 1929	33
187345	Clarke	23 Aug 1929	39
187542	Lanier	7 Aug 1929	49
187548	Burke, Corcoran	2 Aug 1929	55
187576	Lanfair	13 Aug 1929	59
187588	Errigo	13 Aug 1929	63
187610	Williams	23 Aug 1929	67
187656	Munson	5 Sep 1929	77
187781	Starks, Sayles	23 Aug 1929	79
187795	Hammond	1 Oct 1929	83
187850	Taylor	9 Sep 1929	99
187894	Waschak	4 Oct 1929	101
188014	Smith	14 Sep 1929	109
188211	Hornsby	2 Oct 1929	111
188356	Sheehan	26 Oct 1929	113
188432	Soderquist, Wojciehowski	11 Dec 1929	119
188571	Simmons	29 Nov 1929	123
188606	Paparis	13 Nov 1929	129
188766	Ramsey	25 Nov 1929	131
188941	Vezina	19 Dec 1929	133
189200	Osborne	3 Jan 1930	139
189223	Johansen	20 Mar 1930	141
189409	Iverson	6 Feb 1930	163
189658	Hawkins	10 Feb 1930	175
189682	Myers	11 Mar 1930	179
189741	Mulkey	29 Jan 1930	183
189830	Walcher	4 Mar 1930	187
190175	Weber	5 Mar 1930	189

CM No.	Accused	Date	Page
190249	Totten	28 Feb 1930	195
190259	Sheffield	17 Mar 1930	203
190611	Maszeski	29 Mar 1930	211
190628	Coleman	2 May 1930	215
190674	Chase	29 Mar 1930	221
190709	Ogden	26 Mar 1930	229
191076	Porter	3 Jun 1930	231
191180	Nellis	24 May 1930	241
191369	Seluskey	8 May 1930	245
191403	Evans	8 May 1930	247
191413	LaPointe, Fleming	2 Jun 1930	251
191422	Dragoon	9 May 1930	253
191605	Ambrose	9 Jun 1930	257
191622	Shanley	17 May 1930	259
191631	Thomas	3 Jun 1930	261
191638	Giles	12 Jun 1930	269
191693	Boudreau	29 May 1930	271
191695	Johnson	18 Jul 1930	273
191705	Jones	24 May 1930	291
191766	Gilchrest	2 Jun 1930	297
191809	Price	25 Jun 1930	301
191831	Shoop	5 Aug 1930	303
191891	Bailey	21 Jun 1930	311
191990	Brady	22 Jul 1930	315
192128	Strickland	26 Aug 1930	329
192169	Chadwick	5 Aug 1930	347
192335	Clark	7 Aug 1930	355
192408	Carr	15 Aug 1930	357
192451	Hajek	23 Sep 1930	361
192456	Ciambrone	9 Oct 1930	369
192503	Neese	27 Aug 1930	375
192530	Browne	23 Oct 1930	383

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C.M. 187168

July 10, 1929.

UNITED STATES	)	SECOND DIVISION
vs.	)	Trial by G.C.M., convened at Fort Sam Houston, Texas, May 14, 1929. Dishonorable discharge and confinement for seven (7) years. Disciplinary Barracks.
Private ALTO A. GREENE (6229532), 68th Service Squadron.	)	

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by WICKLIFFE, Judge Advocate.

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1. The accused was tried upon the following charges and specifications:

CHARGE I: (Nolle prosequi)

CHARGE II: Violation of the 58th Article of War.

Specification: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at Kelly Field, Texas, on or about December 14, 1928, desert the service of the United States and did remain absent in desertion until he was apprehended at San Antonio, Texas, on or about February 27, 1929.

CHARGE III: Violation of the 93rd Article of War.

Specification 1: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at Duncan Field, Texas, on or about June 15, 1928, feloniously take, steal, and carry away a pair of boots, value about fifteen ($15.00) dollars, the property of Brigadier General F. P. Lahm, Duncan Field, Texas.

Specification 2: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at San Antonio, Texas, on or about February 4, 1929, feloniously take, steal, and carry away a Ford Touring Car, value about two hundred ($200.00) dollars, the property of Julian Villanueva, 321 Grenet Street, San Antonio, Texas.

Specification 3: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at Kelly Field, Texas, on or about February 14, 1929, feloniously take, steal and carry away an Overland Touring Car, value about three hundred ($300.00) dollars, the property of Staff Sergeant Edward J. Hudson, 42nd School Squadron, Kelly Field, Texas.

Specification 4: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at San Antonio, Texas, on or about February 23, 1929, feloniously take, steal, and carry away from United States property surrounding the United States Post Office, a Ford Touring Car, value about two hundred ($200.00) dollars, the property of A. J. Pahl, 410 Jennings Ave., San Antonio, Texas.

Specification 5: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at San Antonio, Texas, on or about February 24, 1929, feloniously take, steal, and carry away, a Ford Roadster, value about two hundred ($200.00) dollars, the property of H. E. Ketner, 215 South Trinity Street, San Antonio, Texas.

CHARGE IV: (Nolle prosequi.)

FIRST ADDITIONAL CHARGES.

CHARGE I: Violation of the 59th Article of War. (Not Guilty.)

Specification 1: (Not Guilty.)

Specification 2: (Plea in bar sustained)

Specification 3: " " " "

CHARGE II: Violation of the 96th Article of War. (Not Guilty.)

Specification 1: (Not Guilty.)

Specification 2: (Plea in bar sustained)

Specification 3: " " " "

SECOND ADDITIONAL CHARGES.

CHARGE I: Violation of the 84th Article of War.

Specification 1: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at San Antonio, Texas, on or about June 1, 1928, unlawfully sell to Gregorio Garcia, 1606 South Laredo Street, San Antonio, Texas, two woolen olive drab blankets, of the value of nine dollars and sixty cents ($9.60), issued for use in the military service of the United States.

Specification 2: In that Private Alto A. Greene, 68th Service Squadron, Kelly Field, Texas, did, at San Antonio, Texas, on or about June 1, 1928, unlawfully sell to Gregorio Garcia, 1606 South Laredo Street, San Antonio, Texas, one dismounted raincoat, of the value of three dollars and forty-nine cents ($3.49), issued for use in the military service of the United States.

CHARGE II: Violation of the 96th Article of War. (Not Guilty.)

Specification: (Not Guilty.)

A nolle prosequi was entered as to Charges I and IV and their specifications.

Pleas in bar of trial were sustained as to Specifications 2 and 3, Charge I, and Specifications 2 and 3, Charge II, First Additional Charges. Accused pleaded not guilty to the remaining charges and specifications. He was found guilty of Charges II and III and their specifications and of Charge I and its specifications, Second Additional Charges; and not guilty of Charge I and Specification 1 thereunder, First Additional Charges, Charge II and Specification 1 thereunder, First Additional Charges, and Charge II and its specification, Second Additional Charges. Evidence of one previous conviction by special court-martial for larceny in violation of the 93rd Article of War was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor at such place as the reviewing authority might direct for seven years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. As to Charge II and its specification, the evidence shows that on December 14, 1928, the accused went absent without leave from his organization at Kelly Field, Texas (Ex. 2) and was apprehended at San Antonio, Texas, on February 27, 1929 (R. 63-64).

As to Specification 1, Charge III, the evidence shows that in June, 1928, accused was an orderly for Brigadier General F. P. Lahm at Duncan Field, Texas, and as such had access to a garage wherein that officer had certain personal effects stored. Among these effects were a pair of boots for which General Lahm had in 1915 paid the equivalent of ninety dollars. About June 15, 1928, General Lahm found that these boots had disappeared. At that time he valued them at $15.00 (R. 27-28). On December 13, 1928, after having been warned that he need not make a statement and that whatever he said could be used against him accused voluntarily stated that he had taken the boots and had traded them to a civilian for a case of beer (R. 60, 63, Ex. 3).

As to Specification 2, Charge III, it is shown by the evidence that on February 4, 1929, a 1924 Ford touring car belonging to one Julian Villanueva was stolen from its parking place in the Missouri Pacific railroad yard at San Antonio, Texas. The car was valued by the owner at about $200.00. The car was later seen by Vallamueva in a wrecked condition at 210 11th Street in San Antonio and returned to him by a Mr. Morales (R. 30-31). Morales testified that he purchased this car as "junk" from accused who said his name was Jones, for $20.00, on about February 12, 1929 (R. 74,76,Ex.5). Upon his apprehension on February 27th, accused stated, after having been warned that he need not make any statement and that what he might say would be used against him, that he had stolen this car, and others, and sold them to Morales under the name of "Jones" (R. 68).

As to Specification 3, Charge III, it is shown that on February 13 or 14, 1929, a 1922 Overland touring car belonging to Private Edward J. Hudson was stolen from its parking place near one of the barracks at Kelly Field, Texas. Hudson valued the car at about $300.00. The car was later recovered by the owner at "Morales' Garage" on 11th Street in San Antonio (R. 36-38). Morales testified that he purchased this car, and another, for wrecking purposes, from accused, under the name of Jones, for $27.00 (R. 75-77). Accused, on February 27th, after having been warned as above described, stated that he had stolen this car and sold it to Morales (R. 68).

As to Specification 4, Charge III, the evidence shows that a 1923 Ford touring car belonging to one A. J. Pahl and valued by him at $200.00, was parked by Pahl at the U. S. Post Office in San Antonio, Texas, on February 23, 1929, and on that date removed from the parking place without the knowledge or consent of the owner. It was later recovered by the owner from "210 11 Street, Morales' Garage", at San Antonio (R. 44-45). Morales testified that he purchased this car, together with the Overland belonging to Hudson, for wrecking purposes, from accused for $27.00 (R. 75-77). Accused, on February 27th, likewise stated that he had stolen this car and sold it to Morales (R. 68).

As to Specification 5, Charge III, the evidence shows that on the night of February 24, 1929, one H. E. Ketner parked his 1927 Ford roadster, valued at $200.00, in front of a church in San Antonio, Texas, and upon re-

turning to the parking place after attending services found that the car had been stolen. On February 27, 1929, when accused was arrested by the military authorities, the Ford roadster was seen parked in the back yard of the premises from which accused was taken (R. 48, 65). It was returned to Ketner on February 28, 1929 (R. 40,41,47,48). In his statement of February 27th, accused admitted having stolen this car (R. 68).

As to Specifications 1 and 2, Charge I, Second Additional Charges, the evidence shows that upon a check of accused's property on December 14, 1928, it was found that he was short four blankets, woolen, O.D., and one raincoat, dismounted (R. 58-59). In his statement of December 13, 1928, after having been warned that he need not make a statement, and that whatever he might say would be used against him, accused voluntarily stated that he and another soldier, some time after disposing of the boots described in Specification 1, Charge III, sold two blankets and a raincoat which had been issued to accused, to one Gregorio Garcia.

The accused, having been advised of his rights as a witness, elected to remain silent.

3. The evidence sufficiently shows accused's absence without leave between the dates alleged in the Specification, Charge II. The duration of his absence was such that the court was justified in concluding that he intended to desert, as found. Apprehension was established.

The evidence also shows that at about the times and at the places alleged in the Specifications, Charge III, the boots belonging to Brigadier General Lahm, and the automobiles belonging to Villanueva, Hudson, Pahl and Ketner, respectively, were taken and carried away without the consent of the owners. Accused's confessions that he had taken this property and had disposed of certain portions of it by sale, together with the evidence of his possession and disposition of three of the automobiles, sufficiently shows that he was the person who took the articles described and that he intended in each case to deprive the owner of his property therein. The essential elements of the offenses of larceny, as found under Charge III and its specifications, are established.

With respect to Charge I and its specifications, Second Additional Charges, the evidence shows that blankets and a raincoat which had been issued to accused were found to be missing from his effects. At about the time of this discovery he confessed having unlawfully sold them, as alleged in the specifications. An accused cannot be convicted legally upon his unsupported confession, and it was not proper for the court to consider the confession with respect to these sales without independent proof that the offense charged had probably been committed, that is, without evidence of the corpus delicti. The Manual for Courts-Martial, page 115, states that "In a case of * * * alleged unlawful sale, evidence that the property in question was missing under circumstances indicating * * * that it was probably unlawfully sold,

would be a compliance with the rule" requiring independent proof of the corpus delicti, but there is nothing in the evidence in this case, aside from the confession, to indicate that the blankets and raincoat were probably sold. The mere fact that the property in question was missing, without proof of attending circumstances indicating unlawful sale, is not sufficient proof of the corpus delicti (C. M. No. 159283, Nelson). There being no proof in this case of the probable commission of the offenses in question, consideration of the confession was improper and the remaining evidence is not legally sufficient to support the findings of guilty.

4. The charge sheet shows that Greene enlisted November 4, 1927, at the age of 27 years, with prior service as follows: "From 7-14-24 to 7-12-27, Btry. G, 55th CAC. Disch. Character Excellent, for convenience of government."

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges II and III and their specifications, and the sentence, but legally insufficient to support the findings of guilty of Charge I and its specifications, Second Additional Charges.

H. A. Turnbull, Judge Advocate.

William F. Burns, Judge Advocate.

Richard W. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

JUL 24 1929

Military Justice
C. M. No. 187175

UNITED STATES v. Private THOMAS A. GENUSO (6700124), Company I, 26th Infantry, Private RONALD W. APPLEBAUM (6699501), Company L, 16th Infantry, General Prisoner BUSTER W. ARGABRIGHT (G.P. 15233), and Private WILLIAM B. CUNNINGHAM, JR., (6125435), Company L, 16th Infantry.	FIRST DIVISION Trial by G.C.M., convened at Fort Wadsworth, New York, May 24, 1929. Sentence as to each accused: Genuso - Dishonorable discharge and confinement for twelve (12) yrs. Applebaum - Dishonorable discharge and confinement for eight (8) yrs. Argabright - Confinement for five (5) years. Cunningham - Dishonorable discharge and confinement for six (6) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BROWN, Judge Advocate.

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1. The accused were tried upon the following charges and specifications:

CHARGE I: Violation of the 69th Article of War.

Specification: In that Private Thomas A. Genuso, Co. I, 26th Inf., Private Ronald W. Applebaum, Co. L, 16th Inf., General Prisoner Buster W. Argabright, and Private William B. Cunningham, jr., Co. L, 16th Inf., acting jointly, and in pursuance of a common intent, having been duly placed in confinement in the garrison guard house at Fort Wadsworth, New York, on or about March 8, 1929, April 1, 1929, January 14, 1929, and April 11, 1929, respectively, did, at Fort Wadsworth, New York, on or about April 22, 1929, escape from said confinement before they were set at liberty by proper authority.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Private Thomas A. Genuso, Co. I, 26th Inf., Private Ronald W. Applebaum, Co. L, 16th Inf., General Prisoner Buster W. Argabright, and Private William B. Cunningham, jr., Co. L, 16th Inf., acting jointly, and in pursuance of a common intent, did, at Fort Wadsworth, New York, on or about April 22, 1929, by force and violence, and by putting him in fear, feloniously take, steal and carry away from the person of Private Kenneth R. Folmsbee, one (1) automatic pistol, number 394086, model 1911, the property of the United States, value $26.38.

Specification 2: In that Private Thomas A. Genuso, Co. I, 26th Inf., Private Ronald W. Applebaum, Co. L, 16th Inf., General Prisoner Buster W. Argabright, and Private William B. Cunningham, jr., Co. L, 16th Inf., acting jointly and in pursuance of a common intent, did, at Fort Wadsworth, New York, on or about April 22, 1929, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private Arthur E. Crabtree, one (1) Springfield rifle, number S-773370, Model 1903, the property of the United States, value $32.75.

Specification 3: In that Private Thomas A. Genuso, Co. I, 26th Inf., Private Ronald W. Applebaum, Co. L, 16th Inf., General Prisoner Buster W. Argabright and Private William B. Cunningham, jr., Co. L, 16th Inf., acting jointly and in pursuance of a common intent, did, at Fort Wadsworth, New York, on or about April 22, 1929, with intent to do him bodily harm, commit an assault upon Private Kenneth R. Folmsbee, by striking him on the head with a dangerous weapon, to wit, an axe.

Specification 4: In that Private Thomas A. Genuso, Co. I, 26th Inf., Private Ronald W. Applebaum, Co. L, 16th Inf., General Prisoner Buster W. Argabright, and Private William B. Cunningham, jr., Co. L, 16th Inf., acting jointly and in pursuance of a common intent, did, at Fort Wadsworth, New York, on or about April 22, 1929, with the intent to do him bodily harm, commit an assault upon Private Arthur E. Crabtree, by striking him on the head with a dangerous weapon, to wit, a pistol.

Each of the accused pleaded not guilty to, and was found guilty of, the charges and specifications. Evidence of one previous conviction of Genuso by summary court-martial, for failure to repair at the fixed time and place for duty, was introduced. Applebaum, Cunningham and Genuso were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for sixteen years, and Argabright was sentenced to confinement at hard labor for sixteen years. The reviewing authority approved the sentence as to each of the accused but reduced the period of confinement in the case of Applebaum to eight years; in the case of Cunningham, to six years; in the case of Genuso, to twelve years; and in the case of Argabright, to five years, designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement and forwarded the record pursuant to Article of War 50½.

2. The evidence shows that during the forenoon of April 22, 1929, the accused, who were prisoners in confinement at Fort Wadsworth, New York, were overheard by other prisoners in a discussion wherein they planned to overcome and tie up the sentinels over them and thereby effect their escape (R 12, 13, 38, 42, 43; Exs. 1-4). On the afternoon of April 22d, the accused, with four other prisoners, were taken in groups under guard of Privates Kenneth Folmsbee and Arthur E. Crabtree as sentinels, to Battery Upton at Fort Wadsworth to work (R 14, 22). Folmsbee was armed with a service pistol (R 15) and Crabtree with a service rifle (R 34). While the eight prisoners were inside a room scraping the walls with hand axes, Folmsbee posted himself outside the door of the room while Crabtree was above near the outer door of the Battery (R 14, 18, 23). About 2.00 p.m., the accused rushed upon Folmsbee, seized and struck him about the eye, tore his pistol from its holster, and struck him on the head with a hand axe, knocking him down and partially stunning him (R 14, 21, 42). Folmsbee testified that it was Genuso who seized him and struck him on the head with the hand axe and that the other three accused "piled on" and struck him about the eye (R 14, 15). A prisoner Barton, who was present in the room, testified that Folmsbee was seized by Genuso and Cunningham (R 42). After accused had knocked Folmsbee down and taken his pistol they ran from the room. Crabtree, having heard the commotion, went to investigate and, seeing what was taking place, started to interfere and prevent the assaults upon Folmsbee when he was stopped by Applebaum and Argabright who seized him and tried to take his rifle away from him. As the three were wrestling, Genuso and Cunningham "came up" and Genuso struck Crabtree on the head with the butt of a .45 caliber pistol, while Cunningham struck Crabtree on the forehead with his fist. When these blows were struck, Applebaum secured the rifle. The accused stated that they were going to tie Crabtree up. They did not, however, do so but ran away, Applebaum in the rear. As Applebaum got out of the entrance to the battery, with Crabtree following at a distance of about 8 feet, Applebaum unloaded and dropped the rifle and continued on. Crabtree thereupon picked up the rifle, reloaded it and ran after the accused, calling on them to halt. At a distance of about thirty feet he fired upon and wounded Genuso who dropped immediately. Cunningham

also dropped to the ground when Genuso was shot, but Applebaum and Argabright escaped from the sentinel's sight (R 23-25). Genuso and Cunningham were taken in custody and later in the afternoon Applebaum and Argabright were found concealed in some bushes on the post. Folmsbee's pistol was found in the same vicinity (R 34, 36). The hand axe with which Folmsbee was struck was found, with blood stains on it, in the vicinity of the assaults (R 24, 31, 35, 36). The pistol and rifle were in evidence before the court and were shown to be of values of $26.38 and $32.75, respectively (R 16, 27, 45). The hand axe was also introduced as an exhibit (R 17).

Accused Genuso testified that he desired to effect his escape and decided that it would be easy to overcome the sentinels. He therefore struck Folmsbee with both fists and knocked him down while Cunningham stood by. Witness did not strike Folmsbee with a hand axe although he had been working with one before the assault. He took Folmsbee's pistol and was holding it in his left hand when he came to Crabtree. He ordered Crabtree to give up his rifle, and the latter "said something but with a little force he dropped his gun." Witness did not strike Crabtree with the pistol. Applebaum and Argabright were outside the Battery during the transaction described, at a place where they could hear but not see what went on. Witness took Folmsbee's pistol in order that he might make his escape but knew nothing about using it and passed it to someone else upon leaving the Battery (R 45-51).

Accused Applebaum testified that he and Argabright were standing outside the Battery with Crabtree when they heard the disturbance inside and that when Crabtree ran in, leaving witness and Argabright outside, they followed and seized him and his rifle. While they were holding him Genuso came up with a pistol in his left hand and told Crabtree to release the rifle. Crabtree complied, whereupon witness took it, sprang four or five paces away and took the cartridges from it. Genuso, followed by Cunningham, then went out of the Battery and witness dropped the rifle. Argabright later had the pistol. When witness heard shouting inside the Battery he knew that someone had attacked the sentinel and "knew we were going to go" (R 53, 54).

Neither Cunningham nor Argabright testified or made an unsworn statement.

3. The evidence shows that at the time and place alleged accused, or some one or more of them struck Folmsbee on the head with an axe, as alleged in Specification 3, Charge II, and Crabtree on the head with a pistol as alleged in Specification 4, Charge II, and took from Folmsbee the pistol described in Specification 1, Charge II, and took from Crabtree the rifle described in Specification 2, Charge II. From all the circumstances, the court was justified in concluding that the assaults were committed with intent to do bodily harm in each case, that the weapon used in each case was a dangerous one, that the taking of the pistol and rifle was accomplished

by force and violence and by putting the sentinels in fear, and that the pistol and rifle were taken with intent to steal. The essential elements of the offenses of assault with intent to do bodily harm with a dangerous weapon, and robbery, as alleged, are established. There is some conflict inthe testimony as to the identity of the person who struck Folmsbee with the axe and Crabtree with the pistol, but it is clear that these assaults, as well as the other offenses, were participated in by all of the accused to such an extent as to make them equally guilty, as charged.

The evidence also sufficiently shows that accused Applebaum and Argabright, acting together, escaped from legal confinement as found under the Specification, Charge I. Although the evidence shows that Gemuso and C unningham were legally confined, and that after assaulting the sentinels, attempted to escape, it does not appear therefrom that they succeeded in shaking off pursuit and actual restraint, Gemuso having been shot down and Cunningham having surrendered after the two had run but a short distance and while Crabtree was in hot pursuit. It follows that the evidence is legally sufficient to support only so much of the findings of guilty as to Gemuso and Cunningham, under Charge I and its specification, as involves a finding that, acting jointly and in pursuance of a common intent, they did, at the time and place alleged, attempt to escape from confinement before set at liberty by proper authority, in violation of Article of War 96.

4. By letter from the reviewing authority, received in this office subsequent to receipt of the record of trial, it is stated that the reviewing authority is in doubt as to whether he acted legally in ordering the trial and approving the sentence in the case of Applebaum, this for the reason that prior to his trial Applebaum's discharge on account of minority had been applied for by his parents and ordered, the discharge so ordered, however, having been withheld on account of the commission of the offenses involved in this case. In this connection the reviewing authority invites attention to that part of the Act of February 12, 1925 (43 Stat. 896; U.S. Code, Title 10, Section 653), which provides that:

> "Upon the presentation of satisfactory evidence as to his age and upon application for discharge by his parent or guardian presented to the Secretary of War within six months after the date of his enlistment, any man enlisted after July 1, 1925, in the Army under twenty-one years of age who has enlisted without the written consent of his parent or guardian, if any, shall be discharged with the form of discharge certificate and the travel and other allowances to which his service after enlistment shall entitle him",

and suggests that its provisions are mandatory.

It has been consistently held that neither a minor nor his parents may avoid an enlistment where the soldier is held for trial or under

sentence for a military offense (See Par. 157, page 199, Manual for Courts-Martial, and cases cited). Subsequent to the enactment of the statute above quoted the Office of The Judge Advocate General reaffirmed the view that while the enlistment of a minor under eighteen years of age may be voidable it is not void, and that a soldier serving under such an enlistment may legally be punished by courts-martial for his offenses, although application has been previously made for his discharge as contemplated by the statute (J.A.G. 220.808, March 24, 1927). There appears to be nothing in the language of the statute quoted to indicate an intention on the part of Congress to render the enlistment of a minor under twenty-one years of age void from the beginning. From the very fact that provision is made for discharge under certain stated conditions there necessarily arises an inference that the Congress did not intend by this Act to render null and void the enlistments of persons under the age of twenty-one years. The requirements for the minor's discharge under certain conditions, as set forth, must be read as subject to the long existing condition that the soldier be not held for trial by or under sentence of a military court. In the opinion of the Board of Review, the reviewing authority's action in ordering the trial of Applebaum was legal, the court had jurisdiction over his person and offense and the sentence in his case as adjudged and approved is valid.

5. For the reasons above stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty as to accused Argabright and Applebaum, legally sufficient to support the findings of guilty of Charge II and its specifications as to accused Genuso and Cunningham, and legally sufficient to support only so much of the findings of guilty as to Genuso and Cunningham under Charge I and its specification as involves a finding that, acting jointly and in pursuance of a common intent, they did, at the time and place alleged, attempt to escape from confinement before set at liberty by proper authority, in violation of A rticle of War 96, and legally sufficient to support the sentence in each case.

H. A. Trundell, Judge Advocate.

William G. Simms, Judge Advocate.

Robert W. Hoover, Judge Advocate.

Military Justice
C.M. No. 187175.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

(13)
JUL 24 1929

Subject: Record of trial in the case of Private Thomas A. Genuso (6700124), Company I, 26th Infantry, Private Ronald W. Applebaum (6699501), Company L, 16th Infantry, General Prisoner Buster W. Argabright (G.P. 15233), and Private William B. Cunningham, Jr. (6125435), Company L, 16th Infantry.

To: The Commanding General, Headquarters First Division, Fort Hamilton, New York.

1. The record of trial in the case of the soldiers named above shows that they were found guilty of robbery (two specifications), assault with intent to do bodily harm with a dangerous weapon (two specifications), and escape, and sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, in the case of Applebaum, for eight years, in the case of Argabright, for five years, in the case of Cunningham, for six years, and in the case of Genuso, for twelve years. The record of trial has been examined by the Board of Review and held, among other things, to be legally sufficient to support the findings of guilty and the sentences in the cases of Applebaum and Argabright, and by separate communication I have advised you of my concurrence in that holding.

2. The papers accompanying the record indicate that both Argabright and Applebaum are about nineteen years of age. The evidence indicates that each took substantially the same part in the assaults, robberies and escape of which they were convicted, and that neither actually struck the blows which constituted the assaults with dangerous weapons. Argabright is a general prisoner and it appears that Applebaum has also previously committed offenses which would have justified his trial by general court-martial. In view of all the facts and circumstances in the case, it is believed that Applebaum's sentence should not exceed that adjudged in the case of Argabright.

3. It is accordingly recommended that so much of the sentence to confinement in the case of Applebaum as is in excess of confinement at hard labor for five years, be remitted.

E.A. KREGER,
Major General,
The Judge Advocate General.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington, D. C.

Military Justice
C. M. No. 187200

UNITED STATES)	HEADQUARTERS SEVENTH CORPS AREA
)	
vs.)	Trial by G. C. M., convened at
)	Fort Robinson, Nebraska, June 6,
Private DAVID L. MORRIS)	1929. Dishonorable discharge and
(6650739), Headquarters,)	confinement for three (3) years.
Headquarters Battery and)	Disciplinary Barracks.
Combat Train, 4th Field)	
Artillery Battalion.)	

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by SCOTT, Judge Advocate.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Private David L. Morris, Headquarters, Headquarters Battery & Combat Train, 4th Field Artillery Battalion did, at Fort Robinson, Nebraska, during the period from about May 1, 1929 until about May 23, 1929, feloniously take, steal, and carry away one Bulova watch, value about $20.00, one bill fold, value about $3.00 containing $16.00 currency, one cash bag containing $6.00 currency, of the total value of about $45.00, the property of Second Lieutenant David G. Erskine, 4th Field Artillery Battalion.

Specification 2: In that Private David L. Morris, Headquarters, Headquarters Battery & Combat Train, 4th Field Artillery Battalion, did, at Fort Robinson, Nebraska, during the period from about May 1, 1929

> until about May 23, 1929, feloniously take, steal, and carry away one bill fold value about $3.00 containing $10.00 currency, one gold pin value about $3.00, one ring value about $3.00, of the total value of about $19.00, the property of Second Lieutenant William M. Creasy, Jr., 4th Field Artillery Battalion.

He pleaded not guilty to, and was found guilty of, the charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for three years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of the court. The only question in the case requiring special consideration is whether the sentence imposed by the court and approved by the reviewing authority is within the maximum limit of punishment authorized for the offenses of which the accused is found guilty. It is the opinion of the Board of Review that the sentence imposed exceeds such maximum limit.

It is evident that the court in adjudging, and the reviewing authority in approving, the sentence aggregated the value of the property found to have been stolen in the two specifications. Such action was in violation of Paragraph 104 c, Manual for Courts-Martial, which provides in part as follows: "In determining the maximum punishment for two or more separate and distinct, but like, offenses against property, values as found in different specifications can not be aggregated." While the court found as to each specification that the larceny alleged therein was committed "during the period from about May 1, 1929, until about May 23, 1929", it does not appear from the record of trial that all of the property was taken at the same time so that it can be said there was but one larceny. The two specifications, therefore, must be considered as alleging two separate and distinct offenses. The maximum punishment authorized on the finding of guilty of Specification 1 is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, and on the finding of guilty of Specification 2, dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

4. In view of the foregoing, the Board of Review holds that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and six months.

H. A. Trudell, Judge Advocate.

William H. Burns, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT,
In the Office of The Judge Advocate General,
Washington, D.C.

Military Justice
C.M. 187252

JUL 29 1929

UNITED STATES vs. Private ED HUDSON (6280956), Company A, 2nd Engineers, alias Private ED HARDY, Troop C, 8th Cavalry, alias Private EDWARD HALEY, Company D, 29th Infantry, alias Private EARL HUFF, Infantry, Unassigned.	)	NINTH CORPS AREA Trial by G.C.M., convened at Fort MacArthur, California, April 27, 1929. Dishonorable discharge, suspended, and confinement for five (5) years. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
TURNBULL, BURNS, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by WICKLIFFE, Judge Advocate.

1. The accused was tried upon the following charges and specifications.

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Private Ed. Hudson, Company "A" Second Engineers, alias Private Ed. Hardy, Troop "C" Eighth Cavalry, alias Private Edward Haley, Company "D" Twenty-ninth Infantry, alias Private Earl Huff, Infantry Unassigned, did under the name of Ed. Hudson, at Amarillo, Texas, on July 5, 1927, by willfully concealing the fact he was then a private in said Troop "C" Eighth Cavalry, procure himself to be enlisted in the military service of the United States by Captain Charles Lewis, Infantry (DOL).

Specification 2: In that Private Ed. Hudson, Company "A" Second Engineers, alias Private Ed. Hardy, Troop "C" Eighth Cavalry, alias Private Edward Haley, Company "D" Twenty-ninth Infantry, alias Private Earl Huff, Infantry Unassigned, did under the name of Edward Haley, at New Orleans, La., on July 17, 1928, by willfully concealing the fact he was then a private in said Troop "C" Eighth Cavalry, procure himself to be enlisted in the military service of the United States by 1st Lieut. E. M. Edmonson, Field Artillery, (DOL).

Specification 3: In that Private Ed. Hudson, Company "A" Second Engineers, alias Private Ed. Hardy, Troop "C" Eighth Cavalry, alias Private Edward Haley, Company "D" Twenty-ninth Infantry, alias Private Earl Huff, Infantry Unassigned, did under the name of Earl Huff, at Chattanooga, Tenn., on August 30, 1928, by willfully concealing the fact he was then a private in Troop "C" Eighth Cavalry, procure himself to be enlisted in the military service of the United States by Captain H. D. Bagnall, Infantry (DOL).

CHARGE II: Violation of the 58th Article of War.

Specification 1: In that Private Ed. Hudson, Company "A" Second Engineers, alias Private Ed. Hardy, Troop "C" Eighth Cavalry, alias Private Edward Haley, Company "D" Twenty-ninth Infantry, alias Private Earl Huff, Infantry Unassigned, did, under the name of Ed. Hudson, at Fort Logan, Colorado, on or about August 15, 1927, desert the service of the United States and did remain absent in desertion until he was apprehended by Civil Authorities at Long Beach, California, on or about February 26, 1929.

Specification 2: In that Private Ed. Hudson, Company "A" Second Engineers, alias Private Ed. Hardy, Troop "C" Eighth Cavalry, alias Private Edward Haley, Company "D" Twenty-ninth Infantry, alias Private Earl Huff, Infantry Unassigned, did, under the name of Edward Haley, at Fort Benning, Ga., on or about August 23, 1928, desert the service of the United States and did remain absent in desertion until he was apprehended by Civil Authorities at Long Beach, California, on or about February 26, 1929.

Specification 3: In that Private Ed. Hudson, Company "A" Second Engineers, alias Private Ed. Hardy, Troop "C" Eighth Cavalry, alias Private Edward Haley, Company "D" Twenty-ninth Infantry, alias Private Earl Huff, Infantry, Unassigned, did, under the name of Earl Huff, while en-route to Fort Sam Houston, Texas, for assignment and duty, on or about August 30, 1928, desert the service of the United States, and did remain absent in desertion until he was apprehended by Civil Authorities at Long Beach, California on or about February 26, 1929.

He pleaded not guilty to the charges and specifications. He was found guilty of Specification 1, Charge I, except the words "Amarillo, Texas", substituting therefor the words, "Oklahoma City, Oklahoma", of the excepted words, not guilty, of the substituted words, guilty, and guilty of the remaining specifications and of the charges. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 171, Headquarters Ninth Corps Area, June 10, 1929.

2. The evidence shows that accused, under the name of Ed Hardy, enlisted at Oklahoma City, Oklahoma, for three years on May 2, 1925, for the 8th Cavalry at Fort Bliss, Texas (Ex. 10) and on June 2, 1925, absented himself without leave from that organization (Ex. 6). Under the name of Ed Hudson, he reenlisted at the same place on July 5, 1927, for three years for the 2d Engineers at Fort Logan, Colorado (Ex. 11), and on August 15, 1927, absented himself without leave from that organization (Ex. 7). Under the name of Edward Haley he reenlisted at New Orleans, Louisiana, for three years on July 17, 1928, for Infantry, Fort Benning, Georgia (Ex. 12), and on August 23, 1928, absented himself without leave from Company D, 29th Infantry, at Fort Benning, Georgia (Ex. 8). Under the name of Earl Huff he reenlisted at Chattanooga, Tennessee, on August 30, 1928, for three years for Infantry, Eighth Corps Area (Ex. 13). An extract copy of the morning report of the Post Recruiting Office, Fort Sam Houston, Texas, for September, 1928, containing the following entries, was introduced:

> "Sept. 4, 1928, Rct. Huff, Earl, enroute fr. Chattanooga, Tenn., to AWOL since 8-30-28. BBB
> Sept. 11, 1928, Rct. Huff, from AWOL, to dropped as a deserter. BBB"

Accused was arrested and taken into custody at Long Beach, California, on February 26, 1929, by a civil police officer. On each of his reenlistments accused declared that he had had no prior military service. The finger prints of accused (Ex. 1) were taken in open court (R 7), and a qualified finger print expert testified that from a comparison thereof with finger prints appearing on photostatic copies of the identification records of Ed Hardy (Ex. 2), Ed Hudson (Ex. 3), Edward Haley (Ex. 4), and Earl Huff (Ex. 5), he was of the opinion that all the prints were made by one and the same person (R 11).

The accused remained silent and offered no evidence in his behalf.

3. The evidence sufficiently shows that at the times and places alleged in the Specifications, Charge I, accused fraudulently procured reenlistments by concealing the fact that he was already in the military service, as found by the court. The essential elements of the offense of fraudulent enlistment in violation of Article of War 96 are established in each case.

The evidence also shows that at the times and places alleged in Specifications 1 and 2, Charge II, accused absented himself without leave and remained absent until taken into custody by the civil authorities on February 26, 1929. The duration of the absence in each case, together with his intervening fraudulent enlistment in each case, establishes desertion, as found by the court. The evidence that accused was arrested and taken into custody by a civil officer sufficiently establishes apprehension, as charged and found.

By Specification 3, Charge II, it is alleged that accused deserted on August 30, 1928, while en route to Fort Sam Houston, Texas, for assignment to duty. The only evidence of this desertion consists of his reenlistment at Chattanooga, Tennessee, on August 30, 1928, for service with Infantry, 8th Corps Area, and the entry from the morning report of the Post Recruiting Office, Fort Sam Houston, Texas, reciting his absence without leave on August 30, 1928, while en route from Chattanooga, Tennessee. The recital that accused absented himself without leave en route from Chattanooga is manifestly hearsay and is therefore incompetent to prove such absence without leave. While this entry and the subsequent one showing accused dropped as a deserter, are sufficient, perhaps, to show that accused did not in fact report for duty at the Post Recruiting Office, Fort Sam Houston, Texas, there is no evidence in the record that he was ordered or otherwise obliged to report to that organization. It follows that the evidence is not legally sufficient to show accused's absence without leave or desertion as found under this specification.

4. The charge sheet shows that Hudson enlisted July 5, 1927, at the age of 25 years and 4 months, with no prior service.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record is legally sufficient to support the findings of guilty of Charge I and its specifications, and Charge II and Specifications 1 and 2 thereunder, and the sentence, but legally insufficient to support the finding of guilty of Specification 3, Charge II.

N. A. Trundell, Judge Advocate.

William E. Burns, Judge Advocate.

Lukar W. Hoover, Judge Advocate.

WAR DEPARTMENT,
In the Office of The Judge Advocate General,
Washington, D. C.

Military Justice
C.M. 187316

July 11, 1929.

UNITED STATES	SEVENTH CORPS AREA
vs.	Trial by G.C.M., convened at the Cavalry School, Fort Riley, Kansas, June 13, 1929. Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.
Private AUBURN J. HENSLEY (6768968), Battery D, 18th Field Artillery.	

HOLDING by the BOARD OF REVIEW,
TURNBULL, BURNS, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by WICKLIFFE, Judge Advocate.

1. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Auburn J. Hensley, Battery "D" 18th Field Artillery, did, at Fort Riley, Kansas, between the dates of April 1, 1929, and May 24, 1929, feloniously take, steal, and carry away about $1.85 in United States money and one deck of playing cards, value about $.75 the property of Captain Edward H. Brooks, 18th Field Artillery.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, at such place as the reviewing authority might direct, for six months. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. The evidence shows that between April 1 and May 26, 1929, while accused was orderly for Captain Edward H. Brooks, 18th Field Artillery (R.7,10), some small articles, not described in the testimony otherwise than as souvenirs of no monetary value, were taken from the officer's quarters. Suspecting accused, Captain Brooks called him into his orderly room and after warning him that whatever he might say would be used against him (R.8,9), questioned him in regard to the missing articles. Accused denied having taken them. Captain Brooks then searched the effects of the accused and found therein a pack of cards, valued at seventy-five cents, which he recognized as his property and as having been kept in his quarters. Accused later admitted having taken the cards from the quarters (R.7-8, 9-10), and also confessed to having taken from a small bank in the quarters money in the sum of $1.85 (R.8).

No evidence was offered by the defense and accused elected to remain silent at the trial.

3. The evidence, including the admissions of accused, sufficiently shows that at the place and within the dates alleged accused took and carried away from Captain Brooks' quarters the pack of cards described in the specification, of the value alleged. The intent to steal the cards is shown by the circumstances under which they were taken and recovered.

The evidence is not sufficient, however, to establish the larceny of any money. Accused confessed to having taken money to the amount of $1.85 from a small bank in Captain Brooks' quarters, but he cannot be convicted legally upon his unsupported confession. Outside the confession there is no evidence whatever of the larceny by anyone of money from Captain Brooks' quarters, that is to say, there is no independent proof of the corpus delicti. Such being the case it was improper for the court to consider the confession.

The evidence is legally sufficient to support only so much of the findings of guilty of the specification as includes a finding of guilty of the larceny at the place and between the dates alleged, of one deck of playing cards, value $.75, the property of Captain Edward H. Brooks, 18th Field Artillery.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the specification as includes a finding of guilty of the larceny at the place and between the dates alleged of one deck of playing cards, value about $.75, the property of Captain Edward H. Brooks, 18th Field Artillery, and legally sufficient to support the charge and the sentence.

W. A. Trudell, Judge Advocate.

William E. Burns, Judge Advocate.

Luther C. Woods, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 187319

Aug. 7, 1929.

UNITED STATES	SECOND DIVISION
v.	Trial by G.C.M., convened at Fort Sam Houston, Texas, May 2, 1929. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private George S. Line (R-1097122), 3d Wagon Company, 2d Division Quartermaster Train.	

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War. (Finding of Not Guilty by the court)

Specification: (Finding of Not Guilty by the court)

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Private First Class George S. Line, 3rd Wagon Company, 2nd Division Quartermaster Train, did, at Fort Sam Houston, Texas, on or about February 5, 1929, unlawfully and feloniously conspire with Private First Class Foster Krammerer, 3rd Wagon Company, 2nd Division Quartermaster Train, to commit an offense against the United States, to wit, unlawfully and feloniously to take, steal and carry away a field safe and contents, property of the United States, of the value of four hundred eleven dollars and seventy five cents, ($411.75), and to effect

the object of such conspiracy, did, at Fort Sam Houston, Texas, on or about February 12, 1929, wrongfully and unlawfully tear the screen from the window of the Orderly Room, 3rd Wagon Company, in which was said safe.

Specification 2: In that Private First Class George S. Line, 3rd Wagon Company, 2nd Division Quartermaster Train, did, at Fort Sam Houston, Texas, on or about February 12, 1929, wrongfully and unlawfully attempt to break and enter the orderly room, 3rd Wagon Company, 2nd Division Quartermaster Train, with intent to commit an offense therein, to wit, the larceny of a field safe ahd contents, property of the United States, of the value of three hundred two dollars and seventy five cents, ($302.75).

The accused pleaded not guilty to all charges and specifications, and was found not guilty of Charge I and the specification thereunder, but guilty of Specification 1, Charge II, except the words and figures, "four hundred eleven dollars and seventy five cents ($411.75)", substituting therefor the words and figures, "about three hundred dollars ($300.00)", of the excepted words, not guilty, of the substituted words, guilty; guilty of Specification 2, Charge II, except the words and figures, "three hundred two dollars and seventy five cents ($302.75)", substituting therefor the words and figures "about one hundred seventy-five dollars ($175.00)", of the excepted words, not guilty, of the substituted words, guilty; and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record pursuant to Article of War 50½.

3. Viewing the case in the light most favorable to the prosecution the record shows, as to the specifications and charge of which accused was found guilty, that on or about February 5, 1929, while acting supply sergeant of his organization accused suggested to one Private 1st Class Krammerer, a

horseshoer in the same organization, that the two break and enter the orderly room of their Company and remove therefrom a safe containing approximately $250.00, property of the organization and its individual members (R.26-28, 53,54,86). It was proposed to place the safe in a car belonging to Krammerer, move it to a point beyond a certain Salado Creek and there break it open. Krammerer temporized by saying that he would have to get his car fixed, but sought to leave the impression that he agreed to the proposal, and probably did agree, but at no time did he have any real intention of participating in the commission of the offense. The following Saturday night, February 9th, was the date set for the attempt (R.29,26,36,62,66). One or two days after February 5th, Krammerer, escorted by an unidentified soldier, appeared at the office of Lieutenant Drake, Military Police Officer, Fort Sam Houston, and revealed to this officer the details of the plot to burglarize the orderly room (R.28,29,62,26,29,66). Krammerer did not report the contemplated crime to his organization commander or any other person connected with the organization because he "did not think of it that way" (R. 36,56). He was instructed by the Military Police Officer to go through with the plan "just as if I meant it, and not to do any busting up, or anything like that". He was further instructed to report the time and place set for the commission of the offense and was told to advise no one else of what was taking place. Following the information given him by Krammerer, the Military Police Officer and one of his sergeants went on the night of February 9th to the point beyond Salado Creek and there lay in wait. Krammerer had told the Military Police Officer that the offense would be committed at 10:30 o'clock that night. Accused decided that he "would not do it" and did not meet Krammerer (R.29,87), and at 11:30 o'clock Krammerer appeared at the hiding point of the Military Police, alone, and informed them that accused had not appeared at the scene of the crime at the time set for its commission (R.34,35,62,65,66). Quoting from Krammerer's testimony:

"Q And what night were you to take the safe out of there?
A Saturday night. It was to be around 11:00.
Q Can you state why you did not take it out around 10:00 or 11:00?
A Yes, sir ------ Line was not there.
Q What is the first thing you said to Line after this ----- the first time you saw him?
A I asked him where he was Saturday.
Q What else did you say?
A I do not remember.
Q Do you remember saying, 'Where have you been? Why are we not getting this safe out?'
A. No, sir.

Q Did you say, 'When are we going to get this safe out?'
A Yes, sir.
Q Didn't you say, 'Let's go get it out'?
A Yes, sir." (R.29,30)

The record is silent as to where or exactly when this conversation took place and as to the circumstances surrounding it except that accused testified that Krammerer came to him the morning following the night of the agreed rendezvous and asked where accused had been (R. 87). On the following Monday, Krammerer reported to the Military Police that the robbery was to take place that night (R. 67). Accused and Krammerer met in accused's room at 11:00 o'clock of the same night and at 12:30 A.M. they proceeded to the orderly room (R.26,28). Lieutenant Drake and his sergeant, about 10:30 o'clock that evening, secreted themselves in a building adjoining the orderly room containing the safe and lay in wait for accused and Krammerer. The two appeared at the orderly room about 12:30 A.M., February 12th, and while being watched by the hidden Military Police began ripping the screen from a window directly beneath which was the safe (R.28,62). A passing automobile interrupted the operation and the two ran. Krammerer went to where the Military Police were hiding and told them accused "was getting scary and about ready to quit". He was told by the Military Police officer to get away "that Line would see him, and that I did not want him to know he was talking to anyone there." Shortly thereafter accused and Krammerer again met at the window and resumed work on the screen. A loud scratching, as if a nail were being pulled, caused both men to again stop and run. About five minutes later Krammerer again went to the hiding place of the Military Police and stated that accused had said that he would make but one more attempt at gaining access to the window, that he, accused, was afraid they would disturb someone and was afraid they would be "grabbed". Krammerer then left and a few minutes later the Military Police Officer found himself confronted in the darkness by accused. The latter was thereupon immediately placed in arrest and subsequently confined (R.62,63,67,68). Later, for some reason not appearing in the record, accused was taken to the city of San Antonio by Lieutenant Drake and was left in the hands of city detectives for a few minutes. After leaving the detectives accused claimed that he had been assaulted by them but an examination of his body by Lieutenant Drake disclosed no injuries (R. 72).

Accused, 30 years of age, is a soldier with more than six years service, with two honorable discharges (R. 102). He was sworn and testified as a witness in his own behalf but for the purpose of this holding it is not deemed necessary to set out his testimony.

4. The use of decoys in the entrapment of known or suspected criminals is a practice recognized and supported by civil courts generally, and, within proper limitations, is not forbidden by military law. An

important and equally well recognized exception to the rule permitting decoys and entrapments, based on public policy, is that acts conceived and instigated by Government agents cannot be prosecuted criminally. The exception is stated in the late case of Cain v. United States, 19 Fed (2d) 472, as follows:

> "True it is that one who is not, and recently perhaps has not been engaged in violating the law, and who presently has no intention of violating it, may not through sympathetic appeals, or impelling machinations of officers, or so-called stool-pigeons, be induced to commit a crime and then be prosecuted and convicted for committing it."

In the case of United States, ex rel. Hassel v. Mathues, 22 Fed. (2d) 979, the court says:

> "It is against the public policy to sustain a conviction for crime where the party is induced to commit it by officers of the government, who thereafter ensnare and apprehend him in such commission."

In Butts v. United States, 273 Fed. 35, the court stated:

> "The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

See also Woo Wai v. United States, 223 Fed. 412; Sam Wick v. United States, 240 Fed. 60.

The evidence introduced in behalf of the prosecution in this case was sufficient to justify the court in concluding that accused first suggested burglarizing his organization's orderly room and agreed upon February 9th as the date for the commission of the offense. Had he made any attempt to carry this plan into execution at the time set, Krammerer's passive or active participation would not have constituted a defense. He did not, however, go forward with his criminal purpose, and the record fairly shows that the plan and purpose were utterly and wholly abandoned by him. Had the transaction stopped with this abandonment by accused of the wrongful design, it is quite clear that the housebreaking would not have been attempted. But Krammerer did not allow the transaction to stop. He sought out accused, impliedly upbraided him for his failure to go through with the plan,

and suggested and urged that they take the safe at a later day. The Government agent thus not only laid the trap for accused, but reconceived and instigated the criminal purpose and actively lured accused into the appearance of the criminal act. The law does not countenace conviction and punishment under such circumstances.

The public policy preventing the criminal prosecution of persons whose acts are induced by Government agents, is accentuated in military law. One of the principal duties of an officer of the Army is the development, training, discipline and leading of the soldier he commands. When an officer becomes aware that the soldier is about to commit a criminal offense it becomes his positive duty immediately to restrain that soldier, certainly not to encourage and incite him to violate the law. No justification for instigation by the Military Police based upon proof that accused was a practiced criminal, or that he was engaged in an unlawful business, is found in this case. Such being the fact, it was the duty of the officers involved to prevent the offense, not to incite it in order that accused might be criminally prosecuted.

In the opinion of the Board of Review the record is not legally sufficient to support the finding of guilty of an attempt to commit housebreaking, as alleged in Specification 2, Charge II. The remaining specification of the charge is founded on Section 37, Federal Penal Code, and alleges a conspiracy on the part of accused with Krammerer to commit an offense against the United States. The attempt to enter the orderly room on the night of February 12th is alleged as the overt act.

"A conspiracy is an agreement by two or more persons to do an illegal act, or to do a legal act by illegal methods." United States v. Kissel, 173 Fed. 823. It is "a partnership in criminal purposes". United States v. Kissel, et al, 218 U.S. 601. An overt act is essential to conspiracy. United States v. Rabinowich, 238 U.S. 78; Joplin Mercantile Co v. United States, 236 U.S. 351; Hyde v. Shine, 199 U.S. 62; McGinniss v. United States, 256 Fed. 621. Thus a combination of minds in an unlawful purpose is the foundation of the offense of conspiracy but an overt act is necessary to complete the offense. Hyde v. United States, 225 U.S. 347; United States v. Hirsch, 100 U.S. 33; United States v. Kissel, 173 Fed. 823. Do the facts in the case at hand, when viewed in the light of these decisions, meet the test? The Board can but hold in the negative. There is an utter lack of that essential combination of minds, that partnership of purpose which is the essence of the offense. The entire evidence shows that at no time did Krammerer, the alleged co-conspirator, intend to participate in the

alleged conspiracy, but on the contrary that it was his purpose to prevent the carrying into effect of its alleged object. There could not, therefore, be a real combination of minds or partnership of purpose. Woodworth v. The State, 20 Tex. Crim. Appeals Reports 375.

Again, the proof fails as to that second essential of the offense of conspiracy, the overt act, for it was never intended by Krammerer that larceny should be accomplished. If, as previously held, accused was lured by the Military Police decoy into the commission of the alleged overt act, then that act can have no legal significance in its relation to the offense charged. Inasmuch as the acts contemplated were not to be a violation of the law accused and Krammerer could not, in contemplation of law, criminally conspire to do them. In the case of Woo Wai, et al. v. United States, 223 Fed. 412, defendant and his associates were charged with conspiring to smuggle Chinese across the border. The court in passing upon the matter of the overt act in that case said:

> "It was the intention of the officers who induced Woo Wai and his associates to attempt to bring Chinese across the Mexican border that the law should not be violated. They intended to prevent the consummation of the offense which they lured the defendants to undertake. Their purpose was to intercept the Chinese so brought across the border and return them to the country whence they came. Woo Wai and his associates, therefore, although they were not aware of the fact, were engaged in an act which was not to result in an accomplished offense against the laws of the United States. * * * If no violation of the law was to be accomplished by the act of the defendants, it follows that they could not be held for conspiring to do that act."

See also State of New Jersey v. Harry Dougherty, 96 Atl. 56; L.R.A. 1916 C 991. In the opinion of the Board of Review the record is legally insufficient to support the finding of guilty of Specification 1, Charge II.

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its specifications, and the sentence.

N. A. Trumbull, Judge Advocate.
William E. Jones, Judge Advocate.
Robert W. Harris, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

JUL 15 1929

Military Justice
C. M. No. 187322

U N I T E D S T A T E S	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Howard, Maryland, June 17, 25, 1929. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private ROY DOWELL (R-3363661), Troop C, 2nd Cavalry, alias Private Dave O'Connor, Infantry, Panama (Unassigned).	)	

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BROWN, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 54th Article of War.

Specification: In that Private Roy Dowell, Troop C, Second Cavalry, Fort Riley, Kansas, alias Private Dave O'Connor, Infantry, Panama (Unassigned), did, at Baltimore, Maryland, on or about March 22, 1929, under the name of Dave O'Connor, by willfully concealing the fact he was then a private in said Troop C, Second Cavalry, Fort Riley, Kansas, procure himself to be enlisted in the military service of the United States by Captain William R. Hamby, Cavalry, (DOL)., and did, thereafter at Fort Howard, Maryland, receive allowances under the enlistment so procured.

CHARGE II: Violation of the 58th Article of War.

Specification: In that Private Roy Dowell, Troop C, Second Cavalry, Fort Riley, Kansas, alias Private Dave O'Connor,

Infantry, Panama (Unassigned), did, at Fort Riley, Kansas, on or about April 23, 1920, desert the service of the United States, and did remain absent in desertion until he was apprehended at Fort Howard, Maryland, on or about March 25, 1929.

CHARGE III: Violation of the 93rd Article of War. (Finding of Not Guilty by the court)

Specification: (Finding of Not Guilty by the court)

He pleaded not guilty to the charges and specifications, and was found guilty of Charges I and II and their specifications, and not guilty of Charge III and its specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three and one-half years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to Article of War 50½.

3. The evidence shows that accused enlisted for one year, under the name of Roy Dowell, on May 6, 1919 (Exs. A, B). On March 22, 1929, he procured a second enlistment, under the name of Dave O'Connor, by stating that he had never served as an enlisted man in the Army and by concealing his previous enlistment (Exs. C, D). He was not discharged from his enlistment of May 6, 1919 (Ex. F). Under his second enlistment he received allowances of rations and clothing (R. 12, 13).

From a comparison of finger prints appearing on duly authenticated photostatic copies of identification record cards of Roy Dowell (Ex. A) and Dave O'Connor (Ex. C) with finger prints taken of accused on May 15, 1929 (R. 8; Ex. E), a duly qualified finger print expert testified that all of the prints were made by the same person (R. 9) (Charge I and its specification).

Second Lieutenant John L. DePew, 2d Cavalry, custodian of the records and morning reports of Troop C, 2d Cavalry, inactive, testified that a diligent search for the morning reports of the troop had been made but that they could not be found (Ex. I). Over objection by the defense upon the ground that under Paragraph 117, Manual for Courts-Martial it was incompetent, a copy of a Report of Changes rendered by "2d Cav The Cavalry School Ft Riley Kans" for the twenty-four hour period ending at midnight, April 23, 1920, and containing a recital that Recruit Roy Dowell, Troop C, 2d Cavalry, had passed from duty to absent without leave, authenticated by the seal of the office of The Adjutant General, was received in evidence (R. 34; Ex. J).

4. The accused testified that "in regard to this charge of desertion against me I have a very peculiar story to tell", that in August, 1924, he was confined in a reformatory at Anamosa, Iowa, where he was beaten over the head for an offense of which he knew nothing, and later found his mind a blank. "I did not remember a thing or realize what happened till about 1927". He also testified that "I do not know what happened before 1924, if I did I would be willing to take the blame for deserting. If I had known I was under military rule I would have left them know where I was. I came out and enlisted in the Army" (R. 29, 30).

John Dale Paul, physician and surgeon of the reformatory at Anamosa, Iowa, testified that accused was confined in that institution under the name of Harvey Baker from November 15, 1922, to February 10, 1928, and that he was in the hospital on two occasions in 1922 and 1923 for mental observation, witness being "constantly under the impression that he was a paranoid type of dementia praecox, although never officially declared insane". Witness believed that accused's memory "might have been confused" (Ex. H).

5. The evidence sufficiently shows that on March 22, 1929, accused under the name of O'Connor procured his reenlistment by concealing the fact that he was already in the military service and that he received allowances under the enlistment so procured. The essential elements of the offense of fraudulent enlistment as found by the court are established.

The only evidence of accused's desertion on or about April 23, 1920, as alleged in the Specification, Charge II, is that contained in the entry from the Report of Changes reciting his absence without leave from Troop C, 2d Cavalry, on that day. But this entry was not competent, and its admission,

over objection by the defense, was error. The Report of Changes from which it was taken was not a record of original entry but was a mere compilation or summary of other official records (A.R. 345-800). The personnel adjutant who made it was not charged with the duty of knowing whether or not the entry was correct or whether or not the record on which it was based was correct. He was charged simply with accurately reporting the data communicated to him. (See C.M. 130886, Osborne; C.M. 127832, Keyes; see also holding by Board of Review in C.M. 178789, Gardner). Paragraph 117 of the Manual for Courts-Martial provides that an official statement in writing is admissible to prove the truth of the facts recited when the officer or other person making it has the duty to know the facts stated and to record them, but this established exception to the rule excluding hearsay though included in an official report, does not justify the use of an official writing to prove the truth of the matter stated therein where the party making it was not under the duty to know or ascertain the truth of the facts stated prior to recording them, as is the case with Reports of Changes.

In reaching its conclusion with respect to the admissibility of the Report of Changes, the Board of Review has considered the views expressed by The Judge Advocate General and the action taken in C.M. 178789, Gardner, the facts of which were in some respects similar to but not identical with the facts in this case. In the Gardner case, there having been evidence of a confession by the accused and proof of entries on a Report of Changes from accused's organization and from accused's service record reciting his desertion, both entries having been admitted without objection by the defense, and it having been shown that the morning report entries pertaining to accused's desertion had been lost or destroyed, it was held, in effect, that the entries from the Report of Changes and from the service record furnished sufficient proof of the corpus delicti. It was expressly stated by The Judge Advocate General in that case that the principles underlying former precedents holding Reports of Changes incompetent to prove the truth of the facts recited therein were not questioned. Emphasis was, moreover, laid upon the proposition laid down that with respect to the entry from the service record the officer making it was charged with the duty not only of recording the facts but of knowing their truth. It is the view of the Board that the conclusions and results based upon the particular facts of the Gardner case are not controlling here.

From the testimony indicating accused's imprisonment in a state reformatory from 1922 or 1924 to 1927 or 1928, and the proof that accused was not discharged from his enlistment of 1919, the court would have been justified in inferring that he absented himself without leave at some time prior to his reenlistment. But there is no competent direct evidence or proper basis of an inference as to the date on which he so absented himself without leave. It cannot, therefore, be determined from the record whether the statute of limitations, if properly pleaded, would have barred accused's trial for desertion. Trial would have been so barred had the offense been committed subsequent to the legal termination of the World War on March 3, 1921, and within such period prior to accused's imprisonment that the time between his desertion and arraignment, exclusive of the time of imprisonment during which he was not amenable to military justice, would exceed three years. It follows that, assuming accused's absence without leave at an undetermined date prior to his imprisonment to have been established, the admission of the Report of Changes indicating his desertion at a date which would take the offense out of the limitations of Article of War 39 was error injuriously affecting accused's substantial rights, within the meaning of the 37th Article of War.

In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge II and its specification. The maximum sentence authorized by Paragraph 104 c of the Manual for Courts-Martial for the offense of fraudulent enlistment involved in Charge I and its specification, is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one (1) year.

5. The charge sheet shows that accused enlisted March 23, 1929, at the age of 23 years and 4 months, with prior service as follows: "Enlisted 7/25/18 at Columbus Barracks, Ohio; Honorably discharged 5/5/19, to reenlist; Private, Infantry, attached to Recruit Co Casual Bn, Camp Merritt, N.J., deserted 4/23/20 at Fort Riley, Kansas, Private, Troop C, Second Cavalry".

6. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of

Charge I and its specification, legally insufficient to support the findings of guilty of Charge II and its specification, and legally sufficient to support only so much of the sentence as includes dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one (1) year.

N. A. Trundell, Judge Advocate.
William E. Burns, Judge Advocate.
Luther S. Hoover, Judge Advocate.

WAR DEPARTMENT,
In the Office of The Judge Advocate General,
Washington, D. C.

Military Justice
C.M. 187345

AUG 23 1929

UNITED STATES vs. Captain JOHN M. CLARKE (08514), Quartermaster Corps, United States Army.	FOURTH CORPS AREA Trial by G.C.M., convened at Fort Benning, Georgia, September 14 and October 18, 1928; January 7, 18, 22, 31, and June 20, 1929. Dismissal.

OPINION by the BOARD OF REVIEW,
TURNBULL, BURNS, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BRADEN, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that Captain John M. Clarke, Quartermaster Corps, United States Army, did, at Camp McClellan, Ala., on or about October 21, 1927 feloniously embezzle by fraudulently converting to his own use electrical equipment of the value of $2050.32, the property of the United States entrusted to him by the said United States.

Specification 2: In that Captain John M. Clarke, Quartermaster Corps, United States Army, did, at Camp McClellan, Ala., on or about November 18, 1927, feloniously embezzle by fraudulently converting to his own use toilet bowls of the value of $500.00, the property of the United States, entrusted to him by the said United States.

Specification 3: (Disapproved by Reviewing Authority).

Specification 4: In that Captain John M. Clarke, Quartermaster Corps, United States Army, did, at Camp McClellan, Ala., on or about December 7, 1927, feloniously embezzle by fraudulently converting to his own use toilet bowls of the value of $500.00, the property of the United States entrusted to him by the said United States.

Specification 5: (Disapproved by Reviewing Authority).

Specification 6: (Disapproved by Reviewing Authority).

CHARGE II: Violation of the 94th Article of War.

Specification 1: In that Captain John M. Clarke, Quartermaster Corps, United States Army, did, at Camp McClellan, Ala., on or about October 19, 1927, wrongfully and knowingly, by illegal sales, dispose of certain electrical equipment of the value of about $2050.32, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain John M. Clarke, Quartermaster Corps, United States Army, did, at Camp McClellan, Ala., on or about November 18, 1927, wrongfully and knowingly, by illegal sales, dispose of 70 toilet bowls, of the value of $700.00, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Captain John M. Clarke, Quartermaster Corps, United States Army, did, at Camp McClellan, Ala., on or about December 24, 1927, wrongfully and knowingly, by illegal sales, dispose of 100 toilet bowls, of the value of $750.00, property of the United States, furnished and intended for the military service thereof.

CHARGE III: Violation of the 95th Article of War.

Specification 1: In that Captain John M. Clarke, Quartermaster Corps, United States Army, did, at Camp McClellan, Ala., on or about December 31, 1927, sign an official report of sales of salvaged material, which report was false, known to him to be false, and made with the intent to defraud the United States.

Specification 2: (Nolle Prossed).

Specification 3: (Nolle Prossed).

A nolle prosequi was entered as to Specifications 2 and 3, Charge III. Accused pleaded not guilty to and was found guilty of the charges and remaining specifications. He was sentenced to be dismissed the service and to be confined at hard labor for six months. No evidence of previous convictions was introduced. The reviewing authority disapproved the findings of guilty of Specifications 3, 5, and 6, Charge I, approved the sentence but remitted the period of confinement, and forwarded the record of trial for the action of the President under Article of War 48.

2. The evidence shows that accused became Quartermaster and Agent Finance Officer for Camp McClellan, Alabama, about August, 1925, and was relieved by Captain Anton Zeman on April 1, 1928. During the period covered by the charges accused was present for duty at Camp McClellan (R.211).

Before and during the time accused was on duty at Camp McClellan numerous buildings on the Government reservation were dismantled and property, such as plumbing and electrical equipment, removed from these buildings, was stored in a warehouse No. 3 at the camp (R.179,180). This was salvage property which did not appear on the stock record cards of accused but nevertheless was in his custody and entrusted to him as Camp Quartermaster (R.160,168,217,218). In September or October, 1928, the salvage property in warehouse No. 3 was moved to warehouse No. 7, by order of accused, and that part of it which was fit for use by the utilities department was separated from the rest of the material (R.174).

On or about October 1, 1927, the Construction Superintendent of the Profile Cotton Mills at Jacksonville, Alabama, received a letter from accused inviting sealed bids on certain salvage electrical supplies, therein listed, to be sold at Camp McClellan on October 12, 1927 (R.135,137,138,143; Ex. 8). About October 6, 1927, the Profile Cotton Mills submitted a bid for part of these supplies, including wire, conduits, condulets, brackets, switches, and transformers (Ex. 5). Acting upon orders received from accused, Staff Sergeant John McConnell and Sam Ford, a Government employee, removed these electrical supplies from warehouse No. 7 and Ford delivered them to the Profile Cotton Mills at Jacksonville, Alabama, where they were received and checked by Mr. T. J. Waldrep, Construction Superintendent of the mills (R.135,146,147,174,175,181, 183,184). On October 18, 1927, a man who said his name was Captain J. M. Clarke presented an invoice for this material to Mr. H. V. Weaver, Treasurer of the Profile Cotton Mills, and requested payment (R.130, 131; Ex. 6). Weaver gave him a check for $2,050.32, dated October 19, 1927, and made out to Captain J.M. Clark, Quartermaster, in payment thereof (R.131; Ex. 7). This check, which was received in evidence, bears on its back the endorsement "Capt. J.M. Clark, Quartermaster" (Ex.7). It was not testified that this endorsement was made by accused. Proper specimens of accused's handwriting were, however, received in evidence (R.155; Exs. 9,10,11,12; Cash Book withdrawn from record).

Some time in 1927 Mr. Peter Klepsig of the Klepsig Plumbing and Heating Company at Anniston, Alabama, asked accused about buying toilet bowls at Camp McClellan. Accused replied that there were some there but he would have to procure orders from Washington before he could sell them (R.149). Six or eight months later accused told Klepsig that he had orders to dispose of the bowls and would sell them at $10.00 each, whereupon Klepsig ordered one hundred of them (R.149). Acting upon orders from accused, Staff Sergeant McConnell and Sam Ford removed about seventy toilet bowls from warehouse No. 7 at Camp McClellan and Ford delivered them to the Klepsig Plumbing and Heating Company in Anniston, Alabama, the day after Klepsig had ordered them (R.149, 150,, 175, 176, 182, 184). When Klepsig saw the bowls he cancelled the remainder of his order and complained to accused about their poor condition. Accused promised to make good and a short time later a box of repair parts and accessories taken from warehouse No. 7 was delivered to Klepsig by Government truck (R.152, 176). On November 18, 1927, accused requested payment for the seventy toilet bowls and Klepsig handed him a check for $500.00, stating that he would give him the balance on the first of the month (R.150; Ex. 12). At the request of accused, Klepsig had the check cashed and gave accused the $500 in money (R.150). On December 5, 1927, Klepsig gave accused a check for $200.00, to cover the balance due on the bowls, and at his request made it payable to cash. This check was afterwards endorsed by accused (R.151, 155; Ex. 13).

On or about December 7, 1927, Mr. T. J. Waldrep, Construction Superintendent of the Profile Cotton Mills at Jacksonville, Alabama, bought from accused 100 toilet bowls at $7.50 each (R.139). These bowls were originally bought for the Profile Mills but the president of that concern disapproved the expenditure and Waldrep paid for them himself (R.139). Staff Sergeant McConnell and Sam Ford, obeying instructions received from accused, removed these bowls from warehouse No. 7 at Camp McClellan and Ford delivered them to Waldrep at the mills in Jacksonville (R.47, 158-160, 175, 182-184). Waldrep paid for the bowls in three payments, giving accused three checks, the first for $500.00, dated December 7, 1927, the second for $150.00, dated December 24, 1927, and the third for $100.00, dated January 5, 1928 (R.139, 140, 142, 146; Ex. 9-11). These checks were later endorsed by accused and he cashed one of them in the presence of Waldrep (R.141, 155).

An official report of Sales and Awards of Waste Materials at Camp McClellan, Alabama, for the second quarter of the fiscal year, ending December 31, 1927, as required by Paragraph 124, Circular #1, Office of the Quartermaster General, dated January 3, 1927, was prepared in the office of accused at Camp McClellan and signed by him about December 31, 1927. It was false in that it failed to show the sale of the salvage electrical supplies to the Profile

Cotton Mills for $2,050.32, the sale of the seventy salvage toilet bowls to the Klepsig Plumbing and Heating Company for $700.00, and the sale of the hundred salvage toilet bowls to Mr. T.J. Waldrep (or the Profile Cotton Mills) for $750.00 (R.8-11, 212; Ex. 2). The records of the Quartermaster and Agent Finance Officer at Camp McClellan and the Fourth Corps Area Finance Officer, to whom accused rendered reports, were searched and nothing was found to indicate that during this period the sales were made or that the sums of money mentioned were received by accused or deposited to the credit of the proper Finance Officer (R.9, 10, 188, 210, 212-215, 251-264; Ex. 14). The cash book in the Agent Finance Office at Camp McClellan, kept personally by accused, was examined but no record of the receipt of the moneys was found (R.31, 32, 194-196). The defense admitted that none of the sales or proceeds thereof were reported (R.250).

The defense introduced no witnesses other than those who testified as to the mental condition of accused, as will hereinafter appear, and accused elected to remain silent at the trial.

4. It is clear from the evidence that accused caused to be taken and carried away electrical equipment of the value of $2,050.32, toilet bowls of the value of $700.00, and toilet bowls of the value of $750.00, all property of the United States, entrusted to him, wrongfully disposed of them by sale as alleged, failed to account for the proceeds, and afterwards signed an official report which he knew to be false and fraudulent in that it failed to show the sales of this Government property. Since the evidence shows that the property was taken from buildings on a Government reservation, that it was stored in Government warehouses, and that it was under the control of an Army Quartermaster, the court was justified in inferring that it was property of the United States furnished and intended for the military service thereof. The endorsement on the back of the check by which the Profile Cotton Mills paid for the electrical supplies, was not identified as the signature of accused, and accused was not definitely identified as the person who made the sale and received the check but there was sufficient circumstantial evidence before the court, in addition to many properly identified samples of the handwriting of accused, which the court might use as standards of comparison with the endorsement purporting to have been made by accused, to justify the court in finding that accused did receive and endorse the check and make the sale. Violations of the 93d Article of War as alleged under Specifications 1, 2 and 4, Charge I, and violations of the 94th Article of War as alleged under the Specifications, Charge II, are established. Accused's act in knowingly signing the false official report of sales was clearly conduct of a nature unbecoming an officer and a gentleman, and constituted violation of the 95th Article of War, as charged in Specification 1, Charge III.

5. Early in the trial the defense counsel suggested that accused was of unsound mind to the extent that he was probably incapable of entertaining the criminal intent involved in the offenses charged, and was probably incapable of adequately assisting in the conduct of his defense. Various witnesses, including Government civilian employees, officers and noncommissioned officers, who had served with and observed accused, testified that he was subject to frequent, unprovoked and violent outbursts of anger; that following such outbursts he usually promptly apologized or indirectly made known his regret for his actions; and that he appeared on the whole to be mentally abnormal or of unsound mind (R.22,24,25,33,34,36,40,52,53,178,185). Upon recommendation of the court (R.54) a board of three medical officers was thereupon convened at Fort Benning, Georgia, to examine accused and report upon his mental condition. This Board, as shown by a report dated October 3, 1928, received in evidence as Court Exhibit 1, found that accused was not sane in the ordinary accepted meaning of the term, that at the time of the rendition of the report he was suffering from syphilis of the brain, and that mental deterioration was then present. The Board further found that accused's reaction to ordinary human motives and his discrimination between right and wrong was abnormal, that his control of his actions was subnormal and that at the time of rendering the report he was incapable of conducting his defense intelligently. Attached to the report was a statement of laboratory spinal fluid tests, Wassermann and colloidal gold curve, indicating "probably a weakly positive syphilitic reaction," and of a blood test, Wassermann, which was negative. The Board recommended accused's transfer to Walter Reed General Hospital for further observation and treatment, and with a view to his final disposition, stating, however, that the laboratory findings "are not as conclusive as could be desired, and it is recognized that higher medical authority might well disagree with the medical conclusions, i.e.,medical diagnosis." (Ct. Ex. 1).

Major George D. Chunn, Medical Corps, a psychiartrist member of the board, testified that from his examination and observation of the accused he had found him "practically entirely listless," with "a marked mental confusion," restless, with "a rather peculiar expression of the eyes," and with memory for recent events deteriorated. Witness made a diagnosis of syphilis of the central nervous system before learning of the laboratory tests upon accused's cerebral spinal fluid, which confirmed his previous views. He was satisfied that accused had not feigned his mental symptoms (R.61,62,65,66,67). The witness also testified that the Board recommended observation and treatment at Walter Reed General Hospital "because medical responsibility in this case extends beyond the trial of the accused "(R.66).

After receiving the report of the Board the court found accused not in proper mental condition to undergo trial, and adjourned on October 18, 1928 (R.74).

6. The court reconvened on January 7, 1929, and a report of a second Board of three medical officers convened at Walter Reed General Hospital and composed of personnel different from that of the previous Board was received in evidence(Ex. 3). The report shows that this Board, after physical and mental examination of accused and daily observation from November 30, 1928 to December 13, 1928, and after consideration of the report of the previous Board, a statement of accused's medical record as furnished by the War Department, and other matters, found that accused was sane and mentally responsible for his acts at the times of the commission of his offenses, that he was sane and mentally responsible at the time of the report and that he was capable of understanding the nature of the court-martial proceedings against him and of intelligently conducting or cooperating in his defense. The report shows with respect to laboratory findings that a Wassermann blood test taken on November 30, 1928, was negative, and that a Kahn test made on the same date was "single plus." Wassermann and Kahn blood tests taken on December 11, 1928, were negative. A spinal fluid examination on the latter date showed Wassermann and colloidal gold curve tests negative, and a further spinal fluid examination made on December 18, 1928, again showed both Wassermann and colloidal gold curve tests negative. The Board found that accused was not suffering from any nervous or mental disease, but showed "a certain amount of emotional depression, which is consistent with the situation in which he finds himself." It further found "no evidence of the existence of a physchosis, such as definite mental confusion, obvious and unquestioned loss of memory, clouding of consciousness, or disorientation, delusions or hallucinations" (Ex. 3).

Captain Patrick S. Madigan, Medical Corps, a psychiartrist member of this Board, testified that the Board had been unable to agree with the previous diagnosis of syphilis of the brain, and believed that accused was not suffering from mental disease or derangement (R.96-98, 101). In this connection he also testified that accused had informed the Board that he had received hospital treatment in Hawaii in 1912 for syphilis (R.105), but that his mental record as received from the War Department and accepted by the Board did not show admission to a hospital for treatment of this disease (R.117).

Major L.B. McAtee, Medical Corps, testified by deposition, as a witness for the defense, that in November, 1912, he treated Quartermaster Sergeant John M. Clarke (accused previously served as Quartermaster Sergeant (R.52)) for syphilis at the post hospital at Fort Shafter, Hawaii, and that at the time of his discharge from the hospital he had not been cured (Def. Ex. 1).

After the admission of the report of the second Board of medical officers, and the testimony of Captain Madigan, the court received testimony with respect to accused's offenses and testimony of some civilian employees, officers and others to the effect that they had observed accused and believed him to be normal mentally (R.47, 49, 51, 141, 172, 210, 216).

On January 31, 1929, the court again found accused not in proper mental condition to undergo trial, and adjourned (R.278).

7. On June 20, 1929, the court was reconvened and the report of a third Board of three medical officers was introduced in evidence (Ex. 15). This Board was also convened at Walter Reed General Hospital but of personnel different from that of either of the two previous Boards. The report dated May 22, 1929, shows that this Board found that accused was sane and mentally responsible for his acts at the time of the rendition of the report, that there was nothing abnormal in his mental condition which would prevent intelligent cooperation in his defense, that there was no evidence to substantiate the diagnosis of syphilis of the brain at the time of the rendition of the report, that in so far as the Board could judge from the evidence before it accused was sane and mentally responsible for his acts at the times of the commission of his offenses, and that in so far as the Board could determine he had no mental disease at these times which rendered him incapable of understanding the difference between right and wrong or of adhering to the right. The report shows that Wassermann and Kahn blood tests taken on April 18th, 23d, 27th and 29 and on May 1st, 2d, 3d, 7th and 14th, 1929, were all negative; that neosalvarsan was administered on April 30, 1929; that spinal fluid examination were made on April 24th and on May 14, 1929, and that Wassermann and colloidal gold curve tests were negative in both instances; that the serological tests to determine the presence or absence of syphilis were performed under the personal supervision of Colonel Charles F. Craig, Medical Corps, President of the Board; that the physical examinations to determine the presence or absence of syphilis and the administration of neosalvarsan preliminary to provocative serological tests for syphilis were performed by Major Roy E. Fox, Medical Corps, a member of the Board; and that other physical and mental examinations were made by Captain William C. Porter, Medical Corps, a member of the Board. The Board reported that from its mental examination of accused it found a general mental and physical slowness but not to a degree considered excessive or inconsistent with accused's circumstances; that while he claimed loss of memory with respect to his offenses, his memory for other recent events appeared to be good; and that he displayed mild tantrums or emotional instability not severe in character, but that these manifestations were considered by the Board to be consistent with his situation. Among other things the Board considered the record of treatment of accused for syphilis as shown by the deposition of Major McAfee (Def. Ex. 1).

Following the introduction of the report of this Board of medical officers the court found accused in proper mental condition to undergo trial and found that at the time of the commission of his offenses he was so far free from mental

defect or derangement as to be able to distinguish between right and wrong and to adhere to the right (R.295), and thereupon proceeded to its findings upon the general issue.

8. While the record contains some evidence that accused suffered from a disease of the brain and that this disease affected his mental responsibility for his actions and his capacity to conduct his defense intelligently, the preponderance of proof is that accused is and was sane and is not and was not at the times of the commission of his offenses or at the time of trial suffering from any mental disease or derangement which affected his capacity to distinguish between right and wrong and to adhere to the right, or to cooperate fully in the conduct of his defense. The latter examinations of accused were made with great thoroughness by experts specially qualified to reach accurate conclusions, and the reports of these Boards are convincing in character. The report of the First Board, carrying as it does, an expression of doubt as to the accuracy and significance of the laboratory findings on which it was necessarily largely based, does not carry conviction. The court was amply justified, upon the testimony with respect to accused's offenses and the manner of their commission and all the expert evidence, in concluding that accused was mentally responsible for his acts, and in proper mental condition to undergo trial.

9. When the report of the second Board of medical officers was offered in evidence objection thereto was made upon the grounds that it had not been properly authenticated and that without the supporting testimony of at least one member of the Board it would be hearsay and therefore incompetent. The objection was overruled and the report admitted, whereupon the psychiatrist member of the Board was called and testified at length with respect to the subject matter of the report, upon direct and cross-examination. The defense did not request the presence at the trial or the testimony of any of the other members of the Board. By repeated references thereto the member of the Board who testified sufficiently identified the report offered in evidence as that actually submitted by the Board. Assuming that the admission of the report over the objection made was possibly erroneous, it is nevertheless clear that the report would, in any event, have been admissible following the testimony of the member of the Board, his authentication of the report, and the opportunity afforded the defense to cross-examine him, and that therefore the error, if such it was, was harmless to the accused.

10. The prosecution, over the objection by the defense, introduced in evidence, as bearing upon the mental condition of accused, certain parts of a cashbook kept by accused in connection with his duties as Agent Finance Officer. As the entries introduced were in the handwriting of accused and amounted to a record of cash transactions by him as Agent Finance Officer during the period covered by the charges, they were in the nature of admissions and were properly received in evidence (R.28-32).

11. The defense objected to the admission in evidence of a copy of the report of accused's annual physical examination of January 3, 1928 (Ex. 4) on the ground that it was not properly authenticated. The copy admitted bore the seal of The Adjutant General, thus sufficiently authenticating it as a copy of an official record in a branch of the War Department (Paragraph 116, M.C.M.). The objection was properly overruled.

12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War and is authorized for violation of the 93d and 94th Articles of War.

N. A. Trumbull, Judge Advocate.

William S. Burns, Judge Advocate.

Herbert W. Hoover, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington

Military Justice
C.M. No. 187542.

AUG 7 - 1929

UNITED STATES vs. General Prisoner Lee H. Lanier, alias Pvt. Pat L. Grayson, Cav., alias Pvt. Robert L. Marland, Infantry, Hawaii, alias Pvt. Robert L. Marshall, Co. L, 2nd Infantry, alias Pvt. Harry L. Emery.	HEADQUARTERS SIXTH CORPS AREA Trial by G.C.M. convened at Fort Brady, Michigan, April 12, 1929. Confinement for five (5) years.

REVIEW by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate

1. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 69th Article of War.

Specification: In that General Prisoner Lee H. Lanier, formerly Private Headquarters Troop, 3rd Cavalry, alias Private Pat L. Grayson, Cavalry, Fort Clark, Texas, alias Private Robert L. Marland, Infantry, Hawaii, alias Private Robert L. Marshall, Company L, 2nd Infantry, alias Private Harry L. Emery, having been duly placed in confinement in the guard-house at Fort Myer, Virginia, on or about June 1, 1928, did, at Fort Myer, Virginia, on or about July 13, 1928, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 54th Article of War.

Specification I: In that General Prisoner Lee H. Lanier, formerly Private, Headquarters Troop, 3rd Cavalry, alias Private Pat L. Grayson, Cavalry, Fort Clark, Texas, alias Private Robert L. Marland, Infantry, Hawaii, alias Private Robert L. Marshall,

Company L, 2nd Infantry, alias Private Harry L. Emery, did, under the name of Robert L. Marland, at Fort Leavenworth, Kansas, on or about December 7, 1928, by wilfully concealing the fact that he was then a Private in said Headquarters Troop, 3rd Cavalry, procure himself to be enlisted in the military service of the United States by Major James A. Watson, Infantry, DOL; and did thereafter at Fort Leavenworth, Kansas, receive allowances under the enlistment so procured.

Specification 2: In that General Prisoner Lee H. Lanier, formerly Private Headquarters Troop, 3rd Cavalry, alias Private Pat L. Grayson, Cavalry, Fort Clark, Texas, alias Private Robert L. Marland, Infantry, Hawaii, alias Private Robert L. Marshall, Company L, 2nd Infantry, alias Private Harry L. Emery, did, under the name of Robert L. Marshall, at St. Louis, Missouri, on or about December 14, 1928, by wilfully concealing the fact that he was then a Private in said Headquarters Troop, 3rd Cavalry, procure himself to be enlisted in the military service of the United States by Major J.J. Koch, Infantry; and did thereafter at Fort Brady, Michigan, receive pay and allowances under the enlistment so procured.

CHARGE III: Violation of the 96th Article of War.

Specification: In that General Prisoner Lee H. Lanier, formerly Private, Headquarters Troop, 3rd Cavalry, alias Private Pat L. Grayson, Cavalry, Fort Clark, Texas, alias Private Robert L. Marland, Infantry, Hawaii, alias Private Robert L. Marshall, Company L, 2nd Infantry, alias Private Harry L. Emery, did, under the name of Pat L. Grayson at Fort Hayes, Ohio, on or about August 21, 1928, by wilfully concealing the fact that he was then a Private in said Headquarters Troop, 3rd Cavalry, procure himself to be enlisted in the military service of the United States by Captain J.H. Washburn, Cavalry, DOL.

CHARGE IV: Violation of the 58th Article of War.

Specification 1: In that General Prisoner Lee H. Lanier, formerly Private Headquarters Troop, 3rd Cavalry, alias Private Pat L. Grayson, Cavalry, Fort Clark, Texas, alias Private Robert L. Marland, Infantry, Hawaii, alias Private Robert L. Marshall, Company L, 2nd Infantry, alias Private Harry L. Emery, did, at Fort Myer, Virginia, on or about July 13, 1928, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Brady, Michigan, on or about January 18, 1929.

Specification 2: In that General Prisoner Lee H. Lanier, formerly Private Headquarters Troop, 3rd Cavalry, alias Private Pat L. Grayson, Cavalry, Fort Clark, Texas, alias Private Robert L. Marland, Infantry, Hawaii, alias Private Robert L. Marshall, Company L, 2nd Infantry, alias Private Harry L. Emery, did, at Fort Hayes, Ohio, on or about August 21, 1928, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Brady, Michigan on or about January 18, 1929.

Specification 3: In that General Prisoner Lee H. Lanier, formerly Private Headquarters Troop, 3rd Cavalry, alias Pat L. Grayson, Cavalry, Fort Clark, Texas, alias Private Robert L. Marland, Infantry, Hawaii, alias Private Robert L. Marshall, Company L, 2nd Infantry, alias Private Harry L. Emery, did, at Fort Leavenworth, Kansas, on or about December 7, 1928, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Brady, Michigan, on or about January 18, 1929.

Accused pleaded not guilty to and was found guilty of all charges and specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for five (5) years. The reviewing authority approved the sentence, directed its execution and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court-Martial Orders No. 283, Headquarters Sixth Corps Area, July 18, 1929.

2. The evidence shows that accused, under the name of Lee Harry Lanier, enlisted at Harrisburg, Pennsylvania, for three years, on May 27, 1928, and was assigned to the Headquarters Troop, 3d Cavalry, Fort Myer, Virginia (Ex. F, G). On June 1, 1928, accused was placed in confinement at Fort Myer, Virginia, and on July 13, 1928, he escaped from confinement and absented himself without leave (Exs. G, H) (Charge I and its specification; Specification 1, Charge IV).

Under the name of Pat Leo Grayson he procured his reenlistment at Fort Hayes, Ohio, for three years, on August 21, 1928, by concealing his prior service, and absented himself without leave the same day from the Recruit Detachment, Fort Hayes, Ohio (Exs. M, N) (Charge III and its specification; Specification 2, Charge IV).

Under the name of Robert Lee Marland he procured his reenlistment at Fort Leavenworth, Kansas, for three years, on December 7, 1928, by concealing his prior service. On December 9, 1928, the accused, after receiving clothing to the value of $27.21, absented himself without leave from the Guard and Service Company, G.S.S., D.E.M.L., Fort Leavenworth, Kansas (Exs. I, K, J) (Specification 1, Charge II; Specification 3, Charge IV).

Under the name of Robert Lee Marshall he procured his reenlistment at St. Louis, Missouri, for three years, on December 14, 1928, for the 2d Infantry, by concealing his prior service. He received pay and allowances of rations, clothing and quarters under this enlistment. He was placed in confinement January 18, 1929 (R 13, 14, Ex. L) (Specification 2, Charge II).

Captain William B. Kenworthy, M.C., after being accepted by the defense as a finger print expert, testified that he knew the accused as Lee H. Lanier and that photostatic copies of finger prints borne on the identification record cards of Lanier, Grayson, Marland and Marshall (Exs. B, C, D and E) were made by one and the same person (R 9, 10).

First Sergeant Robert H. Riddle, Company L, 2nd Infantry, testified that he knew the accused as Robert Marshall, 2nd Infantry (R 13-14).

The accused after being properly advised of his rights as a witness elected to remain silent (R 17).

3. The accused's escape from confinement, as alleged in Charge I and its specification, is sufficiently shown by an entry from his organization's morning report and by the testimony of his troop commander.

The evidence sufficiently shows that at the times and places alleged in the Specifications, Charge II, accused fraudulently procured reenlistments by concealing the fact that he was already in the military service, and received allowances under such reenlistments, as found by the court. The essential elements of the offense of fraudulent enlistment in violation of Article of War 54 are established in each case.

The evidence sufficiently shows that at the time and place alleged in the Specification, Charge III, accused fraudulently procured reenlistment by concealing the fact that he was already in the military service, as found by the court. The essential elements of the offense of fraudulent enlistment in violation of Article of War 96 are established.

The evidence also shows that at the times and places alleged in Specifications 1, 2 and 3 of Charge IV accused absented himself without leave and remained absent until confined at Fort Brady, Michigan, January 18, 1929. The duration of accused's absence in each case, together with his intervening fraudulent enlistment in each case, establishes desertion as to each specification. The testimony shows that accused was placed in confinement on January 18, 1929, but there is no evidence that any of the various desertions were terminated by apprehension as found by the court. Therefore, the evidence is legally sufficient to support only so much of findings of guilty under these specifications as involves desertion at the times and places alleged, terminated on the date alleged but in a manner not shown.

In testifying with respect to his comparison of finger prints appearing on the identification records in this case, the finger print expert identified and testified to his comparison thereof with the other finger prints, a set of finger prints taken "at the Hospital at Fort Brady, on January 28, 1929, signed Robert L. Marshall". These latter finger prints were not otherwise identified by him or any other witness as having been taken from the hands of accused. Another witness, however, testified that accused was known to him as Robert Marshall. Regardless of the legal sufficiency of the identification of this set of finger prints as having been made by accused, an inference by the court that the prints on the Lanier and Marshall identification records pertained to accused, based upon the identity of names, was justified and the testimony of the finger print expert was therefore competent to prove that accused and the persons entering into the various enlistments were identical.

4. The charge sheet shows accused enlisted May 27, 1928, at the age of 22 years, 10 months, with no prior service.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record is legally sufficient to support the findings of guilty of Charges I, II and III and the specifications thereunder, but legally sufficient to support only so much of the findings of guilty of Charge IV and its specifications as involves findings of guilty of desertion, at the times and places alleged, terminated in each case on the date alleged but in a manner not shown, and legally sufficient to support the sentence.

N. A. Trundell, Judge Advocate.

William T. Burns, Judge Advocate.

Robert D. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

AUG 2 - 1929

Military Justice
C. M. No. 187548

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, May 29, 1929. Sentence as to each: Confinement for six (6) months and forfeiture of $14.00 pay per month for a like period. Fort Sheridan, Illinois.
Private WILLIAM E. BURKE (6764873), Troop A, 14th Cavalry, and Private JAMES E. CORCORAN (6732617), Troop A, 14th Cavalry.	)	

OPINION by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BROWN, Judge Advocate.

1. The record of trial in the case of the soldiers named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentences, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused were jointly tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William E. Burke, Troop A, 14th Cavalry, and Private James E. Corcoran, Troop A, 14th Cavalry, acting jointly and in pursuance of a common intent, did, at Chicago Heights, Illinois, on or about April 14, 1929, feloniously take, steal, and carry away one automobile (Chevrolet Coupe), value about two hundred dollars ($200.00), the property of Mr. Frank Seipel, 328 West 14th Street, Chicago Heights, Illinois.

Each of the accused pleaded not guilty to the charge and specification and was found, of the specification, "Guilty except the words: 'and in pursuance of a common intent', 'feloniously', and 'steal'; substituting for the word 'feloniously' the words, 'attempt to'; of the excepted words: Not

Guilty; of the substituted words: Guilty", and of the charge not guilty, but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. Each of the accused was sentenced to be confined at hard labor at such place as the reviewing authority might direct for a period of six months and to forfeit $14.00 of his pay per month for a like period. The reviewing authority approved the sentences, directed their execution and designated Fort Sheridan, Illinois, as the place of confinement. The sentences were published in General Court-Martial Order No. 290, Headquarters Sixth Corps Area, July 19, 1929.

3. The only question presented by the record is whether or not the specification with the exceptions and substitutions as found and made by the court states a military offense. As a result of such exceptions and substitutions the specification of which the accused were convicted reads as follows:

> In that Private William E. Burke, Troop A, 14th Cavalry, and Private James E. Corcoran, Troop A, 14th Cavalry, acting jointly, did, at Chicago Heights, Illinois, on or about April 14, 1929, attempt to take and carry away one automobile (Chevrolet Coupe), value about two hundred dollars ($200.00), the property of Mr. Frank Seipel, 328 West 14th Street, Chicago Heights, Illinois.

That a specification must exclude every reasonable hypothesis of innocence---must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true or duly proven to be true, the accused cannot be innocent---may be regarded as the settled law of this office as it is the settled law of the land (C. M. No. 132905, Osborn; C. M. No. 110347, Denham; Par. 29a, M.C.M.). It is manifest that the specification with the exceptions and substitutions found and made by the court does not fulfill this requirement. Nothing substantial remains but the statement that the accused on April 14, 1929, acting jointly, attempted to take and carry away an automobile which was the property of another person. No words were substituted in place of those excepted, showing that the act was done unlawfully or constituted any disorder, neglect, crime or offense. It is entirely consistent with the pleadings set forth in the specification resulting from the exceptions and substitutions that the accused attempted to take the car with authority of

the owner or had rented the car or had been ordered to remove the car. In the absence of some word or necessary implication indicating the contrary, their acts must be presumed to have been lawful and innocent. The accused have not, therefore, been found guilty of any offense in violation of the 96th or other Article of War.

4. For the reasons above stated the Board of Review is of the opinion that the record is legally insufficient to support the findings of guilty and the sentences.

N. A. Trumbull, Judge Advocate.
William E. Jones, Judge Advocate.
Michael O'Hooey, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT,
In the Office of The Judge Advocate General,
Washington, D. C.

Military Justice
C.M. 187576

AUG 13 1929

UNITED STATES	EIGHTH CORPS AREA
vs.	Trial by G.C.M., convened at Fort Brown, Texas, June 28, 1929. Dishonorable discharge, suspended, and six (6) months' confinement. Fort Brown, Texas.
Private BURL W. LANFAIR (6244071), Machine Gun Troop, 12th Cavalry.	

OPINION by the BOARD OF REVIEW,
TURNBULL, BURNS, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BRADEN, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Burl W. Lanfair, Machine Gun Troop, 12th Cavalry, did, at Fort Brown, Texas, on or about June 4, 1929, desert the service of the United States, and did remain absent in desertion until he was apprehended at Kingsville, Texas, on or about June 4, 1929.

He pleaded not guilty to and was found guilty of the charge and the specification and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for six months. No evidence of previous convictions was introduced. The reviewing authority approved the sentence, suspended the execution of that part adjudging dishonorable discharge until the soldier's release from confinement, and designated Fort Brown, Texas, as the place of confinement. The sentence was published in General Court-Martial Order No. 349, Headquarters Eighth Corps Area, Fort Sam Houston, Texas, July 24, 1929.

3. The evidence shows that accused absented himself without leave from his organization at Fort Brown, Texas, on the night of June 3, 1929 (R.5), and on the morning of June 4th was apprehended at Kingsville, Texas, while asleep on top of the tender of an engine of a passenger train. When arrested he stated that his name was Jack W. Jones, that he was en route to El Paso, Texas, which was his home, and that he had purchased certain articles of Government clothing which he was wearing from a soldier at Brownsville, Texas. Upon investigation of the charge he told the Investigating Officer that he had left Fort Brown with a Private Errigo for the purpose of going to Fort Sam Houston, where he intended to "turn in" with some other organization (R.7).

Accused testified that he left Fort Brown on June 3, 1929, at about 9:00 P.M., and arrived at Kingsville, Texas, at about 12:00 midnight, where he was apprehended. He intended to "turn in" at Fort Sam Houston, Texas, with an organization of the Signal Corps. He also testified that he was 17 years of age and that he had been in the service less than a month at the time at which he absented himself (R.8-10).

4. The court by which accused was tried was composed of five members, of which Major Henry L. Flynn, 12th Cavalry, was President and Law Member. The report of investigation and attached papers accompanying the record of trial show that by 1st Indorsement dated June 12, 1929, Major Flynn, as Commanding Officer, Fort Brown, Texas, concurred in a recommendation of the investigating officer that trial upon the charges in this case be had by general court-martial, and forwarded the charges and accompanying papers to the Commanding General, Eighth Corps Area. At the trial, the trial judge advocate requested the members of the court to state any facts of which they were aware which they believed might constitute grounds of challenge against them. He did not, moreover, disclose in court the existence of Major Flynn's indorsement which was in the trial judge advocate's possession and therefore necessarily known to him, although by the provisions of Paragraph 57 a of the Manual for Courts-Martial, it was his duty as trial judge advocate to make known every ground of challenge believed by him to exist. Neither did Major Flynn disclose the fact of his concurrence in the recommendation for trial by general court-martial.

The indorsement by Major Flynn amounted to an expression of a positive and definite opinion as to the guilt of the accused and would have constituted sufficient basis for sustaining a challenge for cause against him as a member of the court. No copy of Major Flynn's indorsement appears to have been served on accused, nor was it required to be. No facts appear from which it might be inferred that accused or his counsel had knowledge of Major Flynn's expression of opinion as to the guilt of accused. There could not, therefore, have been a waiver by the defense of the right to challenge. In the opinion of the Board of Review the failure of the trial judge advocate and Major Flynn to make known at the trial Major Flynn's previous connection with the case and his expression of opinion as to the guilt of accused was error. It cannot be said, on the whole record, that this error did

not injuriously affect the substantial rights of the accused within the meaning of the 37th Article of War (C.M. 184519, Wright; C.M. 157586, Phillips; C.M. 155523, Summers).

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

N. A. Imshull, Judge Advocate.

William E. Burnes, Judge Advocate.

Hubert D. Hoover, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT,
In the Office of The Judge Advocate General,
Washington, D. C.

Military Justice
C.M. 187588

AUG 13 1929

UNITED STATES vs. Private HARRY ERRIGO (6220073), 12th Cavalry, Unassigned, Attached to Machine Gun Troop, 12th Cavalry.	EIGHTH CORPS AREA Trial by G.C.M., convened at Fort Brown, Texas, June 28, 1929. Dishonorable discharge, suspended, and confinement for one (1) year. Disciplinary Barracks.

OPINION by the BOARD OF REVIEW,
TURNBULL, BURNS, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BRADEN, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Harry Errigo, 12th Cavalry, unassigned, attached to Machine Gun Troop, 12th Cavalry, did, at Fort Brown, Texas, on or about 4 June, 1929, desert the service of the United States, and did remain absent in desertion until he was apprehended at Kingsville, Texas, on or about 4 June, 1929.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, directed its execution but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court-Martial Orders No. 363, Headquarters Eighth Corps Area, July 24, 1929.

3. The evidence shows that accused absented himself without leave from his organization at Fort Brown, Texas, on the night of June 3, 1929 (R.5), and on the morning of June 4th was apprehended at Kingsville, Texas, while asleep on top of the tender of an engine of a passenger train. When arrested he gave a fictitious name, denied that he was a soldier or a deserter, and stated that he was going to his home in Pennsylvania (Ex. 1). Upon investigation of the charges he stated that it was very painful for him to ride a horse on account of an injury under his arm and that at the time of his apprehension he was going to Fort Sam Houston for the purpose of joining an organization of the Signal Corps, of which he had previously been a member (R.6).

Accused testified that he left Fort Brown at about 9 P.M., June 3, 1929, and that he arrived in Kingsville about 1 A.M., June 4th. He denied that he told the apprehending officer that he was not a soldier or that he was going to Pennsylvania (R.8).

4. The court by which accused was tried was composed of five members, of which Major Henry L. Flynn, 12th Cavalry, was President and Law Member. The report of investigation and attached papers accompanying the record of trial show that by 1st Indorsement dated June 12, 1929, Major Flynn, as Commanding Officer, Fort Brown, Texas, concurred in a recommendation of the investigating officer that trial upon the charges in this case be had by general court-martial, and forwarded the charges and accompanying papers to the Commanding General, Eighth Corps Area. At the trial, the trial judge advocate requested the members of the court to state any facts of which they were aware which they believed might constitute grounds of challenge against them. He did not, moreover, disclose in court the existence of Major Flynn's indorsement which was in the trial judge advocate's possession and therefore necessarily known to him, although by the provisions of Paragraph 57 a of the Manual for Courts-Martial, it was his duty as trial judge advocate to make known every ground of challenge believed by him to exist. Neither did Major Flynn disclose the fact of his concurrence in the recommendation for trial by general court-martial.

The indorsement by Major Flynn amounted to an expression of a positive and definite opinion as to the guilt of the accused and would have constituted sufficient basis for sustaining a challenge for cause against him as a member of the court. No copy of Major Flynn's indorsement appears to have been served on accused, nor was it required to be. No facts appear from which it might be inferred that accused or his counsel had knowledge of Major Flynn's expression as to the guilt of accused. There could not, therefore, have been a waiver by the defense of the right to challenge. In the opinion of the Board of Review the failure of the trial judge advocate and Major Flynn to make known at the trial Major Flynn's previous connection with the case and his expression of opinion as to the guilt of accused was error. It cannot be said, on the whole record, that this error did not injuriously affect the substantial rights of the accused within the meaning of the 37th Article of War (C.M. 184519, Wright; C.M. 157586, Phillips; C.M. 155523, Summers).

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

N. A. Trumbull, Judge Advocate.

William L. Burns, Judge Advocate.

Hubert W. Hoover, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

AUG 23 1929

Military Justice
C. M. No. 187610

UNITED STATES v. Cadet GERALD EVANS WILLIAMS, First Class, United States Corps of Cadets.	)	UNITED STATES MILITARY ACADEMY Trial by G.C.M., convened at West Point, New York, July 24, 1929. Suspension, without pay and allowances, until July 1, 1930, at which time he will join the then first class.

OPINION of the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BRICE, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the cadet above named and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Cadet Gerald Evans Williams, First Class, United States Corps of Cadets, did, at Fort George Meade, Maryland, without proper leave absent himself from his company from about 10:00 P.M., July 5, 1929, to about 5:00 A.M., July 6, 1929.

CHARGE II: Violation of the 96th Article of War.

Specification: In that Cadet Gerald Evans Williams, First Class, United States Corps of Cadets, did, while in uniform at Baltimore, Maryland, on or about the 5th day of July, 1929, drink intoxicating liquors in violation of paragraph 132, Regulations for the United States Military Academy, 1924, in a public place, to wit, the Richmond Club, where liquor was being sold unlawfully.

The accused pleaded guilty to Charge I and its specification, and not guilty to Charge II and its specification. He was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced "to be suspended, without pay and allowances, until July 1, 1930, at which time he will join the then first class". The reviewing authority approved the sentence and forwarded the record of trial for the action of the President under the 48th Article of War.

3. The evidence shows as to Charge I and its specification, to which the accused pleaded guilty, that he was in Baltimore, Maryland, at about 5 A.M., July 6, 1929 (Exs. B, C and D), that his absence from Fort Meade, Maryland, the station of his class at that time, was without authority (R. 48,49).

As to Charge II and its specification, Charles Tobin, a former member of the First Class of the Corps of Cadets, who resigned as a cadet on July 18, 1929, testified that he and accused left camp at about 9 P.M., July 5, 1929, in white uniforms, and went to Baltimore, arriving at about 10:30 P.M. (R. 12,23). In Baltimore they went to a theatre where they met two young women and the four then went to the Richmond Club, "an ordinary speak-easy, rather private, not open to the general public unless you have certain recommendations". None of the party were members of the Club nor did witness know if it had a membership. None had met the proprietor before (R. 13-14), but witness knew of it and asked a taxi driver to take the party there (R. 28). Witness had been in the place before and had seen a bar in some part of the building with a rail and a mirror behind the bar (R. 35). When they entered the Club, they were escorted upstairs to a room of about 13 feet by 10 or 11 feet in which there was a table, several chairs and a radio, but no other persons (R. 15,25). Witness further testified, after having objected to answering the questions asked him on the ground that the answers might incriminate him and after the court had overruled the objection, that witness thereupon ordered four "gin rickeys" which the waiter brought in glasses and placed on the table in front of the members of the party. The liquid in witness' glasses tasted and smelled like gin, and witness believes that the drinks were "gin rickeys" of "normal" strength, or "weaker". Witness saw accused sip from his glasses twice, and later noticed that the glasses had become empty (R. 18-21,36). Witness paid six or seven dollars for the drinks (R. 34). After an objection by the defense on the grounds of irrelevancy had been overruled, witness testified that

upon leaving the Richmond Club, accused carried wrapped in his raincoat a quart of gin which witness had purchased at the Club (R. 37-40). After accused and witness left the young women they started for the railway station. When nearing the station, witness broke, by accident or otherwise, the window of a store, and was arrested by a policeman, taken to the courthouse and locked up until the following morning at which time he was tried in police court for disorderly conduct and acquitted (R. 24; Ex. E).

Three witnesses testified, by affidavits admitted by stipulation, as to the circumstances surrounding the breaking of the window and Tobin's arrest. One testified that from Tobin's and accused's actions he suspected they were under the influence of liquor, while the other two, including the policeman who arrested Tobin, testified that neither showed any evidence of having been drinking (Exs. B,C,D). Other police officers testified that Tobin showed no signs of intoxication while at the police station (Exs. E,F).

Colonel Robert C. Richardson, Cavalry, Commandant of Cadets at the Military Academy, testified that on July 15, 1929, at the Law Department of the Academy, accused was questioned in witness' presence by Captain James E. Morrisette, Judge Advocate General's Department, the trial judge advocate. Captain Morrisette told accused that he had been detailed to investigate charges that had been preferred, and that accused was not required to answer any questions but that whatever he might say might be used against him at the trial. When witness was asked concerning accused's statements with respect to his presence in Baltimore on July 5th, the defense objected on the ground that on the day previous to the meeting of accused with witness and Captain Morrisette in the Law Department, defense counsel advised Captain Morrisette that he had been appointed defense counsel of the court which would try accused if he were brought to trial, and requested that he be afforded an opportunity to be present as accused's counsel at any time at which accused might be questioned, but that he was not afforded this opportunity. The trial judge advocate stated in court that at the time of the questioning charges had not been preferred, and that he was not acting in the capacity of trial judge advocate but by special direction of the Superintendent. The law member then ruled that any confession made at the time in question would be excluded, but, over further objection on the ground of irrelevancy, permitted the witness to

testify that accused stated that Tobin was drunk on the night of July 5th at the time at which Tobin broke the window (R. 42-46). Witness also testified that before the members of the First Class went to Fort Meade, witness, in the course of a lecture to the class, stated that the regulations of the United States Military Academy would apply wherever the class should go. A memorandum order to the same effect was published (R. 46,47). In the course of the questioning by Captain Morrisette accused stated that he was present at the lecture described (R. 48).

Regulations of the United States Military Academy contain the following with respect to absence without leave, drinking intoxicating liquor and having intoxicating liquor in possession:

> "132. Cadets who shall drink or be found under the influence of intoxicating liquor, or bring or cause the same to be brought within the cadet limits, or have the same in their rooms, tents, or otherwise in their possession, shall be dismissed the service or otherwise less severely punished."

> "138. Cadets who shall absent themselves from their quarters between tattoo and reveille for a longer period than half an hour on any one occasion, without proper authority, shall be dismissed the service or otherwise less severely punished."

4. Captain Clare H. Armstrong, Coast Artillery Corps, testified for the defense that accused had been a member of the organization of cadets of which witness was in command since accused's admission to the Military Academy, and that "he has made a very good cadet and his soldierly qualities have been excellent" (R. 50).

Three cadets, including the Cadet First Captain and a Cadet Captain, testified that they knew accused and would rate him as an average cadet or better (R. 51-53).

Accused did not testify or make any statement prior to the findings of the court. After the court had reached its findings and prior to

the time at which it closed and voted upon the sentence a written statement by accused was introduced. In it he stated that immediately after the window had been broken by Tobin a patrolman came to Tobin and accused, whereupon they explained to him that they were cadets and asked if it would be possible for Tobin to pay for the window without going to the police station. The police officer replied that it would be necessary for Tobin to go to the police station but in response to an inquiry stated that it would not be necessary for accused to go. Witness asked Tobin if he desired him to go to the station and Tobin suggested that accused return to Fort Meade. Upon arrival at Fort Meade accused consulted other cadets as to ways and means of securing Tobin's release, and accused was advised that inasmuch as the Corps was leaving Fort Meade that day the officer in charge of cadets should be notified. It being accused's desire to do the proper and honorable thing in behalf of Tobin and the Military Academy, he thereupon went to his Cadet Captain and told him that Tobin was at the police station. A few minutes later the Cadet Captain told accused that Major Terry, officer in charge, had ordered accused to report to him. Accused complied, supposing that it was necessary for him to go to the police station to secure Tobin's release. Major Terry, however, questioned accused at length concerning his absence, accused protesting against being ordered to "tell on himself". Major Terry stated that he had not told the Cadet Captain to order accused before him. Accused further stated that his absence had not been discovered by any inspection. Upon the Corps' return to West Point accused was called before the Commandant of Cadets who, in the presence of Captain Armstrong, Major Terry and Major Spurgin, the Assistant Commandant of Cadets, told accused that he would be charged with absence without leave, of being drunk and disorderly, of conduct unbecoming an officer and a gentleman and of being involved with the police, and that he would have a short time to decide whether he would resign or be tried by court-martial. Accused stated that the charges would be incorrect and without foundation. Major Terry assured him that inasmuch as his report at Fort Meade had been made through a misunderstanding it could not be used against him. About an hour after this interview accused reported again to the Commandant of Cadets and stated that because of his innocence he would take a court-martial. The Commandant, Major Spurgin and Major Terry then recounted the seriousness of the charges and "inquired if I had any reason for not resigning as it was hopeless for me to think of being acquitted by a court-martial". Accused was told to reconsider his decision

and two days later the Commandant of Cadets told him that Tobin had resigned and suggested that accused do so. Accused was thereafter ordered before the Superintendent, who stated the charges against him, read certain paragraphs from the regulations of the Military Academy, stated his views on the question of intoxicating liquor and "asked me if I had changed my decision about resigning". On the morning of July 15th, accused was summoned to appear before Captain Morrisette in the presence of the Commandant of Cadets. Captain Morrisette "proceeded to make certain accusations, exclusive of those for which I stand charged before this court", and told accused that the statements were made "so that I could make up my mind about resigning". Captain Morrisette stated that accused was not required to answer incriminating questions and then "proceeded to question me and I was also asked certain questions by the Commandant". At the various times his resignation was requested accused was not fully informed of the evidence upon which the proposed charges would be based.

5. Tobin, the former cadet, was required to testify to facts indicating that accused drank intoxicating liquor, although he had objected to so testifying on the ground that this testimony would be self-incriminating. He was required to testify that he purchased, possessed in a public place, and joined in the transportation of intoxicating liquor. The 24th Article of War, in applying the principle laid down in the 5th Amendment to the Constitution of the United States, provides that no witness before a military court shall be compelled to incriminate himself or to answer any qestion the answer to which might tend to incriminate him. The Manual for Courts-Martial, Paragraph 122 b, provides that -

> "If a witness states that the answer to a question might tend to incriminate him, he will not be required to answer the question unless it clearly appears to the court that no answer to the question could have that effect." (Underscoring supplied)

The testimony required from Tobin to prove the commission by accused of the offense of drinking intoxicating liquor involved testimony indicating that Tobin had probably committed violations of the National Prohibition Act in the possession in a public place and transportation of intoxicating

liquor (41 Stat. 308; 27 USC, Sec. 12) which were punishable in the United States civil courts, one perhaps as a felony (Act of March 2, 1929; 45 Stat. 1446). Had the court conformed to the rule laid down that the witness would not be required to answer questions unless it clearly appeared that the answers would not have the effect of incriminating him, it would not have required Tobin to testify. While the court may have had reason for doubting that Tobin would be prosecuted or was punishable, under the statute, in the civil courts, it could by no means be clear that the testimony could not have the effect of incriminating him. The action of the court in requiring him to testify was therefore erroneous. The error committed, however, is not one of which the accused may complain as a violation of his legal rights (State v. Cobley, 103 N.W. 99; Par. 122 b, M.C.M.). The testimony, though improperly obtained, was competent against the accused.

6. Tobin was required to testify, over objection by the defense, that subsequent to the time at which he and accused with their companions drank intoxicating liquor in the Richmond Club, Tobin purchased and accused carried from the building a quart of intoxicating liquor. The accused's act in drinking intoxicating liquor, in violation of the regulations of the Military Academy, was alleged to have occurred at a specific time and place, and Tobin's testimony with respect to the "gin rickeys" ordered and consumed was sufficient to establish the facts charged. It was improper for the court to receive evidence of the commission by accused of the other subsequent and distinct offenses of possessing and transporting intoxicating liquor. Not only was the proof of such possession and transportation irrelevant to any issue before the court but was incompetent because it tended to evidence bad character in accused and the commission by him of other and distinct offenses against military and civil law (Par. 112 b, M.C.M.). Although the introduction of this testimony was erroneous, it is believed that it cannot be said, in view of the other evidence of guilt, that it injuriously affected the accused's substantial rights.

7. Over objection by the defense, the court received evidence of a statement by accused that his companion on the night of July 5th was drunk at a time shortly following the consumption of intoxicating liquor by the

companion and accused. In ruling upon the admissibility of this admission, the law member stated that he would exclude evidence of any confession made during the course of the investigation at which the admission was made because of the circumstances surrounding it. If the admission was voluntarily made by accused under such circumstances that the court had no reason to believe that it had been coerced and was therefore possibly false, it was properly admissible. The evidence does not show whether or not a confession was made in the course of this investigation. If the admission in question was a part of a confession made at this time it would not be admissible, for an isolated admission taken from an incompetent confession would not be competent evidence. The evidence before the court was to the effect that accused was called before a member of The Judge Advocate General's Department, in the presence of the officer commanding the Corps of Cadets, and in the absence of his counsel who had expressly requested an opportunity to be present, and that he was thereupon questioned by the Judge Advocate, a trained and experienced lawyer. The nature of the accusations made against accused and the method of questioning him pursued at this investigation is not in evidence but appears by the report of investigation accompanying the record of trial. The circumstance that accused was so questioned by the member of The Judge Advocate General's Department in the presence of the officer commanding the Corps of Cadets and responsible for the discipline of its members, at a time and place at which accused was denied the benefit of counsel, was itself strongly indicative of coercion and should have suggested further inquiry into this aspect of the case by the court. Such being the fact the admission should have been excluded, or if admitted should have been disregarded by the court (Par. 114 b, M.C.M.). Assuming that the introduction of the admission was erroneous, it is clear, in view of the other convincing evidence of guilt, that the error did not injuriously affect the substantial rights of accused.

8. The evidence, including accused's plea of guilty, sufficiently shows that at the time and place alleged accused absented himself without leave and remained absent without leave as found by the court under the Specification, Charge I.

The findings of guilty of Charge II and its specification, alleging the drinking of intoxicating liquor, rest upon the testimony of former

Cadet Tobin. He testified, in effect, that accused drank from glasses which, in the opinion of Tobin, contained intoxicating liquor. The circumstances under which the drinks were obtained substantiate the conclusion that intoxicating liquor was in fact consumed. Tobin's description of the place where the liquor was consumed, as well as his testimony with respect to the circumstances under which the party entered and occupied it, sufficiently show that it was a public place wherein liquor was being sold unlawfully as alleged. The act of a cadet in drinking intoxicating liquor is a violation of Paragraph 132 of the Regulations for the United States Military Academy.

The record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The accused was admitted to the United States Military Academy on July 1, 1926, with no prior military service. He is now 21 years and 7 months of age.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record is legally sufficient to support the findings of guilty and the sentence.

W. A. Trumbull, Judge Advocate.
William F. Barnes, Judge Advocate.
Hubert D. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C. M. No. 187656

September 5, 1929.

UNITED STATES vs. Private FREDERICK MUNSON (6677914), 2d Motorcycle Company, Quartermaster Corps.	))))))))	SECOND DIVISION Trial by G.C.M., convened at Fort Sam Houston, Texas, June 11, 1929. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by OLLIVETTI, Judge Advocate.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The only question in this case requiring consideration here is whether there is in the record adequate proof of the corpus delicti, that is, whether there is evidence, other than contained in the confession, that the offense charged was probably committed (Par. 114 a, M.C.M.). In the opinion of the Board of Review the facts in evidence, exclusive of the contents of the confession, fall short of showing that probably the offense of sodomy was actually committed. It follows that the record is not legally sufficient to support the findings of guilty.

3. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings and sentence.

N. A. Turnbull, Judge Advocate.

William A. Burns, Judge Advocate.

Robert H. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

AUG 23 1929

Military Justice
C.M. No. 187781.

UNITED STATES vs. Corporal JOHN M. STARKS (R-2374435), and Private First Class CHARLES H. SAYLES (6037982), both of Machine Gun Troop, 12th Cavalry.	)	HEADQUARTERS EIGHTH CORPS AREA Trial by G.C.M. convened at Fort Brown, Texas, July 16, 1929. Acquittal in case of Starks and dishonorable discharge, suspended, and confinement for six (6) months in case of Sayles. Ft. Brown, Texas.

OPINION by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The record of trial in the case of the soldiers named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, as to the accused Sayles, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused were tried upon the following charge and specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Corporal John M. Starks, Machine Gun Troop, 12th Cavalry, and Private 1st Class Charles H. Sayles, Machine Gun Troop, 12th Cavalry, acting jointly, and in pursuance of a common intent, did, at Fort Brown, Texas, on or about 4 June, 1929, feloniously take, steal and carry away one 45 pound can of lard substitute, of the value of about Five Dollars and 20/100 ($5.20), property of the United States, intended for the Military Service thereof.

Specification 2: In that Corporal John M. Starks, Machine Gun Troop, 12th Cavalry, and Pr ivate 1st Class Charles H. Sayles, Machine Gun Troop, 12th Cavalry, acting jointly, and in pursuance of a common intent, did, at Fort Brown, Texas, on or about 4 June, 1929, wrongfully and knowingly sell one 45 pound can of lard substitute, of the value of about Five

Dollars and 20/100 ($5.20), property of the United States, intended for the Military Service thereof.

Each pleaded not guilty to the charge and specifications. Accused Starks was found not guilty of both the specifications and the charge. Accused Sayles was found guilty of both specifications and the charge and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the findings of guilty as to accused Sayles, excepting the words "acting jointly and in pursuance of a common intent", approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The dishonorable discharge was suspended and Fort Brown, Texas, designated as the place of confinement. The sentence was published in General Court-Martial Order No. 382, Headquarters Eighth Corps Area, August 9, 1929.

3. The evidence as to accused Sayles shows that on or about June 4, 1929, Sayles was on duty as first cook in the mess of the Machine Gun Troop, 12th Cavalry, Fort Brown, Texas (R. 6). Food used in the mess was kept in a store room which had two doors, one of which opened into the kitchen, and the other led outside the building. Keys to the store room were possessed by the mess sergeant, Sayles and another cook (R. 5-6, 15). Between May 29 and June 5, 1929, the mess sergeant drew from the Quartermaster, for use at the mess, two 45 pound cans of lard substitute of the value of $5.85 per can. Each can bore the stamp of the Quartermaster Corps (R. 4-5, 7). On June 3, 1929, the two cans were still in the mess but part of the contents of one can had been used (R. 14). On the morning of June 4th, it was discovered that the full can had disappeared from the mess (R. 15). On or about June 4th accused Sayles and another man appeared in an automobile at a restaurant in Brownsville, Texas. In the car was a can of lard substitute which accused Sayles sold to the owner of the restaurant for $4.00, three dollars of which was paid Sayles at the time of the sale. After purchasing the lard substitute the restaurant owner called the Brownsville Chief of Police and delivered it to him. The latter returned the lard substitute to the Troop Commander, Machine Gun Troop, 12th Cavalry (R. 8-11, 13). The can of lard substitute purchased from accused Sayles by the restaurant owner bore the Quartermaster stamp and was similar in appearance to all cans of lard substitute issued by the Quartermaster (R. 7, 9, 12-13).

Accused Sayles elected to remain silent before the court (R. 23).

4. The court by which accused was tried was composed of five members, of which Major Henry L. Flynn, 12th Cavalry, was President and Law Member. The report of investigation and attached papers accompanying the record of trial show that by 1st indorsement dated June 8, 1929, and by a subsequent indorsement dated June 19, 1929, Major Flynn, as Commanding Officer, Fort Brown, Texas, concurred in recommendations of the investigating officer that trial upon the charges in this case be had by general court-martial, and forwarded the charges and accompanying papers to the Commanding General, Eighth Corps Area. At the trial, the trial judge advocate requested the members of the court to state any facts of which they were aware which they believed might constitute grounds of challenge against them. He did not, however, disclose in open court the existence of Major Flynn's indorsements which were in the trial judge advocate's possession and therefore necessarily known to him, although by the provisions of Paragraph 57 a of the Manual for Courts-Martial, it was his duty as trial judge advocate to make known every ground of challenge believed by him to exist. Neither did Major Flynn disclose the fact of his concurrences in the recommendations for trial by general court-martial.

The indorsements by Major Flynn amounted to expressions of a positive and definite opinion as to the guilt of the accused and would have constituted sufficient basis for sustaining a challenge for cause against him as a member of the court. No copies of Major Flynn's indorsements appear to have been served on accused, nor were they required to be. No facts appear from which it might be inferred that accused or his counsel had knowledge of Major Flynn's expressions as to the guilt of accused. There could not, therefore, have been a waiver by the defense of the right to challenge. In the opinion of the Board of Review the failure of the trial judge advocate and Major Flynn to make known at the trial Major Flynn's previous connection with the case and his expressions of opinion as to the guilt of accused was error. It cannot be said, on the whole record, that this error did not injuriously affect the substantial rights of the accused Sayles within the meaning of the 37th Article of War (C. M. No. 184519, Wright; C. M. No. 157386, Phillips; C. M. No. 155523, Summers).

5. For the reasons stated the Board of Review is of the opinion that

the record of trial is legally insufficient to support the findings and sentence as to Sayles.

N. A. Trumbull, Judge Advocate.
William F. Burns, Judge Advocate.
Herbert O. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

OCT 1 - 1929

Military Justice
C.M. No. 187795.

U N I T E D S T A T E S	)	HEADQUARTERS PANAMA CANAL DEPARTMENT
	)	
vs.	)	Trial by G.C.M. convened at Fort Amador, Canal Zone, July 1, 8, 15, 16, 17 and 18, 1929. Dismissal.
	)	
1st Lieutenant JAMES M. HAMMOND (O-11472), Quartermaster Corps.	)	

OPINION by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Lieutenant James M. Hammond, Quartermaster Corps, did, without proper leave absent himself from his post at the Post of Corozal, Canal Zone, from about 7:30 o'clock a.m., February 15, 1929, to about 4:00 o'clock p.m., February 15, 1929.

CHARGE II: Violation of the 95th A rticle of War.

Specification 1: In that 1st Lieutenant James M. Hammond, Quartermaster Corps, while in uniform, was, in a public place, to wit: The Ancon Inn, Panama City, Republic of Panama; at Ancon and Balboa, Canal Zone; en route to and from Taboga Island, Republic of Panama, and in a public place, to wit: the Hotel Aspinwall, Taboga Island, Republic of Panama, on or about February 15, 1929, drunk and disorderly and drinking in company with enlisted men. (As amended).

Specification 2: (Not Guilty).

Specification 3: In that 1st Lieutenant James M. Hammond, Quartermaster Corps, while in uniform and in a public place, to wit: the Hotel Aspinwall, Taboga Island, Republic of Panama, on or about February 15, 1929, did conduct himself in an improper and insulting manner toward Mrs. Matilda J. Malloy, by taking her by the hand, turning it over, and saying "That is the way I like things upside down, that is the way I'd like to have you upside down" or words to that effect. This to the disgrace of the military service.

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant James M. Hammond, Quartermaster Corps, did, at Ancon, Canal Zone, on or about February 15, 1929, wrongfully and unlawfully introduce into the Canal Zone, one quart of alcoholic liquor, to wit: Rum. This in violation of section 20, Title III, of the National Prohibition Act.

Specification 2: In that 1st Lieutenant James M. Hammond, Quartermaster Corps, did, at Ancon and Balboa, C anal Zone, on or about February 15, 1929, wrongfully and unlawfully have in his possession and under his control within the Canal Zone, one quart of alcoholic liquor, to wit: Rum. This in violation of section 20, Title III, of the National Prohibition Act.

Specification 3: In that 1st Lieutenant James M. Hammond, Quartermaster Corps, having received a lawful command from Captain Jack L. Meyer, Quartermaster Corps, his superior officer, not to leave the pool during working hours without first obatining permission from him, did, at the Post of Corozal, Canal Zone, on or about February 15, 1929, wrongfully failed to obey the same. (As amended).

He pleaded not guilty to all charges and specifications and was found not guilty of Specification 2, Charge II, guilty of Specification 1, Charge II, except the words "The Ancon Inn, Panama City, Republic of Panama; at Ancon and Balboa, Canal Zone; en route to and from Taboga Island, Republic of Panama, and in a public place, to wit", and of the words "drunk and", of the excepted words, not guilty, and guilty of all the other specifications and charges. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for the action of the President under Article of War 48.

2. The offenses of which accused stands convicted are all alleged to have taken place on February 15, 1929. There is a direct conflict between the testimony of the accused and that of several of the leading witnesses on many important points, and therefore it will contribute toward a clearer understanding if a brief narrative of the undisputed facts is given at the beginning. It is undisputed that about 7 A.M. on that day accused reported to Captain Jack L. Meyer, Q.M.C., at the Pacific Motor Pool, Corozal, Canal Zone (R 33, 37, 165), which Captain Meyer commanded and where accused was on duty. About February 6, 1929, Captain Meyer had given accused orders in writing (Ex. D) that his working hours would be from 7 A.M. to 3 P.M., and that he would not leave the Pool at anytime without first obtaining permission from Captain Meyer (R 27-28, 173). Shortly after reporting at 7 A.M. on February 15th, accused left the Pool in his car and went to the Cooks and Bakers barracks at Corozal, where he picked up Staff Sergeant Louis J. Klohe, Q.M.C. Sergeant Klohe got his fishing tackle and poles, they drove to the Balboa Police Station and accused went in, staying there about five minutes (R 45, 166). They then drove to Panama City stopping near a Chino store into which Sergeant Klohe went and bought a bottle of Gorgona rum with money given him by accused (R 45, 166-167). They drove back through the Canal Zone to the Mine Planter dock at Fort Amador where they left the car and boarded the Quartermaster launch McKee, which was about to make a trip to outlying stations with rations (R 45-46, 167). On the boat during the trip were the crew of three men,-the colored engineer named Brown, the steersman, McCann, and another soldier, and three passengers,-accused, Sergeant Klohe and Sergeant Carpenter, who got aboard at Bruja Point. The launch made stops at San Jose Rock, Balboa Secondary, Bruja Point and Taboga Island (R 83, 85, 167). The bottle of rum was taken on the launch, and was all or partly consumed (R 47, 84, 167). After the launch arrived at Taboga, accused, Sergeants Klohe and Carpenter and Private McCann went up to the Hotel Aspinwall, seated themselves at a table in the bar room and there partook of sandwiches and beer. They were there possibly half an hour. The bar boy was present and three ladies were seated nearby on the porch. Mrs. Malloy, the manager of the Hotel, cashed a check for $5.00 written by accused, who paid for the drinks and lunch had by the party (R 47-48, 85-86, 168). On the boat returning to Amador, there was another bottle of rum which was all or partly consumed. Going up the ladder to the dock at Amador accused slipped into the water and got his feet wet. He missed his pistol and searched the colored engineer but did not find it (R 50, 88, 169). Accused and Sergeant Klohe drove off in the former's car. They stopped on signal from a traffic policeman, but accused edged his car forward and tooted his horn until the cop came over and "bawled" him out (R 51, 169). They ran out of gas near the Balboa Police Station, and accused took a rubber tube and syphoned some gas from a Ford. They again ran out of gas near the Ancon post office, and left the car there. They went to the Ancon Inn where the bartender cashed a check for $5.00 for accused, and they then got a taxi and went home. Accused gave Sergeant Klohe a dollar, and told him to send his orderly down for the car (R 52-54, 169-170).

We shall now set forth the material testimony where the witnesses are not in agreement, the conflict being in practically every case between accused and the other witness. Evidence relating to the offenses of which accused was found not guilty will be omitted except as it has a bearing also upon some offense of which he stands convicted.

Captain Jack L. Meyer, Quartermaster Corps, testified that he had known accused casually for about two years before he was assigned to his command about January 24, 1929 (R 31, 37). He gave accused written orders as to his hours of duty because he had been from fifteen to twenty minutes late reporting for duty in the morning, and had been absent all morning on January 30th (R 29, 31, 32). Witness missed accused about 8.30 a.m. on February 15, 1929 (R 33). He gave accused no permission to be absent, and accused asked for none (R 28). The subject of a fishing trip was never discussed with accused (R 196). Accused did state that he was sure that he had a spot on his lung, would probably have to go to the hospital, and intended to see a medical officer that day (R 201). Witness never gave accused any work which would necessitate his going to Taboga Island (R 28), or any permission to visit that island at any time (R 29). Accused had no investigations to make on the morning of February 15th (R 41) and did not inform witness that he had an official investigation to make off the post (R 44). He was not present for duty on February 15th from about 7.30 a.m. to 4 p.m., and he had no authority for such absence (R 42-43).

Staff Sergeant Louis J. Klohe, Quartermaster Detachment, Corozal, testified that he had about seventeen years service but he was out from 1907 to 1921 (R 61-62). About 7.30 a.m. on February 15, 1929 (R 44), accused whom he had known about a year and a half (R 54) drove up in his car to the Cooks and Bakers orderly room and called out, "How about going fishing, Sergeant?" (R 45). He had not planned to go fishing that day and accused had not spoken about it before (R 55, 203). Witness got permission from his detachment commander to take the day off and got in accused's car (R 45). He took along plenty of fishing tackle and accused did not request him to buy any tackle for him (R 203). After leaving the police station, accused said "I guess we had better have a bottle", and drove into the Republic of Panama, where he handed witness two dollars and told him to get a bottle of rum. He purchased a bottle of Gorgona rum in a Chino saloon, and handed the bottle and fifty cents change to accused who put the bottle in his musette bag and placed the bag on the shelf behind the seat of the car (R 45, 204). After going on board the launch McKee, accused handed witness the bottle of rum and a cork screw and said "Open it," and "I want a drink" (R 46, 57). The bottle contained Gorgona rum (R 46). The bottle was "drunk empty" before they reached Taboga. Witness had three drinks, McCann at least one and accused had several. On arrival at Taboga, these three and Sergeant Carpenter went to the Hotel Aspinwall. At this time accused "showed some signs of drink" (R 47). Accused said "Let's all go up to the hotel and have something to drink" (R 73). They had the first drink at the bar and then took the drinks and sat at a small table where they had "the second

drink, x x and some sandwiches." Accused had "something in a smaller glass." The others had beer. Accused had two drinks. He cashed a check and paid the bill which was $4.95)R 48-49). Accused was "rather noisy" in the hotel. While accused and Mrs. Malloy were standing between the bar and the table, witness "heard an exclamation in a feminine voice," saw Mrs. Malloy turn and walk away, and she seemed "more flushed in the face" than usual (R 49). On the return trip witness saw accused take one drink from a bottle"marked Seven year old rum." Witness did not drink. On arrival at Mine dock accused "was pretty well under the influence of liquor." After getting on the dock witness

> "heard a splash in the water, looked down and saw Lieutenant Hammond's musette bag in the water. Then it looked to me like Lieutenant Hammond jumped in after the musette bag-he was in the water and he got hold of his musette bag and got hold of the mooring line and pulled himself out and up on the ladder and got up on the dock."

Accused then claimed that someone had stolen his pistol and said "You search that damned nigger." Witness did not do it, but accused "felt him over x x" (R 50). On the dock at Fort Amador, witness looked in accused's musette bag for the pistol and saw the bottle of rum (R 51). It was then about two thirds full (R 211). At the Ancon Inn accused " wrote the check and where the signature should have been, he placed in a date." Witness called his attention to this and he said "You write one and I will sign it," so this was done. While there witness had one glass of beer and accused had a drink of brandy (R 54). At that time, the Ancon bar was "pretty nearly" filled (R 75). Witness does not remember making a statement to Captain Knowles that he drained the gas out of accused's car so that he could not drive it. He did not drain the gas from the car (R 61). He does not remember stating to Major Thompson during the investigation that no liquor was brought into the Zone and that the only liquor drunk was on the island of Taboga (R 70). He has never had any trouble or argument with accused at any time (R 63). Just before the investigation of this case at Quarry Heights accused walked over and said "Are you again me or for me, Sergeant?" Witness answered that he was "absolutely neutral" and that he was "going to tell the truth" if placed on the stand under oath. Accused asked him to come to his room and talk it over but witness did not go (R 206).

Technical Sergeant Harry M. Carpenter, Headquarters Battery, 4th Coast Artillery, Fort Amador, Canal Zone, testified that he was on the launch McKee on February 15, 1929, from Bruja Point to Taboga (R 77) and return to Amador (R 80). He did not see accused take a drink on the boat (R 219) but he was "talking kind of loud, looked kind of sleepy" (R 218). In the bar room of the Hotel Aspinwall, accused had something in a small glass. Accused paid for the drinks (R 79). Witness has had twenty-seven years service and has never had a commissioned officer sit down at a table and drink with him before (R 220). Private McCann got up from the table and

started out on the back porch, when accused said to him in a loud voice "Where are you going, Mac, out to fuck the old lady?" (R 80). Accused, when he said this, was three feet from witness (R 222). Witness considered accused under the influence of liquor (R 218). On the return trip accused came down in the cabin and told the steersman "to turn around, he wanted to fish" (R 80). The boat did turn around. Accused asked him to have a drink while en route to Amador, but witness refused and did not see any liquor (R 81).

Private Francis McCann, Quartermaster Corps, Fort Amador, testified that he saw accused on the McKee on February 15, 1929 (R 83). There was a bottle of Gorgona rum there but he does not know who brought it on board. Witness, accused and Sergeant Klohe drank from the bottle and emptied it before reaching Taboga (R 84, 212-213). Accused "had been drinking and his eyes looked sleepy" but he was not drunk (R 214). At the Hotel Aspinwall, they sat in the bar room at one of the tables near the back porch (R 85). Everyone drank beer (R 89), and accused paid for the drinks. Mrs. Malloy and two other ladies came up from swimming and witness got up to give her some playing cards he had gotten for her, when accused said "Where are you going, Mac, out to fuck the old lady" (R 86). At this time Mrs. Malloy was in the office, but there were some ladies on the back porch about ten feet away (R 92-93). Accused talked to Mrs. Malloy a few minutes, but witness was at the other end of the bar and didn't pay any attention to the conversation (R 215). On the trip back, accused wanted to go fishing around the island, and he took hold of the wheel and twisted it around, but witness knew that something was wrong so he went below and told the steersman to head for the Mine dock (R 87). He saw a bottle of rum on the boat on the return trip, but does not know whose it was. Witness, accused and Sergeant Klohe drank from it. Going up the ladder to the dock at Fort Amador, accused slipped and his bag fell into the water, and he "fell in to his knees." Accused missed his pistol and said "That nigger has my gun." He told Sergeant Klohe to search Brown, but the sergeant didn't wish to, and then accused said, "I will search him," and he felt in Brown's pockets (R 88). Witness had had other officers on the launch but he had never had a drink with an officer either at the bar or on the boat (R 91).

Mrs. Matilda Josephine Malloy testified by deposition (Ex. F) that she was manager of the Aspinwall Hotel, Taboga Island, Republic of Panama. She first saw accused on February 15, 1929, when he came to the hotel. He was in the uniform of an officer of the Army. There were three or four enlisted men with him, and witness thinks all were dressed in dungarees except accused. At McCann's request she cashed a $5.00 check for accused and laid the money on the table before him. About ten minutes later when she came up, he took her wrist, and she thought he wished to see the time, but after making a remark about her ring, he turned her hand over and said, "This is the way I like things up side down, and I would like to have you up side down too." Witness immediately left the room, but she heard accused call a number of times, "Send the boss in here I want to buy her a drink."

Hormer Vincent Crooks, Zone police officer, testified that on the afternoon of February 15, 1929, he was directing traffic at the intersection of Amador and Balboa Roads. About 3 or 4 o'clock in the afternoon, as he stopped the traffic coming down Amador Road, he noticed accused whose car was the first one in line. After stopping for a minute or so, accused edged his car up on the car track and tooted his horn. Witness shook his head and held up his hand. A little bit latter accused again edged his car up on the railroad track and kept blowing his horn. Witness then went over to accused and told him to back off the track and that he would let him know when he was ready for him to move (R 94). Accused replied in "a more or less insolent tone," but he backed up his car. Witness noticed an odor of liquor about the car but he would not say accused was drunk. Accused was dressed in O.D. shirt, campaign hat and had lieutenant's bars on his shoulders (R 95). He did not consider placing accused under arrest (R 96).

Alexander Brown, engineer and master of the launch J.W. McKee, testified that on the return trip from Taboga on February 15, 1929, accused wanted to go fishing and gave the steersman orders to go around the island but that the latter wouldn't do it and hung on to the wheel, whereupon accused took hold of the wheel and turned it. The boat made a couple of circles, and after that McGann told him it would be pretty late getting in, and "we turned and came in" (R 99).

3. Accused testified that on the afternoon of February 14th Sergeant Klohe told him that arrangements had been made whereby they might go fishing the next day on the launch "McKee." Accused replied that he could not agree to go until he had secured permission from Captain Meyer (R 164). When Captain Meyer appeared in his office on the morning of the 15th accused went to him and stated that he desired to go on one more fishing trip before completing his tour of foreign service. Captain Meyer said that he did not want accused to leave the pool that day but, after some discussion, gave him permission to go provided he would first attend to a matter at the police station in which a soldier by the name of Lamonte was involved. The annual maneuvers of the Panama Canal Division were going on at this time but accused did not think that his request for permission to go fishing was unusual for the reason that his duties as assistant to Captain Meyer consisted only of making investigations of motor vehicle accidents and these investigations did not consume all of his time (R 165, 166, 175). At this interview accused said nothing about a spot on his lungs, although he had spoken to Captain Meyer on this subject on February 7th (R 175). After securing permission to leave, accused met Sergeant Klohe and the two drove in accused's car to the police station. After attending to the matter involving Lamonte, they drove from the police station to Panama. In the meantime, Klohe having suggested that they obtain more fishing line, accused gave him some money, a dollar bill and a fifty cent piece, with which to purchase the tackle. Upon arriving in Panama accused stopped his car and Klohe ran into a house and promptly returned with a package which looked like wrapped clothes or fishing line (R 167, 172). Accused did not want any rum and did not at the time know that Klohe had purchased it (R 176).

The package was not placed in accused's bag (R 178). On Klohe's return the two drove to the mine dock, got on the launch and started on their trip. Accused had left his blouse and belt in his car, and on the boat removed his shirt and puttees. When they reached San Jose Rock, Klohe produced the bottle of rum and announced that it was the "tackle" that they had needed. Accused told Klohe that it was all right to have the liquor but that he must keep it away from the crew. Accused and Klohe each then took a drink from the bottle and accused put it behind a locker (R 167). In this connection, on cross-examination, accused testified that in so far as he remembered, he did not drink any rum or "hard liquor" on February 15th (R 178). Accused did not again see the rum until after they left Bruja Point. He then noticed it was between Klohe and Private McCann, both of whom were fishing on the opposite side of the boat from accused. When they were not looking accused got possession of the bottle and threw it overboard, although it was still about half full. When they saw the bottle floating behind the boat the two men inquired as to what had become of it. Accused told them that he had finished it (R 167). Upon arrival at Taboga Island accused, Klohe and McCann went to the hotel, which accused had not before visited, and entered a room which accused at first thought was a dining room but was in fact a bar room. Accused and Klohe sat down together at a table and were joined a few minutes later by McCann. The latter called the bar boy and accused asked the two men to have some lunch. The three ordered beer and sandwiches. At about this time Carpenter, at accused's invitation, also sat down at the table and ordered beer which he drank. Shortly afterwards he left the room. McCann, having remarked that he had a package for Mrs. Malloy and that she had been swimming (R 168), started to leave the room, whereupon accused called to him, "Mac, where are you going, to duck the old lady." (R 168, 179). Accused had never seen Mrs. Malloy at that time. He said nothing more. While they were sitting at the table three women sat down at another table about 25 feet away, near the doorway of the bar room. Neither Mrs. Malloy nor any of the other women came near accused's table at any time. Beer for accused's party was ordered twice. About 30 minutes were consumed with the beer and sandwiches. Accused told the bar boy he would have to pay for the food and drink with a check, and thereupon wrote a check for $5.00 and gave it to Klohe with instructions to pay the bill. Klohe went to the bar and either Klohe or the bartender went from the bar to the ladies' table. Later Klohe reported that he had paid the bill, whereupon the three left the hotel (R 168). Accused received no change from the check, and no money was laid on his table (R 168, 183). He never spoke to Mrs. Malloy while at Taboga or at any other time (R 168). He did not take her hand and say that he liked things upside down and that that was the way he would like to have her, upside down. He testified in this connection, "That statement is a mass of words that I would never think of. Such an idea would be entirely beyond me." (R 173). Accused did not drink any "hard liquor" at Taboga (R 178), and did not drink any intoxicating liquor with enlisted men other than beer at the hotel (R 173). He "felt no compunction at that because it had been customary when men and officers were

out together for the officers to drink beer with the men and I felt that I was doing nothing in the way, out of the way, gentlemen of the Court, in sitting there while they were drinking their beer and eating their sandwiches. We had done that many, many times at these beer parties, and I saw no reason why I should not buy lunch and buy beer for these men." (R 177). At the hotel accused was dressed in a cotton shirt, uniform breeches and leggins and a campaign hat with officer's hat cord. He did not wear any insignia, his lieutenant's bars being on his blouse which he had left in the car (R 183). After leaving Taboga, Klohe produced a bottle of rum which he said he had purchased, apparently from the proceeds of the check given at the hotel (R 168, 184), and drank from it (R 168). Accused told Klohe that it was all right for him to have the liquor but that he must keep it away from the crew and Klohe agreed to do so (R 168, 169, 186). Accused did not drink from this bottle (R 178). On the return trip accused had the steering wheel of the boat for a time but did not take the boat off its course to any appreciable extent. He did not turn the boat about in a circle (R 181). Having discovered before leaving the mine dock that his pistol was missing accused became annoyed and inquired as to its whereabouts. Among other things, he searched the negro engineer. He did not fall in the water at the dock, although he did get his feet wet as he climbed up the ladder, his foot having slipped. Soon after leaving the Zone Police Officer who "bawled me out for blowing the horn", accused's car ran out of gasoline. He "secured primings from an adjoining car" and later again found that he had no gasoline. He finally left his car and took a taxicab to his quarters. Before taking the cab he went with Klohe to the Ancon Inn to have a check cashed and there Klohe ordered and accused paid for a drink (R 170). Accused did not have a drink at this time (R 177).

Doctor William Philip Christian, a dentist residing at Balboa, Canal Zone, testified that on an afternoon about February 15, 1929, accused who had an enlisted man in his automobile with him drove up to the curb in Balboa, spoke to witness, stated that he had been fishing and apologized for not having kept an appointment on that afternoon. At this time accused was dressed in uniform with a shirt without Lieutenant's bars. Witness did not detect the odor of intoxicating liquor about accused or the car (R 146, 147).

Major Edgar H. Thompson, Coast Artillery Corps, Division Inspector, Panama Canal Division, testified that during the course of an investigation by him of accused's actions with respect to a check given by him, his conduct at Taboga and his conduct in the presence of Mrs. Malloy, he questioned Klohe and McCann as to whether or not accused had had liquor on the launch "McKee" en route to and from Taboga Island on February 15, 1929. The witnesses were on oath but their testimony in this regard was not recorded. From Klohe and McCann he "could find no evidence whatsoever to show that he (accused) had liquor while on that boat, either going or coming" (R 138-140).

Various enlisted men testified as witnesses for the defense that they had attended "beer parties", or organization dinners, at which officers had been present and in the course of which beer and possibly other liquor had been consumed by both officers and men (R 143, 150, 154, 155, 157, 158, 159-161). Some of these witnesses testified that on the occasions described by them the officers kept apart from the enlisted men (R. 143, 151, 158, 160, 161).

4. The evidence shows that accused was absent without leave from his post in the Canal Zone on February 15, 1929, between the hours, approximately, alleged in the Specification, Charge I, and that in so absenting himself he failed to obey the order of his Detachment Commander requiring him to obtain permission to leave his place of duty during working hours, as alleged in Specification 3, Charge III. Accused testified that he had been granted permission to be absent but there was a direct conflict between his testimony in this respect and the testimony of his organization commander, Captain Meyer. Captain Meyer's testimony is not impeached otherwise than by the testimony of accused and does not bear any inherent evidence of untruthfulness or inaccuracy. It was the special function of the court to determine the credibility of witnesses and the weight to be attached to their testimony, and in the exercise of such function it apparently found Captain Meyer's testimony with respect to the absence without leave to be true in its essential particulars. In the opinion of the Board of Review the court was justified in so finding. The evidence is legally sufficient to support the findings of guilty of Charge I and its specification and of Charge III and Specification 3 thereunder.

The evidence, including the testimony of accused, shows that accused drank beer in the company of enlisted men at the Hotel Aspinwall, Taboga Island, Republic of Panama, on February 15, 1929, the date alleged in Specification 1, Charge II. There is some testimony also which would have justified the court in finding that accused drank other liquor in company with Sergeant Klohe at this time and place. That he was disorderly on this occasion, as charged, is shown by the testimony of the various enlisted men as to his loud talking and his obscene remarks in the presence of ladies and by the testimony of Mrs. Malloy as to his improper remarks to her. In the opinion of the Board of Review this disorderly conduct, together with his act of drinking intoxicating liquor in a public place in the company of enlisted men and in the presence of civilians was clearly of a nature unbecoming an officer and a gentleman and constituted a violation of the 95th Article of War as found. Apparently in mitigation there was received in evidence testimony tending to show that at so-called beer parties or organization dinners in or near the Canal Zone there had been instances where officers had consumed intoxicating liquor in the presence of enlisted men. There is nothing in the record to show that it was customary for officers to drink in the company of enlisted men under circumstances approximating those shown in this case.

The principal evidence in support of the allegations of Specification 2, Charge II, that accused conducted himself in an improper and insulting manner towards Mrs. Malloy consists of the testimony of that lady. She testified that accused, who was a stranger to her, took her hand and made, in substance, the remark set forth in the specification. Her testimony is corroborated by that of Klohe to the effect that while she and accused were standing between the bar and the table Klohe heard an exclamation in a feminine voice and turned and saw Mrs. Malloy walk away with flushed face, and by the testimony of McCann that he saw accused and Mrs. Malloy talking together. Accused denied the remark attributed to him, denied that Mrs. Malloy came to the table where he and the enlisted men were sitting, and denied that he talked to her at all. Again, it was the province of the court to accept or reject accused's contradiction of the testimony of the prosecution's witnesses. There was adequate evidence before the court to justify its findings of guilty of this specification, and in the opinion of the Board of Review the evidence as a whole is legally sufficient to support those findings. The conduct of accused appears, under all the circumstances, to have been of a nature to indicate his moral unfitness as an officer and to bring discredit upon himself and the military service. It constituted a violation of the 95th Article of War.

With respect to Specifications 1 and 2, Charge III, the evidence shows that accused brought from Panama and introduced into the Canal Zone and had in his possession and control within the Canal Zone the quart of Gorgona rum purchased by Klohe in Panama City on the morning of February 15th, acts which were in direct violation of Section 20, Title III of the National Prohibition Act. There is also evidence from which the court might properly find that he introduced and had in his possession and control a portion of the quart of rum purchased at Taboga. Accused testified that the rum purchased on the morning of February 15th was purchased and transported without his knowledge, but on all the evidence the court was justified in finding that the rum was purchased at accused's request and was in his actual possession and under his control while it was being taken through the Canal Zone to the launch dock. The evidence is legally sufficient to support the findings of guilty of these specifications.

5. The deposition of Mrs. Malloy, the manager of the hotel at Taboga, Republic of Panama, was introduced over objection by the defense on the ground (a) that the officer designated to take it had no authority to administer the oath since the deposition was taken in a foreign country, (b) that the witness should have been required personally to appear before the court, and (c) that the witness was not sworn until after she had given her answers to the interrogatories. The record shows that the deposition was taken on the Island of Taboga, Republic of Panama, for the reason that Mrs. Malloy refused to appear personally before the court-martial. The answers to the stated interrogatories were first made and prepared at the Hotel Aspinwall, whereupon witness was taken to the military reservation at Taboga where she was sworn and where she adopted the written answers and

signed the deposition. It also appears that the military reservation on Taboga Island is occupied by the United States and, there having been a dispute between the United States and the Republic of Panama with respect to the legal right of the United States to occupy the Island, the Republic of Panama has provisionally granted the use, occupation and control of a certain part thereof to the United States. It appears that the officer who took the deposition had been regularly designated to take it.

The 114th Article of War provides, among other things, that -

> "* * * any officer designated to take a deposition * * * shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgement of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law."

The 26th Article of War provides, among other things, that depositions to be read in evidence before military courts may be taken before and authenticated by any officer authorized by the laws of the United States to administer oaths. The officer before whom Mrs. Malloy's deposition was taken having been regularly designated to take it he had a general power to administer oaths and therefore had the power to administer the oath to Mrs. Malloy. It was argued by counsel for the defense that such general power did not, in the absence of military occupation, extend to the taking of an oath in a foreign country. The Board of Review believes that the power to administer oaths vested by the 114th Article of War is not subject to territorial limitations, but even assuming that it is, it appears in this case that the deposition was actually consummated on a military reservation, that is to say, at a place where the Army was serving, within the meaning of the Article above quoted, and that therefore the officer designated to take the deposition was empowered to administer the oath in any event.

The 25th Article of War provides that depositions may be read in evidence if taken when a witness resides, or is found, "beyond the State, Territory or District in which the court is ordered to sit," or when it appears to the satisfaction of the court that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause is unable to appear or testify in person at the place of trial. In this case the witness refused to attend the court and inasmuch as she was outside the territorial limits of the United States, in a foreign country and not subject to military law, the process of the court-martial to compel her attendance would have been impotent and futile. While the statute authoriz-

ing depositions does not specifically cover the case of a witness residing beyond the Canal Zone, the place where this court sat, it is the opinion of the Board of Review that the language therein used is sufficiently broad to embrace such a case, and that there is no valid legal objection to the introduction in evidence before a court-martial sitting in the Canal Zone of a deposition regularly taken in the Republic of Panama. Under the circumstances in this case the court was justified in receiving Mrs. Malloy's deposition in evidence.

Neither the Articles of War nor the Manual for Courts-Martial require that a witness testifying by deposition on stated interrogatories be sworn before his answers are made and transcribed. The 19th Article of War lays down the requirement that all persons who give evidence before a court-martial shall be examined on oath. In this case the deposition did not become such until the witness had affixed her signature thereto, thus adopting as her own the answers theretofore transcribed. Inasmuch as she was sworn at the time or before she signed the deposition, it is the opinion of the Board that there was a substantial compliance with the statutory requirement for examination on oath. It has been held in the civil courts that it is immaterial whether the witness by deposition be sworn before or after giving his answers to the interrogatories propounded. (Samuel Bros. & Co. v. Hostetter, 118 Fed. 257; Barron v. Pettes, 18 Vt. 385; Zeigler v. Woodson, 202 S.W., 163.)

6. Under date of August 27, 1929, accused addressed to the Secretary of War (Thru channels) an eight page communication entitled "Petition for Court of Inquiry and statement of irregularities." This letter was returned to accused requesting a more detailed statement as to the witnesses and a brief statement of their expected testimony for the information of the War Department, which accused declined to furnish. The Commanding General, Panama Canal Department, forwarded the letter by 6th Indorsement, September 16, 1929, with a statement of facts in answer to the complaints made, and stated that he found no basis whatsoever upon which to base a recommendation that a Court of Inquiry be appointed. The request for a Court of Inquiry was denied by the Secretary of War on September 18, 1929, and accused's letter was transmitted to the Judge Advocate General for consideration by him and by the Board of Review in connection with their examination of the record of trial.

The letter of accused enumerates sixteen alleged irregularities, most of them stated on information and belief, which may be grouped as follows:

> (1) That the oath taken by Captain Meyer who signed the charges against accused was equivocal and not the oath required by law; that the person who administered the oath was not qualified to do so; that no investigation of the charges was made by Captain Meyer before signing them, and that Lieutenant Colonel G. T. Trent, the Staff Judge Advo-

cate, authorized such improper oath and refused to allow accused to examine the report of investigation of charges of perjury preferred by accused against Captain Meyer which would have shown further facts reference these matters;

(2) That he was placed in arrest on return to the Panama Canal Zone on June 12, 1929, which prevented him from finding witnesses, that he was denied counsel at the investigation of the charges on June 15 and 18, 1929, which resulted in his trial on a false charge involving a felony, and that since his trial he has been kept in restraint which has prevented him from getting affidavits to prove perjury at his trial;

(3) That Colonel Trent, the Staff Judge Advocate, refused to advise accused, did give advice to the Trial Judge Advocate and possibly to members of the court, and from his knowledge and connection with the charges and trial, was incompetent to impartially review the case for the Department Commander;

(4) That the deposition of Mrs. Malloy was improperly taken and admitted in evidence, and the officer who was designated to take it was the officer who initiated the complaint against the accused and therefore not a fair or impartial person to take the deposition.

With reference to the foregoing, the facts as shown by the record and other papers before the Board, including the report of investigation of the charges against Captain Meyer, are that accused returned to Panama on June 12, 1929, investigation of the charges against him was held on June 15 and 18, his limits of arrest were extended on June 27th in order that he might accompany his counsel, the court met on July 1, 1929, but at the request of accused was adjourned to July 8th and then to July 15th. No question was raised or objection made at the trial that the investigation was improper or that accused was prejudiced in preparing for trial. The charges were properly investigated, signed and sworn to. Lieutenant Colonel Trent appears to have acted properly in the performance of his duties as Department Judge Advocate, and no prejudice against accused on his part is even remotely shown. The record of trial shows that Major Robert C. Garrett, the officer by whom Mrs. Malloy's deposition was taken, at one time, in response to a question by Mrs. Malloy, stated to her that the transaction relating to the unpaid check might properly be laid before accused's commanding officer, but there is nothing in the record, or elsewhere, to indicate that this officer was the accuser in fact, that he initiated the charges, or that he was in any manner unfair or partial in taking the deposition. Other matters concerning the admissibility of the deposition of Mrs. Malloy were fully presented to the court and have been considered by the Board of Review in paragraph 5 of this review.

The Board of Review is of the opinion that the charges were prepared, investigated and brought to trial in substantial compliance with all provisions of the Manual for Courts-Martial, that the substantial rights of the accused were not prejudiced at any step of the proceedings and that the complaint of irregularities made by accused is without merit.

7. The Army Register contains the following with respect to accused's service:

> "Pvt. Sup. Co. and pvt. and corp. Co. L, 362 Inf. 4 Oct. 17 to 30 July 18; 2Lt. Q. M. C. U. S. A. 30 July 18; accepted 31 July 18; 1 lt. Q. M. C. U. S. A. 22 July 19; accepted 25 July 19; vacated 21 Sept. 20.--- 1 lt. Q. M. C. 1 July 20; accepted 21 Sept. 20."

He was born November 24, 1891, and has the degrees of LL. B. and LL. M. from George Washington University.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War and is authorized for violation of the 61st and 96th Articles of War.

E. C. McNeil, Judge Advocate.

William T. Burns, Judge Advocate.

Robert S. Hoover, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 187850

Sept 9, 1929.

UNITED STATES v. Corporal BERNARD J. TAYLOR (R-47445), Headquarters Battery & Combat Train, 3d Battalion, 11th Field Artillery, detached service Headquarters Detachment, Hawaiian General Depot, Fort Armstrong, T. H.	HAWAIIAN DEPARTMENT Trial by G.C.M., convened at Fort Shafter, T. H., July 25, 1929. Dishonorable discharge and confinement for two (2) years. U. S. Penitentiary.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BRADEN, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Confinement in a penitentiary is not authorized, none of the offenses of which accused was found guilty being recognized as an offense of a civil nature punishable by penitentiary confinement for more than one year, by any statute of the United States or by any law of the District of Columbia. The offenses involved in Specification 1, Charge II, and the Specifications, Additional Charge, i.e., making and uttering checks with intent to defraud and with knowledge that the drawer did not have sufficient funds or credit with the drawee bank to pay them, in violation of Section 4272, Revised Laws of Hawaii, 1925, are punishable by the statute referred to by confinement for a maximum period of one year for each offense.

3. The Board of Review holds the record of trial legally sufficient to support the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years, but legally insufficient to support the designation of a penitentiary as the place of confinement.

E. C. McNeil, Judge Advocate.
William T. Burns, Judge Advocate.
Herbert H. Hoover, Judge Advocate.

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WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

OCT 4 1929

Military Justice
C. M. No. 187894

UNITED STATES	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Eustis, Virginia, July 25, 1929. Dishonorable discharge, suspended, and confinement for six (6) months. Fort Eustis, Virginia.
Private ANDREW WASCHAK (6808051), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by OLLIVETTI, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Andrew Waschak, Quartermaster Corps, did, at Fort Eustis, Virginia, on or about June 26, 1929, feloniously take, steal, and carry away three smoked Hams, value about Nine Dollars & Fifty-Cents ($9.50), the property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become

due and confinement at hard labor for six months. The reviewing authority approved the sentence, directed its execution but suspended the execution of the dishonorable discharge and designated Fort Eustis, Virginia, as the place of confinement. The sentence was published in General Court-Martial Order No. 361, Headquarters Third Corps Area, August 20, 1929.

3. Briefly summarized the evidence shows that Captain Otto Harwood, Quartermaster Corps, in charge of the bakery, commissary and cold storage at Fort Eustis, Virginia (R. 18), entered the post bakery during the afternoon of June 26, 1929, discovered the accused, dressed in civilian clothes coming therefrom with a box under his arm at which time he (accused) "hesitated" and "looked startled", proceeded a few feet, stopped and put the box down, whereupon the Captain questioned him and he replied that he was carrying the hams to Private Mills, the chief baker. Captain Harwood then took him to the orderly room and asked him the reason for the waiting automobile in front of the bakery doors and he replied that he was about to go to town for an automobile license. Upon examination the Captain further discovered that the hams were yet cold and the lot numbers thereon appeared to be the same as the numbers on the hams then in the cold storage (R. 20). There was an ice box in the bakery (R. 27). At this time accused was on a detail to the post bakery but had formerly been in charge of the cold storage with access to the keys thereof (R. 29). An inventory of the cold storage made on June 29th (R. 18) disclosed a shortage of 1700 pounds of hams (R. 13), valued at about $445.00 (R. 19).

The accused testified as a witness in his own behalf that having made plans to secure license plates in town that afternoon, he stopped Private Smith who was approaching in a Chevrolet and when the latter parked the car in front of the bakery doors he (accused) entered the latrine but as he was leaving he noticed some waste paper on the floor which he picked up (as his duty was to police the place in the morning), and walked back to the boiler room to dispose of same, where he saw a box in the corner containing three hams which he picked up and was in the act of taking them to Private Mills when Captain Harwood appeared and inquired for Mills, so he (accused) started to locate Mills but the Captain stopped him saying, "What are you doing with those hams?" to which he replied, "I ain't doing nothing with these hams, I found these hams in the boiler room" (R. 33).

4. The court by which accused was tried was composed of one major,

three captains, two first lieutenants and two second lieutenants. During the testimony of the accused one of these members directed a series of questions at him, largely argumentative in nature and apparently for the purpose of testing his veracity, in part as follows:

"Q. How much light is there in that boiler room, how many windows does it have?
A. I don't know, sir, I was never in it before.
Q. Is it very light in the day time?
A. It is light in there, the doors are all open, the windows are all open.
Q. The back doors were all open?
A. It is only one door.
Q. The door going out to the railroad track, that was open?
A. Yes, sir, all the doors were open. (R. 43.)
* * * * * *
Q. And where is the G I kept in that boiler room?
A. Right as you go in the door.
Q. Any light burning in there?
A. No, sir.
Q. Any electric light burning in there?
A. None that I noticed.
Q. No light burning in there that you noticed? (R. 44.)
A. No, sir.
Q. But there was plenty of light in the room?
A. Yes, sir.
Q. It is dark as hell in there - I have no further questions.

By the defense: I arise to a point - I object to the question, or the statement, when the member said 'Dark as hell in there'. That simply has a wrong bearing on the other members of the court, and I would like for that to appear in the record.

By a member: May it please the court, the member who made that remark would also like to have the court take judicial cognizance of the fact, or take judicial notice of the fact, that the room this man is

referring to ought to be inspected by the court, or somebody ought to be brought here to testify to the fact it is one of the darkest places around there; it is kept full of coke, where this man says he found this stuff, and it would be impossible for a man --

By the defense, interposing: I object to that statement.

By the president: What was the remark of the defense.

By the defense: 'Dark as hell' was his remark that I objected to first, and then the last statement.

By the law member: The record will note the objection of the defense." (R. 45.)

Previously during the examination of accused by a member of the court (whether by the same member does not definitely appear), the defense had objected to the line of questions asked upon the ground that they appeared to be "antagonistic" to accused, and the member had then referred to accused's testimony as his "tale". This objection had been overruled (R. 40, 41).

5. The proof that accused stole the hams, as alleged, consists of evidence that at one time he had had access to the cold storage room from which a large quantity of hams was stolen and that he was found in possession of three hams which had, apparently, been taken from that room. Although mere opportunity to steal is not by itself adequate proof of larceny, unexplained possession of stolen property is a fact from which it may properly be inferred that the possessor stole it (Paragraph 112 a, M.C.M.). So in this case accused's possession of the hams, if not satisfactorily explained, was a fact from which his guilt might be inferred. Accused sought to explain his possession of the stolen property by stating, in substance, that he had by chance seen the hams in a corner of a certain room, and, when accosted by the officer, had been innocently taking them to his immediate superior, Private Mills. In support of this statement he testified that the room was lighted from an open door and windows, sufficiently to enable him to see the hams. Whether the room was light or dark, therefore, became a material and important issue bearing upon the sufficiency of his explanation of his possession of the stolen property.

The court member's positive and emphatic statement that the room was "dark as hell", in contradiction of the accused on this material point amounted to a declaration unwarranted by any evidence before the court, that accused's testimony explanatory of his possession and as to how he came into possession of the stolen property was false. In effect, the member made himself an unsworn witness for the prosecution on a material matter of which the court could not take judicial notice, and the court failed to reject his statement or indicate in any manner that it was not accepted as evidence of the fact in issue. No witness was called to testify to the fact stated by the member. The member's conduct and his subsequent participation in the findings and sentence was, under the circumstances, unmistakably erroneous.

In C. M. No. 116012 (Willis), the Acting Judge Advocate, American Expeditionary Forces, France, commented with respect to a similar improper remark by a member of the court as follows:

> "After the Judge Advocate had concluded his cross examination of the accused a member of the court, addressing the accused, said:
>
> > 'This defense of yours that you don't remember what happened inside though you know a good deal of what happened outside seems shaky. Don't you remember anything of what happened inside?'
>
> As indicated by the reviewing authority * * * the remark in open court of a member of the court that the defense of the accused seemed 'shaky' was highly improper. The irregularity is so grave that it must have been held to invalidate the findings and sentence if the record proof of the commission of the acts charged were not quite clear. See page 24, Bulletin 72, War Department, 1917. However, in this case, in view of the very direct evidence to prove the disrespect and disobedience alleged, I am of the opinion that it cannot be held that the substantial rights of the accused were injuriously affected by the improper remark."

Bulletin 72 (page 24), War Department, 1917, contains the following with respect to a court-martial case in which the president of the court made

comments adverse to accused:

> "After the trial judge advocate had concluded his remarks and just before the court was closed for findings in the trial of a soldier charged with desertion and found guilty of absence without leave, the president of the court made the following statement:
>
> 'To my mind it is an aggravated case of overindulgence in whisky in a young man whose future, I fear, is very black.'
>
> This irregularity was of such a grave nature that had not the accused freely admitted his absence without leave on the witness stand the finding and sentence of the court must have been set aside. The president of the court, or any member thereof, has no right to comment in open court upon the evidence adduced at the trial."

Similar unfair and prejudiced conduct by even trial judge advocates, who assuredly are under no stricter duty to act justly and to avoid unfairness than are the members of a court-martial, has been held fatal error (C.M. No. 123945, O'Neill; C. M. No. 182775, Rudd).

Inasmuch as the evidence adduced by the prosecution in the present case did not include direct proof of the larceny, but was purely circumstantial in its essentials and by no means of a compelling or of even strongly convincing nature, and since accused's testimony offered in explanation of his possession of the property in question, if believed, would very probably have resulted in acquittal, it is the opinion of the Board of Review, after examination of the entire proceedings, that the error injuriously affected the substantial rights of accused within the meaning of the 37th Article of War. Substantial justice, as well as the maintenance of discipline and the punishment of crime, is the standard and goal of courts-martial, and it is the opinion of the Board of Review that to hold in this case that the court member's erroneous conduct was not injurious to accused, would be a manifest departure from that standard and goal.

6. The charge sheet shows that accused enlisted September 8, 1928, at the age of 20 years and 10 months, with no prior service.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

E. C. McNeil, Judge Advocate.

_____, Judge Advocate.

Walter H. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C. M. No. 188014

Sept. 14, 1929.

UNITED STATES	)	HEADQUARTERS FOURTH CORPS AREA
vs.	)	Trial by G. C. M., convened at Fort Oglethorpe, Georgia, August 23, 1929. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private JAMES L. SMITH (R-1360801), Machine Gun Troop, 6th Cavalry.	)	

HOLDING by the BOARD OF REVIEW -
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The offenses of which accused was found guilty, fraudulent enlistment, and desertion terminated by surrender after an absence of more than 60 days, were committed on March 13th and 14th, respectively, 1928. Hence the maximum limitations on punishment fixed by the Executive Order of December 10, 1920, published in paragraph 349 of the Manual for Courts-Martial, 1921, are applicable to both offenses. The maximum punishment by confinement authorized by the order mentioned for the offenses here involved is confinement at hard labor for one year and six months, i.e., six months for the offense of fraudulent enlistment and one year for the offense of desertion terminated by surrender after an absence of more than 60 days.

3. The Board of Review therefore holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year and six months.

E. McNeil, Judge Advocate.
William E. Burns, Judge Advocate.
Herbert B. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

OCT 2 - 1929

Military Justice
C. M. No. 188211

UNITED STATES	)	PHILIPPINE DIVISION
v.	)	Trial by G.C.M., convened at Cuartel de Espana, Manila, P.I., August 15, 1929. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private EVERETT L. HORNSBY (6240032), Company G, 31st Infantry.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support the findings of guilty of Charge II and its specification.

2. The evidence is legally insufficient to support the findings of guilty of Charge I and its specification for the reason that it was not proven, other than by accused's confession, that he sold the shirts and raincoat described therein, as charged. The corpus delicti not having been shown, accused's confession as to his disposition of the property was inadmissible (Par. 114 a, M.C.M.; C. M. No. 159283, Nelson; C. M. No. 187168, Greene).

3. The maximum sentence authorized by Paragraph 104 c of the Manual for Courts-Martial for the offense of which accused stands properly convicted, i.e., larceny of Government property of the total value of $8.21, is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six (6) months.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its

DEC 13 1929

specification, but legally sufficient to support the findings of guilty of Charge II and its specification, and only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six (6) months.

E. C. Mullen, Judge Advocate.
William F. Burns, Judge Advocate.
Herbert B. Hoover, Judge Advocate.

1st Ind. OCT 2 1929

War Department, J.A.G.O., - To The Commanding General, Headquarters Philippine Division, Fort William McKinley, Rizal, P. I.

1. In the case of Private Everett L. Hornsby (6240032), Company G, 31st Infantry, (C. M. No. 188211), I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge I and its specification be disapproved and that only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months be approved; and you are advised that, thereupon, you will have authority to order the execution of the sentence so approved.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is 188211. For convenience of reference and to facilitate attaching the copies of the published order to the record in this case, please place the said number in brackets at the end of the published order as follows: (J.A.G.O. 188211).

REC'D. BACK DIV. HQ., PHIL. DIV.
NOV 9 1929

E. A. KREGER,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

OCT 26 1929

Military Justice
C.M. 188356

UNITED STATES vs. Private First Class DAVID A. SHEEHAN (6682701), Detachment Medical Department, Medical Section, Panama Atlantic General Depot.	PANAMA CANAL DIVISION Trial by G.C.M., convened at Fort Davis, Canal Zone, September 11 and 12, 1929. Dishonorable discharge and confinement for ten (10) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private 1cl David A. Sheehan, Panama Atlantic General Depot, Medical Section, did, at Fort Davis, Canal Zone, on or about August 19, 1929, in the night time feloniously and burglariously break and enter the dwelling house of 1st Lieut. Frank F. Taylor, Q.M. Corps, with intent to commit a felony, viz: rape, therein.

Specification 2: In that Private 1cl. David A. Sheehan, Panama Atlantic General Depot, Medical Section, did, at Fort De Lesseps, Canal Zone, on or about August 19, 1929, feloniously take, steal and carry away one Willys Knight sedan, value about $200.00, the property of Mr. Frederick F. Bitters, civilian employee (Machinist), Fort Sherman, Canal Zone.

Specification 3: In that Private 1cl. David A. Sheehan, Panama Atlantic General Depot, Medical Section, did at Mount Hope, Canal Zone, on or about August 19, 1929, feloniously take, steal and carry away one Oakland automobile, value about $500.00, the property of Dale Reagan, Chief Petty Officer, U.S. Navy, Naval Air Station, Coco Solo, Canal Zone.

He pleaded not guilty to, and was found guilty of, the charge and specifications. Evidence of one previous conviction by special court-martial for neglecting to take prophylactic treatment and developing venereal disease, in violation of the 96th Article of War, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. The evidence as to Specification 1 of the Charge is briefly as follows:

Mrs. Dorothy Taylor, wife of 1st Lieut. Frank F. Taylor, Q.M.C., stationed at Fort Davis, Canal Zone, testified that on the evening of August 18, 1929, she retired about nine o'clock and was awakened later by a hand touching her (R. 8) on the shoulder (R. 10). She thought it was Lieut. Taylor and went back to sleep. She was awakened a second time (R. 8) by the touch of a hand on her back (R. 10). This time witness was wide awake, she looked and saw that Lieut. Taylor was "sound asleep." She then thought it was her little boy, and again closed her eyes, when she smelled the odor of beer, looked over the edge of the bed and saw a man (R. 8) "sitting by my pillow. He was crouched" (R. 15). She sat up in bed and tried to yell but could not. The man jumped up off the floor, (R. 8) "leaned over" her and said "Shist" (R. 9). Witness "gasped" several times (R. 10) but could not scream. At this time Lieut. Taylor woke up and she said "There is a man here." Lieut. Taylor sat up in bed, and the man "rushed around the bed and out of the bedroom door." Witness then found her voice and screamed. She testified that there was a dry closet at the head of the bed, the door of which was open about two inches and a beam of light (R. 9) about two feet wide (R. 13) "came by the side of the bed and across the floor." It was bright moonlight, and a street light gave a "beam of light of about two feet" (R. 9). Witness "saw his face distinctly" and positively identified accused as the man who was in her room (R. 10). When accused was on the floor beside the bed his face was from 6 inches to a foot from witness' (R. 11,13). He was in the beam of light from the dry closet. It was light enough in the room for anyone to see that her husband was there in bed (R.13). She had never seen accused before and did not "recognize the man," but she "saw his features" and knew that she would know him if she saw him again. He had very long hair and was dressed in green khaki trousers, white shirt with no necktie (R. 13). Accused did not attempt to rape witness (R. 15).

1st. Lieut. Frank F. Taylor, Q.M.C., testified that "around one o'clock" on the night of August 19, 1929, he was awakened from sleep by hearing his wife give a couple of "gasping sobs." He half raised up in bed and Mrs. Taylor told him there was a man in the house. He went to the window and called a guard, then to the back of the house to get a gun, and then to

the front where he saw a car going past picking up speed. He yelled to the guard to stop the car, but the car did not stop and the guard fired three shots at it (R. 17). The car was "an old dirty blue car" (R. 20). He saw it as it passed in front of a street light (R. 19) but he does not know whether it was open or closed car (R. 20). The next morning witness noticed that the lock on the rear door of his quarters had been forced loose by straightening out the hook, and the front screen had been cut for a distance of about two and one-half feet. No one could have entered the house that night without cutting the screen (R. 17). Witness went fishing and hunting practically every week end, and often stayed away from home over one night. He had been away on this week end (R. 18). He had seen accused several times working around Captain Clark's garage (R. 20) which was about forty feet from witness' quarters (R. 18). Witness missed nothing from his quarters although there was money in plain view (R. 19). At the time of the occurrence, Mrs. Taylor was "frightened" and "upset a little," but she was not hysterical (R. 20).

The evidence as to Specification 2 of the Charge shows that Mr. Frederick F. Bitters, a civilian employee at Fort Sherman, Canal Zone, owned a Willys-Knight sedan of the value of one thousand dollars, dark blue in color, which he kept in the officers garage at Fort De Lesseps, Canal Zone (R. 54-56). About 12:35 A.M., August 19, 1929, a man wearing a dark suit, white shirt and dark necktie was seen by a guard to take this car from its garage (R. 50-52). About one o'clock A.M. (R. 17) the accused, positively identified by Mrs. Taylor as the man who entered Lieutenant Taylor's quarters at Fort Davis, Canal Zone (R. 12), made his getaway in a car answering the general description of Mr. Bitters' automobile (R. 18-19,22,25). This car was fired upon three times by a sentry as it left Fort Davis (R. 29-31). A witness, Lieutenant Morris, observed that the gears clashed at every shift. This car took the Bolivar road out of Fort Davis (R. 25) and was found about 6 P.M. the next day in a drainage ditch at the edge of the road on the old Gatun road about 600 yards from "the filtration plant." There were two bullet holes in the rear which "looked to be a .38 or .30 calibre bullet" and one bullet was found in the car (R. 75). When found the clutch of the automobile was not functioning properly (R. 55).

The evidence relating to Specification 3 of the Charge shows that about 9:30 P.M., August 18, 1929, Chief Petty Officer Dale E. Reagan, U. S. Navy, parked his Oakland sedan, model 1929, value about $1,250, near his quarters at Mount Hope, Canal Zone, about a block from the filtration plant (R. 56-58). This automobile was taken by the accused, driven to Colon and there wrecked when he drove it into a building (R. 87-88). Accused when asked, shortly after the offenses, by a police officer in Cristobal, Canal Zone, if he could drive a car, replied, "No" (R. 63).

The accused, after being warned of his rights as a witness in his own behalf, was sworn and testified in substance that he went to town and from 9:30 P.M., August 18, 1929, until about 11:50 P.M. he was in the Silver Spray Bar drinking with other soldiers. He got on the 12:00 o'clock bus and

then got off again and the bus left without him. After that he started walking toward the post and then remembered that he had often seen a car standing at Mount Hope and decided to take it for a joy ride until the morning bus at 5:30 A.M. He walked to Mount Hope, found the car unlocked and drove it away. He did not drive to Fort Davis and leave the car because that would be stealing it. He intended to leave it again at Mount Hope and catch the reveille bus. He drove out the France Field road and finally back to town. When entering town he saw the road was blocked by a truck, and as he was "riding in a stolen car" he suspected "they were probably wise to it already." He then drove around the block and got on the same road again without realizing it because he had been drinking pretty heavy. A policeman stepped out to halt him but he sped by. He noticed a car following him, and as he turned a corner lost control of the car and crashed into a building (R. 87-94).

3. As to Specification 1 of the Charge, the evidence shows that at the time and place alleged, in the night time, accused, who had been drinking, broke open a door of Lieutenant Taylor's quarters, unlawfully entered and went into a room where Mrs. Taylor and her husband were in bed asleep. Accused touched Mrs. Taylor twice about the shoulders and back and awakened her whereupon she sat up and saw him crouched by her bed. She tried to scream and accused jumped up, leaned over her and indicated to her that she was to remain quiet. Lieutenant Taylor having awakened, the wife told him that "a man" was in the room. At this point Lieutenant Taylor also sat up in bed and accused then rushed from the room. There was nothing in the evidence to indicate that any larceny was committed by accused while in the quarters. Accused denied having been in the Taylor quarters but Mrs. Taylor's identification of him was positive and was sufficient to justify the court in finding that it was accused who broke into the house and entered the room. Although accused was not known to Mrs. Taylor he had been employed near her quarters and had been seen by Lieutenant Taylor.

There is nothing in the evidence to indicate that in breaking and entering the quarters it was accused's purpose to commit rape, as charged, by having carnal knowledge of Mrs. Taylor, or of any other woman, by force and without her consent. To be true, Mrs. Taylor was in bed asleep, and accused after having forced his way into the quarters, touched her person and cautioned her to be quiet, but even were this deemed sufficient to indicate that he expected or hoped to have carnal relations with her (which the Board of Review does not find), it falls far short of showing or even suggesting that he intended to use force in the accomplishment of his object. His every action while in the room as testified to by Mrs. Taylor rather show that he did not intend to use force to overcome her resistance and nonconsent, which force is an essential element of rape. His sudden flight also is quite consistent with the absence of such intent. Neither does the evidence show an intent on the part of accused to commit any other particular criminal offense while in the building. Though his breach and entry were undoubtedly unlawful, and were possibly accomplished with some improper purpose, the nature of that purpose, whether

criminal or not, does not appear, and may not reasonably be inferred from the facts before the court.

The facts presented here are no more (if, indeed they are not less) persuasive of an intent to rape than in the case of Goff (C.M. 151153) in which, upon a conviction for housebreaking with intent to rape, the Board of Review, with the concurrence of the Judge Advocate General, held the evidence legally insufficient to show the alleged intent to rape and to support the findings of guilty of housebreaking . In the Goff case it appeared that accused, while unclothed, wrongfully entered the sleeping room of a member of the Army Nurse Corps at night while the woman was asleep. The latter having been awakened by a shaking of her bed, saw accused and screamed, whereupon he fled. The Board said:

> "Miss Wang was awakened by the slight shaking of her bed. Did accused approach her bed with the intent to force her to submit to his desires or for the purpose of making an indecent proposal to her, or did he accidentally run into the bed in the dark? Was he seeking her? There is nothing in the evidence indicating it. He may have intended any one of a number of other crimes. If he intended to rape Miss Wang he must have expected her to resist, to scream and to continue to scream. How was it with the accused; he broke and ran and this even when he was all undressed. Surely no reasonable hypothesis of entry with intent to rape can be drawn from the evidence of record. In fact the evidence is insufficient to show what was the intent possessed at the time of breaking and entering."

In the opinion of the Board of Review the evidence in the present case is not sufficient to establish the alleged intent to rape, but is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves a finding that accused did at the time and place alleged unlawfully and without the consent of the lawful occupant, break and enter the dwelling house of First Lieutenant Frank F. Taylor, Quartermaster Corps, in violation of Article of War 96, an offense lesser than and included within that charged (C.M. 151153, Goff). No maximum limitation of punishment for this offense is expressly fixed by paragraph 104 c of the Manual for Courts-Martial, but the analogous offense of entering a private dwelling without lawful authority against the will of the lawful occupant as denounced by Section 824 of the Code of the District of Columbia, is punishable under that statute by confinement for not more than six months.

As to Specification 2 of the Charge, the evidence shows that at about 12:35 on the night of August 19, 1929, a Willys Knight sedan of a value in excess of that charged, the property of Mr. Frederick F. Bitters, was stolen from a garage at Fort De Lesseps, Canal Zone, and was recovered on the following day in the vicinity of a filtration plant, apparently at Mount Hope, C. When recovered the car had two bullet holes in the rear, the clutch was not

in good order, and the car was in a ditch along a road leading from Fort Davis to Colon, at a point in the vicinity of that from which a second car was stolen by accused on the same night while fleeing from the Taylor quarters. A bullet taken from the car was before the court, although its caliber was not definitely shown by the testimony. Accused was seen in the immediate vicinity of Fort De Lesseps a few minutes before the car was taken, after having alighted from what apparently was the only public vehicle by which he could have reached Fort Davis prior to his entry into the Taylor quarters. He could not have reached Fort Davis, as he did, at about 1:00 A.M., without the use of a motor or other rapid vehicle. The man seen to take the car was dressed in clothing similar to that worn by accused on the night in question, and a man (it may fairly be inferred that it was accused) drove a car of similar general description from the scene of accused's entry of the Taylor quarters, at which time the gears were clashed and at which time the car was three times fired upon by a sentry armed with a service rifle. This evidence as to the identity of the thief, though circumstantial, was, in the opinion of the board, sufficient to justify the court in concluding that the car was taken by accused. The essential elements of the offense of larceny by accused, as charged, are established.

With respect to Specification 3 of the Charge the evidence, including the testimony of accused, shows that at the time and place alleged accused took and carried away the Oakland sedan automobile described in the specification, of the approximate value alleged, the property of Chief Petty Officer Dale Reagan, as charged. The intent to steal may properly be inferred from the circumstances under which the car was taken and used by accused. The elements of larceny by accused are also established under this specification.

4. The charge sheet shows that accused is 20 years of age, and that he enlisted May 10, 1927, with no prior service.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and Specifications 2 and 3, and the sentence, but legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves a finding that accused did at the time and place alleged unlawfully and without the consent of the lawful occupant break and enter the dwelling house of First Lieutenant Frank F. Taylor, Quartermaster Corps, in violation of the 96th Article of War. Confinement in a penitentiary is authorized by the 42d Article of War for the offenses of larceny involved in Specifications 2 and 3 of the Charge, each recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by Section 287 of the Federal Penal Code.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. No. 188432.

DEC 11 1929

UNITED STATES vs. Private RAYMOND SODERQUIST (6794196) and Private First Class LADISLAUS WOJCIEHOWSKI (6785819), both of Company F, 35th Infantry.	)	HEADQUARTERS HAWAIIAN DIVISION Trial by G.C.M. convened at Schofield Barracks, Territory of Hawaii, July 8, 1929. As to Soderquist: Dishonorable discharge, suspended, and confinement for three (3) years. Disciplinary Barracks. As to Wojciehowski: Findings and sentence disapproved.

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

1. The record of trial in the case of the soldiers named above having been examined in The Judge Advocate General's office and there found legally insufficient to support the findings and sentence as to Soderquist, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused were tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Raymond Soderquist, Company F, 35th Infantry, and Private First Class Ladislaus Wojciehowski, Company F, 35th Infantry, acting jointly and in pursuance of a common intent, did, in camp at Ewa, T.H., on or about June 18, 1929, commit the crime of sodomy, feloniously and against the law of nature, by having carnal connection per rectum.

Each pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years. The

reviewing authority approved "only so much of the findings as involves a finding of the accused Soderquist guilty of committing sodomy in conjunction with an unidentified man", disapproved the findings and sentence as to Wojciehowski, and approved the sentence as to Soderquist, directed its execution but suspended the dishonorable discharge and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 76, Headquarters Hawaiian Division, August 29. 1929.

3. The evidence, including a confession by Soderquist, shows that at the time and place alleged Soderquist committed the offense of sodomy as charged and found by the court by permitting Private Wojciehowski to place his penis in Soderquist's rectum. The only question requiring consideration is as to the legal effect of the action of the reviewing authority upon the findings of the court as to Soderquist.

4. In approving only so much of the findings with respect to Soderquist as involved a finding that he committed sodomy in conjunction with an unidentified man, the reviewing authority, by necessary inference, disapproved the finding of the court that the offense was committed jointly with Wojciehowski, and substituted for that disapproved finding a finding that the offense was committed with an unidentified person (whether at the time and place alleged does not expressly appear). In view of the disapproval of the finding as to Wojciehowski's participation in accused's act, the substituted finding can bear no meaning other than that the unidentified person found to be a participant was <u>not</u> Wojciehowski. But may an accused with legal propriety be convicted, as in this case, of sodomy with X, an unknown, when he has been charged with sodomy with W? The Board of Review is convinced that this question must be answered in the negative.

The power of the court or of a reviewing authority to make substitutions in the language of a specification extends only to corrections involving a lesser offense included in the offense charged, or involving changes which do not alter the nature or identity of the offense charged (Par. 78c, M.C.M.). It cannot be said that an offense of sodomy with X is included within an offense of sodomy with W; or that sodomy with X, though similar thereto in nature, is an offense identical with sodomy with W. The two offenses are distinct and separate. Manifestly, evidence of one will not support conviction of the other. To permit upon the trial of an accused for one offense his conviction by court-martial for another offense (though it be closely allied in nature) would be a violation of that axiomatic rule of military pleading and practice which requires that an accused be fairly apprised of the offense of which he is in jeopardy. "A party cannot be convicted of an offense of which he has not been notified that he is charged and which he has had no opportunity to defend" (Winthrop, p. 583).

Similar variances have been repeatedly held fatal by The Judge Advocate General and the Board of Review. In C.M. 157842, Greening, accused was

charged with and found guilty of sodomy with V, the evidence showing only that he had carnal connection against the order of nature with a man whose identity and name was not disclosed. The Board of Review expressed the opinion that,

> "the failure on the part of the prosecution to prove, as alleged, the name of the party with whom the accused had carnal connection, renders the evidence legally insufficient to support the findings of guilty."

In C.M. 128088, Lee, in which accused was charged with assault upon Private S., Company A, 20th Train Headquarters and Military Police, and was found guilty of assault at the time and place alleged upon "a military policeman", The Acting Judge Advocate General said,

> "The conviction and sentence are not sustained by the record. It is, of course, elementary that an accused is acquitted of all material allegations which are excepted by a court from its findings, and is found guilty of those substituted in their place. It follows that, when the court excepted, from its findings, among other things, the words "Amos Smith Co. 'A', 20th Train Headquarters and Military Police," it acquitted the accused of assault upon Amos Smith whether with intent to commit murder or to do bodily harm; and, therefore, the substituted finding that the accused, with intent to do bodily harm, assaulted a military policeman necessarily refers to a person other than the Amos Smith named in the original specification. In other words, by exception and substitution, the court acquitted the accused of assaulting Amos Smith and found him guilty of assaulting an unknown man. This the court had no legal right to do. The offense with which the accused was charged was an assault on Amos Smith with intent to murder him. Under that charge the accused can not be convicted of assaulting an unknown military policeman. It is fundamental that a court may convict an accused only of the offense of which he is charged or of a lesser included offense. The crime of assaulting an unknown military policeman with intent to do him bodily harm is a different offense from that of assaulting Pvt. Amos Smith Co. 'A', 20th Train Headquarters and Military Police; and it is not a lesser included offense. The court was without authority, therefore, to find the accused guilty of assault upon an unknown and unnamed individual. It is legally impossible to convict an accused of an assault on A under a specification charging him with an assault on B."

In C.M. 164042, Rodden, a rehearing, the record showing that upon the original hearing accused had been charged with the larceny of certain articles, property of the United States, and found guilty of the larceny of these articles, property of "a person unknown", the Board of Review said:

"If, then, the exception by the first court in the words of ownership constituted a fatal variance as we believe it did, it was because the offense left by the court was different from and not included in the first specification. The court might just as well have wiped out the original specification and substituted a new one in its entirety so far as its legal effect in this case is concerned. The accused had been charged with a specific larceny and when he was found not guilty of the words 'United States' it amounted to finding him not guilty of the larceny alleged. In other words, when an accused is charged with the larceny of Government property, ownership in the United States is an essential element of the offense and must be alleged and proved (Thompson vs. U.S., 256 Federal 616). The action of the first court, therefore, in finding accused not guilty of the words 'United States', was to all intents and purposes a complete acquittal of the offense alleged in the specification notwithstanding the court expressed its finding in language not in terms ordinarily employed, and the further action of the court in substituting the words "a person unknown" can not save the situation because by such findings the accused was convicted of a wholly different larceny than the one alleged. To hold otherwise would be to overturn completely precedents of long standing in this office."

Substantially to the same effect is an opinion of The Judge Advocate General in C.M. 110910, Brooks, and holdings by the Board of Review in C.M. 129356, Mumford, C.M. 157982, Acosta, and C.M. 188571, Simmons.

5. For the reasons hereinabove stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings and sentence as to Soderquist.

E. C. Mottelsen, Judge Advocate.

William T. Burns, Judge Advocate.

Robert W. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C.M. 188571

NOV 29 1929

UNITED STATES vs. Private ROBERT F. SIMMONS (6520444), Chemical Warfare Service.	)	EIGHTH CORPS AREA Trial by G.C.M., convened at Fitzsimons General Hospital, Denver, Colorado, October 3, 1929. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

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1. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, desert the service of the United States and did remain absent in desertion until he surrendered himself at William Beaumont General Hospital, El Paso, Texas, on or about June 25, 1929.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Forty-two dollars ($42.00), the personal property of Corporal Tony J. Brainard, Medical Department, entrusted to him by the said Corporal Tony J. Brainard.

Specification 2: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check value of Twenty-one dollars ($21.00), the personal property of Private Earl M. Bruce, 8th Airship Co., A.C., entrusted to him by the said Private Earl M. Bruce.

Specification 3: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Sixteen dollars and ten cents ($16.10), the personal property of Private Walter M. Byrd, Btry B, 2nd F.A., entrusted to him by the said Private Walter M. Byrd.

Specification 4: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Forty-four dollars and ten cents ($44.10), the personal property of Corporal Grady H. Collins, Btry F, 59th C.A., entrusted to him by the said Corporal Grady H. Collins.

Specification 5: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Thirty dollars and fifteen cents ($30.15), the personal property of Private Leslie Ehrhart, Ser Co 7th Inf., entrusted to him by the said Private Leslie Ehrhart.

Specification 6: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Twenty-two dollars and five cents ($22.05), the personal property of Private Wilford Humphreys, Unassgd 38th Inf., entrusted to him by the said Private Wilford Humphreys.

Specification 7: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and

benefit one check, value of Twenty-three dollars and ten cents ($23.10), the personal property of Private Ben Lingo, Co A, 11th Engrs., entrusted to him by the said Private Ben Lingo.

Specification 8: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Twenty-four dollars ($24.00), personal property of Private Louis Saccar, 1st Photo Sect., A.C., entrusted to him by the said Private Louis Saccar.

Specification 9: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Thirty dollars ($30.00), the personal property of Private 1cl Anton Skrinski, Hq Btry, 2d F.A. Brig., entrusted to him by the said Private 1cl., Anton Skrinski.

Specification 10: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Forty-four dollars and ten cents, ($44.10), the personal property of Corporal Richard J. Sweeney, Med. Dept., entrusted to him by the said Corporal Richard J. Sweeney.

Specification 11: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Eleven dollars and sixty cents ($11.60) the personal property of Technical Sgt., Bascomb A. Weaver, C.A.C., entrusted to him by the said Technical Sgt., Bascomb A. Weaver.

Specification 12: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Nineteen dollars($19.00), the personal property of Private Charlie B. Winters, Med. Dept., entrusted to him by the said Private Charlie B. Winters.

Specification 13: In that Private Robert F. Simmons, Chemical Warfare Service, did, at Fitzsimons General Hospital, Denver, Colorado, on or about January 31, 1929, feloniously embezzle by fraudulently converting to his own use and benefit one check, value of Eighty dollars and eighty-six cents ($80.86), the personal property of William B. Lynch, formerly Staff Sgt., Hq Btry 13th C.A., entrusted to him by the said William B. Lynch, formerly Staff Sgt.

He pleaded guilty to the Specification, Charge I, except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave from" and "without leave" of the excepted words not guilty, of the substituted words guilty, not guilty to Charge I but guilty of violation of the 61st Article of War, and not guilty to Charge II and its specifications; and was found guilty of all the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that on the forenoon of January 31, 1929, while accused was a patient in Ward C-1 of Fitzsimons General Hospital, Denver, Colorado (R. 6,17), a number of pay checks were indorsed and given to him by patients of the ward in order that he might cash them and return the proceeds to the various owners (R. 8-19). He had performed similar services for patients of the ward before (R. 18). The checks received by accused were all drawn on the Treasurer of the United States by a finance officer (Ex. C) and included one for $42.00, payable to and delivered by Corporal Tony J. Brainard, Medical Department (R. 8; Ex. C),(Specification 1, Charge II); one for $21.00, payable to and delivered by Private Earl M. Bruce, 8th Airship Company, Air Corps (R. 9; Ex. C), (Specification 2, Charge II); one for $16.10, payable to and delivered by Private Walter M. Byrd, Battery B, 2d Field Artillery (R. 10; Ex. C), (Specification 3, Charge II); one for $44.10, payable to and delivered by Corporal Grady H. Collins, Battery F, 59th Coast Artillery (R. 11; Ex. C), (Specification 4, Charge II); one for $30.15, payable to and delivered by Private Leslie Erhart, Service Company, 7th Infantry (R. 12; Ex. C), Specification 5, Charge II); one for $22.05, payable to and delivered by Private Wilford Humphreys, 38th Infantry (R. 13; Ex. C), (Specification 6, Charge II); one for $23.10, payable to and delivered by Private Ben Lingo, Company A, 11th Engineers (R. 13; Ex. C), (Specification 7, Charge II); one for $24.00, payable to and delivered by Private Louis Saccar, 1st Photo Section, Air Corps (R. 14; Ex. C), (Specification 8, Charge II); one for $30.00, payable to and delivered by Private 1st Class Anton Skrinski, Headquarters Battery, 2d Field Artillery Brigade (R. 15,16; Ex. C), (Specification 9, Charge II); one for $44.10, payable to and delivered by Corporal Richard J. Sweeney,

Medical Department (R. 16,17; Ex. C), (Specification 10, Charge II); one for $11.60, payable to and delivered by Technical Sergeant Bascomb A. Weaver, Coast Artillery (R. 17,18; Ex. C), (Specification 11, Charge II); one for $19.00, payable to and delivered by Private Charlie B. Winters, Medical Department (R. 18,19; Ex. C), (Specification 12, Charge II); and one for $80.86, payable to and delivered by William B. Lynch (R. 19; Ex. C), (Specification 13, Charge II). Accused presented for payment and cashed all of these checks at the First National Bank of Aurora, which bank had a paying and receiving window at the hospital, at about 12:30 P.M., January 31, 1929 (R. 20,21). He indorsed each check (R. 20; Ex. C). Corporal Brainard saw accused at the hospital at about 12:30 P.M., at which time he stated that the bank was closed (R. 8). None of the proceeds was delivered by accused to the owners of the checks (R. 8-17,19,20). Accused was dropped as absent without leave as of 1 P.M., January 31, 1929 (R. 6; Ex. A). He remained absent without leave until he surrendered at William Beaumont General Hospital, El Paso, Texas, on June 25, 1929 (Ex. B) (Charge I and its specification).

Accused made an unsworn, written statement that on January 31, 1929, as usual, he collected pay checks from patients in his ward for the purpose of taking them to the bank and cashing them. The cashier having cashed the checks, he (accused) left the bank at about 10 minutes before one. Inasmuch as he knew that he could not distribute the money to the patients during rest hours and prior to 3 P.M., he went "down town" to keep an engagement with an automobile salesman. The two drove to a place on the "Brighton Road" where accused "took a few drinks of their wine." He did not remember anything further that occurred until the following day at which time he found himself in Colorado Springs and discovered that he had lost "all the money I had excepting a few dollars which I found in my watch pocket." Being unable to return the proceeds of the checks to the patients, he was ashamed to return to the post and thereafter tried to work and earn money to cover the loss but was finally compelled to go to a hospital on account of ill health. He did not intend to desert or "to steal this money" (Ex. D).

3. There is no evidence in the record to show that accused converted to his own use and benefit any of the various checks described in the specifications, Charge II. The testimony shows that the checks were entrusted to him for the purpose of getting them cashed, that he cashed them and that he thereafter absented himself without leave and failed to pay over the proceeds of the checks to the persons entitled thereto. Accused stated at the trial that he took the proceeds of the checks to Denver and soon thereafter became drunk and lost the money while drunk. Thus the evidence, if it shows anything with respect to fraudulent intent or conversion by accused, shows that it was the proceeds of the checks rather than the checks themselves that accused intended to and did convert to his own use and benefit. In so far as the checks are concerned there is no proof, direct or circumstantial, that accused did anything with them other than what he might lawfully have done according to his trust, or that he entertained any fraudulent intent concerning the checks while they were in his possession. To prove that after

the checks were cashed accused converted the money obtained therefrom- which it may be assumed was done- is wholly insufficient to prove that the checks themselves were converted, as charged and as found by the court. This variance between the allegations of embezzlement of checks and the proof of embezzlement of the proceeds thereof must be held to have been fatal to the conviction, since embezzlement of personal property is an offense separate and distinct from embezzlement of the proceeds of the property (State v. Crosswhite, 32 S.W. (Mo.) 991; People v. Davis, 110 N.E. (Ill.) 9; 20 Corpus Juris 479). The Board of Review, with the concurrence of The Judge Advocate General, has held that upon the trial of an accused for the embezzlement of money, proof of the embezzlement of merchandise of equivalent value was fatally at variance with the allegations (C.M. No. 185034, Pitt). It is elementary that an accused cannot legally be found guilty of offenses distinct and separate from those charged (Paragraph 78c, M.C.M.), as would, because of the variance, be the result of conviction upon these specifications. The injurious effect of such variance upon the substantial rights of accused, within the meaning of the 37th Article of War, is self evident.

The evidence sufficiently shows that accused absented himself without leave on January 31, 1929, and remained absent until his surrender on June 25, 1929. In view of the duration of his absence and the circumstances under which he absented himself the court was fully justified in finding that he intended to desert. The essential elements of the offense of desertion as charged in the Specification, Charge I, are fully established. The maximum sentence authorized by paragraph 104 c, of the Manual for Courts-Martial, for the offense involved in this Charge and Specification, that is, desertion terminated by surrender after an absence of more than sixty days, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

4. The charge sheet shows that accused is 29 years of age and that he enlisted August 11, 1927, with prior service from February 6, 1922, to December 22, 1924, in Company K, 15th Infantry.

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, but legally insufficient to support the findings of guilty of Charge II and its specifications, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

[signature], Judge Advocate.

_____, Judge Advocate.

[signature], Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. No. 188606.

Nov. 13, 1929.

UNITED STATES vs. Private, Specialist 5th Class JAMESON PAPARIS (R-279206), Third Wagon Company, Second Division, Quartermaster Train.	)	HEADQUARTERS SECOND DIVISION Trial by G.C.M. convened at Fort Sam Houston, Texas, September 30, 1929. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The offense of which accused stands convicted was an assault and battery aggravated by the circumstance that it was committed by an adult male upon the person of a female and included indecent familiarity with the female. Accused's acts not having been specifically made penal by any law of Congress and having been committed upon lands acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof but within the territorial limits of the State of Texas, the offense arising therefrom was punishable under Section 289 of the Federal Penal Code and Chapter 2, Title XV of White's Penal Code of Texas, which latter code denounced the offense and was in force at the time of the enactment of the Federal Penal Code. The maximum punishment by confinement authorized by the adopted state statute is confinement for a term not to exceed two years. No maximum limit of punishment is specifically fixed by Paragraph 104c of the Manual for Courts-Martial for such aggravated assault and battery, but under this paragraph of the Manual the offense remains punishable as authorized by statute. It follows that the maximum punishment by confinement authorized for the offense in question is confinement at hard labor for two (2) years.

3. For the reasons stated the Board of Review holds the record of

trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two (2) years.

E. McCleij, Judge Advocate.

_____, Judge Advocate.

Robert W. Hood, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C.M. 188766

Nov. 25, 1929.

UNITED STATES	)	EIGHTH CORPS AREA
vs.	)	Trial by G.C.M., convened at Brooks Field, Texas, October 25, 1929. Dishonorable discharge and confinement for one (1) years. Disciplinary Barracks.
Private LLOYD H. RAMSEY (6236818), 11th School Group Headquarters, Air Corps.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by OLLIVETTI, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The evidence sufficiently shows that at the time and place alleged accused embezzled the government pistol described in the specification by converting it to his own use. The court was empowered to take judicial notice of the official price list covering pistols of the general description of the one stolen, but the record contains no real or testimonial evidence with respect to the condition or value of this particular pistol. The court was not, therefore, justified in finding it to be of a value equivalent to the price officially listed, or of any other specific value. Since it had been issued for use in the military service it may properly be inferred, however, that it was of some value (C.M. 185034, Pitt; 183954, Jackson). It follows that the limits of maximum punishment fixed by paragraph 104 c of the Manual for Courts-Martial for embezzlement of property of the value of $20.00 or less, i.e. dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six (6) months, are applicable in this case.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the specification as involves a finding that accused did, at the time and

place alleged feloniously embezzle by fraudulently converting to his own use, one pistol, automatic, Cal. .45, Model 1911, Colts, No. 460360, of some value, property of the United States, furnished and intended for the military service, and intrusted to him by Supply Sergeant William Terry, 11th School Group Headquarters, Air Corps; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six (6) months.

E. C. Kelley, Judge Advocate.

_____, Judge Advocate.

Hubert H. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
G.C.M. No. 188941.

DEC 19 1929

UNITED STATES	)	HEADQUARTERS SECOND CORPS AREA
vs.	)	Trial by G.C.M. convened at Governors Island, New York, November 15, 1929. Dismissal.
First Lieutenant LEONARD VEZINA (O-12575), Q.M.C.	)	

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that 1st Lieutenant Leonard Vezina, Quartermaster Corps, being at the time custodian of the Detachment Fund, 1st Motor Repair Section, did, at Fort Hancock, New Jersey, on or about June 12, 1929, feloniously embezzle by fraudulently converting to his own use seventy five dollars ($75.00), the property of the 1st Motor Repair Section intrusted to him, the said Lieutenant Vezina, for the 1st Motor Repair Section by the Commanding Officer, Fort Hancock, New Jersey.

CHARGE II: Violation of the 95th Article of War.

Specification: In that 1st Lieutenant Leonard Vezina, Quartermaster Corps, did, at Fort Hancock, New Jersey, on or about July 31, 1929, with intent to deceive Major Thomas O. Humphreys, 7th Coast Artillery, officially certify in the Council Book, 1st Motor Repair Section, that the accounts shown therein for the month of July, 1929, were correct, which certificate was known by the

said Lieutenant Vezina to be untrue in that a payment during July, 1929, of $32.50 from officers of the New York National Guard was not entered in the said Council Book.

CHARGE III: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Leonard Vezina, Quartermaster Corps, having received a lawful order from Major Thomas O. Humphreys, 7th Coast Artillery, to deliver the council book and funds of the 1st Motor Repair Section to the said Major Humphreys at Officers' Call on August 23, 1929, the said Major Humphreys being in the execution of his office, did, at Fort Hancock, New Jersey, on or about August 23, 1929, fail to obey the same.

Accused pleaded not guilty to the charges and specifications and was found guilty of the Specification, Charge I, except the words "feloniously embezzle by fraudulently converting to his own use", substituting therefor the words "withdraw by check from his company fund," and after the words "New Jersey" adding the words, "and did thereafter fail and neglect to properly account for the same", of the excepted words, not guilty, of the substituted and added words, guilty, not guilty of Charge I, but guilty of violation of the 96th Article of War, and guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. The evidence shows that at about 9.30 A.M., August 23, 1929, at Fort Hancock, New Jersey (R 14), Major Thomas O. Humphreys, 7th Coast Artillery, who had been directed to audit the funds of all detachments at Fort Hancock (R 25), ordered accused to turn over to him, for audit, the council book and funds of the First Motor Repair Section, which was stationed at Fort Hancock, and which had been under the command of accused since May 4, 1929 (R 8, 14, 75-76). Similar orders had been given to accused by Major Humphreys on previous occasions, but they had not been complied with (R 76-78). Accused was in his office at the time the order of August 23d was given (R 22,76). He stated that "he had to get a signature" but Major Humphreys told him that "he would not get the signature but deliver these funds 'as is' at that time" (R 76), that is at officers' call at 11.45 A.M. on the same day (R 23). At the time this order was given accused appeared to be normal and gave no evidence of drunkenness or other condition which would affect his capacity to understand what was said to him (R 23, 25). Later Major Humphreys "happened to notice on the departure book that Lieutenant Vezina had signed out about half an hour after I had talked to him" (R 22) and the Major did not see him again until about 9.00 A.M. on the following day when the council book was produced and audited (R 7,8, 14, 23). At about 2.30 P.M. on August 23rd, it was reported to Major Humphreys by a guard at the entrance to the reservation that accused was there "in the rear of an automobile

either drunk, asleep or unconscious" (R 14-15). (Charge III and its Specification).

In auditing the fund on August 24th, Major Humphreys discovered that a check for $75.00, dated June 12, 1929, purporting to be signed by accused as custodian of the company fund of the First Motor Repair Section and bearing an indorsement by accused (R 8-9, Ex. 1), had been drawn against the organization fund at a bank, and cashed on June 12th (R 8, Exs. 1 and 3). Accused, after being warned of his legal rights (R 10), was questioned concerning the check and when asked as to the purpose for which the check had been drawn told Major Humphreys that he had "spent" the proceeds (R 9). When asked if he meant by this that he had "spent it personally" he replied in the affirmative (R 10). No voucher supporting disbursement of the proceeds of the check was found (R 9), and the council book of the organization for June, 1929, did not contain any entry covering disbursement of the amount of the check (Ex. 2) or any entry of any cash disbursement (R 16). In the July, 1929, account as contained in the council book, cash disbursements resulting from purchases of subsistence and other articles for a "Quartermaster outing", totaling $62.72, were shown (Ex. 4). After the audit Major Humphreys took accused before the Post Commander and told the latter that accused "admitted stealing from the fund and the commanding officer asked him for an explanation, if he wanted to give one, and he gave none" (R 10). (Charge I and its Specification).

The account for July, 1929, as contained in the council book audited by Major Humphreys on August 24th, bore a certificate, signed by accused (R 19, Ex. 4), that the account was correct. The only receipts of funds entered therein were on account of company collections and rations savings (Ex. 4). On about July 27, 1929 a Major Charles S. Gleim of the New York National Guard, who had been on duty at Fort Hancock, New Jersey, during the summer of 1929, paid over to accused the sum of about $32.50 as a donation to the detachment fund of the Motor Repair Section, the amount having been contributed by National Guard officers "to pay for cleaning the barracks, strikers, etc." and to compensate for the use of the First Motor Repair Section day room (R 16-18). When the money was delivered accused asked the National Guard officer if he wished a receipt and, upon receiving an affirmative reply, prepared and gave one (R 18). Some time after Major Humphreys' audit, he learned that certain moneys had been turned over by the National Guard officer for accused's company fund and thereupon questioned accused about the transaction. Accused stated that the amount in question was "$25.00", "and he said he had a voucher but it was in his desk some place." (R 20). On August 24th, Major Humphreys received from accused a voucher for $32.50 covering the item, but no money was turned over with it (R 21). The ink with which this voucher had been written appeared to be fresh and accused stated that the voucher had been "antedated" (R 22). (Charge II and its Specification).

4. Witnesses for the defense and, on cross examination, a witness for the prosecution testified that during the period of his service in

command of the First Motor Repair Section at Fort Hancock, accused had been intemperate in the use of intoxicating liquor and at times had given evidence of being under the influence of liquor (R 13, 26, 27, 36, 41, 43, 48).

Sergeant Albert A. Hite, First Motor Repair Section, a witness for the defense, testified that on about June 10, 1929 (R 30) he went with accused to a store for the purpose of buying subsistence and soft drinks to be used at an outing of the Quartermaster Corps, and that at this time accused had been drinking (R 29). In August "some day in the twenties" 1929 (R 31) accused came to witness with his council book, stated that the council book needed "straightening out" and asked witness to post certain entries therein inasmuch as accused "was too nervous" to do so. Accused then read from some vouchers and witness "posted the council book for him" (R 27). The entries in the June and July accounts of accused as contained in the council book (Exs. 2, 4) were made by witness (R 28-30). The certificate to the July account (Ex. 4) was not made by witness (R 34).

Mr. J.R. Bennett, a storekeeper of Highlands, New Jersey, testified, as a witness for the defense, that accused came to his store and ordered some grape juice which was to be used at a "Quartermasters dinner" (R 35). Accused was at the time drunk (R 36). The amount of the purchase was subsequently paid by check (R 39).

First Lieutenant DuVal C. Watkins, Q.M.C., individual counsel, testified for the defense that he lived with accused in the latter's quarters for about two weeks in the early part of August, 1929, and that during this period he observed that accused was drinking heavily and was extremely nervous and erratic (R 45-46). Witness asked accused to let him help straighten out accused's company funds, this for the reason that witness believed that on account of his condition accused would procrastinate and get himself in trouble (R 46). Witness also offered to help accused get funds with which to pay certain personal indebtedness (R 46-47). Witness sought information from accused but succeeded in learning little about his accounts. Accused stated that if there was anything wrong with his accounts he wanted to find it out and repay any shortage (R 48).

Accused testified that he had been drinking since February, 1929 and, on this account, had but a vague recollection of what had occurred subsequent to the first of June, 1929 (R 41). He did not recall that Major Humphreys had fixed a specific time at which the council book and funds were to be delivered to him. As he recalled, Major Humphreys saw him when he was coming out of his office and asked for the council book, whereupon accused stated that he was going to town and would be back (R 52, 71). Having brought the council book up to date, he delivered it on the following morning (R 52). In so far as he could remember, he received but one direct order to produce the company fund books (R 80). On this occasion he believed that the order required only that the books be delivered "within a reasonable time" (R 72).

Concerning the check for $75.00 his recollection was that it had been drawn for the purpose of paying for articles to be used at a quartermaster "celebration". In this connection he testified that "I probably did pay for some of it. I haven't any vouchers and cannot find them, and have forgotten what they were for. My own money and this money was all mixed up together." (R 52). He also testified "I remember paying some bills, buying something, but now I have no recollection of what it was; I can find no receipts for it." (R 62). He remembered nothing of the details of the expenditures for the outing (R 62) and did not record them in his council book for the reason that he was "more or less in a state of coma at the time" (R 63). On the occasion on which Major Humphreys questioned him about the check, accused said that he did not have any idea as to what he had done with the proceeds (R 53). He remembered having received $32.50 from the National Guard officer. Of this amount $7.50 was paid to an orderly and the balance was deposited in the bank. Accused had thought that the duplicate of the receipt which he had given to the officer of the National Guard was "in an envelope with the company fund" (R 63). When the matter was called to his attention a receipt for the voucher was prepared and furnished to Major Humphreys (R 63-64). At the time at which the council book was delivered to Major Humphreys, accused did not know that the item of $32.50 had not been entered therein because that period is "rather vague." (R 67).

The defense introduced in evidence (Ex. 6, R 59) a statement, prepared by counsel, of the receipts and disbursements pertaining to the fund of the First Motor Repair Section for the months of May, June, July and August, 1929, the entire period during which accused was in command, which statement showed that accused was indebted to the fund in the amount of $132.91. Accused stated that he had that amount in his possession and was prepared to tender it to the proper representative of the United States (R 54-59).

4. The evidence shows that at the time and place alleged in the Specification, Charge III, accused received a lawful order from Major Humphreys to deliver his council book and funds at officers' call on August 23, 1929, and that he failed to obey this order. Accused testified that he did not understand that the order required the delivery of the books at a specific time, but in view of all the evidence there can be no reasonable doubt that the order required delivery at the specific hour and place as testified by Major Humphreys, and that accused must have so understood it. While there is evidence that accused was under the influence of intoxicating liquor during the day subsequent to receiving this order, there is convincing evidence that at the time the order was given he was in the normal possession of his faculties.

The evidence also shows, as found by the court under the Specification, Charge I, that accused withdrew by check from his company fund the sum of $75.00 and thereafter failed and neglected properly to account for any part of it. Accused testified in this connection that he believed the proceeds of the check were used for the organization of which he was in command.

Whether this was done or whether, as indicated by his admissions to Major Humphreys, he converted the money to his personal use, it is entirely clear that there was a complete failure to render a proper accounting, which failure constituted the gist of the offense found to have been committed.

With respect to the funds received from the officer of the National Guard, the evidence shows that as alleged in the Specification, Charge II, accused officially certified in his council book that the account therein for July, 1929, was correct, and that this certificate was untrue in that the item for $32.50 was not therein entered as a charge against him. The circumstances under which the money was received and receipted for were such that it must be inferred that when the certificate was made and delivered to Major Humphreys, accused knew that the money had been received, and that the certificate was false in that he had omitted from the account certified any reference to the amount. The essential elements of the offense of making a false official statement with intent to deceive, in violation of the 95th Article of War, are fully established.

6. The Army Register contains the following with respect to accused's service:

"2 lt. M.T.C.U.S.A. 11 Nov 18, accepted 30 Nov. 18, vacated 17 Sept. 20. Pvt. sgt. and sgt 1 cl. 5 Co. C.A.C. and Co. A 2 Sup Tn. 1 Apr 14 to 29 Nov. 18; 2 lt. Q.M.C. 1 July 20; accepted 17 Sept. 20; 1 lt. 1 July 20; 2 lt. (Dec. 15, 22); 1 lt. 6 Dec. 24."

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. Dismissal is mandatory for violation of the 95th Article of War, and is authorized for violation of the 96th Article of War. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof.

E. C. Mellen, Judge Advocate.

William L. Jones, Judge Advocate.

Robert H. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 189200

Jan. 3, 1930.

UNITED STATES v. Private JOHN M. OSBORNE (6740943), Company E, 3d Infantry, alias Private Robert A. McPherson (6740943), Company A, 6th Infantry.	SEVENTH CORPS AREA Trial by G.C.M., convened at The Cavalry School, Fort Riley, Kansas, December 5, 1929. Dishonorable discharge and confinement for one and one-half (1½) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty of Charge II and the specifications thereunder, and the sentence.

2. By the Specification, Charge I, it is alleged that accused on May 10, 1929, fraudulently procured his enlistment in the military service by wilfully concealing the fact that he was then a Private in Company E, 3d Infantry. The evidence in support of this specification shows that at the time of his enlistment of May 10, 1929, he was already in the military service, and that on applying for enlistment he answered in the affirmative when asked whether he had served as an enlisted man in the Army, and replied, "'Army' see affidavit", in response to a question requiring him to state his last service and date of discharge. The affidavit referred to in his reply was not introduced in evidence. There is nothing in the declaration signed by accused or elsewhere in the record to show that at the time of applying for this enlistment accused concealed the fact that he was then a Private in Company E, 3d Infantry, or was otherwise in the military service. It follows that the evidence is not legally sufficient to show that accused's enlistment was procured by fraud (C.M. No. 185932, Stinner; C.M. No. 186540, Yost).

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and the specifications there-

under and the sentence, but legally insufficient to support the findings of guilty of Charge I and its specification, as approved by the reviewing authority.

E. C. Mulhee, Judge Advocate.

William E. Burns, Judge Advocate.

Luke H. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 189223

MAR 20 1930

UNITED STATES	EIGHTH CORPS AREA
v.	Trial by G.C.M., convened at Fort Sam Houston, Texas, February 25, June 24-29, July 1-3, 5-6, 9-13, 15-20, 22-24, 26-27, 1929. Dismissal.
Captain HANS C. JOHANSEN [07784], Quartermaster Corps.	

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by OLLIVETTI, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charge and specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: [Finding of Not Guilty]

Specification 2: In that Captain Hans C. Johansen, Quartermaster Corps, being at the time Quartermaster and Finance Officer at Fort Huachuca, Arizona, did, at Fort Huachuca, Arizona, on or about June 15, 1926, make and use a voucher, War Department Public Voucher Purchases and Services Other Than Personal, War Department Form No. 330, appearing in his, the said Captain Johansen's, account for June, 1926, as voucher No. 14½, for six hundred and seventy-three (673) cords of wood purporting to have been delivered to the United States on May 28, 1926, in the amount of three thousand three hundred and sixty-five dollars ($3365.00), well knowing that the said voucher was false and fraudulent.

Specification 3: In that Captain Hans C. Johansen, Quartermaster Corps, being at the time Quartermaster and Finance Officer

> at Fort Huachuca, Arizona, did, at Fort Huachuca, Arizona, on or about June 21, 1926, make and use a voucher, War Department Public Voucher Purchases and Services Other Than Personal, War Department Form No. 330, appearing in his, the said Captain Johansen's, account for June, 1926, as voucher No. 74½, for six hundred twenty-seven (627) cords of wood purporting to have been delivered to the United States on June 12, 1926, in the amount of three thousand one hundred and thirty-five dollars ($3135.00), well knowing that the said voucher was false and fraudulent.

Accused pleaded not guilty to the charge and specifications. He was found not guilty of Specification 1, but guilty of the Charge and Specifications 2 and 3. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The court, in announcing the findings and sentence, made the following statement:

> "Pursuant to the provisions of the 8th sub-paragraph of paragraph 78, Manual for Courts-Martial, 1928, the court announces that its findings as to Specification 1 is based on a reasonable doubt that the accused misappropriated any money subsequent to February 26, 1926." (R. 2666.)

The reviewing authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. The evidence adduced by the Prosecution shows in effect that:-

During the period October 12, 1923 - July 1, 1926, accused was on duty at Fort Huachuca, Arizona, as Quartermaster and Finance Officer, making purchases for the post in the former capacity and paying therefor in the latter capacity (R. 106,107,1147; Exs. 2,3 B,3 C,4,5). Sometime after he assumed such duties shortages began to appear in his finance accounts (R. 1810). When his accounts were examined and inspected by an official inspector on April 21, 1925, the shortage had reached the amount of $2190.40, but he concealed it by making and using a false deposit slip purporting to show that $2190.40 had theretofore been deposited with or sent to a certain bank, when as a matter of fact no such deposit had been made (R. 1721,1810-1813,1815, 1852,2118,2122,2159-2160; Exs. 28,244). On the day of the next inspection,

in November, 1925, this shortage had increased to $3500 or $4000, and it was successfully concealed from the inspector by using another false deposit slip (R. 1024,1049-1056,1063-1067,1088,1241-1246,1524,1730-1732, 1816-1823,1858,2017,2281,2435,2438; Exs. 61,62). This shortage was never made up and when accused was informed during the month of June, 1926, that he was to be relieved from his duties and transferred from the post effective on or about July 1, 1926, he made or caused to be made an audit of his books and ascertained that the shortage had increased to about $6500 (R. 1825,1830, 1947,2124,2128,2441).

At his direction there were then prepared the two vouchers (Exs. 35 J, 35 K), described in Specifications 2 and 3, respectively, which purported to show that $3365 and $3135, a total of $6500, had been paid in cash to one John Watson for 673 and 627 cords of wood, respectively (R. 1831-1834, 1935,1953,1960). Accused signed both of them (R. 1724). They were forwarded to the General Accounting Office as supporting vouchers to accused's account current for June, 1926, and credit therefor was taken on accused's schedule of disbursements for that month (Ex. 35 E). The vouchers were dated June 15th and June 21st, respectively, and half numbers, 14½ and 74½, following the numbers of vouchers of corresponding dates, were given them (R. 1834,2004). These vouchers were apparently ones which had previously been signed in blank by one John Watson, a retired colored soldier and wood contractor, who, when he signed them, was under the false impression that they were receipts for loans of $1500 and $300 made to him by accused (R. 353,357,372,1375,1831-1834, 1935,2004,2005). Credit was taken in accused's June account current for these purported payments aggregating $6500 (Exs. 35 B,35 E), thereby balancing the account. As a matter of fact the wood specified in the vouchers was never delivered to or received by the United States nor was Watson ever paid therefor (R. 65,361,363,391,392,1724,2269).

Accused stated that he unsuspectingly signed and used the fraudulent vouchers in question (R. 1227,1228,1232,1729), and that he believed one or both of his two clerks altered the vouchers in question by raising the amounts thereon for the purpose of concealing a shortage in his office for which they were responsible (R. 1263-1266,1724,1725).

4. Summarized in greater detail, the evidence shows that:-

I. Accused reported for duty at Fort Huachuca, Arizona, on October 12, 1923 (R. 1147; Ex. 3), was assigned to duty as Post Finance Officer,

Post Ordnance Officer and Post Quartermaster (R. 1147; Exs. 2,3 B,3 C) and remained in such status until his relief by Captain C. E. Goodwyn, Quartermaster Corps, on or about July 1, 1926 (R. 106,107; Exs. 4,5).

In the performance of his duties as Post Finance Officer he was assisted by Warrant Officer William Gillam (colored) as Chief Clerk (R. 1149,2107) and bonded special disbursing officer (Exs. 525,526). Gillam was examined by a retiring board in 1928, the board recommending that he be retired from the military service because of Psychosis Senile originating about 1924 (Ex. 595) but upon the court's request (R. 1612, 1613) was examined by a medical board on July 13-15, 1929, and found to be "in normal mental condition, capable of understanding the obligation of an oath at the present time; * * * memory of events occurring three or four years ago is not impaired by his present mental condition" (R. 2064; Ex. 1000). He was also assisted by Staff Sergeant Lloyd M. Sparks (colored) as clerk. Sparks had had twelve years military service (R. 1149,1801,1802) and two years high school education (R. 1872).

II. During accused's tour of duty at Fort Huachuca there were continuing shortages in his finance accounts (R. 1824-1825,1863), amounting to $2190.40 on April 21, 1925; $3500-$4000 on November 23, 1925; and about $6500 on June 15, 1926.

Sparks testified he became aware of the $2190.40 shortage when informed thereof by Gillam. The latter, prior to an inspection, directed Sparks to make a certificate of deposit for $2190.40, and the money was transmitted to the bank about a week after the inspection which took place April 21, 1925 (R. 1810-1813,1852). The certificate, dated April 21, 1925, shows that the deposit was actually received by the First National Bank of Douglas, Arizona, on May 5, 1925 (Ex. 28). The inspector's report relative to the inspection of April 21, 1925, shows that the accused was given credit in the report for this deposit (Ex. 244) about two weeks prior to the date it was actually made. Sparks knew that the amount of this certificate was shown on the inspection report as deposited or "in transit" when as a matter of fact the money was in the safe (R. 1815). Gillam testified that a short time before the April, 1925, inspection, accused told him that some officer had "picked up a bunch of twenties from the desk" when accused was making change for the pay of troops and that this resulted in a shortage of about $2000 (R. 2118). He also testified that a certificate of deposit was made

to cover the shortage and that the deposit itself was not made until after the inspection (R. 2119-2122). Accused testified that he did not know when this deposit was placed in transit (R. 2473). Both accused and Gillam testified that Gillam did not count accused's cash at this time. Gillam testified that he took accused's word for the amount and certified the account current (R. 1721,2159), believing at the time that the cash was in the safe (R. 2160). He did not know whether or not the shortage had in fact been made up at the time he certified the account current (R. 2160); and "objected first strongly to the signing of that certificate to Captain Johansen because of the fact that I was an interested party and he told me that he could not get anyone else to sign it, or he could not get balanced up, * * * and to sign this and see what the General Accounting Office would say, so the General Accounting Office did not come back about me signing that certificate and I signed quite a few after this" (R. 2161).

At or about the time of an inspection by the Corps Area Inspector on November 23, 1925, there was, according to Sparks, a shortage of $3500-$4000. On November 20, 1925, a certificate of deposit amounting to $3708.73, in favor of accused with the First National Bank of Douglas, Arizona, was prepared and used to account for the shortage in the settlement with the inspector. Immediately after such inspection the deposit was made in the bank with cash which had previously been accounted for and considered by the inspector (R. 1816-1819; Ex. 28). Accused testified this money had left his office before, and was on deposit in the bank at the time of, the inspection (R. 2435) and that he was not "short" (R. 2438).

Accused and the Post Exchange Officer followed an arrangement, at the suggestion of accused, whereby the Exchange Officer would from time to time deliver cash to the latter as Finance Officer, receiving therefor the Finance Officer's check on the Treasury for the amount involved (R. 1241). Pursuant to this arrangement and in anticipation of the receipt of cash from the Post Exchange Officer, a Treasury check for $6600, dated March 31, 1926, was prepared for the signature of accused (Ex. 61). On the same day, accused was informed that the Corps Area Inspector was about to inspect his accounts (R. 1243,1524), whereupon he directed Sparks to cancel this check and to prepare another in the same amount but dated April 5, 1926 (R. 1524,1820-1823; Ex. 62). The check was so drawn and the Post Exchange Officer, on

March 31, 1926, delivered $6600 cash to accused in exchange for the check (R. 1245). Examination of this check discloses that it was indorsed to and deposited in the bank by the Fort Huachuca Post Exchange and payment was received by the First National Bank of Douglas, Arizona, on April 2, 1926 (three days prior to its date) (Ex. 62). Sergeant Sparks testified that he was told by accused that the check was to be drawn for the purpose of obtaining cash and that the cash so obtained was to be used to cover or account for the shortage in accused's safe, and that the check was to be postdated so that the inspector would not know that it had been drawn and would not consider it (R. 1820,1858,2017). In this connection, accused testified that he received the $6600 on the check from the Post Exchange Officer on March 31st and locked it in an inner compartment of his safe (R. 1244-1245,1730-1731); and that upon the arrival of the inspector, prevailed upon the latter to postpone the counting of the cash until the following morning as he (accused) wanted to be certain that his cash was sufficient exclusive of this $6600 (R. 1067,1731,1732). Accused further testified that he did not need the $6600 to cover any shortage but had theretofore received from the bank $6500 more than he had expected, so concealed the $6600 which he had received from the Post Exchange in fear that the inspector would not approve such an excess of cash on hand (R. 1731). Lieutenant Colonel Daniel D. Tompkins, the inspector, testified that he arrived at Fort Huachuca on April 3, 1926, but upon the request of accused postponed the counting of the cash until the following day (R. 1067). He made a careful search of accused's safe. In response to a question as to whether he found "$6600 lying in that safe", he testified "I did not" (R. 1073). Accused stated that the inspector neither saw nor considered this $6600 during his inspection (R. 1246). Colonel Tompkins testified that he did not include the check for $6600 in his report, and that had his attention been called to the fact that it had been drawn and cashed he would have found accused $6600 "short" (R. 1073,1074). Accused had not charged himself with the $6600 at the time of the inspection (R. 1078,1731). Colonel Tompkins found the office system disorderly (R. 1088) and though the cash book and cash blotter were apparently correct and balanced, he refused to sign them because they were "a disgrace" (R. 1063,1064). Gillam testified that "very few inspectors" could determine from the books the amount of accused's cash accountability (R. 2281). Captain Edward A. Everitt, the Post Exchange Officer, testified that when he cashed the $6600 check (Ex. 62) for accused on March 31, 1926, he noticed that it was postdated and called accused's attention thereto, but the latter explained that

the date was merely a clerical error (R. 1049-1056).

Sparks testified that accused's "books" were improperly, inaccurately and neglectfully kept, but that witness made no effort to report this condition to anyone (R. 2014) and merely did as he was directed (R. 2015). However, about April 1, 1926 he stopped keeping the cash register or blotter because he "felt that the cash in the office was not properly kept and that I was not able to make this book correspond with the cash in the office safe". At that time accused commenced a record book (Ex. 217) of his own (R. 1809). Accused testified that he experienced difficulty in striking a balance on two occasions as the cash shown by Sergeant Sparks' book did not coincide with the amounts in accused's and Gillam's safe, and consequently accused began to keep a cash book of his own (R. 1311,1312). In a "paid out" column in this book, under date of April 7th, appears an entry "Deposit - (mutilated) 6543.00" (underscoring supplied), the figures "65" being in heavier ink than the remaining figures of the entry (Ex. 217). Accused identified all the figures in this column as being in his handwriting (R. 1319) except the figures "65". These he contended were in Sparks' handwriting (R. 1339,1362). Sparks testified that the figures "65" were not in his handwriting. No deposit of mutilated currency amounting to $6543, or of any sum approaching this amount was in fact made (R. 1335, 1336). Accused testified that the cash book was kept by him personally, that "as far as I know, when the book was out of the safe it was in my hands" (R. 1353), and that Gillam did not have the combination to the safe (R. 1270).

As to the actual existence of a shortage, accused testified, when examined by the court, as follows:

"Q Now, in June you balanced your cash and attempted to balance your account and found that you had trouble in reaching a balance, did you not?

A Yes, sir.

Q Finally, somebody changed a figure or raised a figure from $43.00 or some such amount, to $6543.00, is that right?

A Yes, sir.

"Q When those figures were raised, then your cash in your safe balanced?

A It did; my safe balanced, I was ready to turn over.

Q Then, somebody must have abstracted $6500.00 from your safe, is that not so? Whether they paid the voucher or not, the cash got out of your safe?

A The cash got out of my safe; yes, sir.

Q Did you pay it out personally?

A I don't know, Colonel. * * *

Q But changing figures in your book did not change the cash in your safe?

A The only way I could have accounted for it was that I had given Gillam money and I had not put it down on the book at the time.

Q Then, $6500.00 of the government's money did disappear, is that correct or not, somewhere?

A $6500.00; yes, sir, it is gone somewhere.

Q And there is no - and the vouchers that attempted to account for it are fraudulent?

A Yes, sir.

Q And you signed those vouchers?

A Yes, sir.

Q And the money disappeared from your safe?

A Yes, sir.

"Q In some manner?

A In some way.

Q Now, what could have been the motive, what motive could Sparks have had in raising those figures to $6500.00?

A Sir?

Q What would have been his motive, how can you account for it?

A I can't see unless he wanted to protect Gillam or they had the money between them.

Q Does it not protect you? Does not the $6500.00 raise protect you?

A It does, too; yes, sir.

Q Gillam is not responsible for the money that comes out of your safe?

A No, sir.

Q Neither is Sparks?

A No, sir.

Q So, this $6500.00 raise really protected you? In other words, it enabled you to account for this loss or this disappearance?

A Yes, sir, I - yes, sir.

Q You have nothing to say, you can offer no explanation, then, as to why Sparks or anyone else would want to raise that figure from $43.00 to $6543.00?

A No, sir, I can't." (R. 1723-1725.)

Sparks testified that he was not responsible for any of the shortage (R. 1869) and did not receive any part of the missing $6500 (R. 1836), and stated that he did not know whether Gillam was responsible therefor (R. 1869). Gillam testified that he did not receive any of the proceeds of the spurious Watson vouchers, and had no knowledge of Sparks receiving any of it (R. 2290).

Accused's bank account (Ex. 79) showed, and he testified that he deposited in his personal bank account, a total of $6951.96, in excess of his Army pay during the period July 1, 1925 - July 14, 1926 (R. 1198,1606, 1607). Many of these deposits were made from checks payable to the Quartermaster or Finance Officer at times when accused's account was overdrawn (R. 851-983). Accused testified in explanation that he had received during that period $1250, payment of a loan by a relative (R. 1284,1292,1420); $1000, proceeds from the sale of Liberty Bonds (R. 1287,1420); $500, payment of a loan by Barrow (R. 1287,1630,1667); $200, proceeds of the sale of a rug to Barrow (R. 1423-1426); $80, interest on a note (R. 1424,1440); $38.40, refund from a certain store (R. 1287,1425); $68.46, refund from the New York Life Insurance Company (R. 1287,1425,1632); and $180, from the sale of mining stock (R. 1632), or a total of about $3316.86. He further testified that he made a general practice of cashing personal checks with official funds (R. 1280) but that the bank returned many of these checks with the information that they were "bad", whereupon accused authorized the bank to charge or debit his personal account and transfer the amounts involved therefrom to the credit of his official account, thereby balancing his official bank account and reducing his personal account (R. 1192-1197; Ex. 549), and that subsequently he reimbursed the personal account by depositing Government checks and cash therein. Upon cross-examination he stated that he reimbursed his personal account with checks which he knew were "absolutely good", such as station hospital and post exchange checks (R. 1567). An official of the bank substantiated accused concerning the practice employed and further testified that in many instances accused's official checks were through error charged against his personal account; and that many "bad" checks, including checks drawn by a Private Hammonds for about $400, Major Chapin for $198, Linton Motor Company for $258, and several by Captain Dornblaser and Lieutenant Broaddus, were charged to accused's personal account (Ex. 549). According to accused, these "bad" checks amounted to

approximately $3400. He also stated that some of the makers of such "bad" checks were his close personal friends (R. 1271-1272) and that in one instance concerning Major Frank K. Chapin (who testified as a character witness for the accused in this case, R. 1273; Ex. 559) he permitted the Major about six weeks in which to pay his "bad" checks amounting to about $640 but that he knew the Major was in financial difficulties and he, accused, desired to help him as much as possible. The bank records showed that bad checks aggregating about $600 were charged to accused's personal account (Ex. 79; R. 1608). In August, 1925, accused paid his commissary bill amounting to $84.14 (R. 1402) by check. His bank account (Ex. 79), however, shows that this $84.14 check was never charged to his personal account.

III. Events leading up to the making, signing and use of the two vouchers which are made the basis of Specifications 2 and 3 were as follows:

John Watson, a retired colored first sergeant of the 10th Cavalry, who had theretofore furnished considerable wood at Fort Huachuca (R. 347,348), presented his written bid for wood at the appointed time (June 25, 1925) and place (R. 2318). Watson testified that his bid, at $4 a cord, was opened by accused in the morning and that accused then left the office, stating that he was going to the post office (R. 350,440), but that a short time later Sam Barrow, a civilian and intimate friend of accused (R. 113,1281,2363), entered the office and made out a bid. Accused returned fifteen minutes later, opened the Barrow bid and announced that the latter was awarded the contract as his bid was ten cents per cord less than Watson's bid (R. 350). Shortly thereafter Barrow approached Watson and offered to sell him the wood contract for $3000 (R. 351) although it had not been duly awarded to or executed by Barrow since he had failed to furnish a bond required by accused (R. 2335). Watson was anxious to obtain this contract as he had theretofore cut a considerable amount of wood which was stacked on the reservation and for other reasons, and consequently agreed to purchase the contract from Barrow if he could raise sufficient money (R. 351). Watson then asked accused if there was any objection to buying the contract and accused replied in the negative (R. 371). Upon Barrow's suggestion, Watson requested and obtained a loan or advance of $1500 from accused, which money was taken from the Finance safe by Gillam

at accused's direction and handed to Watson. At accused's suggestion Watson signed a voucher in blank, which, as witness recalled, accused said he "was going to put * * * in his safe" (R. 353). Accused directed Gillam to deduct the $1500 from the "first voucher" that Watson presented (R. 353,372). $700 and $800 were in fact deducted by Gillam on two subsequent vouchers (R. 354).

Watson further testified that Warrant Officer Marchbanks, the chief clerk in the Quartermaster office (R. 1267), also loaned him $1500 at this time and that he (Watson) paid the total of $3000 to Barrow (R. 352). In December, 1925, Watson again approached accused and requested an advance of $300 against his current wood contract, and received this amount from accused after signing and delivering a second voucher in blank (R. 357).

As to the circumstances surrounding the signing of the first voucher Barrow testified that he was the successful bidder on the wood contract (R. 2318) and that accused having demanded a cash bond, Barrow stated that he would comply with the demand by 11 A.M. on the following day (R. 2318). Watson then offered him $500 for the contract (R. 2318), and later approached and offered $1500, saying, "Barrow I have got to have that wood contract * * * the reason is these cutters all owe me money, and I will never get it unless I get the contract again" (R. 2319). Barrow finally accepted $3000 from Watson for the contract (R. 2320), a portion of this money having been borrowed from Marchbanks (R. 352,2322), on a loan secured by notes (R. 2326) signed jointly by Barrow and Watson. Barrow did not pay these notes when notified that they were due, and never heard further concerning them (R. 2322). Barrow informed accused of Watson's offer and the latter acted "surprised" (R. 2321), having theretofore told Barrow that he was foolish to take the contract inasmuch as he would lose money thereon (R. 2338). At one time Barrow approached Watson concerning the contract and "might" have suggested to Watson that the latter could obtain a loan from the accused (R. 2325).

Accused testified that he opened bids at 3 P.M. on the day of their presentation and awarded the wood contract to Barrow as his bid was $3.90 per cord whereas Watson's bid was $4 per cord (R. 1220,1472,1473). Accused did not desire to award the contract to Barrow as he lived fifty

miles distant from the Fort, so he demanded a $2500 bond (R. 1221,1746), whereupon Barrow departed to secure it but returned three or four days later stating that he would have to relinquish the contract as he could not obtain the necessary bond. Accused immediately sent for Watson and awarded the contract to him. While Watson "might have" talked to him relative to the purchase of the wood contract, accused did not think that they had discussed the matter (R. 1221). At about that time Watson approached accused stating that he needed $1500 and accused, after some discussion, "had Watson sign the voucher and gave him the $1500", at the same time directing Gillam to take the voucher and "be sure that Watson was not paid a second time for the wood" (R. 1222,1520,1521,1733). Accused did not know the ultimate disposition of the voucher (R. 1732). He knew that the advance payment was contrary to regulations (R. 1745). Watson made deliveries of wood amounting to approximately $1380 about thirty days after the loan. About ten days later, Watson desired money to pay his laborers, so accused told Gillam to give him an additional $300 or $400 as an advance payment on his running account. During the subsequent seven months Watson delivered wood amounting to $8800 - more than sufficient to cover all of the advance payments theretofore made to him (R. 1223). Gillam testified that he had no recollection of having received these vouchers or having made any payments thereon (R. 2131, 2133,2134).

Accused also testified that he first heard of Watson's $3000 payment to Barrow when he returned to Fort Huachuca for an investigation in the fall of 1928 (R. 1223,1746,2443), and denied receiving any portion of the money (R. 2443). At this time Colonel C. B. Stone, I.G.D., informed him that Gillam and Sparks had accused him of stealing "this $6500", whereupon he immediately wrote letters to everyone whom he thought could possibly help him and in reply received one letter from "somebody, it might have been Barrow" (R. 1223) informing him about the $3000, but prior to this information he was unaware of the arrangement between Barrow and Watson (R. 1224). Sparks testified that while checking the cash in the safe just prior to an inspection, accused remarked that he could not understand a $3500 shortage as he, accused, had placed $1500 therein which he had received from the purchase of a contract by Watson from Barrow (R. 1817).

IV. The defense at first denied the genuineness of the signatures "Hans C. Johansen" and "John Watson" appearing on the fraudulent vouchers

(Exs. 35 J,35 K), and introduced W. A. Weaver, a handwriting expert, who, on direct examination, testified, on the basis of certain comparisons with proved specimens, that the signatures were forgeries (R. 572,583,599,622, 623,691). This expert later, however, changed his testimony and declared that he was positive that the signatures in question were those of accused and Watson (R. 665-667,684,686,691). Two bank cashiers qualified as handwriting experts and testified that the signatures were genuine (R. 313,316, 333,334,1038,1039). Accused thereafter, testifying in his own behalf, stated that the signatures in question were genuine and that he had signed the name "Hans C. Johansen" appearing on the vouchers (R. 1724); but that he did know that they were genuine at the time the expert Weaver was testifying in his behalf to the effect that they were forgeries (R. 1259).

After admitting the genuineness of the signatures on the two vouchers the defense contended that the vouchers had been wrongfully changed by raising the amounts thereof. Accused, in his testimony, suggested an alteration in one, No. 14½, (R. 1263) in that the letter "r" was left out of a word "hundred" at the bottom of the page and that "the word 'sixty-five' might first have been placed on that voucher, and then the rest put in, and when the rest was put in there was not room enough to put all the letters in the word 'hundred', and the word 'hundred' and the word 'sixty-five' are run together". He believed that this voucher was altered after he signed it (R. 1264). He also believed that voucher 74½ (Ex. 35 K) had been altered as the figure "6" in the quantity "627" seemed to be superimposed; the figure "3" in the amount "3135" seemed to be out of line (R. 1265); and the word "thirty" was higher on the line than the "hun" and the "hundred" (R. 1266). Mr. Albert Jackson, a typewriting expert, testified as a witness for the prosecution that in his opinion voucher No. 14½ (Ex. 35 J) showed no evidence of having been changed (R. 2040); and that there was no evidence of any changes on voucher No. 74½ (Ex. 35 K) except in the column marked "Quantity", where the figure "6" seemed to have been written over because of an apparent typographical error (R. 2042,2057). The defense thereupon introduced Mr. M. C. Arnold who testified that certain exhibits concerning which Jackson had testified were made by witness, that they were not made in the manner in which Jackson had testified that he believed them to have been made, and that he had made certain alterations thereon which had not been detected by Jackson (R. 2091,2094,2095).

Sparks testified that he made the two vouchers, that they had not been corrected or altered, that when he saw them in the court room they were in the same condition as when made (R. 1964), and that he could not explain the apparent poor alignment of figures on Exhibit 35 K (R. 2011) otherwise than to say that his typewriting machine was old and not in good condition (R. 2018). Gillam testified that he did not alter the two vouchers and did not believe that Sparks had altered them (R. 2269), but that "there was such an excitement in the office over the shortage, checking and re-checking, working day and night, and everybody was all torn up over it, I really don't know half of what went on" (R. 2166).

The two vouchers were drawn under procurement authority No. 1008 (R. 78) which had previously been reported as entirely expended (R. 79). Though vouchers 14½ and 74½ represented cash payments (R. 207), no record of the purported expenditures thereunder was on file in the office of the Corps Area Quartermaster (R. 65; Exs. 8 B,8 C). The retained records at Fort Huachuca did not include copies or duplicates of the two vouchers and there were no supporting papers concerning them on file in the Post Quartermaster's office (R. 127). Duplicates of receiving reports covering the two vouchers could not be located in the Eighth Corps Area auditor's files, although such reports were required to be sent to and retained there on file (R. 96,97). The record of procurement authorities (Ex. 16) kept at Fort Huachuca did not disclose the purchases purporting to have been made on these two vouchers, as entered under procurement No. 1058 (R. 116) or No. 1008 (R. 117), and all entries on Exhibit 16 correspond to proper vouchers. Moreover, Watson in whose favor these vouchers were drawn denied making any deliveries specified thereon or receiving any money in payment for the same (R. 361,363,391,392), and Gillam also denied making any such payments (R. 2269). In any event the accused testified that the wood was never delivered and that the payments specified on these two vouchers were never made (R. 1724). An examination of the accused's account current for the month of June, 1926, which is standard form No. 1022, and schedules of disbursement, standard form No. 1024 (Ex. 35 E), discloses that the accused took credit for vouchers 14½ and 74½ in his accounts and certified that the account was true and correct. Accused's signatures were at the bottom of certificates on the vouchers, which read in part as follows:

> "I certify that the above articles, * * * have been received in good condition, and in the quality and quantity as stated, * * * or the expenditures made, as stated, and they are in accordance with orders therefor; that the prices charged are reasonable, * * * and that all of the articles enumerated on this voucher have been taken up on the Post Stock Record Account * * *." (Exs. 35 J,35 K.)

Accused explained his signatures on the vouchers by stating that about June 30th his entire account for the month was placed on his desk

(R. 1227) and that he signed the different papers in a routine way, completing the work at one sitting. There were possibly thirty vouchers, requiring a total of about 250 signatures, and as he had to sign so many and knew that the same clerk had prepared the money account for three years, "just signed the papers as I came to them" without reading each one (R. 1228, 1729). He first received actual notice of the inclusion in his account of the two vouchers from Colonel Stone when the latter showed him photostatic copies thereof during an investigation on November 23, 1928. In this connection he admitted his signature on a letter (Ex. 72) addressed to the Chief of Finance, dated July 21, 1926, and forwarding voucher 74½, but explained that "they (the vouchers) were forgotten when my June account was made * * * voucher 74½ at that time was merely a voucher * * *" (R. 1232).

Sparks further testified that about one week prior to July 1, 1926, accused directed that he and Gillam audit the books for the purpose of determining the exact balance of cash in the office safes. Finding no discrepancies in the books, Sparks notified the accused who came, at night, to the office and ascertained the amount of the shortage (R. 1825), saying it amounted to about $6200 (R. 1947). Gillam testified (R. 2270-2271) that accused said at this time, "My God, what am I going to do. I am about $6,000, some odd dollars short" (R. 2124,2128). In this connection accused testified that he "may have" made the statement (R. 2441). Several sheets of paper bearing figures written by accused on the night in question were introduced (R. 1826,1827; Ex. 219). These figures included the figures "6500" and others of uneven numbers approximating the amount of the shortage. Accused testified that he did not know what the figures $6500 in his handwriting meant (R. 1358,1396,1511,1518,1715). Sparks testified that after making the declarations as to the shortage, accused stated that he intended to make up the $6185.50 shortage (R. 1831) by preparing vouchers purporting to show payments for quantities of wood purchased by the Quartermaster (R. 1831,1960), and later accused took two blank vouchers signed "John Watson" from the safe (R. 1831,1834,1935) and handed them to Sparks with directions as to their completion (R. 1832). Sparks prepared the two vouchers in question (R. 1832) in the amounts aggregating $6500 (R. 1834,1953), knowing that they were fictitious, but did not, as he recalled, prepare supporting papers (R. 1834) such as the purchase orders, receiving reports and invoices (R. 1884,1888,1889). Sparks then gave them to Gillam or accused. Sparks next saw the two vouchers when they were returned to him for briefing and filing on the following day, at which time he assigned a half number to each as all whole numbers corresponding to the dates had been assigned to

other vouchers, and dated them back (R. 1834). He used different arbitrary dates to avoid suspicion since the amount of wood involved was equivalent to one-half the year's allotment (R. 2004). He thereupon gave the originals to Gillam and filed the copies (R. 1834,1936). In this connection Gillam testified that to the best of his recollection voucher 74½ was handed to him in blank during the latter part of June by accused who stated at the time that he had paid it and desired Sparks to accomplish it (R. 2139-2141, 2262-2267). The two vouchers came to witness in the usual course of business for entry in the cash book and cash blotter but he did not make any payments thereon (R. 2138,2139). When they were taken up they balanced the shortage (R. 2146).

V. The defense introduced the depositions of three civilians for the purpose of impeaching Warrant Officer Gillam and Sergeant Sparks. Their testimony was to the effect that the reputations of Gillam and Sparks were bad and that deponents would not believe them under oath (Exs. 598,599,600).

Lieutenant Charles W. Fake testified (Ex. 532, 29th interrogatory) that he was in the Finance Office on one occasion when Gillam had difficulty in recovering certain moneys which he had dropped on the floor, that Gillam was so drunk that deponent ordered him to place all the money in the safe and return to his quarters, and that Gillam explained that he felt "blue" because of the decease of his wife.

W. R. Shadley, a civilian employee at Fort Huachuca, testified by deposition (Ex. 600, 12th interrogatory) that Gillam, while drunk on one occasion, overpaid him; that he had also underpaid him; that he had seen Gillam leave his office while drunk at which time $400 or thereabouts was exposed on the table; and that he did not consider Gillam capable of handling money.

The defense also introduced evidence of a conviction (Ex. 533) by general court-martial of Gillam for (a) turning over his personal worthless checks amounting to $20 as cash to the Finance Officer, and (b) neglecting the performance of his duty as chief clerk, Finance Office, from November 27, 1925, to October 18, 1926, by failing to take up certain checks (some of which apparently concerned accused's accounts (R. 2238)) on the money papers of the Finance Office. He was sentenced to restriction for four months and forfeiture of $50 per month for a like period (R. 2237,2238). Sparks, who

was "a good friend" of Gillam, testified as a witness for Gillam at this trial (R. 1913,1914).

Prosecution's Exhibit 240 (R. 1545,1546) is a copy of a letter of commendation signed by accused on February 14, 1927, referring to Gillam and stating in part: "I always found him loyal and willing and I believe as accurate as could be expected. The errors in my account, I believe, were in a great many instances due to the large amount of work Mr. Gillam was required to get out * * * also due to my own limited knowledge of finance matters. I would be willing to have him serve with me again". On cross-examination accused stated that Gillam's "one fault" was excessive drinking but he had considered him reliable and honest (R. 1545).

For the purpose of discrediting Gillam, the defense examined Watson, Gillam and Sparks relative to an alleged "short changing" of Watson by Gillam. Watson testified that at one time he furnished 123 cords of wood at $5 per cord, on a contract not involved in the charges, and that when he was paid therefor by Gillam he received a number of bills which he counted after leaving the office and discovered that he had received only $315 instead of $615. He returned to the Finance Office and notified Gillam of the shortage but the latter merely stated that he was sorry. Watson, realizing that he had made a mistake in not counting the money in the presence of Gillam before leaving the office, did nothing further about the payment (R. 402-407). A check amounting to $300 (Ex. 504), payable to and indorsed "John Watson", was introduced, Watson testifying that he never received or indorsed it (R. 405). Gillam testified that he paid Watson $615 in full payment on this contract, $315 in cash and the balance of $300 by check, and did not recall that Watson returned and made any claim about any shortage (R. 2118,2156,2157,2192); and that the indorsement on the back of the check was in the handwriting of Watson (R. 2150,2194). Sparks testified that he prepared the check in question (R. 1898) and gave it to Gillam but did not know whether Watson ever received it (R. 1901), or made any complaint about the $300 shortage (R. 1901,2006); Sparks was of the opinion that the indorsement "John Watson" on this check was not genuine (R. 2007). Accused testified that Watson never mentioned this matter to him but that other persons had complained of inaccurate payments (R. 1234). A defense handwriting expert testified that the indorsement on the check was

a forgery and was made by the person who made the entries on pages 1, 2 and 3 of Exhibit 19 A (R. 594) which was the cash book kept by Gillam.

VI. The defense introduced in evidence depositions of Major General Malin Craig (Ex. 550), Major General William Henry Hay (Ex. 551), Colonel A.V.P. Anderson, Cavalry, D.O.L. (Ex. 552), Colonel Hu B. Myers, Cavalry (Ex. 556), Lieutenant Colonel George Grunert, Cavalry, G.S. (Ex. 557), Lieutenant Colonel Augustus Bennett Warfield, Q.M.C. (Ex. 558), Lieutenant Colonel John C. Montgomery, Retired (Ex. 562), Major Frank J. Chapin, Cavalry (Ex. 559), First Lieutenant Charles W. Fake, Cavalry, D.O.L. (Ex. 532), James Patrick Boyle (lawyer) (Ex. 560), and Rex Rice (broker) (Ex. 561), each of whom testified to the good character, honesty and integrity of accused, and to the fact that his standard of living was modest and similar to that of any other Army officer in the same grade. Captain Otto Harwood, Quartermaster Corps, testified (Ex. 565) that accused was not extravagant. Lieutenant Colonel Daniel D. Tompkins, Cavalry, who inspected the accused's office in April, 1926, testified that accused's character, according to his commanding officers, was excellent (R. 1083). The defense read in evidence (R. 2665) a letter of commendation to accused, dated August 11, 1921, from Major General Malin Craig expressing thanks for the "intelligent hard work in placing your Department in the satisfactory plane of efficiency in which it now stands".

Major Henry E. Keely, Medical Corps, testified as a witness for the defense (R. 715-731) that he examined accused on June 30, 1929, finding a 40% loss of hearing in the right ear, and 60% in the left (R. 716), and that this was a chronic condition "over a number of years" (R. 729); that the annual physical reports on accused for the years 1924, 1925 and 1926 disclosed abnormal hearing (R. 730); and that in witness' opinion clerks in the same office with him could converse without accused hearing the conversation (R. 731).

VII. Just before the court closed to deliberate on the sentence, accused stated in open court, "I just have this statement to make. No matter what the findings of the court may be, I, myself, my wife and children, will know that I did not get that money" (R. 2665).

5. The uncontradicted evidence shows that at about the dates alleged in Specifications 2 and 3 of the Charge the vouchers described therein were made and used to support statements of expenditures appearing in accused's account current for the month of June, 1926, and that these vouchers were false and fraudulent in that the wood purporting to have been paid for thereby was never purchased by or delivered to the United States and in that the expenditures represented by the vouchers were never actually made by accused or by any other person. The clerk Sparks testified that he made the vouchers except the signatures of Watson, at the direction of accused for the expressed purpose of covering and concealing a shortage in accused's official accounts as Finance Officer, and this witness' testimony was corroborated substantially by the testimony of Gillam. Accused denied knowledge of the preparation and use of the vouchers and contended that they were prepared and transmitted with his account current by Gillam or Sparks, or both, for the purpose of concealing a shortage for which the two clerks, or one of them, were responsible. He testified in this connection that although the vouchers bear his signatures they were affixed under conditions which did not charge him with notice of their character or fraudulent nature. The evidence as a whole, however, including accused's plain admissions at the trial, proves beyond doubt that accused was cognizant of the shortage in his accounts at about the time the vouchers were prepared, that this shortage was substantially equivalent to the aggregate amount of the vouchers, that the use of the vouchers did in fact cover and conceal the shortage, and that the signatures of Watson on the vouchers were procured by accused or by his authority under such circumstances as to permit the fraudulent use to which they were actually put. Such being the facts it is idle to assert that accused did not know of the preparation and inclusion in his account of the vouchers or that he did not directly or indirectly authorize their preparation and use. In the opinion of the Board of Review the evidence is amply sufficient to support the findings of guilty.

Neither of the specifications allege in express terms that the vouchers were made or used for the purpose of obtaining the approval, allowance or payment of a claim against the United States, which purpose involves the fraud against the Government inhibited by the third clause of the 94th Article of War, and to this extent the specifications were defective. The specifications do allege, however, that the fraudulent papers in question appeared in accused's account for June, 1926, as vouchers, and from these

allegations, charged as violations of the 94th Article of War, there is a clear implication that it was intended to be charged that the vouchers were made and used for the fraudulent purpose of obtaining the approval and allowance of the account and of the expenditures for which credits were therein claimed. The specification in each case having been sufficient fairly to apprise accused of the offense intended to be charged, the accused having made no objection thereto and it not appearing that he was misled in any degree, it follows that the defects did not constitute error injuriously affecting the substantial rights of the accused within the meaning of the 37th Article of War (Pars. 73, 87 b, M.C.M.).

The Federal civil courts have held that the making and inclusion in an account of a disbursing officer of a fraudulent supporting voucher is a making and use of a fraudulent paper for the purpose of obtaining the approval and allowance of a claim against the United States within the meaning of section 5438, Revised Statutes, a statute of language and import similar to that of the clause in the 94th Article of War here in question (Bridgeman v. United States, 140 Fed. 577).

6. The record shows that accused was born in Denmark, March 22, 1884, and was commissioned as second lieutenant, Q.M.C., National Army, August 15, 1917; Captain, Q.M. Sec., O.R.C., December 4, 1917; Captain, A.G.N.A., December 4, 1917; honorably discharged October 24, 1919; commissioned Captain, Q.M.C., July 1, 1920; with prior service as Private, Corporal, Sergeant, Sergeant-Major and Quartermaster Sergeant, Troop K and Headquarters Troop, 2d Cavalry, P.N.C.S., and Q.M.C. from July 3, 1906, to August 14, 1917.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is authorized for violation of the 94th Article of War.

E. McClerg, Judge Advocate.

William T. Dwyer, Judge Advocate.

Robert W. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

FEB 6 1930

Military Justice
C.M. No. 189409.

U N I T E D S T A T E S	)	SECOND CORPS AREA
vs.	)	Trial by G.C.M. convened at Governors Island, New York, November 26 and 27, 1929. Dismissal.
Captain LAWRENCE IVERSON (0-9732), 5th Coast Artillery.	)	

OPINION by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 95th Article of War.

Specification: In that Captain Lawrence Iverson, 5th Coast Artillery, U.S. Army, with intent to defraud, did, at Fort Hamilton, New York, on or about May 13, 1929, unlawfully pretend to 2nd Lt. John A. McComsey, Commanding Officer of Headquarters Battery, 5th Coast Artillery, that he, the said Captain Lawrence Iverson, 5th Coast Artillery, had paid the sum of $77.20, to 2nd Lt. Horace T. Beall, Jr., Infantry, Commanding Company I, 16th Infantry, for the rationing of the 5th Coast Artillery Detachment at Fort Wadsworth, New York, with Company I, 16th Infantry, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said 2nd Lt. John A. McComsey, the sum of $77.20, of the Battery Fund, Headquarters Battery, 5th Coast Artillery, U.S. Army.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Captain Lawrence Iverson, 5th Coast Artillery, U.S. Army, did, at Fort Wadsworth, New York, on or about May 3, 1929, with intent to defraud, falsely make in its entirety a certain voucher and receipt in the following words and figures, to wit:

"May 3, 1929.

"I acknowledge to have received from the C.O., Hq. Battery, 5th C.A., Seventy-seven Dollars and Twenty cents ($77.20), same being prorata share of money expended on the mess from 'Other Funds' of Co. I, 16th Inf. during the period July 1, 1928 to March 31, 1929 that the Detachment 5th C.A. was rationed with this organization. These expenditures were in excess of the ration savings money received.

HORACE T. BEALL, Jr.,
2nd Lieut., 16th Inf.,
Comdg. Co. I."

which said voucher and receipt was a writing of a private nature, which might operate to the prejudice of another.

CHARGE III: Violation of the 96th Article of War.

Specification: In that Captain Lawrence Iverson, 5th Coast Artillery, U.S. Army, did, at Fort Hamilton, New York, on or about May 13, 1929, with intent to defraud, wilfully, unlawfully and feloniously pass, utter and publish as true and genuine, a certain voucher and receipt in the following words and figures, to wit:

"May 3, 1929

"I acknowledge to have received from the C.O., Hq. Battery, 5th C.A., Seventy-seven Dollars and Twenty cents ($77.20), same being pro-rata share of money expended on the mess from 'Other Funds' of Co. I, 16th Inf. during the period July 1, 1928 to March 31, 1929 that the Detachment 5th C.A. was rationed with this organization. These expenditures were in excess of the ration savings money received.

HORACE T. BEALL, Jr.,
2nd Lieut., 16th Inf.,
Comdg. Co. I."

> a writing of a private nature, which might operate to the prejudice of another, which said voucher and receipt was, as he, the said Captain Lawrence Iverson then well knew, falsely made and forged.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. The evidence shows that during May, 1929, accused was in command of the Harbor Defenses of Southern New York with headquarters at Fort Wadsworth, New York. Headquarters Battery, 5th Coast Artillery, under the command of Second Lieutenant John A. McComsey, was the active unit of the Harbor Defenses and was stationed at Fort Hamilton, New York. About half the men of this Battery composed a caretaking detachment stationed at Fort Wadsworth, under the immediate command of accused. As Battery Commander, McComsey was custodian of the Battery fund (R 20-22). The detachment at Fort Wadsworth, under the command of the accused, rationed with various companies of the 16th Infantry at that post from April 1, 1928, to June 1, 1929. It was rationed with Company I, 16th Infantry, from August 14, 1928, to October 21, 1928, but not at any other time during the greater period noted (R 57, 58).

At about one o'clock on the afternoon of May 13, 1929, accused visited McComsey at the latter's office at Fort Hamilton and in the course of a conversation concerning the administration of the Battery "offhandedly remarked" that he had a voucher which he wished McComsey to pay and produced the voucher, a copy of which is set forth in the specifications under Charges II and III (R 21; Ex. 1). It bore date May 3, 1929, and purported to acknowledge receipt from the Commanding Officer, Headquarters Battery, 5th Coast Artillery, of $77.20, in payment of moneys expended from "other funds" of Company I, 16th Infantry, in rationing the detachment of the Headquarters Battery, 5th Coast Artillery, during the period July 1, 1928, to March 31, 1929, in excess of receipts of ration savings money on account of rations drawn for this detachment. The voucher bore a signature purporting to be that of Second Lieutenant Horace L. (or T.) Beall, Jr., 16th Infantry, commanding Company I. McComsey expressed the view that the amount was large and would "hit the company fund rather hard" and accused explained that it covered an accumulation of nine or ten months. McComsey started to write a check to cover the amount of the voucher and asked whether he should make it payable to the Commanding Officer, Company I, 16th Infantry, whereupon accused asked him to make the check payable to accused (R 22, 23). McComsey testified that according to his best recollection accused stated in this connection that he had paid the voucher in cash (R 23, 35, 36). A check drawn on the battery fund was thereupon made payable to accused (Ex. 3) and delivered to him, McComsey retaining the voucher (R 23). The signature on the voucher was not that of Second

Lieutenant Horace L. Beall, Jr., Commanding Officer, Company I, 16th Infantry, he had not authorized accused or any other person to sign it for him, and he had not seen the voucher prior to this time or received the money represented thereby (R 62). Beall had relieved a Captain Ritter as commanding officer of Company I on April 10, 1929 (R 61) and had never discussed with accused any question of money due his company from the Coast Artillery detachment (R 64). In so far as Beall knew there was no money due his company from this detachment (R 62). During the month of December, 1928, accused had made a settlement with Captain Ritter, Commanding Officer of Company I, covering expenditures of "other funds" and receipts of ration savings on account of the Coast Artillery detachment for the entire period during which it had been rationed with Company I (R 76, 77). On this settlement accused's detachment had received money in the amount of $9.50 on account of ration savings in excess of expenditures of "other funds" (R 79). The check given to accused by McComsey was deposited in accused's bank to his personal credit on May 14, 1929. Accused did not at any time pay any money to Beall and did not discuss the transaction with him (R 62, 64). On May 14th, checks were charged to accused's account at the bank, which would have substantially overdrawn that account had the deposit represented by the McComsey check not been made on that day (Ex. 6). Overdrafts on this account had, however, theretofore been honored by the bank (R 58, 59, Ex. 6). McComsey testified that after accused left his office on May 13th, McComsey dictated to his clerk a statement-which was typed on the voucher in question and signed by McComsey-to the effect that he acknowledged having paid to the Commanding Officer of Company I the sum of $77.20 on account of the ration adjustment, and that when he signed this statement he caused the clerk to write on the voucher a second statement to the effect that the transaction had been handled through accused who had paid the Commanding Officer of Company I the money, and signed that statement, whereupon the voucher was filed away (R 23, 24; Ex. 1). Private Richard E. Winston, Headquarters Battery, 5th Coast Artillery, the clerk referred to, testified that he recalled having written the first statement but not the second one (R 247). The two statements were apparently written by different typewriters (Ex. 1). There were two typewriters in McComsey's office (R 52).

Accused was at Fort Hamilton on May 21, 1929, in the course of an inspection of the post by the Chief of Coast Artillery, and on this day was in the company of McComsey on two occasions for periods aggregating somewhat over an hour (R 31, 32). On May 24th McComsey was in accused's quarters at Fort Wadsworth for about three-quarters of an hour (R 33). On neither of these occasions was anything said concerning the transaction involving the voucher and check (R 32, 34). McComsey's battery fund book was inspected on June 4th and on completion of that inspection the inspecting officer suggested to McComsey that he should secure a certificate from accused to the effect that the payment represented by the

check for $77.20 had been made to accused (R 25). McComsey then prepared a certificate for the signature of accused reciting receipt of the money from McComsey and indicating the purpose for which it had been paid (R 25; Ex. 2), and inclosed it with a personal letter to the accused explaining the reason for its submission. Two or three days later McComsey received from accused a letter inclosing accused's personal check for $77.20, dated "May 23, 1929", numbered "57", and payable to the Commanding Officer, Headquarters Battery, 5th Coast Artillery (R 27; Ex. 5), the letter containing the following:

> "After I rec'd your check for the amount due 'I' Co. it occurred to me to check their fund book again. The re-check showed that we had apparently in the first computation failed to take into acc't. three months in which there was a considerable ration savings. A new computation showed that actually we owed them nothing, & I got the voucher & money back. I had intended to return this to you the day Gen. Hero was at Hamilton, but injuring my leg put it out of my mind. And two days later I was taken sick & that has further kept it out of my mind.
>
> "I am inclosing my personal check for the amount & suggest you simply cancel the debit entry on your fund book, which will increase your balance on hand by this amount. Please withdraw the voucher & mail it to me here at the hospital." (Ex. 4).

On May 23d, the date borne by the check, accused did not have sufficient funds in bank to pay it, but on the date borne by the letter, June 5, 1929, his balance was sufficient to cover (Ex. 6). Upon receiving the letter and check, McComsey, being reluctant to withdraw the voucher from his accounts, did nothing. About June 11th or 12th accused telephoned and asked if McComsey had mailed the voucher and when McComsey told him that he did not see how he could do so, accused suggested that he make another entry in his fund book to the effect that the payment had been erroneously entered and that he had the cash on hand. McComsey then consulted Captain Linsert who was his immediate superior and turned the voucher and accused's check over to him (R 28, 29).

By stipulation a statement by Mr. Albert D. Osborn, an expert in the comparison and identification of handwriting, was admitted in evidence (R 79-82). The expert stated that the signature purporting to be that of Beall appearing on the voucher in question was probably "a clumsy imitation of a genuine signature with the writer at the same time writing in an unnatural manner", and that after a comparison of this signature with specimens of accused's handwriting he could not say whether accused "did or did not write" Beall's name on the voucher (R 85, 86).

4. Accused testified that on the morning of May 3, 1929, the date of the false voucher, he went to Beall's orderly room for the purpose of asking the latter as trial judge advocate of a special court-martial if he might be excused from attendance or for some other purpose, and, Beall being

absent, sat down at the latter's desk for a few minutes to await his return. While sitting at the desk he saw Beall's council book lying thereon. This brought to his mind the fact that Beall had but recently taken over the company and that accused and the former company commander had had an arrangement for a periodical settlement of expenditures on account of rationing the Coast Artillery detachment, whereupon he opened the fund book and "copied down the balances carried forward from month to month from July 1, 1928, up until March 30, 1929", the period during which he thought the detachment had been rationed with Company I. Beall not having returned, accused then left and during the day obtained from the company clerk of Company I or someone at headquarters a statement of the rationing strength of Company I for the period noted. That night, with the data thus obtained and his own records showing the rationing strength of his detachment, he figured that his detachment was indebted to Company I in the amount of $77.20. He thereupon prepared the voucher in question on his typewriter and attached it to a penciled note in which he told Beall how he had arrived at the figures and asked him to check the voucher, sign and return it in order that accused might take it to Fort Hamilton on his next visit there and secure payment. On the following morning accused placed the note and voucher in Beall's personal mail box, or his organization mail box, and one or two days later found the voucher in his own mail box at headquarters, the voucher bearing what appeared to be the signature of Beall. About a week later on his next trip to Fort Hamilton, accused took the voucher and presented it to McComsey (R 109-114). When presenting it he believed that his detachment was indebted to Company I in the amount of the voucher (R 130). Accused did not sign the voucher and did not, at the time of the presentation or at the time of the trial, know who signed it (R 129). He did not recall that he had given any thought to the form of the check he was to receive but when McComsey asked him as to whom it should be made payable, he asked that it be made payable to himself,this in order that he might send it to his bank in lieu of cash which he had in his possession and which he had not been able to deposit. He thought that this would be a convenient way of making the deposit and that he could readily pay the Commanding Officer of Company I in cash. On giving the voucher to McComsey, accused stated that he "had a bill that was to be paid" (R 115). Accused further testified that the check given him by McComsey was mailed to the bank on the evening it was received (R 157) but payment was not made to Beall for the reason that accused was extremely busy and deemed the transaction of relatively minor importance (R 116, 165). He He did not make any special effort to see Beall and a day or so later "got thinking about this voucher" (R 117), recalled that he had reached a settlement with Captain Ritter in December, 1928, and after obtaining further figures from headquarters soon realized to his confusion and distress that he had made a serious mistake. The check having been already mailed to the bank, it was too late to return it to McComsey so accused put $77.20 in cash in an envelope, together with a copy of the Beall voucher, and locked the envelope in his desk, intending to return the money to McComsey on his next trip to Fort Hamilton, obtain the voucher and return it to Beall and explain to the latter the mistake that had been made (R 118, 119). He next visited Fort Hamilton on May 21st on the

occasion of an inspection of that post by the Chief of Coast Artillery. He took the money with him, intending to give it to McComsey, but on landing at Fort Hamilton he fell on the dock and injured his leg and in the "excitement of the inspection * * * and the injury to my leg was pretty well put out of my mind" and returned to Fort Wadsworth without giving the money to McComsey. On reaching Fort Wadsworth he went directly to his quarters and a surgeon came, examined his leg (R 103, 119) and told him that he should go to bed and stay there. However, because of an approaching inspection by the Chief of Coast Artillery at Fort Wadsworth, accused spent the following day from early in the morning until late in the evening supervising preparations for the inspection (R 120). No officers' call was scheduled for that day and accused did not see Beall and had no occasion to see him (R 121). On May 23rd, after having spent an active forenoon in accompanying the inspecting officers about Fort Wadsworth, accused collapsed and fainted at about noon (R 122, 123). The surgeon took him to his home and told him that he would be sent to the hospital probably that night or the following morning. Accused accordingly spent considerable time that evening in his quarters attending to "routine affairs" which had accumulated on account of the inspection and among other things wrote out a check to the Commanding Officer of Headquarters Battery for the amount of $77.20, intending to give it to the senior non-commissioned officer of his detachment with instructions to get it to McComsey and secure the return of the Beall voucher. Intending at the same time to give the money, which had previously been placed in an envelope, to this non-commissioned officer with instructions to purchase a money order and send it to accused's bank for deposit, he placed the check in his billfold and put it in his pocket (R 123, 124). In support of his statement that the check in question was written on May 23d, accused produced, and there was introduced in evidence, a check purporting to have been made by him under date of May 30, 1929, and bearing the number "60" (the check of McComsey was numbered "57") (R 125; Ex. 8). He testified that other checks drawn by him at about this time, as well as his check stubs, were lost when he changed quarters (R 125). He remained sick in quarters until May 29th, at which time he was sent to the station hospital at Fort Totten (R 105). Following May 24th, he "was sick at the time and * * just forgot" to attend to delivering the check to McComsey or to take any other action with respect to the transaction. In fact he did not think further of the matter until about June 5th when he received a letter from McComsey, whereupon he wrote the letter in reply (Ex. 4) and inclosed the check to McComsey (R 127).

Accused further testified that he was not in financial difficulties during the year 1929, nor did he owe debts during the year 1929 (R 105-106). He had no regular source of income aside from his pay but from time to time received gifts of money from his father and mother, the gifts from his mother usually being money in the amount of $100.00. His wife was not dependent on him, and had an adequate income of her own. He and his wife maintained two joint bank accounts, the one on which accused's check to McComsey was drawn being that in which he carried his own funds and the other containing only funds of his wife (R 106, 107).

Occasionally, accused's account in the bank on which the McComsey check was drawn was overdrawn by reason of checks made by his wife and not recorded in the check book used by both. The overdrafts had, however, invariably been honored and accused could have borrowed as much as $100.00 from the bank or elsewhere without any difficulty (R 107). (A statement of accused's account with the bank on which the McComsey check was drawn shows deposits in substantial amounts during May and June, 1929 which apparently were from sources other than pay (Ex. 6)). At the time the McComsey check was mailed, that is, on June 6th, there were sufficient funds in bank to pay it (R 127; Ex. 6). With respect to his detachment rationing with different companies of the 16th Infantry at Fort Wadsworth, accused testified that the changes from one company to another were ordinarily noted and attended to by accused's first sergeant and accused was not obliged to and did not concern himself with the messing arrangements other than to make occasional inquiries of his men as to whether they were receiving satisfactory treatment (R 128, 129). At the time of trial he could not explain how, on May 3d, he arrived at the figures $77.20 borne on the Beall voucher, although he had frequently tried to duplicate his figures. His own council book did not assist him (R 141). When shown records of trials by special courts-martial reciting the presence of accused and Beall as members of the courts at the trial of cases from 10.25 A.M. until 11.25 A.M., May 3, 1929, the date borne by the voucher, accused testified that he could not say whether he did or did not mention to Beall at that time the matter of the adjustment for rations but was sure that he did not then discuss the figures with Beall for the reason that no computation at that time had been made (R 135-139). He did not telephone to Beall at his quarters for the reason that he was not accustomed to talking business with officers at their quarters and outside of office hours (R 146). He did not know why he had not, subsequent to May 3d, called on Beall at the latter's office (R 146). Accused testified that the statements in his letter to McComsey, dated June 5th, to the effect that after receiving McComsey's letter he had again checked the fund book of Company I, 16th Infantry; that the recheck had shown that the first computation failed to take into account three months in which there was a considerable ration saving; that the new computation showed that the detachment actually owed Company I nothing; and that he had "got the money and voucher back", were false and were inserted in the letter because accused was very much "ashamed of the blunder" which he had made and, though he did not "intend to openly tell him a lie", distorted the facts and was "ambiguous purposely" in order to conceal his blunder (R 178, 179). He asked for the return of the voucher in this letter because of his physical distress and beaause he wanted to return the money to the battery fund and the voucher to Beall in order that the latter "could not be under any misapprehension * * * that I had his receipt for the money which I had not actually paid" (R 180, 181).

Private First Class Joseph C. Soch, Headquarters 1st Brigade, testified, for the defense, that about the middle of May, 1929, while witness was assistant clerk to the personnel sergeant at Fort Wadsworth, accused telephoned him and requested information as to where his detachment had

been rationing for the preceding two months. Witness told him only that the detachment was at the time of the conversation rationing with M Company, 16th Infantry (R 188, 189).

Major Joseph E. Campbell, Medical Corps, post surgeon at Fort Wadsworth, testified, for the defense, that at the annual physical examination of officers in January, 1929, he found accused underweight and suffering from certain physical defects and "quite nervous" (R 192). He thereafter made numerous professional calls on accused prior to May 23, 1929, and found accused "becoming more nervous". Witness advised a prolonged leave but accused would not take it (R 193). On May 23d, witness was called to headquarters at Fort Wadsworth and there found accused in a very nervous condition with "absolutely no control of his arms or legs; he could hardly walk", and his pulse was 160 per minute. He had, on May 21st or 22d, treated accused for an injury to his leg (R 194, 195). Witness believed that from May 23d on, due principally to his nervous and mental condition accused was not capable of exercising normal judgment and mental acumen (R 198). Accused was suffering from diseased tonsils (R 192) and in witness' opinion the absorption of pus therefrom might have had an adverse mental effect (R 199). Witness identified in court a clinical record covering accused's treatment at the station hospital at Fort Totten which contained the following:

> "3. Hysteroid state, manifested by tremor, excitability, vertigo, tachycardia, cardiac palpitation, exaggeration of tendon reflexes, insomnia, and alterations of visual color fields; cause undetermined.
>
> 4. Under observation for mental disease. No symptoms of mental disease found present during this period of hospitalization." (R 202).

Witness testified that "hysteroid state" is similar to hysteria which may be manifested by "a dream state", a condition in which "the patient apparently goes along in a normal manner but is really confused * * * in sort of a day dream" (R 203). Under such conditions a person might do things which, at a later day, he would be wholly unable to account for (R 203, 204). A man suffering from a "hysterical attack" is not responsible for his actions (R 205). Witness, who had had experience as a psychiatrist (R 193), had never observed any evidence of mental aberration or dream state in accused (R 206). Aside from his "increasing nervousness" during the period of witness' observation accused did not evidence any mental abnormalities (R 212). Witness believed that at the time of trial accused was mentally normal (R 213). In connection with the testimony of this witness, the defense counsel stated that it was not intended that an issue of insanity be raised (R 217).

5. In rebuttal there was introduced by the prosecution a report of a board of medical officers appointed to examine into the mental condition of the accused (Ex. 10). The board found that accused

"suffers from no mental defect or derangement marking him as either temporarily or permanently abnormal or peculiar from the medical point of view; that there is no feature of abnormality which renders him not susceptible to ordinary human motives or appreciation of right or wrong or the normal control of his actions. The board finds that he is capable of conducting his defense intelligently and is of the opinion that the accused's mental condition at the time of the act alleged is the same as it is at present."

Major Frank H. Dixon, Medical Corps, an experienced psychiatrist and a member of the board, testified in substantiation of the report of the board (R 222).

Accused testified in surrebuttal that he saw the members of the board of medical officers above referred to on but one occasion (R 233, 234).

6. The evidence shows that at the time and place alleged in the Specification, Charge I, accused presented to Lieutenant McComsey as Commanding Officer of Headquarters Battery, 5th Coast Artillery, the voucher for $77.20, purporting to bear the signature of Lieutenant Beall. Accused, in his testimony, denied that he told McComsey that he had paid the amount of the voucher to Beall, but in view of the wording of the voucher reciting receipt of the money, the testimony of McComsey as to what was actually said, the fact that accused asked that the check in payment be made in his favor, the fact that in his subsequent letter to McComsey accused stated that he had recovered the amount involved from Beall, and all the other circumstances in the case, the court was justified in finding that accused did in fact, directly or by necessary inference, pretend that he had paid the amount of the voucher to Beall for the purpose stated in the voucher. That the voucher and the pretenses were false is clearly proven and uncontradicted. With respect to accused's knowledge of the falsity of the pretenses, he contended at the trial that the voucher was submitted in good faith and in ignorance of its false nature. But did the court err in rejecting this contention as unworthy of belief? Accused not only prepared the voucher in question at a time at which he must have known, as was the fact, that he had already made a rationing settlement covering a substantial period included in the voucher and the only period during which his detachment was rationed with Company I, 16th Infantry, but prepared it at a time at which no demand had been made upon him and no suggestion of indebtedness advanced. He did not consult the company commander of the organization to whom the purported indebtedness was to be paid, a thing which in the ordinary course of such transactions would assuredly be done. The signature to the voucher was in fact forged and accused's possession of the forged instrument without any convincing explanation thereof is in itself a circumstance suggestive of forgery of the signature by accused. In presenting the voucher to McComsey accused stated, or at least created a definite impression in McComsey's mind, that the money had theretofore been paid to Beall. The proceeds of the voucher obtained from McComsey were promptly deposited to accused's personal credit at a time at which his bank account was overdrawn. The

proceeds of the check were not paid to Beall and no effort was made to pay him. Accused's explanation that he had money in his possession and intended to pay it to Beall is not convincing under all the circumstances of the case. Accused stated at the trial that within a few days after obtaining the check from McComsey he discovered through his own mental process that his detachment was not indebted to Company I and that thereafter, he intended to return the proceeds of the McComsey check to that officer. But he saw and was with McComsey on May 21st and on May 24th for considerable periods and failed to mention the transaction. It is true that accused was doubtlessly under stress on these two days but it is not reasonable to assume that had he actually intended to do so he would have forgotten, under all the circumstances, to return the money to McComsey. He did not communicate with McComsey concerning the transaction until the latter brought the matter to his attention by a letter which may have suggested to accused that the transaction was under suspicion, whereupon accused urged return of the voucher, a proceeding which accused sought to explain but which, of course, was unnecessary and irregular from the standpoint of the orderly handling of the Headquarters Battery fund. In this letter, moreover, accused admittedly made false statements in explanation of his request for the return of the voucher. His personal check mailed to McComsey with the letter bore a date on which accused's account was overdrawn. The Board of Review believes that a conclusion of accused's guilty knowledge and of his deliberate intent to defraud, as is embodied in the findings of guilty, cannot, on the evidence, be escaped.

With respect to the forgery and uttering of the forged voucher, as charged in the specifications, Charge II and III, respectively, consideration of the evidence leaves no reasonable doubt of accused's guilt. The handwriting expert was unable to testify that the signature purporting to be that of Lieutenant Beall was written by accused, but, as with the preceding specification, the circumstances compel the conclusion that it was either written by him or with his full knowledge and at his instigation.

In the opinion of the Board of Review, the evidence is legally sufficient to support the findings of guilty.

7. The Army Register contains the following with respect to accused's service:

"Pvt. and pvt. 1 cl. C.A.C. 6 May 17 to 10 Dec. 17; capt. C.A.C.U.S.A. 7 Apr. 19; accepted 26 Apr. 19; hon. dis. 30 June 20.—2 lt. C.A.C. 26 Oct. 17; accepted 11 Dec. 17; 1 lt. (temp.) 26 Oct. 17; 1 lt. 9 Feb. 18; capt. 11 May 21; (a) 1 lt. (Nov. 18, 22); Capt. 28 Dec. 27."

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally suf-

ficient to support the findings and sentence and warrants confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War, and is authorized for violations of the 93d and 96th Articles of War.

E. C. McChord, Judge Advocate.

William F. Burns, Judge Advocate.

Hubert D. Hoover, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT,
In the Office of The Judge Advocate General,
Washington, D. C.

Military Justice
C.M. 189658

FEB 10 1930

UNITED STATES	SECOND CORPS AREA
vs.	Trial by G.C.M., convened at Fort Totten, New York, December 10, 1929. Dishonorable discharge, suspended, and one (1) year's confinement. Disciplinary Barracks.
Private HARRY J. HAWKINS (6702758), Headquarters Battery, 62nd Coast Artillery (AA).	

OPINION by the BOARD OF REVIEW,
McNEIL, BURNS, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charge and specification -

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Harry J. Hawkins, Headquarters Battery, 62nd Coast Artillery, (AA) did, at Fort Totten, New York, on or about October 14, 1929, desert the service of the United States and did remain absent in desertion until he was apprehended at New York City on or about November 2, 1929.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement. The sentence was published in General Court-Martial Order No. 6, Headquarters Second Corps Area, January 10, 1930.

3. The evidence shows that accused, a recruit, absented himself without leave from his station at Fort Totten, New York, on October 14, 1929 (Ex. 1), and remained absent until apprehended by a civil police officer in New York City on November 2, 1929. At the time of apprehension he was dressed in uniform (R. 11,12). About two weeks before he absented himself without leave, accused went on pass for the purpose of visiting his wife, who was about to be confined; and a few days later obtained a further pass upon his statement that the child born to his wife had died (R. 13). After he had been absent without leave for "sometime", an officer of his battery received a telephone message from a person who stated that he was accused's brother-in-law, and that accused had been ill but would be returned to his post in about two days. The First Sergeant of the company reported to the officer that he also had received a similar telephone message (R. 9,10).

Accused testified that he enlisted on August 7, 1929 (R. 17), and that while at Fort Slocum as a recruit he was married, having first obtained permission to marry from his company commander. He enlisted for Hawaii, but after his marriage he was transferred at his wife's request to Fort Totten. This was sometime in September (R. 17,18). On Sunday, October 13th, having gone "home for dinner", he telephoned his wife's mother's home and learned that his wife was ill and "needed" him, whereupon, knowing that there would be no one at the battery from whom he could obtain a pass, he went to his wife, found her "very ill and naturally it was my place to stay with her." He asked his brother-in-law to telephone and report his wife's sickness (R.15). He remained in uniform and at his parents' home, the address given on enlistment, during part of every day during his absence (R. 16).

4. The undisputed evidence shows that accused, a recruit, was absent without leave for a period of twenty days, and that during his absence he was near his post and available at the address of his parents given by him on enlistment. He remained in uniform during his absence and was in uniform when apprehended. He explained his absence by stating that it was occasioned by his wife's illness. During his absence telephone messages prompted by him which were indicative of his whereabouts and expressed an intention to return, were received by his organization. The only evidence that he intended to quit the service rests in whatever inferences may be drawn from accused's absence without leave for a period of twenty days, and from his failure to return until apprehended near his station. The Manual for Courts-Martial states that

> "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent * * *."

Was the absence in this case "much prolonged" and not satisfactorily explained within the meaning of the Manual? The Board of Review is convinced that the absence cannot be deemed "prolonged" when viewed in the light of all the circumstances of the case, and that it was satisfactorily explained by uncontradicted evidence apparently worthy of belief, and corroborated in several particulars. Mere absence without leave for twenty days under circumstances such as are here shown, though terminated by apprehension, is not sufficient to form the basis of a reasonable and legally justifiable inference of intent to desert.

In C. M. 120894, Allen, the Acting Judge Advocate General said with respect to a conviction for desertion at Camp Funston, Kansas, on July 15, 1918, terminated by apprehension at Kansas City, Missouri, on July 31, 1918:

> "* * * There is no evidence to show that he intended not to return, which is the gist of the offense charged. The mere fact of unauthorized absence without leave is not either conclusive or even prima facie evidence of the requisite intent to establish desertion. Mere length of absence is, by itself, of little value as a test, for a soldier who has been led away by indulgence in drink, or in drugs, as in the instant case, may be absent sometime without any thought of becoming a deserter (Winthrop, 2nd Ed. - Vol. II, p. 986, and note 4). Because of the lack of proof of intent to desert, accused should have been found guilty of absence without leave; * * *."

Again, in a case in which accused absented himself without leave at Fort Leavenworth, Kansas, on September 3, 1918, and remained so absent until his apprehension at Leavenworth, Kansas, on October 9, 1918, and in which he was found guilty of desertion, the Judge Advocate General stated:

> "The facts that the accused was apprehended and had been absent a month and six days are not sufficient to show that he went absent with intent not to return or that he afterwards entertained such intent. It follows that the record is not legally sufficient to sustain the findings * * *." (C. M. 123404, Standlea).

In C. M. 125904, Moore, another war-time desertion case, the Acting Judge Advocate General stated:

> "The evidence is insufficient to sustain a conviction of desertion. It cannot be said that an unexplained absence without leave for eleven (11) days, even when terminated by

apprehension, constitutes desertion as a matter of law. It is undoubted that absence without leave may be so prolonged that, unexplained and terminated by apprehension, it may be said, as a matter of law, to constitute desertion. Such a result, however, the law does not compel in the present case."

There being no evidence from which the court might reasonably conclude that accused intended to desert it follows that the record is legally sufficient to support only so much of the findings of guilty as involves findings of absence without leave for the period alleged in the specification, the maximum authorized punishment for which as fixed by paragraph 104 c of the Manual for Courts-Martial, is confinement at hard labor for sixty days and forfeiture of two-thirds of his pay per month for a like period.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, on October 14, 1929, at the place alleged, absent himself without leave and remain absent until apprehended at New York City on November 2, 1929, in violation of the 61st Article of War; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for sixty (60) days and forfeiture of $14 per month for a like period.

E. C. McNeil, Judge Advocate.
William A. Jones, Judge Advocate.
Herbert B. Hoover, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

MAR 11 1930

Board of Review
C. M. No. 189682

UNITED STATES)	NINTH CORPS AREA
vs.)	Trial by G. C. M., convened at Fort MacArthur, California, December 6, 1929. Dishonorable discharge (suspended) and confinement for one and one-half (1½) years. Pacific Branch, Disciplinary Barracks.
Private ROY W. MYERS (6532384), Company H, 7th Infantry.)	

HOLDING by the BOARD OF REVIEW -
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FENN, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence.

2. To prove desertion on August 31, 1929, while en route from March Field, California, to Vancouver Barracks, Washington, as alleged, there was introduced in evidence an extract copy of the morning report of Company H, 7th Infantry, Vancouver Barracks, Washington, containing the following entries:

"September 1929
12th Pvt Roy W. Myers, trfd from Air
H.J.P.H. Corps, March Field, Calif., and asgd
to Co. D.S. enroute since Aug 31/29
H.J.P.H.

September 1929
13th Pvt. Roy W. Myers, D.S. to A.W.O.L.,
H.J.P.H. Aug 31/29. H.J.P.H.

October 1929
2nd Pvt Myers A.W.O.L., to desertion
H.J.P.H. H.J.P.H."

Though the recital, under date of September 12th, that accused was transferred from March Field was not competent to establish that fact inasmuch as it was obviously derived from other than actual knowledge or another original source (had it been derived from another original source the failure of the defense to object thereto might be regarded as a waiver, paragraph 117 a, M.C.M.) there is nothing in the recitals or elsewhere in the record to indicate that accused was not so transferred, that he was not assigned to Company H, 7th Infantry, or that it was not his duty to be present with that organization at the time of the alleged absence. Omitting from consideration the entry reciting transfer, the remaining entries sufficiently show that accused was assigned to and did not in fact report for duty with Company H, 7th Infantry, as it was his duty to do. There being nothing in the record tending to impeach these remaining entries, it must be presumed that they were regularly made in the course of due administration of the organization to which they pertained. They show, prima facie, absence without leave.

In C. M. No. 185932, Stinner, a case in which accused was shown to have been enlisted at Pittsburgh, Pennsylvania, and furnished transportation to Fort Slocum, New York, the Board of Review held that an entry from a morning report of the Depot Force Recruiting Service at Fort Howard, Maryland, reciting accused's absence without leave "en route to join" was incompetent. The Board said -

> "While in the ordinary case it might properly be inferred from similar morning report entries that accused had been assigned to duty with and ordered to proceed to the Depot Force Recruiting Service at Fort Howard, the competent evidence in this case indicates that he was not ordered to proceed to Fort Howard but was issued transportation to Fort Slocum, New York. Under the facts in this case, the morning report entry is not sufficient to show absence without leave and the record is therefore not legally sufficient to support the finding of guilty of desertion under this specification."

Views substantially to the same effect were expressed by the Board of Review in C. M. No. 187252, Hudson, a case in which accused was shown to have been enlisted for Infantry, 8th Corps Area, and in which a morning report entry from the "Post Recruiting Office, Fort Sam Houston, Texas" (an organization not carried in the Army List and Directory and the existence of which the court could not judicially notice) reciting absence without leave en route to join, was introduced to prove absence without leave. But these cases are to be distinguished from that now under consideration. In both the Stinner and Hudson cases irregularity in the morning report entries was

suggested by the evidence for the prosecution, the morning report in the Stinner case having been rendered by an organization other than that to which accused had been furnished transportation, and in the other case by an organization to which it could not be assumed accused had been assigned in the regular course of military administration.

Morning report entries do not and are not intended to recite all preliminary or intermediate facts forming the basis of the authority for making them, and their administrative regularity must be and is presumed. For example, it is presumed, in the usual case, that the soldier was duly transferred to and assigned for duty with the organization from which the report reciting his absence without leave comes. It is only when the accuracy or regularity of the recital is impeached that the presumption falls.

E. C. McNeil, Judge Advocate.

_____, Judge Advocate.

Walter H. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. No. 189741.

Jan. 29, 1930.

UNITED STATES vs. Private HUBERT E. MULKEY (6368164), Detachment, Medical Department.	)	SEVENTH CORPS AREA Trial by G.C.M. convened at The Cavalry School, Fort Riley, Kansas, January 2, 1930. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Hubert E. Mulkey, Medical Department, did, at Fitzsimons General Hospital, Denver, Colorado, on or about the 6th day of September, 1929, desert the service of the United States and did remain absent in desertion until he surrendered to civil authorities at Emporia, Kansas, on November 16, 1929.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Hubert E. Mulkey, Medical Department, did, at Fitzsimons General Hospital, Denver, Colorado, on or about September 6, 1929, feloniously embezzle by fraudulently converting to his own use, one Government check, of the value of $75.00, the property of Edward J. Kernaghan, formerly Private, Service Co., 20th Infantry, entrusted to him by the said Edward J. Kernaghan for cashing said check by Private Hubert E. Mulkey.

He pleaded not guilty to the charges and specifications and was found

guilty of Charge I and its Specification and guilty of Charge II and its Specification except the words and figures "one Government check of the value of $75.00", substituting therefor the words and figures "$70.00 of one Government check of the value of $75.00". Evidence of one previous conviction by summary court-martial for being drunk and disorderly in barracks, in violation of the 96th Article of War, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence but remitted two years of the confinement imposed, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. The evidence shows that on or about September 6, 1929, Edward J. Kernaghan, formerly Private, Service Company, 20th Infantry, then a patient at Fitzsimons General Hospital, owned and possessed a United States Treasury check No. 89151, payable to Kernaghan in the sum of $75.00. Accused on that date requested of Kernaghan a loan of $2.00. The latter replied that if accused would cash the $75.00 check and purchase a carton of cigarettes and two magazines for him Kernaghan would permit accused to retain $5.00 of the proceeds of the check as a loan. With this understanding accused took the check and departed but did not return with the money and was not seen again by Kernaghan. Accused was not authorized to use any of the proceeds of the check other than the $5.00 loaned him by Kernaghan (R 8, Ex. D). After thus securing possession of the check accused went to Sergeant James E. Pickering, Medical Department, and told him that Kernaghan had given him a check to be cashed but that the bank would not cash the check until accused was identified. Pickering then accompanied accused to a bank and after identifying him indorsed the check, which was for a reenlistment bonus. The check bore Kernaghan's and accused's indorsements. The bank cashed the check and when last seen by Pickering accused was in the bank in possession of the $75.00, proceeds of the check (R 8, Ex. C). At 7 P.M., September 6, 1929, accused absented himself without leave (R 8, Exs. A, B) and remained in that status until he surrendered at Emporia, Kansas, November 16, 1929. At the time of his surrender accused was attired in civilian clothing. He stated to the apprehending officer that he had deserted the service at or near Denver and had been in Chicago and other eastern cities prior to his arrival in Emporia (R 8, Ex. E).

Accused elected to remain silent before the court (R 9).

3. By the Specification, Charge II, it is alleged that accused embezzled the certain check described therein, while the evidence shows and the court found that it was part of the proceeds of the check rather than the check itself that accused fraudulently converted to his own use and benefit. This variance between the allegation of embezzlement of the check and the findings of embezzlement of part of the proceeds thereof

must be held to be fatal to the conviction since embezzlement of personal property is an offense separate and distinct from embezzlement of the proceeds of the property (C.M. 188571, Simmons; State v. Crosswhite, 32 S.W. (Mo.) 991; People v. Davis, 110 N.E. (Ill.) 9; 20 Corpus Juris 479). As stated by this Board in the Simmons case (C.M. 188571):

> "It is elementary that an accused cannot legally be found guilty of offenses distinct and separate from those charged (Paragraph 78c, M.C.M.) * * * The injurious effect of such variance upon the substantial rights of the accused, within the meaning of the 37th Article of War, is self-evident."

It follows that the record does not legally support the findings of guilty under Charge II and its Specification.

The evidence sufficiently shows that accused absented himself without leave on September 6, 1929, and remained absent until his surrender on November 16, 1929. In view of the duration of his absence and the circumstances under which he absented himself, together with his statements at the time of apprehension, the court was fully justified in finding that he intended to desert. The essential elements of the offense of desertion, as charged in the Specification, Charge I, are established. The maximum sentence authorized by Paragraph 104c of the Manual for Courts-Martial for the offense involved in this charge and specification, that is, desertion terminated by surrender after an absence of more than sixty days, is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one and one-half years.

4. The charge sheet shows accused enlisted September 20, 1928, with no prior service; and that he is 23 years of age.

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, but legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one and one-half years.

E. C. McChord, Judge Advocate.

William F. Burns, Judge Advocate.

Robert H. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Mar. 4, 1930.

Military Justice
C. M. No. 189830

UNITED STATES	)	SIXTH CORPS AREA
vs.	)	Trial by G.C.M., convened at Jefferson Barracks, Missouri, November 12, 1929. Dishonorable discharge and eighteen (18) months confinement. Disciplinary Barracks.
Private ELMER A. WALCHER (6801871), Company K, 2d Infantry.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence.

2. By the Specification, Charge II, accused was charged with escape from confinement, in violation of the 69th Article of War. He was found guilty as charged but the reviewing authority in his action approved only so much of the findings of guilty of this Charge and Specification as involved a finding that accused, a prisoner on parole, did, at Jefferson Barracks, Missouri, on or about the date alleged, break his parole by leaving the post without proper authority, in violation of the 96th Article of War. The offense of breach of parole substituted by the reviewing authority is not a lesser offense included in the offense of escape from confinement as charged and found by the court (C. M. No. 148683, Rich). It follows that the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specification as approved by the reviewing authority.

3. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its Specification but legally sufficient to support the sentence.

E. C. Mott, Judge Advocate.

William E. Burns, Judge Advocate.

Herbert W. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. No. 190175.

MAR 5 - 1930

U N I T E D S T A T E S	)	UNITED STATES MILITARY ACADEMY
vs.	)	Trial by G.C.M. convened at West Point, New York, January 27, 1930. Suspension until January 1, 1931.
Cadet MILAN A. G. WEBER, First Class, United States Corps of Cadets.	)	

OPINION by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate

1. The Board of Review has examined the record of trial in the case of the cadet named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Cadet Milan A.G. Weber, First Class, United States Corps of Cadets, did, at West Point, New York, on or about the 3rd day of January 1930, in the presence of Cadet Charles C. Cloud, Jr., First Class, United States Corps of Cadets, alleging at the time and place that he was delivering a message to First Lieutenant Daniel De Bardeleben, Cavalry, a tactical officer who was then making an official inspection of Cadet Weber's room in barracks, address the following disrespectful, vulgar and obscene language to the said Lieutenant De Bardeleben, namely, "Screw you. You son-of-a-bitch. Fritz Breidster also told me to tell you to go to hell," or words to that effect, to the scandal and disgrace of the military service.

He pleaded not guilty, and was found guilty of the specification except the words "to the scandal and disgrace of the military service," substituting therefor the words, "to the prejudice of good order and military discipline," of the excepted words not guilty and of the substituted words guilty, not guilty of the charge, but guilty of violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced "to be suspended, without pay and allowances, for one year, at the expiration of which time he will join the then first class." The reviewing authority approved only so much of the sentence "as involves suspension without pay and allowances until January 1, 1931; at the expiration of which time he will join the then First Class", and forwarded the record of trial for the action of the President under the 48th Article of War.

3. The evidence shows that on the evening of January 3, 1930, 1st Lieutenant Daniel De Bardeleben, a tactical officer, was making an ordinary evening inspection of the cadet barracks occupied by the Second Battalion of cadets (R 8). Accused and his roommate, Cadet Charles C. Cloud, Jr., First Class, occupied one of these rooms. After inspecting the room, Lieutenant De Bardeleben turned and started to close the door when Cadet Weber said to him, "Sir, may I make a statement", whereupon Lieutenant De Bardeleben turned and facing the accused, indicated by his manner that the permission had been granted. Accused then said, "Screw you. You son-of-a-bitch. Fritz Breidster also told me to tell you to go to hell." (R 5, 9). These words were said "in a rather determined voice" but without "any sullen spirit or any spirit of resentment." Lieutenant DeBardeleben thought accused's attitude was one of familiarity, or, as it is expressed in the Corps, "blase" (R 9). Lieutenant DeBardeleben was "considerably surprised" and said nothing for a few moments (R 11). Then speaking in a "calm, low, mellow voice" (R 8), he said

> "Mr. Weber, I am surprised. I think that I have a sense of humor. I fail to see anything funny about anything you told me in your message. You displayed extremely poor judgment. Let me give you some advice. Never repeat any such statement as that to any one at any other time." (R 11).

Lieutenant De Bardeleben felt that accused was delivering to him "an insulting, disrespectful and obscene message" from another, but he did not feel that there was any personal feeling on the part of accused involved in the message (R 13). Mr. Cloud, accused's roommate, had no intimation that accused was going to deliver such a message, and accused had never spoken to him about it (R 6). After Lieutenant De Bardeleben left the room, accused who was "red in the face" and "quite nervous", said to Cloud "That didn't go so good" (R 7-8).

Lieutenant De Bardeleben testified that accused was 1st Sergeant of the company of New Cadets, which he commanded the past summer and that he rated him very highly. Accused was also a cadet lieutenant in the company of which he was tactical officer in September. Their relations had always

been satisfactory and there had been no ill will or ill feeling between him and accused (R 9-10), nor had there ever been any familiarity between them (R 12). Fritz Breidster is a classmate of his, a graduate of the Academy in the class of 1923. He resigned shortly after graduation. At West Point, he was captain of the Army football team, First Captain of the Corps of Cadets and President of his class. For three years he and De Bardeleben were members of the same cadet company, and good friends, but not "boon" companions. He has not seen Breidster since the day of graduation and has had no correspondence with him except of a semi-official character on class matters (R 10, 12).

Accused testified that he first met Mr. Fritz Breidster at the Milwaukee Athletic Club about three years before and, knowing that he had been First Captain, Captain of the Football Team, an All American for two years, Captain of several other athletic teams at the Academy, President of his class and President of the Board of Governors, besides engaging in other activities, he looked up to him "as a hero." While on Christmas leave, he met Mr. Breidster at a dance at the Wisconsin Club in Milwaukee on December 28, 1929. While accused was dancing in an uncrowded corner of the hall, Mr. Breidster left his table and came over to speak to him. The conversation concerned the Academy and the several classmates of Mr. Breidster then on duty there, especially Lieutenant De Bardeleben, whom Mr. Breidster referred to as "Good old Dan." The conversation gave accused the impression that Lieutenant De Bardeleben had been Mr. Breidster's best friend at the Academy (R 18). Finally Mr. Breidster called the accused aside from the girl he was dancing with and whispered to him, asking him next time he saw Lieutenant De Bardeleben, to deliver the message set out in the specification (R 19). Accused laughed and said "All right sir," and did not thereafter think over the message or the propriety of giving it (R 22). Accused, "knowing Mr. Breidster and thinking that Lieutenant De Bardeleben was such a very good friend of Mr. Breidster and while knowing that the words were unusual, didn't take it for unusual between Mr. Breidster and any of his friends." (R 21). Mr. Breidster was sober at the time he gave the message (R 19). Accused's relations with Lieutenant De Bardeleben had always been "very harmonious", he had the "greatest respect for him," and he intended nothing disrespectful when he delivered the message to him (R 19). He thought it was a friendly gesture between Mr. Breidster and Lieutenant De Bardeleben (R 21), and

> "that there was a very good companionship between Lieutenant De Bardeleben and Mr. Breidster, and the message had been given in such a jovial and smiling way that I thought that being from one classmate to another it would be taken in that very same manner." (R 22).

Accused also testified that he stood 86 in a class of 247, had been on the "C" Squad football team, on the cross country team for two years, on the track team and on the la crosse team for one year each. He had a major part in the cast of the One Hundredth Night show during his Fourth Class year, was stage chairman last year and had written for the Howitzer and the Pointer. He also represented the Military Academy in a contest during

his Third Class year when one man was chosen from Harvard, Yale, New York and West Point. He had never been court-martialed, never received any special punishment, and had never been before the Battalion Board (R 17-18).

A stipulation covering the testimony which would be given by Waldemar Fritz Breidster, if personally present before the court, contained the following:

> "I knew Cadet Weber before he went to the Point, inasmuch as he came to me to ask several things about it. Naturally, I have been glad to see him and interested in his welfare, as one former cadet would be to another who came from the same town or district. It was only natural then on seeing him at the party at the Wisconsin Club that I should want to talk to him. * * * * * I talked to him with only the friendliest spirit and I am sure that I conveyed to him, both in my tone and in my manner, that any message he would impart from me to anyone of my classmates would be in the most friendly manner. Lieutenant De Bardeleben was in my company, living on the same floor for three years, and was a cadet Captain of "E" Company during the time I was Regimental Commander. Throughout my four years, I considered Dan as one of my best friends. * * * I talked to him and asked him about several classmates and on his telling me that Lieutenant De Bardeleben was the one classmate with whom he came in contact most frequently, inasmuch as he inspected his barracks, I think I said, 'Well, the next time he inspects, please deliver a message to him and tell him that I send my best regards, for him to go to hell, and to write to me.' Inasmuch as he was dancing with a young lady, I cannot recall that I would have given the message, 'Screw you, you son-of-a-bitch,' but if I did, it was given in that same spirit of friendship that Dan and I used to maintain. I realize these words, if I used them, and it is possible that I did, are distasteful but sometimes we overstep the points of our friendship and say things in a profane manner that very good friends realize are only words and have no sinister meaning. He asked me whether we were roommates but I said no, that we were not, but almost the same inasmuch as I was in the same company with Dan for three years and that in my last year our contacts were daily and, as I recall and hope, most friendly. The circumstances under which our conversation took place were such that my tone and manner would convey nothing to him but the closest relation and friendship between Lieutenant De Bardeleben and myself."

Captain E.W. Timberlake testified that accused was an average cadet, never profane to his knowledge, always neat in appearance and characterized by a great deal of initiative; his work was good particularly at camp. Among the tactical officers he was considered "an average cadet" (R 13-14).

4. During the course of cross-examination by the defense of Lieutenant De Bardeleben, the law member sustained an objection by the prosecution to questions apparently propounded for the purpose of showing that on the day following the utterance of the disrespectful remarks, De Bardeleben, after calling accused to his office, made remarks indicating his intention to dispose of the matter by making an adverse efficiency rating. The question was objected to on the grounds that it was irrelevant and immaterial and that the subject matter was remote. The defense stated that the offer was made as bearing upon the "feeling that was involved" and the attitude of De Bardeleben towards accused. Though the facts thus offered were somewhat remote, it is believed that in view of De Bardeleben's previous testimony that accused's attitude when making the improper remarks was one of familiarity and perhaps impertinence, the court should have allowed the questions to be answered, this for the purpose of testing the accuracy of De Bardeleben's testimony and to this extent perhaps serving as impeachment of that witness. In any event, in view of the clear proof that the vulgar and obscene remarks were actually made under circumstances rendering their utterance disrespectful conduct, whatever might have been accused's intention in uttering the words, it is the opinion of the Board of Review that the action of the court in the premises was not error which injuriously affected the substantial rights of the accused.

5. From the testimony it is clear, and indeed accused admits, that, under the circumstances alleged, he addressed to Lieutenant De Bardeleben, in the presence of another cadet, the words contained in the specification. These words were vulgar and obscene to a degree that uttering them under the circumstances stated was clearly disrespectful, and conduct to the prejudice of good order and military discipline in violation of the 96th Article of War. With reference to obscene language, Winthrop at page 567, Reprint 1920, states:

> "Disrespect by <u>words</u> may be conveyed by opprobrious epithets or other contumelious or denunciatory language * * * Disrespect * * by <u>acts</u> may be exhibited in a variety of modes--as by neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in his presence * * *.
> "It is also not essential that the disrespect be <u>intentional</u>: a failure to show a proper respect to the commander, through ignorance, carelessness, bad manners, or no manners, may, equally with a deliberate act, constitute an offence under the Article. Where, however, it is doubtful whether an act, or language, not necessarily disrespectful <u>in se</u>, may properly be treated as amounting to disrespect, the <u>animus</u> of the party becomes a material inquiry * * * * An intentional disrespect is of course much more aggravated than one which is unintentional * * *."

In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty.

6. The Cadet Register shows that accused was admitted to the Military Academy from the 5th Wisconsin District on July 1, 1926, without prior military service, and that he is now 21 years and 4 months of age.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 190249

FEB 28 1930

U N I T E D S T A T E S	)	UNITED STATES MILITARY ACADEMY
	)	
v.	)	Trial by G.C.M. convened at West Point, New York, January 30, 1930. Suspension until January 1, 1931.
	)	
Cadet ROBERT TOTTEN, Third Class, United States Corps of Cadets.	)	

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BEER, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the cadet above named and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Cadet Robert Totten, Third Class, United States Corps of Cadets, did, at West Point, New York, on or about the 12th day of January, 1930, drink intoxicating liquor in violation of paragraph 132, Regulations for the United States Military Academy.

Specification 2: In that Cadet Robert Totten, Third Class, United States Corps of Cadets, was, at West Point, New York, on or about the 12th day of January, 1930, found under the influence of intoxicating liquor in violation of paragraph 132, Regulations for the United States Military Academy.

The accused pleaded not guilty to, and was found guilty of, the charge and specifications. No evidence of previous convictions was introduced. He was sentenced "to be suspended with loss of all pay and allowances for

one year at the expiration of which period of time he will join the then third class". The reviewing authority approved "only so much of the sentence * * * as involves suspension without pay and allowances until January 1, 1931; at the expiration of which time he will join the then Third Class", and forwarded the record of trial for the action of the President under the 48th Article of War.

3. The evidence shows that on the evening of Sunday, January 12, 1930, just before supper formation of the Corps of Cadets at the United States Military Academy, two cadets, roommates of accused and members of his company, observed actions of accused which led them to believe that he was slightly under the influence of intoxicating liquor (R. 30,31,35). One of these cadets, Cadet Zitsman, testified in respect to accused that

> "First I saw he was just very slightly unsteady on his legs -- not very readily noticeable, his smiling somewhat, just a breath odor and may not have been due to drinking. He may have been sick."

Witness stated that the odor about accused was a "slight strange" one, but that he could not say that it was the odor of liquor (R. 31). The other roommate, Cadet Smith, testified that accused

> "Didn't seem to be quite himself. It is hard to say any particular thing that was wrong with him. He seemed fairly steady. His talk was perfectly rational. It didn't seem quite natural."

This witness also detected an odor on accused's breath which he could not identify but which may have been from liquor. Cadet Veal, a Second Classman, testified in this connection that he was in ranks beside accused at supper formation and observed that accused was "a little unsteady" and "went back and forth" in a manner which witness illustrated in court. This witness did not detect any odor of liquor about accused (R. 29).

Cadet Sergeant Appelman, a First Classman, testified that just before supper formation on the evening in question someone gave him a message which conveyed the impression that accused was drunk or ill, and, on that

account, he asked accused to sit at his table in order that witness might observe and protect him if possible. Witness saw nothing whatever that led him to believe that accused was in any degree under the influence of intoxicating liquor (R. 22-23). After supper formation, Cadet Beach, of accused's company, noticed that accused was "a little paler than usual" (R. 32) and asked accused how he felt. Accused replied that he did not feel well, whereupon witness suggested that he take a shower (R. 33). One of the roommates, Cadet Smith, testified that accused took the shower as suggested, dressed and sat down at his desk for study a little after 7:15 P.M., and a little later went to sleep with his feet on the table (R. 35,36). At about 8 P.M., witness heard an officer approaching the room, whereupon he awakened accused (R. 35). Accused arose to his feet and "seemed to be perfectly all right" but as the officer started to leave the room, accused "seemed to lose his balance and took a side step. Aside from that he seemed to be all right" (R. 36). Witness believed that accused was "a little bit slower" in collecting his faculties on this occasion than was usual when he was suddenly awakened (R. 37).

First Lieutenant Philip E. Gallagher, Infantry, a tactical officer at the Military Academy, testified that at about 8 P.M., on January 12th, while making a regular evening inspection he entered accused's room after knocking at the door and as accused arose observed that "he staggered perceptibly or noticeably and it took a good bit of difficulty for him to come to the position of attention". Witness asked accused what was wrong but received no reply and then asked the roommate, Cadet Smith, the same question whereupon Cadet Smith said that accused "had not been right all afternoon". Witness, having "noticed an odor of liquor", suspected that accused had been drinking and ordered him from the room. In the hallway, he stopped and sent Cadet Smith for accused's cap and overcoat (R. 38). At this time, while accused was at attention, he

> "was unsteady. He was swaying. We walked down the steps of barracks going toward the guard house. I had Mr. Totten by the arm as we started down the steps. It was slippery at the time and I was afraid that he might stumble down the steps. He said he could make it all right himself. That's another time I noticed a distinct odor of liquor on his breath." (R. 38-39.)

Witness took accused to the Officer in Charge, Lieutenant Byers. As they entered the office, witness asked accused if he had been drinking but did not receive a reply. While standing before Lieutenant Byer's desk, accused swayed noticeably (R. 39). Witness, when first seeing accused, thought that he might be ill (R. 41) but later concluded that his condition was not caused by sickness and that he was under the influence of intoxicating liquor (R. 39). Witness believed that, though a man aroused from heavy sleep would not immediately have full control of his faculties, a normal person would not have swayed "to the extent that Mr. Totten swayed" (R. 40).

First Lieutenant Clovis E. Byers, Cavalry, testified that when Lieutenant Gallagher brought accused to him on the evening of January 12th, accused did not answer some questions asked by Lieutenant Gallagher. Witness then looked at accused and observed that

> "His eyes were very red * * * his feet were together, he was standing in the position of attention and his body had a very decided sway, more than is normal with a man standing at the position of attention." (R. 41.)

He then told accused to wait in the hall outside and as accused left the room in obedience to this direction, witness "got a very definite odor of liquor from his breath" (R. 42). After telephoning to the Medical Officer of the Day, witness walked with accused to the cadet hospital and waited there about five minutes before the medical officer, Major Collins, arrived. Major Collins' examination of accused commenced about fifteen minutes after accused was brought into witness' room by Lieutenant Gallagher. The odor of alcohol was still noticeable. Witness believed that accused was under the influence of intoxicating liquor when he was brought to witness' room by Lieutenant Gallagher, but at the time of the examination in the hospital "it was not noticeable". It was very cold on the night in question and the ground was frozen (R. 42).

Major Tate B. Collins, Medical Corps, testified that during the course of his examination of the accused on the evening of January 12th he applied the usual tests for determination of intoxication, that is,

"he examined his reflexes, his speech, his coordination and the odor of his breath". He found no evidence that indicated accused's use of intoxicating liquor other than that his breath had "an alcoholic odor". In witness' opinion accused was not under the influence of intoxicating liquor at that time (R. 7). Captain William S. Prout, Medical Corps, testified that he assisted Major Collins in the examination of the accused on the evening of January 12th and, after applying tests and examining him, formed the opinion that he was "cold sober". Witness detected an "aromatic odor" on accused's breath but his own sense of smell being at the time considerably impaired by a cold, he could not recognize the cause of the odor. Accused's eyes were somewhat swollen and bloodshot (R. 10).

Three cadets, as witnesses for the prosecution, testified that they were in the company of accused with but slight interruptions from early in the afternoon of January 12th up to a short time before supper formation, and that at no time on this day did they observe any evidence that accused was under the influence of intoxicating liquor (R. 11-17,20-25).

4. Six cadets, including accused's cadet captain and cadet lieutenants, testified for the defense that they would rate accused as an average cadet (R. 43-46).

Cadet Corporal Corbett, a Second Classman, testified that accused was in his squad at supper formation on the evening of January 12th and that witness observed nothing unusual in his condition and did not notice any unsteadiness on his part (R. 46).

Accused did not testify or make an unsworn statement.

5. In the course of examination by the court (R. 17-19) of Cadet Sergeant Simpson, one of the cadets who testified that he had been with accused during the afternoon of January 12th and had not observed any indication of the influence of intoxicating liquor, and prior to the introduction in evidence of any testimony indicating that accused was under the influence of intoxicating liquor, a member of the court asked the following question:

"Q. Mr. Simpson, in all of your answers to the judge advocate do you mean to infer that during the time that you were with Mr. Totten that he was a perfectly normal individual, that there was nothing strange about his actions or appearance at all. If I may add something to that. In other words, do you mean to infer that during the time from 2:00 o'clock until 7:00 o'clock when you left him that you noticed nothing whatever about him to make you think that he had been affected by anything that he had taken whatever."

The defense objected to the question and the member and President of the court replied as follows:

"DEFENSE: The defense objects to the question. The question implies that the accused had taken something. I would like to ask whether he has formed an opinion in this case.

MEMBER: I have not, but I am not satisfied as a member of the court that this witness has given us any opinion at all. I want to be clear in my mind and see if the witness is clear. From what he has stated he has given me to believe that he was with this cadet from 2:00 o'clock until 7:00 o'clock and he was perfectly normal in every sense. I want to be sure that the witness is positive of that inference that he is at least giving to me.

DEFENSE: The defense does not object to any line of questioning that would bring that out, but the defense does object to that question that was asked.

PRESIDENT AND LAW MEMBER: There is no objection to your changing the question to satisfy the defense counsel."

The member thus asked a question which somewhat indicated that he had formed an opinion not based on the evidence. Having stated, however,

in reply to an inquiry by the defense counsel, that he had not formed an opinion and no challenge having been interposed, it cannot be said that the member was disqualified in fact or that his continued participation in the trial was error.

6. The evidence, including the testimony of the tactical and medical officers and cadets, that on the evening of January 12th accused's breath bore a distinct odor of liquor, together with the proof of his appearance and actions just prior to supper formation and at the time of Lieutenant Gallagher's inspection, sufficiently shows, by necessary inference, that at some time during that day accused drank intoxicating liquor, as alleged in Specification 1 of the Charge. Paragraph 132 of the Regulations for the United States Military Academy denounces such action as an offense. It is as follows:

> "Cadets who shall drink or be found under the influence of intoxicating liquor, or bring or cause the same to be brought within the cadet limits, or have the same in their rooms, tents, or otherwise in their possession, shall be dismissed the service or otherwise less severely punished."

The evidence also shows that at the time and place alleged in Specification 2 of the Charge, accused was found under the influence of intoxicating liquor, within the meaning of the regulation quoted. Though the degree of intoxication was slight there can be no doubt that at the time accused was observed by Cadets Veal, Zitzman and Smith and by Lieutenants Gallagher and Byers, his normal control of his body and actions was appreciably affected by the liquor he had consumed. Neither of the medical officers who examined accused found any evidence of intoxication but this examination took place after accused had walked some distance through the cold air and after his condition had been detected by a tactical officer who, with accused's knowledge, took steps indicating his intention to initiate an investigation. Beyond showing that accused's intoxication must have been slight, the testimony of these medical officers is wholly negative and of little or no weight with respect to accused's condition prior to the supper formation and at the time of the inspection by the tactical officer.

7. The Cadet Register shows that accused was admitted to the Military Academy on July 2, 1928, without prior military service; and that he is now 20 years and 4 months of age.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof.

E. C. McNeile, Judge Advocate.
William H. Burns, Judge Advocate.
Robert W. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Board of Review
C. M. No. 190259

UNITED STATES v. Private HUNTER J. SHEFFIELD (R-612281), Battery B, 5th Field Artillery.	FOURTH CORPS AREA Trial by G.C.M., convened at Fort Bragg, North Carolina, January 24, 1930. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by OLLIVETTI, Judge Advocate.

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1. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Hunter J. Sheffield, Battery B, 5th Field Artillery, did, at Fort Bragg, North Carolina, on or about December 2, 1929, feloniously take, steal, and carry away one wrist watch, value about $37.50, the property of Sergeant Chaldy D. Lambert, Battery B, 5th F.A.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement and forwarded the record pursuant to Article of War 50½.

2. The evidence shows that between 5 P.M., December 2 and sometime on December 5, 1929, a wrist watch of the value of $37.50, property of Sergeant Chaldy D. Lambert, Battery B, 5th Field Artillery, was taken from the foot locker of a Private Ford, Battery B, 5th Field Artillery, at Fort Bragg, North Carolina. The watch had been placed in a box and the box placed in

the foot locker which had been thereupon locked. The accused, a Private Rathel and a Private Pettis and others slept in the squadroom in which the foot locker was placed (R. 6,20).

Private Charlie Rathel, Battery B, 5th Field Artillery, testified that on the evening of December 2d he went to bed at about 7 P.M., the lights being on, and a few minutes later accused and Pettis came into the squadroom, went to accused's bunk and stayed there for about two minutes. Accused then closed the squadroom door, Pettis switched off the lights and accused went to Private Ford's foot locker which was at "the second bunk" from witness, unlocked it with a key, took a wrist watch out of a case, replaced the case, closed the foot locker and started back to the door. When he had nearly reached the door Pettis switched on the lights and witness saw accused standing with the wrist watch in his right hand. The two then left the building and witness did not see them again that night. Though witness saw accused "going in another man's foot locker" which witness knew he had no right to do, he did not report the incident because he hoped that the guilty persons would be apprehended without action on witness' part (R. 8-11). Witness was also afraid of accused and Pettis (R. 13). Witness had seen Ford place the watch in the locker earlier in the evening (R. 10). On the Thursday following the incident described, witness was questioned by a Sergeant Richardson who asked him "was I in it or did I know anything about it" (R. 13). Witness did not make any statement until Sergeant Richardson "promised to not put my name into it if I would tell him exactly who it was. He said he sort of wanted to get on the tracks of the watch. He didn't say anything about hearing it in court or anything that way. He just said he wanted to trace the watch up. He said my name wouldn't be into it" (R. 14).

Captain Buhl Moore, 5th Field Artillery, commanding officer of accused's battery, testified that about December 4, 1929, in the course of an investigation he took some keys which accused had been carrying in his pocket. Thereafter Rathel having told a story which implicated accused and Pettis, witness took accused and Pettis to the squadroom at about 10:30 P.M. and had them rehearse the larceny according to instructions by witness based on Rathel's story. Witness purposely omitted from his instructions a direction to turn out the lights in the room. After the rehearsal, witness directed accused and Pettis again to rehearse the larceny but without instructions from witness. Accused and Pettis complied but "at the point

where Private Sheffield was alleged to have unlocked the trunk locker * * * Private Pettis * * * reached over to the electric light switch and turned the lights out" (R. 18). This witness also testified in response to questions by the prosecution that he "firmly believed" Rathel's story and that "he told a very straight-forward honest story that caused me to finally believe it thoroughly" and that witness believed "he was telling the truth". In response to a question by a member of the court, a second lieutenant, as to whether he deemed Rathel a trustworthy man, witness testified that "from the acquaintance I have had with Private Rathel I have formed the opinion that he is an honest man and a truthful man" (R. 19).

Sergeant Allen Richardson, Battery B, 5th Field Artillery, testified that he was non-commissioned officer in charge of quarters on the night of December 2, 1929, and that between 7 and 8 P.M., he saw accused and Pettis go up the stairs to their squadroom (R. 20,21). While they were upstairs witness heard noises "like somebody hitting a foot locker or something" and witness went to investigate. In going up the stairs he met accused and Pettis coming down, at which time their manner was such that witness was later "suspicious" (R. 23). On reaching the room, witness saw Rathel who was in his bunk "with his head on his hands". The lights were on. Witness did not ask Rathel any questions and Rathel said nothing (R. 24). Witness later questioned Rathel but the latter told him nothing until witness stated "the man's name that I thought got the watch. Then he told me, he said 'You know as much about it as I do' and he said 'Yes, they are the men that got the watch'". In response to questions by the prosecution, this witness testified that he had no reason to disbelieve Rathel's story and thought that Rathel had told the truth. He did not believe that Rathel would testify falsely or would have intelligence enough to fabricate his story (R. 22).

Sergeant William C. Locklear, Battery B, 5th Field Artillery, testified that with a key which was among those taken from accused by Captain Moore he unlocked Ford's foot locker. The key was an ordinary foot locker key (R. 26,27). It also fitted accused's foot locker (R. 27). This witness in response to questions by the prosecution also testified that he had heard Rathel tell his story to Captain Moore repeatedly and did not believe that he would fabricate it (R. 28).

General Prisoner Monroe A. Pettis, Battery B, 5th Field Artillery, testified as a witness for the defense that he was in the squadroom in

question after 7 P.M. on the night of December 2d with accused and that from there they went to a cafe. Witness did not see accused take a watch from Private Ford's locker and did not see him open the locker or tamper with it in any way (R. 29). Accused could not have taken a watch while in the room without witness' knowledge. Witness turned the lights off as the two left the squadroom. When accused and witness were in the room no one else other than Rathel was present (R. 30). Witness and accused returned to barracks at about 9 or 9:30 P.M. and were in bed at about 11 P.M. At the rehearsal conducted by Captain Moore, witness switched off the lights because they had been switched off by someone during the preceding rehearsal in which Captain Moore had given instructions (R. 33).

Private J. R. Martin, Battery A, 5th Field Artillery, testified as a witness for the defense that he had known accused for about fifteen years and that his character during that period had been good. Witness saw accused between 7 and 10 P.M. about December 1st in company with Pettis, at which time they were "down there by the canteen" (R. 37). This was the night on which the watch was reported to have been stolen but witness heard nothing from accused or Pettis about it (R. 38).

Two honorable discharges of accused from the Army dated December 12, 1919, and December 10, 1920, both with character excellent, together with a warrant of appointment as corporal on August 9, 1920, were introduced by the defense (R. 42,43).

Accused testified in his own behalf that he was in the squadroom on the evening of December 2d while Pettis was there but that he did not take a watch belonging to Private Ford at this time or at any other time and that he did not open or unlock Ford's foot locker on this occasion. Accused did not see Pettis take a watch from Ford's effects (R. 44). In addition to his service in the Army accused served two years in the Marine Corps and was discharged therefrom with character excellent (R. 45).

Captain Buhl Moore, recalled as a witness for the court, reiterated his testimony with respect to the rehearsals of the larceny and Pettis' action in turning off the light in the squadroom (R. 50). In response to questions by a member of the court, a second lieutenant, witness testified

on this occasion that Rathel's stories were consistent and "never varied from the same straight-forward story".

3. The court by which this case was tried was composed of five members including a major, a first lieutenant and three second lieutenants.

4. There is direct testimony by the witness Rathel that at the time and place alleged accused took and carried away from Ford's foot locker the watch described in the specification. There is also some slight corroboration to the effect that accused and Pettis were in the squadroom at about the time the watch was stolen. Serious errors as hereafter noted were, however, made in the admission of incompetent evidence, and the Board of Review is convinced, after careful consideration of the entire record, that these errors were fatal to the validity of the conviction.

Three witnesses for the prosecution, Captain Moore and Sergeants Richardson and Locklear, testified in response to questions by the prosecution or by members of the court, that they believed Rathel's story and were of the opinion that this witness was truthful. No attempt had been made by the defense to impeach Rathel upon the ground that his reputation in his military community for truth and veracity was bad. Such being the case, the testimony was wholly incompetent and its admission was erroneous (Par. 124 b, M.C.M.).

Captain Moore's testimony as to Pettis' incriminating acts during the rehearsal of the larceny carried into execution under the direction of that officer was also incompetent. This rehearsal was meaningless except for Pettis' acts which plainly indicated his knowledge of how the larceny had in fact been committed. The only theory on which the act or admission of a person other than the accused might have been introduced to establish the guilt of the accused was that this person and accused were agents one for the other, that is, that they were at the time of the act or admission acting with a common design or in the execution of a conspiracy. But in this case it is entirely clear that the common design or conspiracy, if such there was, had ended prior to the rehearsal, and the acts or admissions done or made by one after the termination of the conspiracy are not admissible against the other (Par. 114 c, M.C.M.).

It is true that the defense did not object to the admission of the testimony as to Rathel's veracity or as to Pettis' acts, but there is nothing whatever in the record to indicate that the defense understood its right to object, and it follows that the mere failure to object did not amount to a waiver of the legal rights involved (Par. 125 c, M.C.M.).

In this case a chief issue before the court was as to the veracity of the witness Rathel, for on his testimony alone the legality of the conviction rests. Serious question as to his veracity was suggested by the very facts to which he bore witness. He was admittedly in the room at about the time of the larceny and had full opportunity to commit it himself. The non-commissioned officer in charge of quarters came to the room after Ford's locker had apparently been tampered with but Rathel, though on the alert, made no report of the unlawful occurrence that he claims to have witnessed a very short time before. Neither, indeed, did he report the occurrence at all until questioned and until assured that he was not himself to be accused of the offense. His testimony was, moreover, denied categorically by accused and Pettis. Can there be any doubt that under these circumstances the incompetent opinions of Captain Moore and the non-commissioned officers as to Rathel's veracity and the incompetent testimony as to Pettis' incriminating actions, influenced the court to a great degree in determining the credibility of Rathel? That such was the fact is shown not only by the circumstances in evidence but by the action of various members of the court in asking questions developing and emphasizing each phase of the incompetent testimony. It cannot be contended that members of the court were not unduly influenced by the testimony as to Rathel's trustworthiness and truthfulness when the members themselves drew this testimony from the witnesses on their own initiative. Neither can it be successfully argued that the court did not give substantial corroborative weight to the incompetent evidence of Pettis' actions at the rehearsal, in view of the convincing nature of this evidence and the fact that the court, after the conclusion of the case for the defense, recalled Captain Moore and had him repeat the details of those acts. The Board of Review can reach no conclusion other than that the conviction was induced by the incompetent testimony. Such being the case it must be said that the errors injuriously affected the substantial rights of the accused within the meaning of the 37th Article of War.

5. For the reasons hereinabove stated the Board of Review holds that errors of law were committed which injuriously affected the substantial rights of accused.

_____, Judge Advocate.

William H. Burns, Judge Advocate.

Lubel H. Hoover, Judge Advocate.

Military Justice
CM No. 190611

WAR DEPARTMENT
In the Office Of The Judge Advocate General
Washington

MAR 29, 1930

UNITED STATES vs. Private JOSEPH C. MASZESKI (6800744), 10th Ordnance Company.	)	PANAMA CANAL DIVISION Trial by G.C.M. convened at Fort Clayton, Canal Zone, February 12, 1930. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Joseph C. Maszeski, 10th Ordnance Company (Maint), Ord Section, Panama Pacific General Depot, Corozal, Canal Zone, did, at Balboa Quarantine Office, Balboa, C.Z., on or about December 28, 1929, attempt to desert the service of the United States by falsely representing himself under an alias as a civilian to Dr. J.D. Odom, Quarantine Officer, requesting the assistance of said Dr. Odom in establishing a false identity and securing a permit of entry into the Republic of Panama under said false identity, with intent permanently to absent himself without proper leave from his post and proper duties.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Private Joseph C. Maszeski, 10th Ordnance Company (Maint), Ord Section, Panama Pacific General Depot, Corozal, Canal Zone, did, at Quarry Heights, Canal Zone, on or about December 27, 1929 with intent to deceive, deny his identity as a soldier to Lieutenant Royal A. Machlo, Infantry, Military Police Officer.

Specification 2: In that Private Joseph C. Maszeski, 10th Ordnance Company (Maint), Ord Section, Panama Pacific General Depot, Corozal, Canal Zone, did, at Quarry Heights, Canal Zone, on or about December 27, 1929, with intent to deceive, deny his identity as a soldier to Major David B. Falk, Infantry, Provost Marshall, Panama Canal Department.

Specification 3: In that Private Joseph C. Maszeski, 10th Ordnance Company (Maint), Ord Section, Panama Pacific General Depot, Corozal, Canal Zone, with intent to deceive, did, at Panama City, R de P., on or about December 27, 1929 deny his identity as a soldier to Pvt Elbert R. Capwell, Hq & MP Co., P.C. Div., a Military Policeman.

Specification 4: (Not Guilty).

Specification 5: (Not Guilty).

Accused pleaded not guilty to the charges and specifications and was found not guilty of Specifications 4 and 5, Charge II, and guilty of the charges and remaining specifications. Evidence of two previous convictions, one by summary court-martial for absence without leave in violation of the 61st Article of War, and one by special court-martial for desertion in violation of the 58th Article of War, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that on or about December 27, 1929, accused entered the Studebaker Agency in Panama City, Republic of Panama, and stated to the dealer that he was interested in the purchase of a car. Subsequently, the same day, he gave the dealer his check for $100.00 as a deposit on a car but instructed the dealer not to cash the check until accused saw him the next morning. The dealer told him he could not cable for the car on a $100 deposit, and accused replied that he was in no hurry for it. After receiving the check, the dealer ascertained that accused did not have an account in the bank on which the check was drawn (R 10-20). On the same day Private First Class Capwell, while on duty as assistant commander of the Panama Guard, encountered accused in the Peerless bar in Panama City. Accused stated that his name was Malowski and, upon being asked by the military policeman if he were a soldier, replied in the negative. After further conversation accused stated to the military policeman that he was a soldier but when Capwell started to take him to a post, accused again denied that he was a soldier. Thereupon the military policeman took him to the Panama Police Station where he was confined as a civilian (R 21-23). Later on the same day accused was in confinement at Quarry Heights, C.Z. There he was interviewed by Lieutenant Machlo on duty with the Military Police Company. Accused stated to the officer that his name was Martowski and that he was not a soldier. He further stated that he had been in Panama about three

months, lived in house No. 32, Canal Zone, and worked at the Ancon Garage. Upon being informed by Lieutenant Machlo that it would be necessary to keep him in confinement until his identity was established accused replied that he did not object to remaining in the guardhouse and that Major Falk, who was a fraternity brother, would identify him. Later he stated to Lieutenant Machlo that he had told the authorities at the Panama jail that he was a soldier, because he did not like the jail (R 23-24). Upon being advised by Lieutenant Machlo of accused's confinement, Major Falk, on December 27, 1929, interviewed accused at the guardhouse. Accused was dressed in civilian clothes and stated to the major that his name was Wartowski or Warlowski and that he was not a soldier. He further stated that after being arrested in Panama he claimed to be a soldier in order to escape confinement in the Panama jail. Accused succeeded in convincing Major Falk that he was not a soldier and was released from confinement (R 25). (Charge II and Specifications 1, 2 and 3 thereunder).

On or about December 28, 1929, while on pass from his organization (R 30), accused entered the office of Doctor J. D. Odom, Quarantine Officer at the Post of Balboa, and gave his name as Cass Wartowsky. He stated to this official that he was an American seaman and requested "a seaman's identification card, or some kind of identification card." In response to questions accused further stated that he had come from Columbia on an oil tanker about a month before. Upon being asked if he were a soldier or sailor, accused replied that he had been in the Navy at one time but was now a civilian. As a rule an American ship will not take on as a member of the crew a man who does not possess some proof of his American citizenship. Foreign vessels require no proof of identification from applicants for the crew. The Immigration official refused accused's request and he was thereupon arrested and confined by a member of the Canal Zone Police. Accused stated to the policeman that he had lied to the Immigration official and gave his correct name and organization (R 26-29).

4. By the Specification, Charge I, accused is charged with an attempt to desert the service of the United States by "falsely representing himself under an alias as a civilian to Doctor J. D. Odom, Quarantine Officer, requesting the assistance of the said Doctor Odom in establishing a false identity and securing a permit of entry into the Republic of Panama under said false identity, with intent, permanently to absent himself without proper leave from his post and proper duties." Viewing this allegation in the light most favorable to the prosecution, it charges nothing more than mere preparation and intent to desert without alleging any overt act which would be necessary to accomplish an attempt to carry out the plan to desert and is, therefore, legally insufficient to charge the offense of attempting to desert. "An attempt to desert is an overt act other than mere preparation towards accomplishing a purpose to desert." (Par. 130b, M.C.M.); Or as more generally defined, an attempt "is an act done with intent to commit that particular crime,, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission." (Par. 152c, M.C.M.). (See also

C.M. No. 155131, London; C.M. 155621, Drezner, C.M. No. 157586, Phillips). Nor is the defect in the specification cured by the proof. At most, the evidence shows that on the day prior to his alleged attempt accused discussed the purchase of an automobile and gave as part of the purchase price thereon a worthless check instructing the dealer, however, not to cash the check until he heard further from accused. He stated to the dealer that he was in no "hurry for it", and indeed the model he discussed purchasing was not on hand, but would have to be ordered by cable. Later the same day accused gave fictitious names and denied his identity on three separate occasions to military police officers and a private of the military police force. On the date alleged in the specification he gave a fictitious name, falsely represented himself as an American seaman, denied his identity as a soldier to the quarantine official, and attempted to obtain from that official false papers of identity. At this time he was not absent without leave from his organization, but, on the contrary, was lawfully absent on pass. Such evidence fails to establish more than preparation or intent to desert. It does not show any overt act, that is any act which would, apparently, by itself or as a part of a series of proven acts, have resulted in the actual commission of the offense of desertion. Mere intent to commit an offense not accompanied by an overt act to carry it out does not constitute an attempt (Par. 152c, M.C.M.).

5. As to Specifications 1, 2 and 3, Charge II, the evidence shows that at the times and places alleged therein accused, with intent to deceive, denied his identity as a soldier to Lieutenant Machlo, Major Falk, and Private Capwell, all of whom were in the performance of their official duties at the time. No maximum punishment is prescribed by Paragraph 104c, M.C.M., for offenses of this kind, but that paragraph prescribes as maximum punishment for the closely related offense of a false official report by a soldier, confinement at hard labor for one month and forfeiture of two-thirds pay per month for a like period. Thus it appears that the maximum punishment authorized for the offenses of which accused stands properly convicted (3 specifications), is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

6. The charge sheet shows that accused enlisted July 10, 1928 with no prior service and that he was 28 years of age at the time of the commission of his offenses.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and Specifications 1, 2 and 3 thereunder, but legally insufficient to support the findings of guilty of Charge I and its specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

/s/ E. C. McNeil, Judge Advocate.

/s/ W. F. Burns, Judge Advocate.

/s/ Hubert D. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. No. 190628.

MAY 2 - 1930

UNITED STATES	)	EIGHTH CORPS AREA
vs.	)	Trial by G.C.M. convened at Fort Logan, Colorado, January 23, 1930. Dishonorable discharge, suspended, and confinement for two (2) years. Disciplinary Barracks.
Private THEODORE R. COLEMAN (6233152), Company D, 2nd Engineers.	)	

OPINION by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Theodore R. Coleman, Company D, Second Engineers, having taken an oath in a trial by General Court-Martial of Staff Sergeant George E. Maples, Company D, Second Engineers before the trial judge advocate of said court, a competent officer, that he would testify truly, did at Fort Logan, Colorado, on or about December 9, 1929, willfully, corruptly and contrary to such oath testify in substance that while he was a Corporal in Company D, Second Engineers, he had Private Morris Robey, Company D, Second Engineers, on his detail to police up, that he told the said Robey to do something, that the said Robey told him to go to Hell and that he hit the said Robey, which was a material matter and which he did not then believe to be true.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years. The reviewing authority approved only so much of the findings of guilty "as finds the accused guilty of the specification as set forth, excepting the words 'which was a material matter and'", in violation of the 96th Article of War, approved only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years, ordered the execution of the sentence but suspended the dishonorable discharge and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 131, Headquarters Eighth Corps Area, March 1, 1930.

3. The evidence shows that on December 9, 1929, after having been duly sworn as a witness for the defense in the trial by general court-martial of Staff Sergeant George E. Maples, Company D, 2d Engineers, accused testified that while he was a corporal in Company "E", 2d Engineers, he had Private Morris Robey "on my detail to police up, and I told him to do something, and he told me to go to Hell, and so I hit him" (R. 5-7; Ex. A, pp. 62, 142-143). Accused further testified at Maples' trial that at the time of the altercation described both he and Robey were members of Company E (Ex. A, p. 143).

An extract copy of the morning report of Company E, 2d Engineers, containing an entry under date of March 2, 1929, reciting accused's discharge while a corporal on that date, was introduced in evidence (Ex. B). There was also introduced, without objection by the defense, a certificate by the Personnel Adjutant of the 2d Engineers to the effect that the service record of accused, a Private of Company "D", 2d Engineers, showed that he was a member of Company "E", 2d Engineers, from March 3, 1926, to March 2, 1929, that he was discharged on the latter date, that he reenlisted at Fort Logan, Colorado, on March 6, 1929, and that he was assigned to Company D on March 7, 1929 (Ex. C). A morning report entry of Company E under date of March 8, 1929, reciting that Private Robey was assigned to and joined the company on that date (Ex. B) and a certificate that his service record showed that he was transferred to the 2d Engineers from the 1st Infantry (stationed at Fort D. A. Russell, Wyoming), that he was assigned to Company E, 2d Engineers,

on his arrival at Fort Logan, Colorado, on March 8, 1929, and that he was transferred to Company D, 2d Engineers, on October 2, 1929 (Ex. D), were introduced. Without objection there was read from Robey's service record an entry showing that he was on furlough from February 6, 1929, to March 8, 1929 (R. 9).

First Sergeant Cornell Swisher, Company C, 2d Engineers, testified that he was First Sergeant of Company E of that regiment about February 15, 1929, and that Private Robey often came to Company E for the purpose of making inquiries as to his transfer to that company but that he was never on duty with it prior to joining on March 8, 1929. Robey was not "worked" in Company E before he joined, and witness did not think that Company E and Company D were joined for the purpose of fatigue details. Witness also testified that nothing came to his attention prior to March 8, 1929, concerning trouble between Robey and accused (R. 13).

A certified copy of the entire record of trial of Sergeant Maples was introduced in evidence (Ex. A) without objection by the defense (R. 7). It contains testimony by Robey at that trial that he was never on any detail with accused and that accused never struck him (Ex. A, pp. 145,146). In his closing argument at the trial of accused, the trial judge advocate invited attention to this testimony at Maples' trial (R. 15).

4. By the specification, it is alleged that accused testified that while he was a corporal in Company D, 2d Engineers, he had an altercation, as described, with Robey. But there is no proof that accused so testified. The evidence shows, on the contrary, that accused testified that the altercation took place while he was a corporal in Company E. The case was prosecuted and possibly defended upon the theory that it was intended to charge that accused had testified that the event in question transpired while he was a corporal in Company E, and it will be assumed, without deciding, that the designation of the company in the specification as "Company D" was an error which, standing alone, did not injuriously affect the rights of accused.

As indicated, the evidence shows that on the date alleged, accused, after having been duly sworn, testified in substance that while he was a corporal in Company E, 2d Engineers, he had Private Robey on a police detail and that the two had words which resulted in accused striking Robey. There is competent evidence that Robey was not, in fact, a member of accused's detail and did not have an altercation with him at the time testified to by

accused, that is, while accused was a corporal in Company E, 2d Engineers, for the records show that Robey did not become a member of Company E until after accused had ceased to be a member of it, and the first sergeant testified that Robey was not "worked" in Company E prior to accused's separation from that company. There is no competent direct evidence, and no substantial circumstantial evidence that Robey was not on a detail under accused at another time or that the altercation did not take place at another time. The competent evidence does not preclude a reasonable hypothesis that the detail and altercation testified to by accused occurred, as alleged in the specification, subsequent to the time at which accused was a corporal in Company E, for he and Robey served at the same post in different companies (D and E respectively) of the same regiment after March 8, 1929, and in the same company (D) after October 2, 1929. The only proof that accused's false testimony as to the time of the alleged occurrences was not the result of an honest, and perhaps natural, mistake, but was given corruptly and with knowledge of its falsity, an essential element of the offense of false swearing, lies in whatever inferences may be drawn from the fact that his testimony was, as to the detail of time, untrue and pertained in that particular to a matter within his knowledge. In view of the considerable period intervening between the alleged occurrences and the testimony by accused and the reasonable possibility that the occurrences may actually have taken place while accused was a member of Company D, as he was alleged in the specification to have testified, these inferences of corrupt intent are by no means of a compelling nature. Such being the case, it becomes necessary to examine the effect of the consideration by the court in this case of Robey's testimony on Maples' trial as included in the record of that trial introduced in evidence and referred to by the trial judge advocate in his argument, as bearing upon the proof of corrupt intent.

Robey's testimony involved a positive and sweeping contradiction of that of accused in that Robey denied that he had been on a detail with accused at any time and denied that Robey ever struck him. It thus constituted the only substantial and direct evidence of the falsity of accused's testimony as a whole; and if his testimony as a whole was false the inference of corrupt intent would be inescapable. Robey's testimony was, however, wholly incompetent. Though the record of Maples' trial was properly introduced to show accused's testimony and to establish the alleged materiality thereof, no part of it beyond his own testimony was competent to prove the falsity of that to which he swore. To hold otherwise would be to violate the fundamental right of accused to cross-examine the witnesses against him.

No exception to the hearsay rule permitted the introduction by the prosecution in this case of the testimony of Robey at Maples' trial for the purpose of proving in this case the falsity of accused's testimony. It was error for the trial judge advocate to refer to Robey's testimony and for the court to consider it (C. M. 186441, Hays). That the court must have considered it and must have given it great weight is clear from the court's acceptance without comment of the trial judge advocate's reference thereto, from the fact that it constituted the only evidence sustaining the finding of the falsity of accused's testimony as a whole and from the fact that it was the only convincing basis of an inference of his corrupt intent. Consideration of the record as a whole leaves no doubt that the erroneous consideration of Robey's testimony materially influenced, if it did not determine, the findings of the court as to accused's corrupt intent, the very gist of the offense; and, that, therefore, this error injuriously affected the substantial rights of the accused within the meaning of the 37th Article of War.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

E. C. Miller, Judge Advocate.
William T. Burns, Judge Advocate.
Robert W. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C. M. No. 190674

MAR 29 1930

UNITED STATES	)	SECOND CORPS AREA
	)	
vs.	)	Trial by G. C. M., convened at
	)	Governors Island, New York,
Major EDWIN H. CHASE,	)	February 14, 1930. Dismissal.
Ordnance Department, U. S.	)	
Army.	)	

OPINION of the BOARD OF REVIEW -
McNEIL, BURNS and HOOVER, Judge Advocates,
ORIGINAL EXAMINATION by OLLIVETTI, Judge Advocate.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Major Edwin H. Chase, Ordnance Department, U. S. Army, being indebted to Private John A. Hull, 56th Ordnance Company, U. S. Army, in the sum of five hundred dollars ($500.00) on account of money loaned him by the said John A. Hull, did at Pig Point Arsenal, Portsmouth, Virginia, on or about the 3rd day of April, 1929, attempt to defraud Private John A. Hull in that, on the last mentioned date, the said Major Edwin H. Chase, with intent to defraud did deliver to the said John A. Hull a receipt for five shares of stock of the Clapp Engineering Company, an inactive corporation which had discontinued business operations and whose stock was of doubtful, if any, value which the said Major Edwin H. Chase then and there well knew, and did falsely claim and pretend that the loan of five hundred dollars ($500.00) theretofore received by the said Major Edwin H. Chase from the said John A. Hull was not a loan but had been paid to the said Major Edwin H. Chase by said John A. Hull with the request that Major Edwin H. Chase invest the same for said John A. Hull and that he the said Major

> Edwin H. Chase had in fact invested the said sum of five hundred dollars ($500.00) for the said John A. Hull in the purchase of five shares of stock in the Clapp Engineering Company, which said claim and pretenses were false and fraudulent which he the said Major Edwin H. Chase then and there well knew.

Accused pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. Private John A. Hull, Ordnance Department, testified that he had been continuously on duty at Nansemond Ordnance Depot, formerly Pig Point Arsenal, Portsmouth, Virginia, since 1921, and that accused assumed command of that depot during the year 1925 and remained thereat until on or about April 3, 1929. Witness had a savings account in a local bank in which he made periodical deposits through accused who held the bank pass book. He had followed this same arrangement with two commanding officers who had preceded accused and when the latter assumed command the arrangement was continued (R. 7-9). He lived near accused's quarters and visited there occasionally (R. 21). On one occasion accused and Mrs. Chase looked after him when he was ill (R. 24). About November, 1926, during a visit at accused's quarters the latter told witness that "he could make good use of $500", and, on the following day, witness asked accused for a blank check, filled it out in the amount of $500 and gave it to accused (R. 10), the understanding being that it was a loan. At this time witness had about $1116 in his savings account (R. 11). About a year thereafter (R. 24), he told a Chief Clerk Schroeder of this loan and they discussed it occasionally thereafter (R. 18,19). He never asked accused for repayment of the loan and never discussed the matter with him until about April 3, 1929, when accused was about to depart for duty at Raritan Arsenal. At this time witness went to accused and "asked him for everything he had" (R. 11) but accused gave him only the bank book. Witness then said, "Well, Major, how about the $500 you borrowed from me", whereupon accused held up a paper which looked like a "bond" and said, "Oh, I have invested that $500 of your money and $500 of my own money in the Clapp Engineering Company and as soon as I get up to Raritan I will get a few days off and run over to New York and have it changed" (R. 12). Witness then proceeded to a Captain Rogers' office and informed the latter of what had taken place, but, either on the same or the following day, returned to accused and said that he wanted something to show that accused had his money, whereupon accused gave him a receipt (R. 12,13,16) as follows:

"April 3, 1929.

This is to certify that I am holding for John A. Hull five shares of stock in the Clapp Engineering Co.

(Signed) E. H. CHASE." (R.14)

Witness accepted the receipt (R. 14). A short time thereafter accused came to witness' quarters and said, "Don't worry about your money, you won't lose a cent of it; that stock is good; I have $10,000 worth of that stock myself" (R. 15). Witness was surprised at the time of these occurrences and felt "just taken back" because he then first learned of accused's investment of the $500 (R. 16). Prior to this time he had no fears nor doubts concerning the transaction (R. 20,23,27). About July, 1929, witness had the matter looked into and upon the receipt of information that the stock was worthless, wrote a letter to accused requesting the return of the money, but upon failing to receive the money wrote a second letter demanding its return by July 13th (R. 33,34, Ex. 2). Accused still failed to send him the money so witness made complaint to his commanding officer. When "the 13th passed and some more days passed", witness thought he was not going to get his money. On September 29, 1929, witness received from accused $582.50, principal and interest at 6% (R. 27,28). At one time accused told witness that the stock was not paying dividends but in a letter to witness written after accused had left Pig Point Arsenal, accused said:

> "that my money was drawing so little interest in the bank, it was drawing three and one-half or so percent interest, and the reason he wanted the $500 to invest for me-- this was said later on after he had told me he had invested it-- that he wanted to invest it where I could make much more money" (R. 26).

Stewart Harold Clapp of East Orange, New Jersey, testified that, assisted by accused, he organized the Clapp Engineering Company on October 15, 1923, as a patent holding company for the purpose of marketing an automobile brake design. Witness was President of the Company while accused was a minority stockholder, having received 100 shares from witness for his assistance in promoting the concern. In 1923 some shares were sold to individuals at $100, par value, but no sales were made after November, 1926 (R. 37, 41). The company never paid dividends (R.45) and the stock was never listed with any stock exchange (R. 37). The company discontinued business in November, 1927, at which time witness gave up his connection therewith and accepted a position with the Otis Elevator Company. At this time the value of the stock, in witness' opinion, was "problematical", and on April 3, 1929, the value of the stock was "problematical * * * doubtful

value, if any". The company had no assets except its patents and it was difficult to state what they were worth. In witness' opinion the Ford Motor Company had infringed these patents, and in the event that suit might be instituted and successfully prosecuted the Clapp Engineering Company might receive considerable money as a result. Witness estimated that it would cost about $150,000 to institute and prosecute such a suit and that no legal action was contemplated at the time of trial (R. 44). Witness said the headquarters of the company were "in my house -- in my hat" (R. 40). Accused was cognizant of the company's condition because he kept in close touch with it, and presumably received a statement from the company treasurer in January, 1929, showing the "instability or doubtfulness of the concern continuing business" (R. 38). No stock of the company was ever issued in the name of John A. Hull; no application for stock was ever made on Hull's behalf; and no application was ever made for the transfer of stock from accused to Hull (R. 39).

4. Captain Lloyd R. Rogers, Ordnance Department, testified as a witness for the defense that at the time accused was leaving the Ordnance Depot in April, 1929, Hull showed him a note or slip purporting to be a receipt from accused to Hull for certain stock, and that he told Hull that he should have a note stating the value of the stock rather than one which only stated the number of shares. Although witness was Hull's company commander at this time he did not mention the matter to accused as he did not believe that Hull was going to lose his money since Hull had said that accused had told him he would send him the money as soon as he arrived at his new station (R. 51). On several occasions when Hull was reported drunk in quarters accused directed witness to see that he was taken care of by a hospital surgeon and sent to the hospital rather than to the guardhouse (R. 50).

Richard L. Schroeder, Chief Clerk, Nansemond Ordnance Depot, testified as a witness for the defense that while accused was on duty at the Pig Point Arsenal, he kept some bonds in witness' safe, and from time to time clipped coupons from them (R. 53,54). He also testified that in October, 1927, and later Hull told him that he had loaned accused $500 (R. 55). Hull always referred to the transaction as a loan but at the time the accused was leaving, Hull told witness that the accused had informed him that he had invested this money for him (R. 56). Hull was in the habit of going on periodical sprees (R. 58), but was considered a good machinist (R. 59).

Accused testified that when he relieved a previous commanding officer at Pig Point Arsenal in May, 1926, the latter told him that Hull was a very good man and a good machinist but was addicted to drink and in order to prevent him from squandering his money, the officer had induced Hull to give him the custody of his savings account pass book so that the money could not be drawn from such account without the knowledge of the officer (R. 60). After accused had been in command for about four months Hull went

on his first "spree", whereupon accused discussed the matter with him and referred to the bank pass book which had been kept by his predecessors. Hull then said, "All right, Major, you keep it too", so a few days thereafter Hull handed him the pass book and periodically thereafter handed over certain amounts to be deposited to the credit of his savings account. At this time accused was interested in the Clapp Engineering Company which he assisted Clapp in organizing (R. 61), and being very optimistic concerning its future and realizing that Hull was only drawing a small amount of interest on his bank account, said to the latter, "If you want me to I will invest some of your money in that company" and Hull replied "All right, sir". He then asked Hull if he desired to invest $500 and Hull replied in the affirmative and gave him his check for that amount (R. 62). When accused was about to be transferred to Raritan Arsenal, Hull walked into his office and stated, "I have got a sister who lives up in Pennsylvania and in case anything should happen to me she wouldn't have anything to show that you have got my stock", whereupon accused made and gave him a receipt for five shares of the Clapp Engineering Company stock (R. 63, Ex. 1). After accused's arrival at Raritan Arsenal, he received a letter from Hull concerning the investment (R. 63) but knowing Hull's tendency to get on "these sprees", during which he would spend all of his money, he decided to "put him off" for Hull's good (R. 64). He told Hull he would attempt to sell the stock for him but did so merely as a means of postponing the payment to Hull, thereby keeping him from squandering it when drunk (R. 83). On June 17, 1929, he wrote Hull as follows: "I hope to be able to get to New York in the near future and when I do will see what can be done toward selling the stock for you" (R. 83), and on July 8, 1929, wrote him as follows: "I told you that time I did not have the cash due to large expenses but as soon as my duties would permit I would go to New York and endeavor to sell your stock or purchase it from you as soon as I had the funds" (R. 83). Accused denied that the $500 was a loan or was ever considered as such. When the money was advanced to him by Hull the latter clearly and distinctly understood that it was to be an investment. At the time it was turned over accused did not need money as he had Liberty Bonds valued at $900 in his office safe which he could have used to procure a loan (R. 63). Accused never had any intention to defraud Hull, assured him at all times that he would not lose any money and paid him back the entire principal with interest (R. 65) after the Chief of Ordnance had directed him to do so (R. 81,82). Though accused did not purchase any stock for Hull or place any particular stock in Hull's name he considered that he was holding five shares for Hull included in the 100 shares represented by one certificate in accused's name. It never occurred to him that he should transfer the stock because "I was there serving with Private Hull at the place, and he knew I had it, and I had told him that it was on my certificate, and it never entered my head". In the event of accused's decease, Hull would have had no legal claim against accused's estate for the stock, but accused was confident that in such an event Mrs. Chase would repay Hull (R. 68,69). Accused believed that the stock was

very valuable. While he had written letters to Clapp expressing doubt as to the financial condition of the company and suggesting a receiver therefor and had, in 1927, offered to sell his entire holdings of 100 shares to Clapp for $600, he had been suspicious of Clapp with respect to the latter's possible intention to "freeze out" the minority stockholders and had written the letters in an endeavor to get Clapp to express his opinions in writing and disclose his plans (R. 71,72,73,74). One of the letters written to Clapp, dated June 14, 1927, was as follows:

> "Now to be perfectly candid, in view of conditions to date, and in the absence of any definite, concrete, details, it is my personal belief that there are no valid prospects of any reputable, or respectable manufacturer adopting the brake. Therefore, from your apparent refusal to furnish the detailed information asked for in my letter of June 7th, and from the statements made in your reply thereto of June 9th-- it is evident that the Clapp Engineering Company is hopelessly insolvent, and there are no valid or concrete prospects of contracts or agreements to be consumated in the reasonably near future" (R. 71).

Accused realized that the company had no physical assets but he considered the intrinsic value of the patents to be high, and believed that a successful suit for infringement might be brought against the Ford Motor Company (R. 64, 65,72). Hull gave Mrs. Chase a radio valued at about $250 as a Christmas gift after accused had advised against it (R. 67). Accused being a mechanical engineer and Hull a mechanic, they had many things of common interest and since they occupied adjoining quarters Hull visited him occasionally (R. 60), and "I wanted to help the man; I took quite an interest in Hull; he was a boy that when he is sober he was a very lovable character. It has always been my principle in life, you might say, to help the other fellow as much as I could * * *" (R. 65).

5. Hull testified, in rebuttal, that the radio was purchased in February, 1929, with accused's approbation (R. 108-110).

6. The evidence shows that, at the time and place alleged in the specification, accused delivered to Private Hull the receipt for five shares of stock of the Clapp Engineering Company described in the specification and stated that the money theretofore received by him from Hull had been invested by accused by the purchase of the five shares of stock. It is clear that the stock represented by the receipt and alleged to have been purchased as an investment for Hull was of a corporation which was wholly inactive in so far as business operations were concerned, and that the stock was of doubtful, if any, value. That accused knew the condition of the corporation and was fully aware that the only value of the stock lay in the possibility of a

successful law suit for infringement of patents owned by the concern, and that the company was without funds necessary to prosecute such suit, is fully established by the testimony of Mr. Clapp and accused. Hull testified that the money was turned over to accused as a loan and not as an investment. Accused testified that the money was delivered to him in order that he might make an investment for Hull and that he believed that to all intents and purposes it had been so invested. In view, however, of accused's failure to purchase specific shares of stock for Hull and to return the money when Hull demanded it, together with the fact that accused knew at the time the money was delivered to him that the stock in question was of extremely doubtful value and without earning power, it is believed that the court was fully justified in rejecting as untrue accused's testimony in this respect and in concluding that the money was in fact delivered to accused as a loan, that it was never actually invested for Hull, and that the receipt was given and the statements as to investment were made only as subterfuges wrongfully to avoid repayment of the loan when demanded. The evidence establishes the allegations that the receipt was delivered by accused to Hull with fraudulent intent, that the pretense that the money had been invested was false and fraudulent, and that the delivery and false pretense were made in furtherance of an attempt to defraud, by avoiding repayment of the loan as charged and found. These dishonest acts of accused were obviously unbecoming an officer and a gentleman and constituted a violation of the 95th Article of War. The fact that the money was finally repaid by accused does not alter the fraudulent character of the acts involved in the offense.

There is no direct proof, and the Board of Review does not find any convincing circumstantial evidence that at the time of delivering the receipt for the five shares of stock accused pretended to Hull, expressly or by implication, that the money theretofore delivered by Hull was received not by way of a loan but for the purpose of investment as alleged and found. Although there is thus a failure of proof as to this allegation it does not appear that such failure was material. The gist of the offense charged and proved lay in accused's fraudulent attempt to defraud Hull by avoiding repayment of the loan, this by means of inducing him to accept in lieu of money the stock of little or no value. Whether in fact accused made false statements concerning the nature of the original transaction by which accused received the money (facts which were of course within the peculiar personal knowledge of Hull as well as accused) neither adds to nor detracts from the force and fraudulent character of the pretenses with respect to the actual investment of the funds and the receipt for the stock.

The specification does not contain in terms an allegation that the fraudulent acts of accused were performed and the fraudulent statements of accused were made for the purpose of avoiding repayment of the loan

as shown by the evidence; it is alleged, however, that the fraud was perpetrated in an attempt to defraud and this allegation in connection with the remaining ones appear fairly to have apprised accused that it was intended so to charge him. Such being the case, and the defense having made no objection, it not appearing that accused was misled, and the proof supplying the omitted fact, it must be concluded that the fault in pleading did not injuriously affect the substantial rights of the accused (Par. 87 b, M.C.M.).

7. The Army Register shows that accused was born November 15, 1872, and was commissioned Captain, Ordnance Section, O.R.C., January 21, 1918, Major, Ordnance Department, U.S.Army, July 30, 1919, and Major, Ordnance Department (Regular Army), July 1, 1920.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War.

E. M. Allen, Judge Advocate.
William S. Burns, Judge Advocate.
Robert W. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
C. M. No. 190709

MAR 26 1930

UNITED STATES	)	FIRST CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Ethan Allen, Vermont, March 7, 1930. Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.
Private WILLIAM J. ODGEN (6127538), Battery C, 7th Field Artillery.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BEER, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined and found legally sufficient to support the findings of guilty of the Charge and Specification 2 thereunder and the sentence.

2. By Specification 1 of the Charge it is alleged that on January 24, 1930, accused stole an overcoat, property of the United States, issued to a Private Ausplund. The testimony shows that accused, after having been ordered to confinement, turned over this overcoat and another to his supply sergeant on or about January 26th. Ausplund testified that, on the evening of January 25th, he went to a locker in which the non-commissioned officer in charge of quarters kept the special made overcoats issued to men of the battery, and asked for his overcoat which bore the last four figures of his serial number, but that the coat was missing. It was shown that customarily the men obtained their coats from the charge of quarters who, when turning them over, checked the figures thereon with the serial numbers of the men asking for the coats; but that when rushed it was not always possible for the charge of quarters to check the numbers. The charge of quarters did not testify and the circumstances under which the overcoat here in question was removed from the locker and reached accused's possession were not otherwise proved. There being nothing to show that the coat was not removed from the locker by honest mistake, the possibility of which is suggested but in no wise controverted, or that it was wrongfully taken from the possession of the charge of quarters, it is not shown that the property was taken by trespass, an essential of the offense of larceny. The sole fact that it was

taken from the possession of the charge of quarters without the permission of Ausplund is not, under the circumstances of the case, sufficient to justify a reasonable inference that there was trespass in the taking. The evidence is not legally sufficient to support the finding of guilty of this specification.

3. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1 of the Charge, but legally sufficient to support the findings of guilty of the Charge and Specification 2 thereunder and the sentence as approved by the reviewing authority.

[signature], Judge Advocate.
[signature], Judge Advocate.
[signature], Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

C. M. No. 191076

June 3, 1930.

UNITED STATES	)	PANAMA CANAL DIVISION
v.	)	Trial by G. C. M., convened at Fort Clayton, Canal Zone, March 3, 1930. Dishonorable discharge and confinement for twenty-nine (29) years and six (6) months. U. S. Penitentiary.
Staff Sergeant RAYMOND PORTER (6045902), Medical Department.	)	

HOLDING by the BOARD OF REVIEW -
McNEIL, BURNS and CONNOR, Judge Advocates.
ORIGINAL EXAMINATION by HOOVER, Judge Advocate.

1. Accused was tried on the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification 1: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, did, at Corozal, Canal Zone, on or about August 13th, 1929, desert the service of the United States, and did remain absent in desertion until he was apprehended at the City of Panama, Republic of Panama, on or about January 31st, 1930.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, being at the time, an agent, clerk or employee of the Medical Detachment, Corozal, Canal Zone, did, at Corozal, Canal Zone, and or in the City of Panama, Republic of Panama, on or about July 18th, 1929, wrongfully and feloniously embezzle by fraudulently converting to his own use and benefit, the sum of one hundred and five dollars ($105.00), lawful money of the United States, the property of Hospital Fund of Station Hospital, Corozal, Canal Zone, which sum of money came into his possession, and under his control by virtue of specific instructions and his said employment.

Specification 2: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, being at the time an agent, clerk and or employee of the Medical Detachment, Corozal Canal Zone, did, at Corozal, Canal Zone, and or in the City of Panama, Republic of Panama, on or about August 1st, 1929, wrongfully and feloniously, embezzle by fraudulently converting to his own use and benefit, the sum of thirty two dollars ($32.00), lawful money of the United States, Property of Hospital Fund of Station Hospital, Corozal, Canal Zone, which sum of money came into his possession, and under his control, by virtue of specific instructions and his said employment.

Specification 3: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, being at the time an agent, clerk and or employee of the Medical Detachment, Corozal, Canal Zone, did, at Corozal, Canal Zone, and or in the City of Panama, Republic of Panama, on or about August 2nd, 1929, wrongfully and feloniously, embezzle by fraudulently converting to his own use and benefit, the sum of two hundred seventy-two dollars and nine cents ($272.09), lawful money of the United States, Property of the Hospital Fund, of Station Hospital, Corozal, Canal Zone, which sum of money came into his possession and under his control, by virtue of specific instructions and his said employment.

Specification 4: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, did, at Corozal, Canal Zone, and or in the City of Panama, Republic of Panama, on or about August 6th, 1929, with intent to defraud, falsely change or alter check No. 949, dated August 6th, 1929, drawn by the Hospital Fund, Station Hospital, Corozal, Canal Zone, and signed by Captain P. L. Moore, M.C. custodian of said Fund, on the Chase National Bank, Panama Branch, Panama, Republic of Panama, and payable to the order of "Cash" for seven dollars and fifty cents ($7.50), by inserting the figure "nine" (9) between the dollar mark and the figure seven (7) and by adding the word "ninety" just before the word seven on said check, which said check was a writing of a public nature and which said alteration thereon might operate to the prejudice of another. The said check as thus altered or changed, is in the following words and figures, to wit:

PANAMA CITY, R.P. August 6, 1929 192_ No. 949
THE CHASE NATIONAL BANK
Of the City of New York
PANAMA BRANCH

Pay to the
order of Cash $97.50

Ninety-seven and 50/100----------Dollars
POST HOSPITAL FUND COROZAL CANAL ZONE

Capt. P. L. Moore (Signed)
Capt. P. L. Moore, M.C., Custodian of Fund.

Specification 5: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, did, at Corozal, Canal Zone, and or in the City of Panama, Republic of Panama, on or about August 2nd, 1929, with intent to defraud, falsely change or alter check No. 947, dated August 2nd, 1929, drawn by the Hospital Fund, Station Hospital, Corozal, Canal Zone, and signed by Captain P. L. Moore, M.C. Custodian of said fund, on the Chase National Bank, Panama Branch, Panama, Republic of Panama, and payable to the order of Panama Railroad Company, for two hundred seventy two dollars and nine cents ($272.09), by inserting in said check as payee, "Staff Serg't Raymond Porter, Corozal, C.Z.", in lieu of Panama Railroad Company, payee, a writing of a public nature, and which said alteration thereon might operate to the prejudice of another. The said check as thus altered or changed, is in the following words and figures, to wit:

PANAMA CITY, R.P. August 2, 1929 192_ No. 947
THE CHASE NATIONAL BANK
Of the City of New York
PANAMA BRANCH

Pay to the
order of Staff Serg't Raymond Porter, Corozal, C.Z. $272.09

Two hundred seventy two and 09/100---------- Dollars
POST HOSPITAL FUND COROZAL CANAL ZONE

Capt. P. L. Moore. (Signed)
Capt. P. L. Moore, M.C., Custodian of Fund.

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, did, at Corozal, Canal Zone, and or in the City of Panama, Republic of Panama, on or about August 2nd, 1929, with intent to defraud, willfully, unlawfully and feloniously pass, utter, and or publish as true and genuine, a certain check in words and figures as follows:

PANAMA CITY, R.P. August 2, 1929 192_ No. 947
THE CHASE NATIONAL BANK
Of the City of New York
PANAMA BRANCH

Pay to the
order of Staff Serg't Raymond Porter, Corozal,C.Z. $272.09

Two hundred seventy two and 09/100----------Dollars
POST HOSPITAL FUND COROZAL CANAL ZONE

Capt. P. L. Moore. (Signed)
Capt. P.L.Moore,M.C., Custodian of Fund.

a writing of a public nature, which might operate to the prejudice of another, which said check was as he the said Staff Sergeant Raymond Porter, then well knew falsely altered and forged.

Specification 2: In that Staff Sergeant Raymond Porter, Medical Department, Corozal, Canal Zone, did, at Corozal, Canal Zone, and or in the City of Panama, Republic of Panama, on or about August 6th, 1929, with intent to defraud, willfully, unlawfully and feloniously pass, utter and or publish as true and genuine, a certain check in words and figures as follows:

PANAMA CITY, R.P. August 6, 1929 192_ No. 949
THE CHASE NATIONAL BANK
Of the City of New York
PANAMA BRANCH

Pay to the
order of Cash $97.50

Ninety-seven and 50/100---------- Dollars
POST HOSPITAL FUND COROZAL CANAL ZONE

Capt. P. L. Moore (Signed)
Capt. P. L. Moore.M.C., Custodian of Fund.

> a writing of a public nature, which might operate to the prejudice of another, which said check was as he, the said Staff Sergeant Raymond Porter, then well knew, falsely altered and forged.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor at such place as the reviewing authority might direct for twenty-nine years and six months. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. The evidence shows that during July and the early part of August, 1929, accused was First Sergeant and Acting Mess Sergeant of the Medical Detachment, Station Hospital, at Corozal, Canal Zone, Captain P. L. Moore, Medical Corps, was the Post Surgeon and in command of the hospital and detachment. Accused performed all administrative duties for Captain Moore and among other things made purchases for the hospital mess and prepared checks for Captain Moore's signature for payment of bills against the Hospital Fund. The checks were usually prepared on a typewriter by accused and he filled out the stubs in longhand (R. 13). Captain Moore testified that accused was his "main assistant", agent and clerk, and that, because of the press of professional duties, he reposed confidence in accused and put him "in charge of the office" (R. 13,14).

About July 18, 1929, Captain Moore told accused that he had decided to purchase a Victrola for the detachment from one Albert Lindo at a price of $105 (R. 14,40), and directed accused to prepare a check for this amount and complete the purchase. The officer, as custodian of the Hospital Fund, thereupon signed a check for $105 payable to "Cash" (R. 14,15: Ex. A), delivered the check to accused and gave him specific instructions to purchase the Victrola therewith (R. 14). On the check stub accused wrote the word "(Victrola)" (Ex. E). Captain Moore testified that he did not recall whether he told accused that he was to cash the check or turn it over in payment for the merchandise "but it was the same, whether he used the check to pay Lindo or whether he cashed it" (R. 15). On the same day accused purchased the Victrola from Lindo but did not make any payment thereon, agreeing with Lindo that payment should be made at the rate of $25 per month (R. 40; Ex. L) The check given to accused was cashed by the bank on which it was drawn on July 18, 1929 (R. 49; Ex. F). It was returned to Captain Moore along with the bank statement at the end of the month, hav-

ing been charged to the Hospital Fund. It bore a single indorsement "Raymond Porter" (Ex. A). Accused did not return to Captain Moore any of the proceeds of the check (R. 15) and the Victrola was subsequently paid for from the Hospital Fund (R. 16). Captain Moore testified that he was familiar with the handwriting of accused and that in his opinion the indorsement on the check was written by accused (R. 17). A witness, who qualified as an expert in the comparison and identification of handwriting (R. 45), testified that after a comparison of the indorsement on the check for $105 with proven specimens of the handwriting of accused (Exs. L,M; R. 41,43), he was of the opinion that all of the writings were made by the same person, that is, accused (R. 45) (Specification 1, Charge II).

On August 1, 1929, Captain Moore requested accused to prepare a check for the purpose of paying a bill of $32 which the Hospital Fund owed to Armour & Company. Accused made a check, payable to "Cash", for the amount in question, and presented it to Captain Moore who signed it as custodian of the Hospital Fund (R. 17; Ex. B). Accused prepared the check stub reciting the purpose of the check (R. 18; Ex. E) and Captain Moore directed him to use the check for the purpose of paying the bill. The Armour & Company bill was not paid (R. 18), but the check, bearing a single indorsement "Raymond Porter", was cashed by the bank on August 1, 1929 (R. 18,50; Ex. G). Accused has no authority to cash the check and keep the proceeds (R. 18). Captain Moore testified that he believed that the indorsement was written by accused (R. 19); and the handwriting expert, after comparison with accused's proven handwriting, as above, testified, in effect, that the indorsement was written by accused (R. 45) (Specification 2, Charge II).

On August 2, 1929, Captain Moore instructed accused to prepare a check for the payment of a bill of $272.09, owed by the Hospital Fund to the Panama Railroad Commissary. Accused prepared the check, payable to the "Panama Railroad Commissary", for the amount designated, and presented it to Captain Moore, who thereupon signed it as custodian of the Hospital Fund (R. 20; Ex. C), and gave it to accused, directing him to mail it in payment of the account. The check was not delivered to the Panama Railroad Commissary (R. 20), but the designation of the payee was altered to make the check payable to "Staff Serg't Raymond Porter, Corozal, C.Z." (R. 21; Ex. C) and the check, bearing a single indorsement "Staff Serg't Raymond Porter", was cashed by the bank on August 2d (R. 20-21, 50; Ex. C,G). Accused was not authorized to alter the check. Captain Moore testified that he believed the indorsement was written by accused (R. 22) and the handwriting expert testified, in effect, likewise (R. 45). The assistant manager of the Chase National Bank, which bank cashed the check, testified that the check for $272.09 (as well as the

other checks above described) would not, according to the custom of the bank, have been cashed without indorsement by the person to whom the money was paid (R. 49) (Specifications 3 and 5, Charge II; Specification 1, Charge III).

On August 6, 1929, Captain Moore instructed accused to prepare a check for $7.50 for use in purchasing Victrola records. Accused prepared the check for the amount mentioned, payable to "Cash", and presented it to Captain Moore who signed it as custodian of the Hospital Fund (R. 23, 24; Ex. D) and told accused to go to town and get the records that afternoon (R. 23). Accused brought back about six Victrola records. On the same day the check, bearing a single indorsement "Raymond Porter", and having been altered by typewriter to call for an amount of "$97.50" instead of "$7.50" (R. 25; Ex. D), was cashed by the bank (R. 24,49; Ex. G). Captain Moore testified that he recognized the handwriting of this indorsement to be that of accused (R. 25) and the handwriting expert testified, in effect, that the indorsement was made by accused (R. 46). The assistant manager of the bank testified with respect to this check that any person cashing it would be required to indorse it (R. 49) (Specification 4, Charge II; Specification 2, Charge III).

On August 12, 1929, accused absented himself without leave at Corozal (R. 31,32; Ex. J). He was apprehended by a civil police officer about February 1, 1930, at "House No. 2" (in Panama City, R. P.). At the time of his arrest he was dressed in civilian clothes and made no statement other than to say he was sick (R. 54-56) (Charge I and Specification).

3. By Specifications 1, 2 and 3, Charge II, accused is charged with the embezzlement of certain moneys, the property of the Hospital Fund of the Station Hospital, Corozal, Canal Zone. The evidence shows that checks for the respective amounts involved were entrusted to accused for the purpose of applying them in payment of specific obligations of the fund, but that he diverted them (in one case forged an alteration in the designation of the payee), indorsed and cashed them and failed to pay over or account for the proceeds. Though accused's dishonest purpose no doubt continued after the checks were cashed, it is positively shown that the fraudulent conversion in each case was accomplished before the checks were cashed, for each was deliberately diverted from its intended purpose and wrongfully indorsed prior to payment by the bank. The embezzlements of the checks (if it was embezzlement rather than larceny) were thus complete before the proceeds reached accused's possession. The checks having been embezzled, it was not possible for accused again to embezzle the proceeds, as charged. His application to his own use of the moneys was but an incident of his fraudulent conversion of the checks. The evidence does not, therefore, show embezzlement of the moneys. Proof of embezzlement of the checks does not support the findings

of embezzlement of the moneys, for the two offenses are separate and distinct and proof of one is fatally at variance with findings of guilty of the other (C. M. 188571, Simmons; C. M. 185034, Pitt). It follows that the evidence is not legally sufficient to support the findings of guilty of Specifications 1, 2 and 3, Charge II.

The evidence as to accused's forgery by alteration of the checks for $97.50 and $272.09, as charged by Specifications 4 and 5, Charge II, is circumstantial but convincing. The checks were delivered to and promptly cashed by accused, the alterations having been made in the interim. In view of all the facts in the case and the absence of any showing that the checks were out of accused's possession between the time they were signed and the time they were cashed, and in the light of the self-evident advantages to accused resulting from the alterations, the inference that, with fraudulent intent, he made the alterations, or caused them to be made, cannot be escaped. It is likewise proved that the forged instruments were uttered by accused as alleged in the specifications, Charge III. Though no witness testified that he saw accused present or cash the checks, it is shown that he alone indorsed them and that the bank required the indorsement of the person to whom the payments thereon were made. The essential elements of the offenses of forgery and uttering a forged instrument are established with respect to each of the two checks.

The evidence shows that at the time and place alleged in the Specification, Charge I, accused absented himself without leave and remained absent until apprehended about February 1, 1930. The duration of the absence together with the circumstances under which he absented himself sufficiently shows the intent to desert. The essential elements of the offense of desertion are established.

4. For the reasons above stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, Charge II and Specifications 4 and 5 thereunder, and Charge III and its specifications; legally insufficient to support the findings of guilty of Specifications 1, 2 and 3, Charge II; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty-two and a half (22½) years, the maximum sentence authorized for the offenses of which accused was properly convicted. Confinement in a penitentiary is authorized by the 42d Article of war for the offenses involved in Specifications 4 and 5, Charge II (forgery), and the Specifications, Charge III (uttering), recognized as offenses of a civil nature and so punishable by confinement for

more than one year by Section 843 of the Code of the District of Columbia.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C. M. No. 191180

MAY 24 1930

UNITED STATES vs. Private SOL NELLIS (6417970), Headquarters Battery, First Field Artillery.	EIGHTH CORPS AREA Trial by G. C. M., convened at Fort Sill, Oklahoma, March 20, 1930. Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW -
McNEIL, BURNS and CONNOR, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The record of trial in the case of the soldier named above, having been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence therein.

2. The accused was convicted as charged of fraudulent enlistment in violation of the 54th Article of War committed by wilful concealment of a discharge from the Army, June 4, 1925, under the name of Sol Nelson with character "Poor", to which he pleaded guilty. The only question needing notice here is whether the court committed reversible error in allowing the plea of guilty to stand and thereby remain available as a basis for findings and sentence.

3. The language of the court's questionsand defense responses thereto touching the plea of guilty (R. 4-5) evinces that this plea was advisedly entered by the accused after being informed of the meaning and effect and punitive consequences of the same. However, the court was under no duty to ascertain or make of record the fact that counsel for the accused had performed his duty to the latter in this particular (M.C.M., pars. 45 b, 70). The court was under the duty to intervene in the interest of the accused in the matter of his plea of guilty (a) should the evidence of

record have caused the court to believe that the plea of guilty "may have been entered improvidently or through lack of understanding of its meaning and effect", or (b) should the accused have made "a statement to the court, in his testimony or otherwise, inconsistent with the plea" (A.W. 21, M.C.M. par. 70). The Board of Review is of opinion, upon a careful examination of the record of trial as a whole, that neither ground of intervention existed in the instant case, and therefore that the plea of guilty of itself affords sufficient legal basis for the findings and sentence (C. M. 118766).

As to (a) above, it should be noted that the evidence of record, so far from affirmatively disproving the specification (C. M. 118766) tends strongly to substantiate it. It shows that the accused practiced wilful concealment both by express negation and by silence while under the duty to speak. Concealment by negation appears from his answer "No" on his enlistment record of January 27, 1930, to the question, "Have you ever been discharged from the service (Army, Navy, Marine Corps, Coast Guard, or National Guard) of the United States, or any other service, on account of disability or through sentence of either a civil or military court?" (Ex. IV), in connection with Exhibit III and accused's statements on the witness stand (R. 15,16,17,19) which show that he was discharged on June 4, 1925, through (i.e., in consequence of) sentence of a military court, having on that date been discharged without court-martial proceedings on account of fraudulent enlistment resulting from a concealed sentence to dishonorable discharge in a previous enlistment. Concealment by silence while under the duty to speak appears from the deliberate failure of the accused to answer other pertinent questions (e.g., "Have you ever been discharged from any service, except with good character, and for the reasons given by you to the recruiting officer?"; "Have you ever served as an enlisted man in the United States Army, National Guard, Navy, or Marine Corps? _____ If so, state last service and date of discharge") in the prescribed enlistment record form signed by him January 27, 1930, and containing a statement immediately above his signature to the effect that all his answers to questions therein had been correctly recorded, and that all questions therein had been read to him (Ex. IV).

As to (b) above, the accused's reference on the witness stand to what he thought was "good service" (R. 17) is too shrouded in uncertainty of recollection (R. 21) to be noticed as a statement inconsistent with his plea of guilty. But irrespective of whether the accused made a positive assertion with respect to the nature of his service, it is manifest from his testimony as a whole that his reference thereto had to do with Army

service antedating his sixteen-day fraudulent enlistment beginning May 19, 1925 (Ex. I) and ending June 4, 1925 (Ex. III) (R. 17,18,20,21). From this latter enlistment he admitted that he received a blue discharge (R. 5), and he made no specific statement relative to the character given on it. The court was not required to torture the aforementioned reference into a characterization by the witness of this sixteen-day period of service under the name of Sol Nelson ending in a discharge on June 4, 1925, with character "Poor" (Ex. III), which by plea of guilty the accused confessed to have concealed and which the evidence of record, above noticed, shows that he did conceal. Consequently, the Board of Review is of opinion that no reversible error appears in the trial proceedings and that the record of trial, as a whole, is legally sufficient to support the findings and sentence.

E. M. Kelley, Judge Advocate.

_____, Judge Advocate.

J. W. Cramer, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 191369.

MAY 8 - 1930

UNITED STATES	)	PHILIPPINE DIVISION
vs.	)	Trial by G.C.M. convened at Cuartel de Espana, Manila, P.I., March 14, 1930. Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.
Private WILLIAM SELUSKEY (R-761371), Company K, 31st Infantry.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William Seluskey, Company K, 31st Infantry, did, at Manila, P.I., on or about February 28, 1930, commit the crime of sodomy by feloniously and against the order of nature having carnal connection with Inis Bulac, a male human being, by mouth.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that about 7.15 P.M. on the evening of February 28, 1930, accused, who had been drinking heavily, was found on "part of the wall", at the "corner of Cabillo", on "Gin Hill" Manila, P.I., with a native Filipino. Accused was lying on his back on the ground and his penis was in the native's mouth. Private Joseph Gillan, of the Military Police Detachment, who was a witness to the act and apprehended accused, testified concerning

the identity of the Filipino only that he was a "native" man (R 6-7). A native policeman to whom Gillan turned over the Filipino testified that he did not know the Filipino's name (R 10).

4. The specification charges accused with "carnal connection with Luis Bulac, a male human being" but there is no proof in the record that the person with whom accused committed sodomy was Luis Bulac. The failure to prove, as alleged, the name of the person with whom the accused had carnal connection, leaves the evidence legally insufficient to support the findings of guilty (C.M. 157842, Greening).

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 191403.

MAY 8 - 1930

U N I T E D S T A T E S	)	EIGHTH CORPS AREA
vs.	)	Trial by G.C.M. convened at Kelly Field, Texas, April 7, 1930. Dishonorable discharge, suspended, and confinement for one (1) year. Disciplinary Barracks.
General Prisoner JAMES O. EVANS.	)	

OPINION by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 69th Article of War.

Specification: In that General Prisoner James O. Evans, formerly Private, Battery D, 18th Field Artillery, having been duly placed in confinement at Fort Riley, Kansas, on or about the 4th day of March, 1929, did, at Fort Riley, Kansas, on or about the 1st day of November, 1929, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement for one year. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 251, Headquarters Eighth Corps Area, April 21, 1930.

3. The evidence shows that on November 1, 1929, while accused was a "parole" general prisoner, that is, "a Class 'A' prisoner working without sentry", at Fort Riley, Kansas, he was sent from the guardhouse at 7 A.M. to a designated place for work. He failed to report at this place, whereupon search was made for him but he was not found. He did not return to the guardhouse that evening (Exs. 1,2,3,4).

Accused testified that he "broke confinement" because his father was ill and unable to work and accused wished to assist him. On leaving Fort Riley he went to his father's home at Pittsburg, Kansas, where he worked and contributed to the support of his parents for about two months. Then he went to Houston, Texas, where he obtained employment and continued to contribute to the support of his parents (R. 12-15).

4. The evidence thus shows that accused absented himself without authority from the post at which he was serving a sentence to confinement, but at the time of absenting himself he was working without a sentry and was not under any physical restraint. Accused testified that he "broke confinement", but in view of all of the evidence, this language cannot be construed as implying an admission that he was under physical restraint at the time he absented himself. "Confinement imports some physical restraint" (M.C.M., p. 153); and the Manual for Courts-Martial provides that

> "A violation of a restraint on liberty other than arrest or confinement - for example, the restraint imposed on a prisoner paroled to work within certain limits - should be charged under A. W. 96." (M.C.M., p. 154.)

Although the facts in the present case may show the commission by accused of some other offense, they do not establish the offense charged, that is, escape from confinement, for the physical restraint which is the essence of confinement did not exist.

While the terms of the "parole" under which accused was working do not expressly appear, it might be assumed that his failure to report for work at the designated place and to return to the guardhouse at the appointed time, and his departure from the post amounted to violations of that parole. But it has been held that a violation of parole under such circumstances is

not a lesser offense included in the offense of escape from confinement, and that a conviction of violation of parole under a charge of escape is not legally justified (C. M. 189830, Walcher; C. M. 148683, Rich).

Prior to the promulgation of the Manual for Courts-Martial, 1928, in which appears the rule with respect to charging under the 96th Article of War violations of restraint other than physical restraint, as above quoted, the Board of Review used language in certain cases (C. M. 148252, Pavlick; C. M. 155305, Acree) indicative of an intention to hold that the restraint imposed in "parole" cases such as the one now under consideration was such restraint that a breach thereof would amount to escape within the meaning of the 69th Article of War. Language used by the Board in another case (C. M. 148683, Rich) passed upon prior to the 1928 Manual, suggests the contrary view. Whatever the rule may have been prior to the 1928 Manual, however, there can be no doubt, in view of the explicit language of that Manual above quoted, that the stated definition of escape in violation of the 69th Article of War is intended to exclude the case of a prisoner "paroled to work within certain limits" who leaves his place of duty and the station where he is serving his sentence.

5. For the reasons hereinabove stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
C.M. 191413

JUN 2 - 1930

UNITED STATES vs. Private WILFRED J. LAPOINTE (6122998), Battery B, 11th Field Artillery, and Private THEODORE P. FLEMING (6814584), Battery B, 11th Field Artillery.	HAWAIIAN DIVISION Trial by G.C.M., convened at Schofield Barracks, T. H., March 24, 1930. Lapointe: Dishonorable discharge, suspended, and confinement for three (3) years. Fleming: Dishonorable discharge, suspended, and confinement for one (1) year. Disciplinary Barracks, as to each.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

The record of trial in the case of the soldiers named above, having been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentences, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence as to each accused. Though there is no direct proof thereof, penetration may reasonably be inferred from the facts in evidence. The offense of sodomy, including penetration, requires strict proof; but circumstantial evidence may be sufficient (C.M. 119377, Ellison; 119378, McBryant).

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

I concur:

E. A. FREGER,
Major General,
The Judge Advocate General.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

May 9, 1930.

Military Justice
C. M. No. 191422

UNITED STATES v. Private GEORGE A. DRAGOON (6673880), Company G, 26th Infantry.	)	FIRST DIVISION Trial by G.C.M., convened at Plattsburg Barracks, New York, April 10, 1930. Dishonorable discharge, suspended, and confinement for six (6) months. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private George A. Dragoon, Company "G", 26th Infantry, did, at Plattsburg Barracks, New York, on or about July 21, 1929, desert the service of the United States and did remain absent in desertion until he surrendered himself at Plattsburg Barracks, New York, on or about March 18, 1930.

Accused pleaded to the Specification, guilty except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave"; of the excepted words, not guilty, of the substituted words, guilty; to the Charge, not guilty but guilty of violation of the 61st Article of War. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced.

He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years. The reviewing authority approved the sentence, reduced the period of confinement to six months, directed its execution but suspended the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement. The sentence was published in General Court-Martial Orders No. 211, Headquarters First Division, April 22, 1930.

3. The record of trial shows that after accused entered his pleas of guilty to absence without leave for the period alleged in the specification and not guilty of violation of the 58th Article of War but guilty of violation of the 61st Article of War, the prosecution announced that it rested its case. No evidence was introduced by either the prosecution or the defense.

4. The only question presented by the record in this case requiring consideration is whether or not the pleas of guilty to absence without leave for the period alleged are legally sufficient to support the findings of guilty of desertion. The Manual for Courts-Martial, 1928, paragraph 130 a, page 143, plainly supplies the answer to this question, as follows:

> "* * * a plea of guilty of absence without leave to a charge of desertion is not in itself a sufficient basis for a conviction of desertion. In such a case no inference of the intent not to return arises from any admission involved in the plea, and therefore, to warrant conviction of desertion, evidence, such as evidence of a prolonged absence or other circumstances, must be introduced from which the intent in desertion can be inferred."

It has been repeatedly so held by the Board of Review with the concurrence of The Judge Advocate General. See C. M. 151647, Wright; C. M. 151386, Wilson; C. M. 144470, Bruce; C. M. 143989, Wall.

The pleas of guilty being themselves an insufficient basis of an inference of intent to desert, and there being no other proof of such intent, the record is legally sufficient to support only so much of the findings as involves findings of guilty of the lesser included offense of absence without leave as admitted by the pleas of guilty.

5. For the reasons hereinabove stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings as involves findings of guilty of absence without leave from July 21, 1929, to March 18, 1930, in violation of the 61st Article of War, and legally sufficient to support the sentence.

E. M. Weil, Judge Advocate.

William F. Burns, Judge Advocate.

Hubert D. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 191605.

UNITED STATES vs. Private ROBERT AMBROSE (6700395), Battery B, 15th Coast Artillery.	)	HAWAIIAN SEPARATE COAST ARTILLERY BRIGADE. Trial by G.C.M. convened at Fort Shafter, T.H., April 17, 1930. Dishonorable discharge and confinement for two (2) years and six (6) months. Penitentiary.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder and the sentence as modified by the reviewing authority.

2. Under Specification 2 of the Charge, accused was found guilty of the offense of sodomy by having carnal connection per anum with prisoner Bowman. There is in the record no evidence, direct or circumstantial, sufficient to show penetration, an essential element of this offense. The evidence does, however, sufficiently show that at the time and place alleged in the specification, accused committed acts which amounted to an attempt to commit sodomy with Bowman in the manner alleged, an offense lesser than and included within that charged.

3. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder and the sentence as modified by the reviewing authority, but legally sufficient to support only so much of the finding of guilty of Specification 2 of the Charge as involves findings of guilty of an attempt to commit sodomy with the person named at the time and place and in the manner alleged, in violation of the 96th Article of War.

_____ Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 191622

May 17, 1930.

UNITED STATES v. Private WALTER A. SHANLEY (6059666), 40th School Squadron, Air Corps, alias Private Michael R. Shea, Headquarters Troop, 12th Cavalry.	EIGHTH CORPS AREA Trial by G.C.M., convened at Kelly Field, Texas, April 28, 1930. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BEER, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty of Charge II and Specifications 1 and 2 thereunder.

2. By Specification 2, Charge I, it is alleged that accused on January 30, 1930, procured himself to be enlisted in the military service by wilfully concealing the fact that he was then "a Private in said 40th School Squadron, Air Corps". The evidence in support of this specification shows that at the time of his enlistment on January 30, 1930, he was already in the military service, and that on applying for enlistment he answered in the affirmative when asked whether he had served as an enlisted man in the Army, and replied "See Affidavit" in response to a question requiring him to state his last service and date of discharge. The affidavit referred to in his reply was not introduced in evidence. There is nothing in the declaration signed by the accused or elsewhere in the record to show that at the time of applying for this enlistment, accused concealed the fact that he was then a Private in the 40th School Squadron, Air Corps, or was otherwise in the military service. It follows that the evidence is not legally sufficient to show that accused's enlistment was procured by fraud (C. M. No. 185932, Stinner; C. M. No. 186540, Yost; C. M. No. 190368, Clark).

The maximum punishment authorized by paragraph 104 c of the Manual for Courts-Martial for the offenses of which accused stands properly convicted, i.e., two offenses of desertion terminated by surrender after an absence in each case of less than sixty days, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and the two specifications thereunder, but legally insufficient to support the findings of guilty of Charge I and of Specification 2 thereunder, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years.

E. Quechee, Judge Advocate.

William E. Burns, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 191631

JUN 3 - 1930

U N I T E D S T A T E S	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sill, Oklahoma, March 8
Major CHARLES B. THOMAS	)	and April 12, 1930.
(04689), Field Artillery.	)	Dismissal.

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BEER, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 69th Article of War.

Specification: In that Major Charles B. Thomas, Field Artillery, United States Army, having been duly placed in arrest at Fort Sill, Oklahoma, on or about February 8, 1930, did, at Fort Sill, Oklahoma, on or about February 8, 1930, break his said arrest before he was set at liberty by proper authority.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Major Charles B. Thomas, Field Artillery, United States Army, was, at Lawton, Oklahoma, on or about February 7, 1930, drunk and disorderly.

Specification 2: In that Major Charles B. Thomas, Field Artillery, United States Army, did, at Lawton, Oklahoma, on or about February 7, 1930, in a dangerous and threatening manner,

wrongfully point a loaded pistol at Captain Leroy E. Everett, 124th Field Artillery, Illinois National Guard.

Specification 3: (Finding of Not Guilty.)

He pleaded not guilty to the charges and specifications; and was found not guilty of Specification 3, Charge II, and guilty of the charges and remaining specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for the action of the President under the 48th Article of War.

3. The evidence shows that during the day and early evening of February 7 (Friday), 1930, accused, who was on duty as a student officer at the Field Artillery School at Fort Sill, Oklahoma, but quartered in an apartment building at 226½ D Avenue, Lawton, Oklahoma, was to some extent drunk (R. 37, 41,42,57). At about 7:30 or 8 P.M. on this date, he entered the quarters of a Captain Leroy E. Everett, 124th Field Artillery, Illinois National Guard, located in the apartment building, where Everett and a Major Flanigan of the New York National Guard were, and where a "party" had been in progress. Accused, after some other remarks had been made, objected to Everett "leaving the party to keep an engagement", and suddenly drew from his pocket a loaded .44 caliber revolver and pointed it at Everett. Major Flanigan, who observed accused's actions, gave a "yell" and took the weapon away from accused (Exs. III, IV) who resisted "not much if any" (Ex. III). Everett told accused to go to his apartment and sober up, and later left with Major Flanigan. Major Flanigan testified that at the time of this occurrence accused was drunk and did not appear to be in full possession of his faculties (Ex. III); and Captain Everett testified that accused was "not absolutely drunk but he had been drinking and was not sober", and was "somewhat" under the influence of alcohol. Both Flanigan and Everett had also been drinking. Everett and accused were on very friendly terms (Ex. IV). Major Flanigan testified with respect to the use of the revolver that "at the time it seemed a serious matter to me but after thinking the matter over I do not believe that Major Thomas was serious or meant it to be a threat" (Ex. III). Everett testified: "I do not believe Major Thomas had any serious designs on my person - I do believe that he was joking" (Ex. IV). Shortly after the occurrence Everett called Captain Hugh Boone, Field Artillery, who was also quartered in the building, into Everett's apartment and there Flanigan and Everett told Boone

what had recently occurred (R. 58,59). Boone formed the impression from their conversation and actions that they were afraid of accused (R. 63). On February 9th, at the suggestion of Everett, a request was made that accused be confined to the post "so that Captain Everett could live in peace down in Lawton" (R. 82,132,133).

A short time after Captain Boone's conversation with Flanigan and Everett, Boone went to accused's apartment and asked him as to the cause of the trouble but received an "incoherent" reply. Accused did not have a weapon at this time, but Boone observed two holes in the ceiling which he believed had been made by bullets (R. 67,68). When Boone entered the room accused, who appeared to be "entirely beside himself" with drink, ran to a bureau in a drawer of which Boone had previously seen a pistol, and attempted to open the drawer, whereupon Boone "ran after him and he closed the drawer and * * * jumped on his bed". Boone then left (R. 73). About 8 P.M. on the same evening, Night Chief of Police Jones of Lawton received three telephone calls within a few minutes from accused (R. 50,85) complaining of molestation by military police and asking for immediate protection. Upon receipt of the third call Jones proceeded with another policeman (R. 85), one in uniform (R. 147), to the apartment. They were directed to accused's room by Captain Boone who warned them that accused was armed. The police announced their identity and asked what was wanted, to which accused replied "You God damn sons of bitches you are not coming in here", and when Jones, because of the darkness of the room, flashed his flashlight in the door, accused "stuck a double-barreled shotgun" in his face and threatened to shoot if he entered (R. 85,86,94). At this point Captain R. G. Hunter, Field Artillery, who lived adjacent to accused in the apartment house, heard the disturbance and upon going into the hall found the two policemen at accused's door, each with a gun in his hand. Hunter requested that he be permitted to go in and speak to accused, and did so. Accused, dressed in underclothes and bathrobe, was on "the Chesterfield" just inside the door with two loaded guns, a shotgun and a rifle, in his lap. The guns were given to Hunter or one of the police officers (R. 39,86,95). The "safety" of the shotgun was "off" (R. 95). Accused was arrested for "being drunk, disturbance and assault with deadly weapons" and, as he refused to dress further, was taken as he was to the city police station (R. 86). As the party left the apartment accused gave "a kind of wild animal cry" of protest but soon "recovered his self possession" (R. 69). After arrival at the police station accused was, on the same night,

released in custody of Captain L. S. Arnold, Provost Marshal, Fort Sill, Oklahoma (R. 87). The latter returned accused to his quarters, remaining in his room about two hours or until he thought accused was asleep. Accused was drunk at this time (R. 100). At about 11:30 that night, or between 10 o'clock and midnight, accused, who was "muttering" at the time, fired two shots in the hallway of the apartment building. There was a cat in the hall at the time but no persons were visible (R. 71-73). The shots barely missed the bed of a man and his wife who lived in a room at the end of the hall (R. 77). In the opinion of Captain Boone, who witnessed the shooting, accused was not firing at either Captain Everett or Major Flanigan, but was "just shooting" (R. 73).

About 3 P.M., February 8, 1930, Major Herbert R. Odell, Field Artillery, Fort Sill, Oklahoma, was verbally directed by the Assistant Commandant of the Field Artillery School to serve upon accused the following letter written by order of the Commandant (R. 26-28; Ex. I):

"The Field Artillery School
Office of the Commandant.

Fort Sill, Oklahoma,
February 8, 1930.

"SUBJECT: Official Notice of Arrest.

TO: Major Charles B. Thomas, F.A.

1. Upon receipt of this notice and thereafter until released by proper authority, you will consider yourself in arrest and will restrict yourself to the following limits:

(a) From receipt of this notice until 6:00 PM this day, the city limits of Lawton and the public highway therefrom to and including the Fort Sill Military Reservation.

(b) From and after 6:00 PM this date, the Fort Sill Military Reservation.

2. You will immediately move your personal effects from your present quarters in Lawton to quarters No. 60-AB, Post Field.

3. Motor transportation for use in conveying your effects to the above designated quarters will be available to you upon telephone request to the Quartermaster, Fort Sill, Telephone No. 187.

4. In connection with your arrest as above ordered your attention is directed to A.R. 600-355.

By order of Colonel TYNER:

E. F. HART,
Captain, 1st Field Artillery,
ADJUTANT."

Major Odell delivered a copy of this letter to accused after reading it to him at the latter's quarters in Lawton, Oklahoma, at 5:15 P.M. on that date. Accused appeared to understand the "contents and significance of the arrest", though suffering from what appeared to be a "hangover" (R. 28). Captain Hunter saw accused in the latter's apartment shortly after Major Odell had served the notice of arrest, at which time accused showed the letter to him. Accused was going about the apartment gathering up his things and seemed very much agitated in having only about forty-five minutes to comply with the order (R. 42). At about 7 o'clock the same evening, accused was seen driving toward the post on the main highway between Lawton and Fort Sill (R. 106). At 9:30 P.M., Captain Hunter visited accused in the quarters assigned him at Post Field, and found accused intoxicated (R. 43,44). At about 11 o'clock on the same night accused, while under the influence of liquor, appeared in his old apartment in Lawton and attempted to gain entrance thereto (R. 30-36). Later it was discovered that "someone had broken the door" (R. 44-46). Accused was not set at liberty by proper authority after having been placed in arrest on February 8th (R. 107,108). Brigadier General William M. Cruikshank arrived at Fort Sill at about 4 P.M., on February 8, 1930, for the purpose of assuming

command of the post (R. 29). He formally announced his arrival and assumption of command by general order bearing date February 8th. Within about two hours after his arrival he was "told everything that had been done concerning Major Thomas. He said he approved of it and it was all right" (R. 137).

The defense announced that accused had been advised of his rights as a witness and had elected to remain silent (R. 154).

4. The evidence shows that on February 7, 1930, the time alleged in Specification 1, Charge II, accused was drunk while about the apartment building in Lawton, Oklahoma, in which he was quartered. His conduct during the evening, including the reckless firing of shots from dangerous weapons, and his altercation with the civil police officers who came to his quarters at his solicitation, was of a nature which must be characterized as disorderly. The findings that accused was drunk and disorderly are fully supported by the evidence.

That accused wrongfully pointed a loaded pistol at Captain Everett, as alleged in Specification 2, Charge II, is clearly shown. The testimony of Major Flanigan, an eyewitness to this act, together with the evidence relating to the behavior and demeanor of Captain Everett and Major Flanigan following the occurrence, leave no doubt that the pistol was pointed in a dangerous and threatening manner, and that these officers at the time considered the transaction to be in the nature of a serious assault. Accused was unquestionably drunk to some extent when the acts described took place; and the defense contended, in making a motion for a finding of not guilty of this specification, that accused was so drunk as to be incapable of entertaining a specific intent to cause an injury to Captain Everett. No specific intent was alleged or found, and it need not here be determined whether or not such an intent could or did exist. Suffice it to say that accused's voluntary drunkenness was not legal excuse for the offense under consideration (Par. 126 a, M.C.M.).

The evidence also shows that accused breached his arrest on February 8, 1930, as alleged in the Specification, Charge I, by leaving the limits of the Fort Sill reservation contrary to the written and oral directions he

had received. It again appears that he was drunk at the time of the breach, but this fact has no bearing upon the legal propriety of the finding of guilty (Pars. 126 a, 139 a, M.C.M.). The defense, in making a motion for a finding of not guilty under this specification, contended that inasmuch as there was a change in commanding officers after the order for arrest was issued but before it was served upon accused, the order was without legal force. The point is without merit. Assuming that the order for arrest did not become binding upon accused until it was served on him, it is entirely clear that it was legally effective for its pronounced purpose when issued, and that, like any other legal order, continued in legal effect after the officer making it had ceased to exercise the command by virtue of which it was issued. There was nothing in its terms or in the circumstances under which it was given to indicate that it was intended to operate only until another officer assumed command of the post. Though the new commanding officer might properly have revoked the order upon his assumption of command he did not do so, but, on the contrary, approved it. The order, when served upon accused, was effective to place him in arrest within the meaning of the 69th Article of War and paragraph 20 of the Manual for Courts-Martial.

5. The charge sheet shows that accused, who is 34 years of age, entered the service as Second Lieutenant of Field Artillery, November 30, 1916; was promoted to First Lieutenant February 20, 1917; to Captain, August 5, 1917; and to Major, his present rank, on September 19, 1928.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is authorized for violation of the 69th and 96th Articles of War.

E. C. Wadden, Judge Advocate.

[illegible], Judge Advocate.

Dudley W. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C.M. 191638

UNITED STATES	)	FOURTH CORPS AREA
vs.	)	Trial by G.C.M., convened at Fort Benning, Georgia, April 17, 1930. Confinement for six (6) months and forfeiture of $14.00 of his pay per month for like period. Fort Benning, Georgia.
Private First Class CECIL R. GILES (6344069), Company A, 24th Infantry.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

The record of trial in the case of the soldier named above, having been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held legally sufficient to support the sentence. Accused was found guilty of the offense substantially as charged, for the finding that the shoes had been "issued to Private George Patterson" is equivalent in substance to the allegation that they were "property of Private George Patterson." The finding that the shoes were property of the United States, furnished and intended for use in the military service may be disregarded as surplusage, since there remains the offense substantially as charged. The court erroneously substituted, under the charge, the 94th Article of War for the 93rd, but this may also be disregarded (C.M. 147387, Sys).

E. C. McNeil, Judge Advocate.

William E. Burns, Judge Advocate.

Lulu W. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 191693.

UNITED STATES vs. General Prisoner JAMES O. BOUDREAU.	)	PANAMA CANAL DIVISION Trial by G.C.M. convened at Fort Clayton, Canal Zone, May 1, 1930. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and CONNOR, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried on the following charge and specification:

CHARGE: Violation of the 69th Article of War.

Specification: In that General Prisoner James O. Boudreau, P.C. Department, General Prison Stockade, having been duly placed in confinement at Corozal, Canal Zone, since December 6th, 1929, did, at Corozal, Canal Zone, on or about April 4th, 1930, escape from confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to, and was found guilty of, the Charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that accused was a Class A paroled prisoner on April 4, 1930 (R. 9,11) at the Prison Stockade, Corozal (R. 10). At about 11:15 A.M. on this day, accused left the stockade without guard to go to the Mess Hall about 200 yards away to get ice for the prisoners, - a routine duty which he performed daily and which should have taken about fifteen minutes. He did not return (R. 9,11,13) until April 16, when he was brought back under guard. Accused chose to remain silent (R. 13).

4. The accused was charged with escape from confinement, and "confinement imports some physical restraint", M.C.M., page 153. Since the prosecution failed to show that accused broke away from "some physical restraint", but on the contrary was permitted to leave without guard or other physical restraint, the essential element of the crime alleged was not established by the proof. In C. M. 191403, Evans, circumstances very similar to the instant case are recited, and the Board of Review held:

> "Although the facts in the present case may show the commission by accused of some other offense, they do not establish the offense charged, that is, escape from confinement, for the physical restraint which is the essence of confinement did not exist".

While the evidence shows that accused committed some offense analogous to breach of parole in violation of the 96th Article of War, he cannot be punished therefor in this instance inasmuch as he was not charged with such an offense. Breach of parole is not a lesser included offense where an accused is charged with escape from confinement. See C. M. 189830, Walcher.

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence.

E. C. McNeil, Judge Advocate.

_____, Judge Advocate.

Jno. M. Cramer, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 191695

U N I T E D S T A T E S	)	EIGHTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Logan, Colorado, March 4-7, 1930. Dismissal.
Captain JOSEPH S. JOHNSON, Jr. (0-8430), First Infantry.	)	

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BEER, Judge Advocate.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93d Article of War. (Finding of Not Guilty.)

Specification: (Involuntary manslaughter - Finding of Not Guilty.)

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Captain Joseph S. Johnson, Jr., 1st Infantry, United States Army, did, at Fort D. A. Russell, Wyoming, on or about December 7, 1929, wrongfully and unlawfully drive an automobile in a reckless manner at a high rate of speed and while he was drunk and as a consequence thereof did cause the death then and there of one Louise H. Early.

Specification 2: In that Captain Joseph S. Johnson, Jr., 1st Infantry, United States Army, was, at Fort D. A. Russell, Wyoming, on or about December 7, 1929, drunk in post.

He pleaded not guilty to the charges and specifications, and was found not guilty of Charge I and its specification, and guilty of Charge II and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for the action of the President under the 48th Article of War.

3. The evidence shows that at about 11:30 P.M., December 7, 1929, accused, after leaving a gathering of officers, reserve officers and ladies (R. 96,151,155) at the First Infantry Club at Fort Francis E. Warren, then Fort D. A. Russell, Wyoming (R. 83), drove his Studebaker Sedan automobile (R. 188), with one Mrs. Louise H. Early as a passenger, rapidly along Randall Avenue, a road on the military reservation, in an easterly direction, towards the City of Cheyenne (R. 83,103). Before reaching the boundary of the reservation, the automobile was seen to swerve to the left. It very soon thereafter crashed (R. 84,85) into a brick and iron gate pillar on the left or north side of the road (R. 50,60; Ex. 3). Nearby persons hearing the crash of the collision hurried to the scene (R. 45,60,86,106) and there found the automobile in a wrecked condition, the frame bent and twisted, the motor thrust back several inches, the radiator, bumper, fenders, headlights and steering wheel damaged, the windshield broken (R. 180,181), and the left front tire flat (R. 191,210). The pillar was demolished (R. 114, 132). The car was turned somewhat across the road and the dead body of Mrs. Early was lying along and near the right side, the right front door of the car being open (R. 49,60,175). Mrs. Early's neck had been broken (R. 135) and she had received severe gashes on the head and other parts of her body (R. 42). Accused was in the front seat but had fallen over toward the right and an arm was hanging outside the right-hand door (R. 47,54,66). He was apparently unconscious and remained in the seat in an unconscious or semiconscious condition for perhaps half an hour (R. 47,48,56,74,166,175,176) and until finally removed and taken in an automobile to the station hospital (R. 168). After his arrival at the hospital, two medical officers examined him and formed the conclusion that he was very drunk (R. 112,123). At this time it was found that he was suffering from a cut across the bridge of his nose and from some slight cuts and abrasions of slight importance on his body (R. 113). The road along which accused traveled just prior to the collision was straight for several hundred yards (Ex. 3), was 60 feet wide from gutter to gutter, was arched and had a comparatively flat, oiled driving surface which was on the average about 27 or 28 feet wide (R. 37,38).

There was a street light on the north side of the road about 28 yards from the pillar (R. 34). The brick pillar into which the automobile crashed was slightly less than three feet square and was about six feet high with iron wheel guards on the sides next to the road (R. 33; Ex. 3). It was one of two pillars situated on either side of the road and outlining the entrance to the reservation (Exs. 1,3). The pillars were slightly more than 32 feet apart (R. 33). The authorized maximum speed limit on the road within the reservation was 30 miles per hour (R. 41) and in the City of Cheyenne on the continuation of the road was 30 miles per hour because it was a through street (R. 189). Several witnesses testified that the speed limit of 30 miles per hour on the road within the reservation was frequently exceeded (R. 141,190).

The gathering at which accused was present just before the occurrences above described was an informal one for the entertainment of reserve officers, who had come to the post for the purpose of engaging in a pistol match with officers of the First Infantry, and was in progress during the afternoon and again in the evening (R. 72,151). There was card playing, and liquor was served in the club rooms or nearby (R. 72,80,104,152).

Second Lieutenant Elmer L. Hager, 20th Infantry Reserve, testified that during the course of the afternoon he saw accused take one drink of liquor at the club. Some time before 6 P.M., witness went with accused to Mrs. Early's home in "town" and dined there (R. 79,80). Accused appeared to be in full possession of his faculties and sober at this time. No liquor was served at Mrs. Early's home (R. 80).

Captain James R. Hoffman, Infantry, Reserve, testified that he saw accused at the club during the afternoon and evening. Witness "saw liquor being passed around and various ones taking it" during the evening and, while he did not recall that he saw accused drink any of it, noted that accused "was in a slightly hilarious condition and having a good time" (R. 72,73). He "recited poetry" as did others in the party and was not "particularly different" from others of the party who "were having a good time" (R. 76,77).

First Lieutenant Edwin B. Allen, Reserve, testified that he saw a "little" liquor at the club during the gathering and that when leaving the club at approximately the same time at which accused left, asked accused

if he wanted witness to drive his car. Witness did this because a "woman that was in the party seemed to be afraid to ride" with accused as driver. Accused declined the offer and nothing more was said (R. 104,109,110). The woman, however, did not ride with accused but became a passenger in an automobile with witness and Lieutenant Arnbrecht (R. 110). Witness' car followed accused at a short distance until they reached Randall Avenue, the main road leading toward Cheyenne, but thereafter accused "gained a considerable distance" before the crash occurred (R. 106). Before reaching the main road both cars drove around some sharp curves which could not be taken at high speed and accused did not appear to have any difficulty with his car (R. 105,108). The night was "fairly dark" and witness did not recall that there were any lights along the road (R. 107).

First Lieutenant Elmer F. Arnbrecht, Cavalry, Reserve, testified that he was at the gathering during the evening and, although he did not see accused drink liquor, believed that "he had been drinking", this because of his "mood" - "he was very jolly, reciting poetry and one thing and another" (R. 99,102). Witness further testified that accused "was walking all right, he went out before we did, I was standing in the hallway just looking out on the street and I noticed he came on up and run on out and got into the machine" (R. 87). On leaving the club, the car driven by witness followed accused's car at a distance of about 50 feet (R. 84). Accused appeared to have no difficulty in taking the curves on the road (R. 88). The two cars entered the road leading to Cheyenne with about the same distance between them. Witness believed that at this point they were about a half mile from the spot at which the collision took place (R. 101). Witness' car proceeded along the road toward Cheyenne at about 35 or 40 miles per hour - "not over 40" (R. 84), while accused proceeded at 50 or 60 miles per hour (R. 103). Accused's car, which witness could distinguish by the tail light (R. 88,89), was, just before the collision, seen "swerving for perhaps a quarter of a minute". At the instant of the collision witness believed that he had progressed along the road to a point about 50 or 75 yards beyond the last barracks building (R. 85) which, according to a map introduced in evidence as Exhibit 1, was about 948 yards from the scene of the collision, but witness estimated that at the time of the crash the distance between his car and that of accused was about 350 yards (R. 89,97,101). After hurrying to the scene of the crash, witness left Lieutenant Allen there and returned to the First Infantry Club and notified a Lieutenant Killen of

what had taken place (R. 86,91).

Mrs. Bessie Archuequette testified that she heard the crash of the collision and ran about a hundred yards to the scene (R. 45). She at first believed from accused's appearance that he was dead but later discovered that he was breathing, whereupon "we raised him back up in the car" (R. 47). When asked as to whether she believed he was drunk or sober, she testified that she "could not say about that, only I smelled alcohol". While accused was still in the car he "was trying to start the car, and then they told him he could not start his car, and he said he wanted to start it and go home". He did not appear to know that "there was any woman there" (R. 48).

Sergeant Robert Megallis, Quartermaster Corps, testified that he heard the crash of the collision and hurried a short distance to the scene (R. 60). He could not say that he smelled alcohol on accused for the reason that "there was alcohol on every other thing, radiator compound, or whatever it was", and he did not know whether accused was drunk or not - "he was shook up pretty bad. I was not certain which he was" (R. 63,69). He gave an officer who was present instructions to take accused to his quarters, thinking that he would be better off there than at the hospital (R. 62).

Major F. H. Petters, Medical Corps, testified that he was Officer of the Day at the hospital when accused was brought in on the night of December 7th (R. 111). Witness examined him at about 11:50 or 11:55 P.M. for a period of five or ten minutes (R. 114,115), and found "several small wounds on his body, none of them of any consequence, and one cut over the bridge of his nose, apparently superficial, and apparently at that time of no particular consequence as far as his general condition was concerned" (R. 113). Witness applied a small dressing to the cut on accused's nose (R. 119). The cut was about half an inch long and if witness had stitched it would have used but one stitch (R. 115). Witness did not find any other wound on accused's scalp or about his head (R. 155,119). Accused's nose was not broken (R. 266) though the bones of the nose are very thin, fragile and brittle (R. 257). Witness found no evidence of "surgical shock", the only shock "recognized as a diagnosis" by the medical profession (R. 255)

and believed that none of the actions or symptoms exhibited by accused could have been the result of shock (R. 112). He testified that surgical shock is evidenced by marked lowering of blood pressure and with loss of blood from the brain, usually exhibited by fainting (R. 256). It is possible that a person might be made irrational by a severe blow on the head (R. 118), but witness believed that there would be no difficulty in differentiating between the effects of shock and drunkenness except that the symptoms might be similar in the case of a "soporific drunk" (R. 256). At the time of the examination, accused staggered when he walked, was incoherent in speech and action and "very evidently was not at all certain as to what he was doing or where he was". Witness further described his condition as "incoordinate" (R. 112). Accused wandered about and because of the difficulty of controlling him and preventing him from becoming a nuisance about the hospital, witness detailed an enlisted man, a Private Sawyer, to take care of him. The two sat on a bench for a considerable time and while there witness observed that accused "had his arm around Sawyer's neck and was rubbing his face against Sawyer's face, and hugging him, and made one or two abortive attempts to kiss him" (R. 120,121). Witness believed that these actions were not induced by shock (R. 121) but by alcohol (R. 112,121).

Major Lewis E. J. Browne, Medical Corps, testified that on the night of December 7th he learned that there had been an accident and went to the hospital in order to render any assistance which might be needed. After arriving there he was directed by the post adjutant to examine accused in regard to his sobriety (R. 123). Witness thereupon made an examination which was "not very long" (R. 129,130) and found no wound other than the cut over the bridge of his nose (R. 124). The nose was not apparently broken. In witness' opinion, none of the actions of or symptoms exhibited by accused could have been due to shock (R. 125). Accused "talked very foolishly and incoherently, and was staggering when he walked, had to be assisted, and after he sat down on the bench in the corridor a soldier was put there to sit with him, and he was throwing his arms around this soldier and talking foolishly to him. He apparently thought he was with some lady, or someone making love to him" (R. 123,124). Witness testified that a blow on the head might cause a man to stagger and become incoherent "in a certain way" (R. 125,126). When witness received orders to examine accused he had been given no information that accused was in fact drunk (R. 128). Accused was

not given a "stomach wash" for the reason that while such treatment is given for the purpose of relieving drunken persons it is not given to determine whether or not they are intoxicated (R. 128). Witness did nothing to relieve accused's condition because he was not on duty at the hospital at the time (R. 129). He smelled liquor on accused at the time of the examination and again on the following morning between 10 and 10:30 (R. 130,131).

Major Harry E. Hearn, Medical Corps, testified that on the morning of December 8, 1929, at the request of Major Petters (R. 241,26), he took the "history" of accused and that in the course of this proceeding accused stated that "he had been in an automobile accident * * * and I think he said he was not driving, he was asleep at the time, and that some lady was driving the car. I asked him who the lady was, and as I recall it he said he did not know" (R. 246). Accused at this time appeared to be sober and in possession of his faculties (R. 247).

4. Accused made the following unsworn statement through his counsel:

> "I was not drunk nor under the influence of intoxicating liquor at any time on December 7, 1929.
>
> At the conclusion of the informal reception at the Officers' Club, on my way to town I was traveling along Randall Avenue at my usual speed, which is about forty miles an hour. Just prior to my arrival at the entrance of the reservation my left front tire went flat causing the car to swerve to the left. I tried to straighten it, Mrs. Early screamed, started opening the right door, I reached for her to prevent her from jumping, that was the last I remember until the next morning. I remember Major Moore sewing up my nose; I remember feeling the top of my head and that my hair was matted with clotted blood, and I felt an open wound. A nurse washed it out and said she would see a doctor to ask if it was necessary to take any stitches. I remember going home in an ambulance on the afternoon of December 8th. I am confident that I am in no way responsible for the accident and unfortunate death of Mrs. Early." (R. 238,239.)

Captain Peter G. Marshall, First Infantry, testified that he was present during the gathering at the First Infantry Club and saw accused for the last time at about 10:45 P.M., at which time "as far as I could observe he was sober". Witness did not recall that he had seen accused drink during the evening (R. 150), although liquor was served (R. 152). Accused was "clowning; he was laughing and joking as most of the people were". Witness stated that accused is of a "rather effervescent type, full of spirit and likes to clown a little bit" (R. 152).

Captain M. V. Buchanan, First Infantry, testified that he was present at the gathering and observed accused from time to time during the evening and up to about 11 o'clock, but did not see accused take any liquor and believed that he was sober (R. 157). Accused talked and joked in a rather loud manner at a card game which was going on in the club (R. 162), but accused is inclined to be "loud and hilarious" (R. 158).

Captain Forest N. Carhart, Reserve, testified that he was at the gathering on the afternoon and evening of December 7th and observed accused from time to time up until about 10 or 11 o'clock. Accused appeared "perfectly normal" as to sobriety (R. 165). On leaving the club, witness went to bed in accused's quarters to which he had been assigned as a guest, and after having been asleep was awakened and told of the collision. Witness and Captain Hoffman then drove to the scene. Accused was sitting in the car. Witness asked him if he was hurt and understood accused to reply "No" - "it was rather muffled, it was kind of a groan, he said no". Witness then repeated his question and received about the same response (R. 166). It did not occur to witness that accused was drunk (R. 167). Witness later took accused to the hospital where he was carried inside on a stretcher (R. 168). After arriving at the hospital, accused "just sat there, and there was an orderly held him up; he kept trying to get up and wanted to leave, but the orderly kept him there". He was talking incoherently. Witness remained at the hospital for an hour or an hour and a half (R. 169), but he did not talk to accused during this time (R. 173). Soon after accused was brought in, a Major of the Medical Corps "came and looked at him", remarked that he was "dead drunk", and walked away. Witness did not see any further examination (R. 169). Witness smelled liquor on accused (R. 171) and it was difficult for him to say whether he was drunk but his impression was that

he "was rather out of his head" (R. 170,171). This impression was strengthened by accused's actions in laughing hysterically and suggesting that a medical officer was trying to "kid him" when the officer asked accused as to the identity of the lady that had been killed (R. 171). At the scene of the accident, witness noticed that the left front tire of the car was flat (R. 167), but did not notice any marks on it (R. 173).

Lieutenant Colonel G. C. Lawrason, 20th Infantry, testified that he was a member of a board of officers convened to investigate the accident in which accused was concerned, and that the board met at the hospital at about 1:30 A.M., December 8, 1929. On this occasion he saw accused sitting quietly on a bench in the corridor of the hospital, not making any motions nor talking. Witness did not at this time form any opinion as to accused's sobriety, but the other members of the board, Majors Petters and Browne, told him that accused was not then competent to make a statement before the board (R. 259,260).

Captain Leland O. W. Moore, Medical Corps, testified that he examined accused on the morning of December 8, 1929, between 9 and 11 o'clock and did not at that time detect any odor of alcohol upon him. Accused appeared to be sober. Witness put some stitches in the wound on accused's nose but did not observe any other wounds, nor see any evidence that the nose was broken (R. 147-148).

First Lieutenant Wade D. Killen, First Infantry, testified that he went to the scene of the collision while accused was still in the car and examined the car but did not find any liquor (R. 177). One tire only, the left front one, was flat and "the front of the car was smashed in as though from a blow almost directly between the headlights, the engine was moved possibly from 6 to 10 inches back from its original mounting" (R. 177). From the appearance of the wreck witness gained the impression that the blow had not been received on either wheel (R. 179).

Captain Adolphus Bernard Pence, First Infantry, testified that, being on duty as provost marshal at the time of the collision, he went to the scene and examined the wrecked car, his examination covering a period of about ten minutes (R. 211). In the course of this examination he crawled partially under the car "in order to look the tire over to see whether or

not the tire was torn or any marks were upon the tire. The left front tire was flat, and I wondered, * * * because the spring was bent away from the tire. * * * I found no marks of any sort upon the tire" (R. 211,212). This witness on cross-examination, stated that prior to the trial he had said that he "was looking to see if there was anything that would assist" accused (R. 218). Witness also testified that he saw accused at the hospital following the collision and that accused arose to his feet twice and stated that he wanted to go home. He also brushed his hand across his face and complained that he was hurt. To witness, he appeared to be irrational and "not exactly in his right mind, it seemed as if from the injury I saw, and from what he told me that he might have been dazed from the accident" (R. 214). Witness asked a medical officer if he was going to treat accused's wound and received a reply to the effect that accused was not hurt but was only drunk. In witness' opinion, accused was not drunk (R. 214,215).

W. J. Deneen, manager of a garage (R. 179), testified that he took the wrecked car to his place of business (R. 180). Among other things he found that the tire on the left front wheel was flat, but, from the appearance of the wreck, thought that the deflation had not been caused by an impact with the pillar. He did not notice any cut in the tire. The tire was repaired prior to the trial (R. 192) but witness did not know whether it had been punctured or blown out (R. 193). The impact of the collision was such that both front tires had been pushed back against the "fender wells". In repairing the car it was necessary to replace both front and the right rear wheels. Witness recalled that the tires on the car were neither smooth nor new but that there was "some tread" on them. The casing of the left front tire was "pretty good looking" (R. 194).

Wilbur K. Mylar, a physician and surgeon of Cheyenne, Wyoming, and a reserve officer of the Medical Department, testified that during his practice since his graduation from Medical School in 1913 he had had experience in the diagnosis and treatment of cranial injuries and acute alcoholism. In witness' opinion the symptoms of concussion and acute alcoholism are almost identical (R. 199). Such being the case an accurate diagnosis could not be made without a careful examination for injuries of the head, a determination as to blood pressure, an examination of "eye grounds", and perhaps a spinal puncture to determine the condition of the spinal fluid (R. 198). Witness believed that a diagnosis of acute alcoholism would be incorrect where it appeared that a person had been rendered unconscious for a period of about

thirty minutes by an automobile accident and exhibited thereafter the symptoms testified to by Majors Petters and Browne but on the morning following the accident was apparently sober and without an odor of liquor on his breath (R. 197,198). In witness' opinion acute alcoholism could not actually disappear within nine, ten or eleven hours (R. 198). He believed that in a case such as that of accused as described to witness, a diagnosis of acute alcoholism, following an examination of only five or ten minutes would be no more than an "assumption" (R. 199). Witness examined accused in the early part of January, 1930, on the occasion of the annual physical examination of officers at Fort Francis E. Warren and found him "not up physically as he should be", extremely nervous and with a rapid heart action suggestive of goiter. Witness stated to another officer that he could not pass accused physically and the other officer took accused's blood pressure and told him that it was low (R. 205). (It was stipulated that the blood pressure at this time was found to be 95 (R. 261).) Witness saw accused about a month later and noted a marked improvement in his health. On this latter occasion an eye specialist told witness that he had examined accused's eye grounds and found indications that accused had previously suffered from an "intercranial pressure" (R. 205).

Philip Work, a physician of Denver, Colorado, testified that he had specialized in nervous and mental diseases subsequent to his graduation from Medical School in 1913; that he had served in the Army during the war slightly over two years, and that he had also served as a reserve officer of the Medical Department (R. 221). He had had considerable experience with cranial injuries and was also familiar with the symptoms produced by acute alcoholism (R. 222). In his opinion the two are "bound to be confused" (R. 228). A person suffering from concussion of the brain "has a period of foolishness in which he has no control of any of his functions" (R. 229). In witness' opinion, a diagnosis of acute alcoholism following an examination of five or ten minutes of a person in the condition of accused at the hospital on the night following the accident, as described to witness, would not be valuable (R. 225). In such a case, a thorough physical examination, particularly for head injuries, should be made. There should also be a test of the spinal fluid, use of the X-ray, and an examination of the eye grounds (R. 225). Witness observed in court a scar on the bridge of accused's nose and was of the opinion that "most any result might be expected from that" (R. 223). He also testified in this connection that the injury from which the scar resulted might have caused damage to the front part of the brain, that part which

is "commonly accepted among medical men as affecting the state of the emotions" (R. 232). In answer to a question as to whether a man in a shocked condition might be liable "to indulge in love making to a man who was sitting on the bench beside him in a hospital", witness stated that he "would not want to pass on that specific thing" but that he had seen many unexplainable actions of persons suffering from head injuries and that theoretically such a patient "might have been thinking of making love to some woman, and that is the last idea he had in his mind * * * these concussion cases hark back to the ideas they had in mind before they were hurt" (R. 236).

5. The evidence shows that at the time and place alleged in Specification 1, Charge II, accused drove his automobile at a high rate of speed, and that while so driving a collision occurred in the course of which Mrs. Early, the woman passenger named in the specification, lost her life. It was the contention of the defense that the collision was caused by sudden deflation of a front tire on the automobile, rendering the vehicle unmanageable and causing it to strike the pillar. Witnesses testified that they saw no cut or bruise on the tire which might have resulted from the collision and caused the deflation observed after the accident, but the nature of the impact and the demolition of the car and pillar were such that it would not be unreasonable to assume that the deflation may have been caused by the collision. It might be argued with some force in this connection that had the loss of control of the car been caused by sudden deflation of the tire the change of course, if such change resulted, would, in view of the excessive speed at which accused was driving, have been sudden also. That the change of course was not sudden is indicated by the testimony of the only eyewitness to the effect that the swerving was quite gradual, continuing over an appreciable period of time, during which, if the estimate of fifteen seconds be correct, the car at its estimated speed would have traveled about a fourth of a mile. But it is not necessary to reach a determination as to whether or not the tire was deflated before the collision, for in view of all the evidence the conclusion cannot be escaped that the collision must have resulted from lack of control inherent in the car's speed. Whatever may have been the fact as to the deflation of the tire and its cause, the Board of Review entertains no doubt that accused was driving at a recklessly high rate of speed just prior to the collision and that this reckless speed and nothing else was the direct cause of the collision and the death of Mrs. Early. Not only was accused driving in excess of the speed limit, but the testimony of the eyewitness, Lieutenant Arnbrecht, together with the inescapable inferences to be drawn from the

physical condition of the wrecked car and the obstacle it struck, show conclusively that accused was driving at such a rate of speed, - 50 to 60 miles per hour, that he could not expect to maintain control of his car for the purpose of preventing it, under conditions which he ought to have foreseen, from running off its course.

The record contains but little evidence of drunkenness during the period immediately preceding accused's departure from the First Infantry Club. One eyewitness testified, however, that he had been drinking intoxicating liquor. The testimony of the two medical officers who examined him at the hospital shows that he was very drunk a short time after the accident. These witnesses were experienced medical officers free, in so far as the record shows, from prejudices or predetermined conclusions. Their examinations of accused were brief but their opportunities to observe him were prolonged and the contention that they were mistaken in their diagnosis is, under all the facts, untenable. Physicians testified as witnesses for the defense that they did not believe that the examinations by the medical officers were sufficient to justify the diagnosis of acute alcoholism, these witnesses basing their beliefs largely on the assumed similarity of symptoms of drunkenness and shock resulting from cranial injury. It also appears that accused was in an unconscious condition for a considerable period immediately following the collision and that he received a wound which might conceivably have caused concussion of the brain. But there is evidence that the symptoms of drunkenness and concussion of the brain are parallel only in cases of soporific, or somnolent, drunkenness, a state in which accused was not found while at the hospital. It is to be noted that neither of the physicians who testified for the defense had opportunity to observe accused on the night of the collision. In view of the positive testimony of the medical officers who did observe him; the fact that he did drink intoxicating liquor on the evening of December 7th; the fact that one woman declined, apparently from fear, to ride in his car with him; the fact that he drove his automobile in such a manner that a fatal accident resulted; the fact that his actions following the accident were, to common knowledge, characteristically drunken ones; and the fact that on the morning following the accident he stated that he was asleep at the time it occurred, it must be concluded, as found by the court, that accused was drunk while driving his car just prior to the collision. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of Charge II and the specifications thereunder and warrants confirmation thereof.

6. At the beginning of the trial the defense counsel stated in connection with the relief of three members of the court, Colonel John H. Neff, Infantry, Law Member, and Majors Ballard Lyerly, Field Artillery, and Sherman R. Ingram, Veterinary Corps, and the substitution of officers in their stead, that the trial judge advocate had improperly brought about the relief of the three members for the reason that he had believed them disqualified and that he had thus, in effect, been permitted the use of three unauthorized peremptory challenges (R. 11-16). Counsel also stated that prior to the trial he had requested that Colonel Neff and Major Lyerly be brought before the court, apparently for questioning (R. 17). The trial judge advocate contended and the court ruled, in effect, and so advised the defense, that the court could not with propriety question the action of the appointing authority in relieving members of the court and substituting other officers in their stead (R. 12,13). One of the substituted members, Captain Martin, was challenged for cause by the accused, it being stated that the grounds for challenge lay in the circumstances of the relief and substitution above noted. The challenged member, having been sworn on his voir dire, stated that he knew of no reason why he could not give accused a fair and impartial trial and the challenge was not sustained (R. 19,23). Neither of the other substituted members was challenged for cause or peremptorily.

In his review of the record of trial, the Staff Judge Advocate, Eighth Corps Area, has made the following statements in regard to this contention of the defense:

> "The relief of the members of the court came about in this way. Upon examination of the charges against Captain Johnson and the evidence taken at the investigation of those charges, the Corps Area Commander directed the Commanding General, Fort Francis E. Warren, to make an investigation of the situation disclosed by that testimony, involving the affair at the Officers' Club of the 1st Infantry and out of which the charges against Captain Johnson arose. After the charges against Captain Johnson had been referred to the court for trial I received information as to the far-reaching investigation being conducted by General Howland and it then occurred to me that possibly Colonel Neff and Major Lyerly, who were

stationed at Fort Francis E. Warren might be disqualified to sit as members of the court due to the publicity given the facts in the case and the investigation then being conducted. Due to the number of officers who had attended the Club at the time in question and the wide knowledge of the facts, practically all the officers at Fort Francis E. Warren were disqualified to sit on the court and it was necessary to appoint officers stationed at Denver and Fort Logan. The available officers were practically exhausted without taking officers from Fitzsimons General Hospital. To save having to send the officers from Denver and Fort Logan to Fort Francis E. Warren, the case was ordered tried at Fort Logan, Colorado. To prevent any delay after the court had convened at Fort Logan by officers disqualifying themselves and to save the expenses of two officers from Fort Francis E. Warren to Fort Logan, if they intended to disqualify themselves, I directed Captain Scott, the Trial Judge Advocate and who is also an assistant in my office, that when he reached Fort Francis E. Warren to find out if it was the intention of Colonel Neff and Major Lyerly to disqualify themselves as members of the court. He was instructed that if he learned that such was their intention to notify me so that I could arrange for their relief and the appointment of other members in their stead. He was not concerned with the opinion these officers had formed either for or against the accused, but solely with the fact that an opinion had been formed which the officers believed would disqualify them from sitting on the court. It would have been a useless gesture to have two officers report as members of the court who intended to disqualify themselves. I am informed that upon arrival at Fort Francis E. Warren, Captain Scott did interview Colonel Neff as to whether or not he intended to disqualify himself; that Colonel Neff informed Captain Scott that he had heard so many reports or stories of the affair that he did not care to sit on the court. Colonel Neff did not state what the stories or reports were that he had heard and Captain Scott was not concerned with their nature, but only with the fact that Colonel Neff felt that he was disqualified. Later Major Lyerly called Captain

Scott and informed him to the same effect and in accordance with my instructions he then wired me that these officers were disqualified. The telegram also contained the names of the officers recommended to replace those relieved. I understand the names of these officers were furnished Captain Scott by General Howland. It is not known if Major Ingram had any knowledge of the facts in the case, nor were his views known, but it was deemed advisable to relieve him from the court.

The change in membership of the court was not with any view of obtaining a conviction, but solely with a view of obtaining a fair and impartial court."

These statements of the staff judge advocate are confirmed by a report, with accompanying papers, submitted June 19, 1930, by the reviewing authority and now filed with the record of trial.

The Manual for Courts-Martial, paragraph 37, provides that it is within the discretion of the appointing authority to make changes in the personnel of courts-martial and that he may relieve old and detail new members. There is no indication whatever in the record of trial or elsewhere that the change in personnel of the court in this case was the result of a desire on the part of the appointing authority, his staff judge advocate or the trial judge advocate to remove members of the court favorable to accused, to select members unfavorable to accused, or to do anything to detract from the fairness of the trial. On the contrary, in view of the statements of the staff judge advocate and the reviewing authority, it appears that the change in personnel was made for proper administrative reasons and without any possibility of injury to accused. The questioned actions of the trial judge advocate were performed in compliance with competent orders and in the capacity of a staff officer. It is not suggested by the defense and there is nothing to indicate that the court by which accused was tried, or any member thereof, was in fact prejudiced against accused, or that he did not receive a fair and impartial hearing. In the opinion of the Board of Review the contention of the defense in this particular as raised at the trial and as argued in the brief which accompanies the record, is without merit from the standpoint of the legal sufficiency of the record of trial, and otherwise.

7. All the points raised by individual counsel for accused in his brief accompanying the record of trial have been carefully considered by the Board of Review. Among other things, counsel by this brief invites attention to his motion at the beginning of the trial (R. 24a) to strike Specification 1, Charge II, upon the ground that it was but a duplication of the Specification, Charge I, which alleged manslaughter. He argues that inasmuch as the court acquitted accused of the charge and specification alleging manslaughter, it should have acquitted him also of the offense alleged in Specification 1, Charge II. Though both specifications allege acts of accused resulting in the death of Mrs. Early, other vital allegations are not duplications. The Specification, Charge I, alleges manslaughter, an offense denounced by the 93d Article of War, whereas the essence of the offense alleged by Specification 1, Charge II, is reckless driving of an automobile at a high rate of speed and while drunk, with fatal consequences, an offense cognizable under the 96th Article of War. The allegation of fatal consequences contained in the latter specification only sets forth an aggravating circumstance, which the court might properly find, and which the court and the reviewing and confirming authorities might properly consider in fixing the sentence. The latter specification does not in terms allege the crime of manslaughter and accused does not stand convicted thereunder of that offense.

Proof that accused's acts were to the prejudice of good order and military discipline or were of a nature to bring discredit upon the military service, was necessary to establish the offense charged in violation of the 96th Article of War; and was not required under the 93d Article. The necessity of thus proving a fact under the one charge which was not required under the other, alone marks the two offenses as distinct in law. Conviction of both specifications would not have placed accused twice in jeopardy for the same offense (Gavieres vs. United States, 220 U.S. 338; Carter vs. McClaughry, 183 U.S. 365; McRae vs. Henkes, 273 Fed. 108; p. 224, M.C.M.).

The Manual for Courts-Martial in laying down the rule that one transaction should not be made the basis for an unreasonable multiplication of charges expressly recognizes that

> "There are times when sufficient doubt as to the facts or law exist to warrant making one transaction the basis for charging two or more offenses." (Par. 27.)

It was not, therefore, legally improper to charge separately the two offenses described above, although both are referable to the same transaction; nor was it legally improper to deny the motion to strike one of the two specifications. In this connection the case of Commonwealth vs. Edds, et al (14 Gray's Reports, 406,409) is in point. In that case, in which the accused was tried upon two counts alleging in different forms acts constituting the same transaction, the Supreme Court of Massachusetts said:

"It is urged that no judgment can be properly entered upon the second count, inasmuch as the jury have found a verdict of not guilty upon the first count, which embraces the entire period of time in which the offence is charged in the second count, and so the finding of the jury is repugnant. The objection here taken is not that of a former conviction, or former acquittal under an indictment of the same purport as the first count. Had it been so, it might have constituted a more valid objection. But the case as now presented is the common case of several counts introduced into one indictment, intending to charge the party of one offence, although charging it in different forms. In such case the whole evidence goes to the jury, and, when thus given to the jury at the same time, is to be applied as may be proper to one or the other of the counts; and it is competent and proper for the jury, having applied it to one of the counts, and thus exhausted its force by a verdict of guilty upon such count, to return a verdict of not guilty upon the other. Such verdict implies no contradiction, but only negatives the commission of two offences."

By the practice of the federal civil courts a proper remedy in cases in which the same offense is charged in different counts is to require an election by the government after the evidence has been presented (Clifton vs. United States, 295 Fed. 926; Cain vs. United States, 19 Fed., 2d, 472). In the present case, though the Board holds that two distinct offenses were in reality charged, rather than the same offense as argued by the defense, the action of the court in finding accused not guilty of Charge I and its specification amounted, in effect, to such an election.

8. The accused, who is 34 years of age, entered the service as a second lieutenant of Infantry on August 15, 1917. He was promoted to first lieutenant April 10, 1919, and to captain March 3, 1926.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is authorized for violation of the 96th Article of War.

E. C. McNeil, Judge Advocate.

William F. Burns, Judge Advocate.

Herbert D. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C. M. No. 191705

UNITED STATES v. Cadet SAMUEL E. JONES, First Class, United States Corps of Cadets.	UNITED STATES MILITARY ACADEMY Trial by G. C. M., convened at West Point, New York, May 16, 1930. Suspension until January 1, 1931.

OPINION of the BOARD OF REVIEW -
McNEIL, BURNS and CONNOR, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the cadet named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Cadet Samuel Edward Jones, First Class, United States Corps of Cadets, was, at Aberdeen Proving Ground, Maryland, on or about May 5, 1930, in a public place, to wit, the Auditorium where a cadet hop was being held, drunk in uniform, this to the disgrace of the military service.

The accused pleaded not guilty, and was found guilty of the specification except the words "this to the disgrace of the military service", substituting therefor the words "thereby bringing discredit upon the military service", of the excepted words not guilty, of the substituted words guilty, and of the charge not guilty but guilty of violation of the 96th Article of War. He was sentenced "to be suspended without pay and allowances for one

year, at the end of which time he will join the then First Class". The findings and sentence were not announced in open court. The reviewing authority approved only so much of the sentence "as involves suspension without pay and allowances until January 1, 1931; at the expiration of which time he will join the then First Class", and forwarded the record for action under the 48th Article of War.

Evidence for the Prosecution.

3. On May 5, 1930, the First Class of the United States Military Academy was at Aberdeen Proving Ground, Maryland. That evening the class, including accused, attended a reception and dance given in its honor in the Auditorium at the Proving Ground. About 11:15 P.M., Captain Harry C. Barnes, Coast Artillery Corps, who had accompanied the class to the Proving Ground and to the social function, started down the stairs to the first floor of the Auditorium. Captain Barnes was in uniform at the time. As he passed a landing where three or four people were talking (R. 5) accused, in full dress uniform, caught him by the arm (R. 5-6) and said "Where's Bill". Upon being asked by Captain Barnes if he were speaking to him, accused again asked "Where's Bill". At that time Captain Barnes detected the odor of liquor on accused's breath and directed accused to follow him down stairs. Cadets, young ladies, officers and their friends, were then on the stairway and in the vestibule of the Auditorium. Captain Barnes took accused into a small empty room adjoining the main hall of the Auditorium and after closing the door charged accused with being drunk or with having had too much to drink. Accused denied both allegations and refused to give his name to the officer after being twice asked for this information. Captain Barnes then directed accused to stand at attention and to address him as a cadet should an officer. He finally gave his name after Captain Barnes explained his official connection with the First Class. The officer then ordered accused to his barracks and because of accused's "reluctance" to obey was forced to repeat the order "two or three times". Finally Captain Barnes opened the door of the room and told accused to go upstairs and get his cap. When he returned the officer again ordered him to go to his barracks, and when accused showed a disposition to "argue further", Captain Barnes directed Cadet Dodson to take accused to the barracks. Cadet Dodson then "took charge" of accused and the two departed (R. 6,16). Captain Barnes is of the opinion that accused was drunk when he saw him at the Auditorium (R. 9). Cadet T. W. Dunn, who saw accused at the Auditorium, is of the opinion that accused's condition was abnormal (R. 17).

Captain Barnes reported the occurrence to Captain William S. Eley, who was in charge of the cadets while on the trip to the Proving Ground, and together the two officers went to cadet headquarters. Upon arrival there Captain Eley sent for accused. He arrived a few moments later,

or about 11:30 o'clock P.M., and, "apparently" not understanding a question propounded by Captain Eley, the latter asked Captain Barnes to repeat in the presence of accused "what you told me a few minutes ago". Captain Barnes then began a recital of accused's actions and conduct while at the Auditorium. Accused frequently interrupted and when Captain Barnes related accused's refusal to comply with his order to go to the barracks accused stated, "That's not so. I did do it. I did go". Captain Eley then sent for Colonel Richardson, Commandant of Cadets, who was at the Auditorium. (R. 8) The Commandant arrived about midnight and found accused sitting on a bench in full dress uniform with his collar unbuttoned. When directed by the Commandant to stand, accused reeled or staggered and would have fallen had not Captain Eley supported him. Upon being asked by Colonel Richardson where he obtained the liquor accused refused to answer. At this time there was an odor of liquor on accused's breath and a few minutes later he became ill and vomited. In the opinion of Colonel Richardson and Captains Eley and Barnes accused was at that time drunk (R. 8,9,12, 14).

Evidence for the Defense.

First Lieutenant W. S. Broberg, Ordnance Department, and Cadet R. H. Booth, both saw and conversed with accused about 11:00 o'clock P. M. on the evening of May 5th at the Auditorium, and neither observed any evidence of drinking on the part of accused (R. 22,23,24).

Lieutenant Colonel Robert C. Richardson considers accused's delinquency record above average and regards him as "a very good cadet, one that has been well trained, subordinate and I think imbued with the spirit of this institution. In my judgment he is good officer material", and he would be "very glad to take him" as an officer in his command (R. 15).

Major Richard E. Anderson, Field Artillery, regards accused as "a man of considerable intellect, a man of obviously good breeding, considerable savoir faire, and considerable self-reliance. He impressed me as being a man of considerable efficiency" and as possessing the potential qualities of good leadership such as one would look for in good officer material. Major Anderson would like to have accused as an officer in his command (R. 18,19).

Captain L. Mc. Jones, Field Artillery, has known accused for three years, during which time accused was assistant manager and manager of the football team. These duties, which carried great responsibility, he performed in an "entirely satisfactory manner". Captain Jones regards accused as good officer material (R. 19). Many of accused's duties were performed without supervision, and Captain Jones has never known him to fail to "measure up to what we expect of a cadet" or to violate regulations although he had every opportunity to do so. He would "care" to have accused

as an officer in his command (R. 20).

Captain F. A. Macon, Infantry, has known accused for about three years, during two years of which accused was a member of the cadet company commanded by Captain Macon (R. 20), and in this officer's opinion accused is an "excellent cadet, a young gentleman of fine character, and will make an excellent officer". Captain Macon would like to have accused as an officer in his command (R. 21).

Major R. I. Sasse, head football coach, has known accused since September 1, 1927, and observed him daily during the football season, both at West Point and while on trips. Accused has impressed Major Sasse as "a loyal, conscientious cadet" and as one whose conduct has not been open to criticism.He would be glad to have accused serve in his command (R. 29, Ex. 8).

Cadet William A. Carter, a classmate of accused, regards him as a good cadet with an above average reputation, and as one who will make a good officer (R. 21).

Accused elected to remain silent before the court (R. 25).

4. It was thus shown by the evidence of record that, at the time and place alleged accused, while in uniform, was drunk in a public place. The drunkenness, while not extreme or particularly conspicuous, was of such degree as to attract the attention of an officer, and the subsequent conduct of accused showed clearly that he was drunk within the meaning of the 96th Article of War. Paragraph 132, Regulations for the United States Military Academy, provides that any cadet who shall drink or be found under the influence of intoxicating liquor, shall be dismissed or otherwise less severely punished. The testimony of the officer and cadet who saw accused about the time he was alleged to have been drunk and who observed nothing unusual in his condition is at most negative evidence and is more than offset by the positive testimony as to accused's condition given by Colonel Richardson, Captains Eley and Barnes, and Cadet Dunn. Needless to say such conduct is of a nature to bring discredit upon the military service and warrants a sentence such as was imposed in this case.

5. The cadet register shows that accused was admitted to the Military Academy from the 7th Kentucky District on July 1, 1925; discharged January 24, 1926, for deficiency in English; reexamined August 20 and 21, 1926, found proficient, and readmitted January 23, 1927. He was twenty-four years of age on October 18, 1929.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof.

E. C. McCy, Judge Advocate.
William F. Burns Judge Advocate.
Jno. U. Quinn Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 191766.

UNITED STATES vs. General Prisoner HAROLD B. GILCHREST.	PANAMA CANAL DIVISION Trial by G.C.M. convened at Fort Clayton, Canal Zone, May 8, 1930. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

1. The record of trial in the case of the soldier named above had been examined by the Board of Review.

2. The accused was tried on the following charge and specification:

CHARGE: Violation of the 69th Article of War.

Specification: In that General Prisoner Harold B. Gilchrest, P.C. Department General Prison Stockade, having been duly placed in confinement at Corozal, Canal Zone, since November 19th, 1929, did, at Corozal, Canal Zone, on or about April 4th, 1930, escape from confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that accused was a general prisoner and that on or about November 19, 1929, he was placed in confinement in the Department Prison Stockade, Corozal, Canal Zone (R 8-9). The Prison Officer testified that on or about April 4, 1930, accused either "absented himself or escaped

without authority (R 9). The Sergeant of the Guard, who personally made the entries, read from the Guard Report entries pertaining to accused as follows:

> "April 4, General Prisoner Gilchrest escaped at eleven thirty A.M."
> "April 16,General Prisoner Gilchrest from escape to confinement at eleven thirty A.M." (R 10).

Witness stated that upon receiving a report from the Corporal of the Guard (R 11) he checked the prisoners and found Boudreau and accused missing. In answer to the question, "Was this absence authorized?" witness testified:

> "No Sir it was not. The two prisoners left the Department Stockade to go to the Mess Hall for the ice for the prisoners. They left approximately a quarter of eleven in order to have plenty of time to reach the Mess Hall and get back to the stockade to fall out for mess, and the two prisoners failed to return." (R 12).

Accused chose to remain silent (R 13).

4. There is no evidence in the record of trial to show that accused broke away from any physical restraint. On the contrary the record shows that accused was permitted to go beyond the limits of the stockade in order to get ice, and while on such mission he went absent and failed to return. The proof therefore fails to establish the essential element of the crime alleged, that is, breaking away from some physical restraint. The record shows that accused in this case was accompanied by General Prisoner Boudreau, who was tried for the same offense at the same time and place. The record of trial in Boudreau's case, C.M. 191693, showed that accused was a Class A prisoner working without a guard. In Boudreau's case the Board of Review held the evidence legally insufficient to support the findings of guilty of escape in violation of Article of War 69, and sentence, citing C.M. 191403, Evans, wherein the Board under similar circumstances, held -

> "Although the facts in the present case may show the commission by accused of some other offense, they do not establish the offense charged, that is, escape from confinement, for the physical restraint which is the essence of confinement did not exist."

While the evidence shows that accused committed some offense analogous to breach of parole in violation of the 96th Article of War, he cannot be punished therefor in this instance inasmuch as he was not charged with such an offense. Breach of parole is not a lesser included offense where an accused is charged with escape from confinement. See C.M. 189830, Walcher.

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings and

sentence.

E. C. Illeler Jr. Judge Advocate.

William F. Burns Judge Advocate.

Hubert H. Hoover Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

June 25, 1930.

Military Justice
C. M. No. 191809

UNITED STATES	)	FOURTH CORPS AREA
v.	)	Trial by G.C.M. at Fort Benning, Georgia, May 1, 1930. Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.
Private REED PRICE (6362911), Company F, 29th Infantry.	)	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Reed Price, Company F, 29th Infantry, did, at Company F, 29th Infantry, Fort Benning, Georgia, on or about April 5, 1930, feloniously take, steal and carry away one pair of shoes, value $3.73, the property of Private Clarence N. Haynes, Company F, 29th Infantry, Fort Benning, Georgia.

Accused pleaded not guilty to the charge and specification. He was found guilty of the specification except the words "the property of Private Clarence N. Haynes, Company F, 29th Infantry, Fort Benning, Georgia", substituting therefor the words "property of the United States, issued and intended for use in the military service thereof", of the excepted words, not guilty, of the substituted words, guilty, and of the charge, not guilty, but guilty of violation of the 94th Article of War. Evidence of one previous conviction by special court-martial for neglect to take proper prophylactic treatment was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor

for six months. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The only question in this case requiring consideration here is as to the legal effect of the findings whereby accused was found not guilty of that part of the specification alleging that the stolen shoes were the property of Private Clarence N. Haynes, and not guilty of violation of the 93d Article of War, and guilty, by exceptions and substitutions, of larceny of these shoes, property of the United States, issued and intended for the military service, in violation of the 94th Article of War.

Not only do the findings of guilty contain findings of vital elements not included in the offense as charged, and thus violate the rule that the power of courts-martial to make exceptions and substitutions does not, where the identity of the offense is changed, extend beyond the power to convict of a lesser included offense (Par. 78 c, M.C.M.; C.M. 186919, Sweat), but the findings also result in a variance between the allegations and findings as to ownership of the stolen property, a variance which has been held, in similar cases, to be fatal to conviction (C. M. 164042, Rodden; C.M. 157982, Acosta; C.M. 110910, Brooks).

The present case is to be distinguished from C.M. 191638, Giles, in which it was held that upon a charge of larceny of a certain article, alleged to be the property of a Private Patterson, there was no substantial variance in a finding that the stolen article had been issued to Private Patterson; and in which it was also held that a further finding that the article was property of the United States, issued and intended for the military service, was surplusage which might be disregarded. In the Giles case accused was found guilty as charged plus something else which did not in substance alter the allegation, whereas in the present case accused is found not guilty of the particular offense charged but guilty of another distinct offense not charged.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

E. M. Lee, Judge Advocate.

William T. Burns, Judge Advocate.

Herbert B. Ezra, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington

Military Justice
C. M. No. 191831

AUG 5 - 1930

UNITED STATES	NINTH CORPS AREA
v.	Trial by G.C.M. convened at March Field, Riverside, California, May 13 and June 16, 1930. Dismissal.
Flying Cadet CLARENCE A. SHOOP (6655331), Air Corps.	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

1. The record of trial in the case of the flying cadet named above has been examined by the Board of Review.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Flying Cadet Clarence A. Shoop, Flying Cadet Detachment, March Field, Calif., did, at March Field, Calif., on or about April 25, 1930, wilfully disobey Special Flying Regulations, March Field, Calif., in that he unlawfully and without authority participated in an airplane flight as pilot of PT-3 Airplane No. 219. (A.C. #P.T. 3X 28-258)

Specification 2: In that Flying Cadet Clarence A. Shoop, Flying Cadet Detachment, March Field, California, did, at March Field, California, on or about April 25, 1930, unlawfully pilot one PT-3 Airplane No. 219, property of the United States, in that the said Flying Cadet Clarence A. Shoop, had not then been designated a qualified pilot in accordance with standing Operations Orders, March Field, California, and was unable to fly an airplane safely, as he then well knew, thereby endangering human life and damaging government property.

He pleaded not guilty to, and was found guilty of, the charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to be confined at hard labor for three months, and to forfeit fifty dollars per month for a like period. The reviewing authority approved only so much of the sentence as involved dismissal from the service and forwarded the record for action under the 48th Article of War. By letter dated June 9, 1930, the Acting Judge Advocate General returned the record to the reviewing authority recommending revision proceedings. The letter stated among other things:

"(a) The sentence as approved is not expressed in appropriate language. A flying cadet is an enlisted man and if the court intended the accused's separation from the service to be accomplished by the sentence (as appears obvious) it is preferable that the term 'dishonorable discharge' rather than 'dismissal' be used, the latter being a form of sentence appropriate for an officer.

(b) The 48th Article of War does not apply to this case as a flying cadet is not a 'cadet' within the meaning of this Article and the sentence adjudged does not otherwise come within its purview. Article of War 50½ does apply."

The record was returned to the court by the reviewing authority by indorsement reading, in material portion, as follows:

"1. The record of trial in this case is herewith returned for proceedings in revision, attention being invited to procedure by the court prescribed in Par. 83, M.C.M. and Appendix 6, p. 269.

2. The record shows on pages 5 to 9 that four members of the court were separately challenged for cause by the defense and that three of the challenges were not sustained but fails to show affirmatively that the challenged members withdrew during the deliberations and voting on the challenges or that the voting thereon was by secret written ballot (see Par. 58f and Appendix 6, Manual for Courts-Martial and the 31st Article of War.). If the prescribed procedure on challenges was followed by the court the record of trial should show the facts in the form indicated in Appendix 6, p. 262.

"3. The sentence is not expressed in appropriate language. A flying cadet is an enlisted man and if the court intended the accused's separation from the service (as appears obvious) it is preferable that the term 'dishonorable discharge' rather than 'dismissal' be used. Furthermore, a forfeiture in a stated amount can not be imposed after separation from the service; in this connection, however, careful note should be taken of the provisions of A.W. 40."

The court, on June 16th, revoked its former sentence and sentenced accused "to be dismissed the service and to be confined at hard labor at such place as the reviewing authority may direct for three (3) months". In the indorsement returning the record to the reviewing authority, the trial judge advocate by direction of the court, stated:

"The Court, on deliberation which determined a new sentence, decided that the status of the flying cadet should be retained the same as a flying cadet as explained in paragraphs 103-c and 104-a of Manual for Courts-Martial. The Court further instructed the Trial Judge Advocate to state that it is not the intention of the court that the man be dishonorably discharged but that his status be considered that of a flying cadet and that he be dismissed from the service in the same manner that a cadet at the Military Academy would be dismissed." (Underscoring supplied.)

The reviewing authority on July 2, 1930, approved only so much of the sentence as involved dismissal from the service and again forwarded the record under the 48th Article of War. In his indorsement returning the record to this office, the reviewing authority stated:

"The court does not contemplate a dishonorable discharge to follow the conviction, and I prefer to approve the dismissal as awarded and return the record for action under Article of War 48."

3. The form of sentence "to be dismissed the service" is inappropriate, for a flying cadet is an enlisted man. Such has been the uniform holdings of this office (Ops. JAG 220.26, July 13, 1922, C.M. 152017, Fowler; Ops. JAG 211, November 24, 1924; Ops. JAG 211, May 3, 1927; Ops. JAG 211, March 14, 1928; Ops.

JAG June 9, 1930, this case). In 26 Comp. Dec. 727, the Comptroller said:

> "While aviation students are given the grade of 'flying cadet' and the status of enlisted men while undergoing training, they may be discharged if they so desire upon completion of the prescribed course. They are enlisted men, but when enlisted from civil life they are enlisted for a specific purpose, to train for flying, and for an indefinite period; whether enlisted from civil life or appointed from an enlisted grade of the Army, upon completion of the prescribed course they are entitled to discharge: a somewhat different status from that of the great body of enlisted men of the Army." (Underscoring supplied.)

That the Manual for Courts-Martial also recognizes that flying cadets are enlisted men appears from paragraph 104 thereof providing that the limits of punishment therein prescribed "will be applied * * * in cases of enlisted men only, excluding flying cadets * * *". Paragraph 103 c of the Manual enumerates other general limitations on sentences for officers, and states that similar limitations apply in the case of flying cadets, but these limitations may, of course, be applied though the flying cadets are enlisted men and though the sentence of dishonorable discharge and not dismissal is appropriate in their cases. Nothing in this latter paragraph takes flying cadets out of the category of enlisted men, or expresses an intention to make the sentence of dismissal appropriate to them.

Dishonorable discharge has always been the appropriate means of separating enlisted men from the military service under dishonorable conditions as the result of the sentence of a general court-martial. Dismissal is the corresponding punishment in the case of an officer (Winthrop, p. 433, Reprint).

The term "cadet" as used in certain Articles of War, the 2d and 14th, has been held to exclude flying cadets (Ops. 250.4, May 7, 1918; Ops. JAG 211, November 24, 1924), and by analogy and established practice the same term as used in the 48th Article of War must be construed as excluding flying cadets. The requirement of confirmation by the President as contained in the 48th Article of War in the case of "any sentence extending to the suspension or dismissal of a cadet" was enacted into law prior to creation by statute of the grade of flying cadet, and has been uniformly construed as applying only to cadets of the United States Military Academy. The 48th Article of War does

not apply to this case and action by the President is not required.

4. Return of the record to the court for further action upon the sentence might be appropriate but for the remark made by the court in returning the record that "it is not the intention of the court that the man be dishonorably discharged". Winthrop, at page 434, Reprint, says:

> "A sentence - 'to be dismissed the service', while a rare and irregular form, inappropriate to a case of a soldier, has, where employed, the same effect as if the word discharged had been used. * * *",

but the above quoted expression by the court of its intent at the time it imposed the sentence precludes the Board of Review from considering whether the sentence "to be dismissed" in this case is, or may be, equivalent to a sentence "to be dishonorably discharged".

The 108th Article of War provides that "no enlisted man, lawfully inducted into the service of the United States shall be discharged from said service without a certificate of discharge" signed by his proper superior officer; the court in this case states that it did not intend that Flying Cadet Shoop be "dishonorably discharged"; the sentence, therefore, could not be construed so as to separate accused from the service.

Under the circumstances shown, the sentence "to be dismissed the service" in this case is unauthorized, impossible of execution, and of no legal effect.

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the sentence.

E C Mehrer, Judge Advocate.
William L Burns, Judge Advocate.
Walter D Hoover, Judge Advocate.

Military Justice
C.M. 191831. 1st Ind.

War Department, J.A.G.O., AUG 5 - 1930 - To The Adjutant General.

1. In the case of Flying Cadet Clarence A. Shoop, Air Corps (C.M. No. 191831), I concur in the foregoing holding of the Board of Review and, for the reasons therein stated, recommend that the sentence be vacated by the reviewing authority.

2. On June 9, 1930, the Acting Judge Advocate General returned the record of trial to the Commanding General, Ninth Corps Area, for revision proceedings. In thus returning the record the Acting Judge Advocate General stated, in substance, that the sentence "to be dismissed the service" is inappropriate in the case of a flying cadet, who is an enlisted man; that if the court intended by its sentence that the accused be separated from the service pursuant to the sentence, the correct form of sentence is to be "dishonorably discharged", and that the 48th Article of War does not apply in this case as a flying cadet is not a cadet within the meaning of that Article.

The reviewing authority, in returning the record to the court for revision proceedings, advised the court that a flying cadet is an enlisted man and that if the court intended that the accused be separated from the service pursuant to the sentence, the term "dishonorable discharge" rather than "dismissal" should be used. Disregarding these instructions and the rule laid down in 64a, M.C.M., that in case of difference of opinion as to a question of law "the court will accede to the views of the reviewing authority," the court again imposed a sentence to be dismissed the service and to be confined at hard labor for three months, and in addition directed the trial judge advocate to inform the reviewing authority "that it is not the intention of the court that the man be dishonorably discharged but that his status be considered that of a flying cadet and that he be dismissed from the service in the same manner that a cadet at the Military Academy would be dismissed." Thereupon the reviewing authority approved so much of the sentence as involves dismissal from the service, and again forwarded the record for action under the 48th Article of War.

3. It is recommended that the holding and this indorsement be transmitted to the Commanding General, 9th Corps Area, for the action required by Article of War 50½.

4. When copies of the published order in this case are forwarded to this office together with the record of trial, which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is 191831. For convenience of reference and to facilitate attaching copies of the published order to the

record in this case, that number should be placed in brackets at the end of the published order, as follows:

(J.A.G.O. No. 191831).

E. A. Kreger,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

10 Received A. G. O. AUG 6 1930

AG 201 Shoop, Clarence A.(8/5/30)Enl. 2nd Ind. VS/47

War Department, A.G.O., August 7, 1930 - To the Commanding General, Ninth Corps Area.

The views expressed by the Board of Review and The Judge Advocate General in the foregoing case of Flying Cadet Clarence A. Shoop, Flying Cadet Detachment, March Field, Calif., Air Corps, are approved by the Secretary of War.

P. T. Hayne
Adjutant General.

1 Incl.
201-Shoop, Clarence A.(ENL) 3rd Ind.
Hq. Ninth Corps Area, Presidio of S.F., Calif., August 29, 1930-To: The Adjutant General, Washington, D.C.

2 Incls.
1 Add. GCMO No. 254.

12 Received A. G. O. SEP 3 1930

Form No. 34

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Military Justice

C. M. No. 191891.

June 21, 1930

UNITED STATES vs. Private GEORGE W. BAILEY (6377068), Infantry, Unassigned.	FOURTH CORPS AREA Trial by G.C.M., convened at Fort McPherson, Georgia, April 14 and May 16, 1930. Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates

ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

H. McNeil, Judge Advocate.
William F. Burns, Judge Advocate.
Hubert D. Hoover, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. June 21, 1930 To the Commanding General, Fourth Corps Area, Fort McPherson, Georgia.

1. In the case of Private George W. Bailey (6377068), Infantry, Unassigned (C.M. No. 191891),

JUN 20 1930
4th Corps Area

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is 191891 For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order, as follows:

(J.A.G.O. No. 191891).

E. A. KREGER,
Major General,
The Judge Advocate General.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

June 21, 1930.

MEMORANDUM for General Kreger.

Subject: Record of trial in the case of Private George W. Bailey, Infantry, Panama, Unassigned.

1. The Board of Review has carefully reconsidered the points suggested by your memorandum of June 16, 1930, concerning the case of Private George W. Bailey.

2. In the opinion of the Board, accused stands convicted of involuntary manslaughter, that is, homicide unintentionally caused by culpable negligence in performing a lawful act (Par. 149 a, M.C.M.). The court has found that the killing came about through "carelessness and negligence" by shooting the decedent in the chest with a riot gun. It is not expressly found that accused's negligence was "culpable", that is to say, that it was criminal negligence or negligence of a degree greater than would be necessary to base a civil action for damages, but the specification, as changed by the findings, appears to embody such a conclusion nevertheless, (for it would be unreasonable to say that the careless and negligent handling of a loaded riot gun resulting in the death of a person standing within a few feet of accused would not be culpable negligence. There is evidence in the record from which the court might reasonably believe that accused's negligence was in fact of such a degree that the homicide amounted to involuntary manslaughter, and the Board could not, without weighing the evidence, decide otherwise. The Board believes that the record is legally sufficient to support the findings and sentence.

3. Accused was but 16 years and 6 months of age at the time of the shooting and was obviously below the average mentally. What little experience he had gained in the Army was insufficient to give him a mature sense of responsibility. There is no possibility that he intended the decedent any harm. Those responsible might well be subjected to criticism for arming this child with a riot gun and putting him in the position in which he found himself at the time of the tragedy. It is believed that a letter to the reviewing authority suggesting the remission of the sentence on account of accused's youth, low mentality, inexperience and freedom from criminal intent would serve the ends of justice.

E. H. Crowder, Judge Advocate.

William Fleming, Judge Advocate.

Robert H. Hoover, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C. M. No. 191990

JUL 22 1930

UNITED STATES	)	HAWAIIAN DIVISION
	)	
vs.	)	Trial by G.C.M., convened at
	)	Schofield Barracks, Territory
Captain WILLIAM H. BRADY, 11th	)	of Hawaii, May 12 and 13, 1930.
Field Artillery.	)	Dismissal.

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 95th Article of War.

Specification 1: In that Captain William H. Brady, 11th Field Artillery, did, at Honolulu, T.H., on or about February 15, 1930, with intent to defraud, wrongfully and unlawfully make and utter to the Army and Navy Young Mens' Christian Association, Honolulu, Hawaii, a certain check, in words and figures as follows, to wit:

"Honolulu, Hawaii, February 15, 1930 No.___

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of ----------Cash ----------$5.00

Five and No/100---------- Dollars

William H. Brady
Capt. 11th F. A.";

and by means thereof, did fraudulently obtain from the Army and Navy Young Mens' Christian Association, Honolulu, Hawaii, Five dollars, ($5.00), he, the said Captain William H. Brady, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Hawaii, Ltd., Waipahu Branch, for the payment of said check.

Specification 2: In that Captain William H. Brady, 11th Field Artillery, did at Honolulu, T. H., on or about February 15, 1930, with intent to defraud wrongfully and unlawfully make and utter to the Army and Navy Young Mens' Christian Association, Honolulu, Hawaii, a certain check, in words and figures as follows, to wit:

"Honolulu, Hawaii, February 15, 1930 No.____.

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of ---------- Cash ---------- $10.00
Ten and No/100 ---------- Dollars
William H. Brady, Capt 11 FA.

and by means thereof, did fraudulently obtain from the Army and Navy Young Mens' Christian Association, Honolulu, Hawaii, Ten Dollars, ($10.00), he, the said Captain William H. Brady, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Hawaii, Ltd., Waipahu Branch, for the payment of said check.

Specification 3: In that Captain William H. Brady, 11th Field Artillery, did at Honolulu, T. H., on or about February 15, 1930, with intent to defraud wrongfully and unlawfully make and utter to the Army and Navy Young Mens' Christian Association, Honolulu, Hawaii, a certain check, in words and figures as follows, to wit:

"Honolulu, Hawaii, February 15, 1930 No. ____.

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of Army & Navy Y.M.C.A. ---------- $10.00
Ten and No/100 ---------- Dollars

William H. Brady"
Capt. 11th F. A.";

and by means thereof, did fraudulently obtain from the Army and Navy Young Mens' Christian Association, Honolulu, Hawaii, Ten Dollars, ($10.00), he, the said Captain William H. Brady, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Hawaii, Ltd., Waipahu Branch, for the payment of said check.

Specification 4: In that Captain William H. Brady, 11th Field Artillery, did at Honolulu, T. H., on or about February 18, 1930, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange, Fort Armstrong, Honolulu, Hawaii, a certain check, in words and figures as follows, to wit:

"Honolulu, Hawaii, February 18, 1930 No.____.

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of -------- Post Exchange, Fort Armstrong -- $15.00
Fifteen and No/100 ---------- Dollars

William H. Brady"
Capt. 11th F. A.";

and by means thereof, did fraudulently obtain from the Post Exchange, Fort Armstrong, Honolulu, Hawaii, Fifteen Dollars ($15.00), he, the said Captain William H. Brady, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Hawaii, Ltd., Waipahu Branch, for the payment of said check.

Specification 5: In that Captain William H. Brady, 11th Field Artillery, having on or about January 2, 1930, become indebted to the Bank of Hawaii, Ltd., Waipahu Branch, in the sum of Eight Hundred and Twenty-Five Dollars, ($825.00), for a cash loan, and having failed without due cause to liquidate said indebtedness, and having on or about February 11, 1930, promised in writing said Bank of Hawaii, Ltd., Waipahu Branch, that he would on or about February 18th, 1930, pay on such indebtedness the sum of Two Hundred Dollars, ($200.00), did, without cause, at Honolulu, T. H., on or about February 18, 1930, dishonorably fail to keep said promise.

Specification 6: In that Captain William H. Brady, 11th Field Artillery, did at Schofield Barracks, T.H., on or about January 20th, 1930, with intent to defraud, wrongfully and unlawfully make and utter to S. Takeda, Tailor, 11th Field Artillery, Schofield Barracks, T.H., a certain check, in words and figures as follows, to wit:-

No. ___ SCHOFIELD BARRACKS, T.H. January 20 1930.
SCHOFIELD BARRACKS BRANCH

BISHOP FIRST NATIONAL BANK
Of Honolulu

Pay to the
order of ---------- S. Takeda ----------$ 105.00
One hundred and five and No/100 ----------Dollars
W. H. Brady,"
Capt. 11th F.A.";

and by means thereof, did fraudulently obtain from S. Takeda, Tailor, 11th Field Artillery, Schofield Barracks, T.H., One hundred and five dollars, ($105.00), he, the said Captain William H. Brady, then well knowing that he did not have and not intending that he should have sufficient funds in the Bishop First National Bank of Honolulu, Schofield Barracks Branch, for the payment of said check.

CHARGE II: Violation of the 96th Article of War.

Specification 1: Finding of not guilty.

Specification 2: Finding of not guilty.

Specification 3: In that Captain William H. Brady, 11th Field Artillery, did, at Schofield Barracks, T.H., on or about January 20, 1930, willfully and unlawfully make and utter to S. Takeda, Tailor, 11th Field Artillery, Schofield Barracks, T.H., a certain check in words and figures as follows, to wit:

No. ___. SCHOFIELD BARRACKS, T.H., January 20 1930
SCHOFIELD BARRACKS, BRANCH
BISHOP FIRST NATIONAL BANK
Of Honolulu

Pay to the
order of ---------- S. Takeda ----------$ 105.00
One hundred and five and No/100 ----------Dollars
W. H. Brady",
Capt. 11th F.A.";

he, the said Captain William H. Brady, then well knowing that he did not have sufficient funds in or credit with the Bishop First National Bank of Honolulu, Schofield Barracks, Branch, to meet the said check in full upon its presentation, in Violation of Section 4272, Revised Laws of Hawaii, 1925.

Specification 4: In that Captain William H. Brady, 11th Field Artillery, did, at Honolulu, T.H., on or about February 15th, 1930, willfully and unlawfully make and utter to the Army and Navy Young Mens' Christian Association, Honolulu, T.H., a certain check in words and figures as follows, to wit:-

"Honolulu, Hawaii, February 15, 1930 No.___.

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of ----------Cash ----------$5.00
Five and No/100 ---------- Dollars
William H. Brady"
Capt. 11th F.A.";

he, the said Captain William H. Brady, then well knowing that he did not have sufficient funds in or credit with the Bank of Hawaii, Ltd., Waipahu Branch, to meet the said check in full upon its presentation, in violation of Section 4272, Revised Laws of Hawaii, 1925.

Specification 5: In that Captain William H. Brady, 11th Field Artillery, did, at Honolulu, T.H., on or about February 15th, 1930, willfully and unlawfully make and utter to the Army and Navy Young Mens' Christian Association, Honolulu, T.H., a certain check in words and figures as follows, to wit:-

"Honolulu, Hawaii, February 15, 1930 No.___

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of ----------Cash ----------$10.00
Ten and No/100 ----------Dollars
William H. Brady"
Capt. 11th F.A.";

he, the said Captain William H. Brady, then well knowing that he did not have sufficient funds in or credit with the Bank of Hawaii, Ltd., Waipahu Branch, to meet the said check in full upon its presentation, in Violation of Section 4272, Revised Laws of Hawaii, 1925.

Specification 6: In that Captain William H. Brady, 11th Field Artillery, did, at Honolulu, T.H., on or about February 15th. 1930, willfully and unlawfully make and utter to the Army and Navy Young Mens' Christian Association, Honolulu, T.H., a certain check in words and figures as follows, to wit:-

"Honolulu, Hawaii, February 15, 1930 No._____

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of ------ Army & Navy Y.M.C.A. ----------$10.00
Ten and No/100 ----------Dollars
William H. Brady"
Capt., 11th F.A.";

he, the said Captain William H. Brady, then well knowing that he did not have sufficient funds in or credit with the Bank of Hawaii, Ltd., Waipahu Branch, to meet the said check in full upon its presentation, in Violation of Section 4272, Revised Laws of Hawaii, 1925.

Specification 7: In that Captain William H. Brady, 11th Field Artillery, did at Honolulu, T.H., on or about February 18th, 1930, willfully and unlawfully make and utter to the Post Exchange, Fort Armstrong, Honolulu, Hawaii, a certain check in words and figures as follows, to wit:-

"Honolulu, Hawaii, February 18, 1930 No.____.

THE BANK OF HAWAII, Ltd.
Waipahu Branch

Pay to the
order of ---------Post Exchange, Fort Armstrong ----$ 15.00
Fifteen and No/100 ----------Dollars
William H. Brady"
Capt. 11th F.A.";

he, the said Captain William H. Brady, then well knowing that he did not have sufficient funds in or credit with the Bank of Hawaii, Ltd., Waipahu Branch, to meet the said check in full upon its presentation, in Violation of Section 4272, Revised Laws of Hawaii, 1925.

Accused pleaded guilty to Specifications 1, 2, 3, 4 and 6, Charge I, except in each case, the words "with intent to defraud" and "fraudulently", of the excepted words not guilty, guilty to Specification 5, Charge I, guilty to Charge I; and not guilty to Charge II and its specifications. He was found guilty of Charge I and Specifications 1, 2, 3, 4 and 5 thereunder, guilty of Specification 6, Charge I,

"except the words and figures in the second line of the specification 'January 20th', substituting therefor, the words and figures 'January 10th' and in the sixteenth line the words and figures '105', substituting therefor, the words and figures '100', of the excepted words and figures not guilty, of the substituted words and figures guilty";

not guilty of Specifications 1 and 2, Charge II; guilty of Specification 3, Charge II,

"except the words and figures in the second line of the specification 'January 20', substituting therefor the words and figures 'January 10'; in the fifteenth line, except the word 'did', substituting therefor the

> word 'would'; in the eighteenth line, except the words and figures 'in violation of Section 4272, Revised Laws of Hawaii, 1925', substituting therefor the words 'to the prejudice of good order and military discipline'; of the excepted words and figures not guilty, of the substituted words guilty";

guilty of Specifications 4, 5, 6 and 7, Charge II, except in each case, the words and figures "in violation of Section 4272, Revised Laws of Hawaii, 1925", substituting therefor, the words "to the prejudice of good order and military discipline", of the excepted words and figures not guilty, of the substituted words guilty, and guilty of Charge II. Evidence of one previous conviction by general court-martial for being drunk and disorderly in a public place, at Honolulu, H.T., on May 8, 1929, in violation of the 96th Article of War, was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. The evidence shows that on November 27, 1929, accused executed a demand note for $825, in favor of the Bank of Hawaii, Ltd., to cover a cash advance by the bank and two notes for lesser amounts previously executed. The note, payable on demand, also provided for monthly installments of $100 on the principal, the first installment to be paid January 2, 1930. It was indorsed by two other officers (R. 86; Ex. 9). A few weeks prior to the execution of this note, accused had stated to the bank in writing that he expected funds from Tacoma, Washington, which would be more than adequate to cover his indebtedness to the bank (R. 81; Ex. 7, 8). About January 13, 1930 (R. 115) accused, in the company of First Lieutenant Roy P. Turner, Field Artillery, one of the indorsers on the note, went to the home of the Cashier and Manager of the Waipahu Branch of the Bank of Hawaii and there, in the course of a conversation in which the banker upbraided him for failure to keep promises previously made with respect to payment of the note, stated to the banker that he had made untrue statements, that he had been "stalling for time" (R. 84), and that he had no funds coming to him from any source. The banker agreed to give accused additional time, the latter "faithfully promising he would keep his word hereafter if I" (the banker) "would not make complaint to his superior officers" (R. 85). Accused had an allotment running which left him only about $90 a month from his pay and allowances (R. 111). On February 1st the banker received "through the Finance Officer" a payment of $50 to be applied on the note (R. 86). At this time also there was deposited to accused's credit in the bank $25.18 (R. 88). No other deposits to accused's credit were made with this bank after December 31, 1929 (R. 90, 103), on which date his balance was 74 cents (R. 88). Accused, however, drew checks for which there were insufficient funds, the total drawn by him against this account between December 31, 1929 and April 19, 1930, being $222.99 (R. 88, 90). On February 11, 1930, accused wrote to the banker in regard to the note

on which there was an unpaid balance of $775 and interest, as follows:

> "Have two signatures for note and will get third on Friday night after Inter-Island Boat arrives. Expect to reduce note by about $200.- after first of next week.
> Will take care of all post dated checks." (R. 91;Ex. 10.)

No payments were, however, made and accused did not further communicate with the debtor bank (R. 91). On May 10, 1930 (after the charges were preferred), accused executed a written assignment of his pay and allowances to the bank covering the balance of principal on the note, $775 (R. 99). At the trial it was stipulated that the Finance Officer was withholding pay and allowances of accused in the amount of $480 "as of May 10, 1930" (R. 100; Specification 5, Charge I).

About 1:30 a.m. on the morning of February 15, 1930 (R. 46), accused appeared at the desk of the Army and Navy Y.M.C.A. in Honolulu, T.H., and asked a clerk, Kendall, to cash for him a check drawn on the Bank of Hawaii, Ltd., for $5, payable to cash (R. 42; Specification 1, Charge I; Specification 4, Charge II). Accused's speech was indistinct and the clerk "imagined" that he was under the influence of liquor (R. 46). Accused was dressed in civilian clothes and the clerk declined to cash the check until he had been identified as an officer. The clerk asked accused to make the check for $2 only, but he refused to do so and "after some discussion" the clerk cashed the check (R. 43; Ex. 3). At about 7:30 a.m., on the same day, accused reappeared at the desk and presented a second check, drawn on the same bank, for $10, payable to cash (Specification 2, Charge I; Specification 5, Charge II). There was no evidence of insobriety at this time and the clerk cashed the check after a very brief conversation (R. 46, 47). On the same day at about 6 p.m. (R. 49, 51), accused presented to another clerk of the same Y.M.C.A., Bishop, a third check, drawn on the same bank, for $10, payable to the Army and Navy Y.M.C.A. (R. 49, 50; Specification 3, Charge I; Specification 6, Charge II), and the clerk cashed it (R. 50). Accused appeared to be normal at the time of this transaction (R. 51). His balance at the bank on February 15th was $1.43 (R. 104). As noted above, no deposits to his credit were thereafter made (R. 103). Statements of his account were sent to him by the bank monthly (R. 87). The three checks were deposited by the cashier of the Y.M.C.A. in regular course but were returned unpaid (R. 56). The cashier then advised accused that the checks had been so returned and requested him to attend to them at once (Ex. 5). On the morning of February 20, 1930 accused came to the Y.M.C.A. with the letter from the cashier, and stated that he would see the cashier at about 9 o'clock, and that the checks should have been drawn on the Waipahu Branch of the bank. The clerk to whom he spoke had the checks and gave them to accused, who thereupon, with pen and ink, changed them by writing in the words "Waipahu

Branch" (R. 119, 120). After this was done, the checks were presented to the bank a second time but were again returned unpaid (R. 58, 59). Several days later the cashier of the Y.M.C.A. received a telephone message from accused in the course of which accused asked if the checks were in the cashier's possession and whether or not he had cashed them. Upon being advised that the checks had been transmitted to the military authorities, accused exclaimed, "My God, I wish you had gotten in touch with me". Accused appeared to be "very excited" at this time (R. 62). The checks had not been paid at the time of the trial (R. 65). During the period December 31, 1929 to February 16, 1930, accused drew checks against his account in the amount of $207.99, although, as noted above, the total amount on deposit to his credit during this period was $25.92 (R. 88, 90).

About February 18, 1930, accused, apparently sober (R. 77), approached the Post Exchange Officer at Fort Armstrong, Honolulu, and asked him to cash a check drawn on the Waipahu Branch of the Bank of Hawaii, Ltd., for $15, payable to the Post Exchange (R. 72; Ex. 6). The check was cashed as requested, from Post Exchange funds (R. 69). Accused later telephoned the Post Exchange Officer and asked him to hold the check for "a couple of days". This request was complied with and the check was then deposited for collection (R. 73). Accused's balance in the bank on February 18th was $0.93 (R. 104), and, as noted, there were no subsequent deposits (R. 90). When the check was presented to the bank for payment February 24, 1930 (R. 94) accused's balance was $0.68 (R. 93, 104). The check was returned unpaid, whereon it was redeposited and was returned unpaid a second time. At the time of trial the check had not been paid (R. 74). The Exchange Officer wrote a letter to accused asking him to make the check good but did not receive a reply (R. 75). (Specification 4, Charge I; Specification 7, Charge II.)

On January 10, 1930, accused approached one Shotaro Takeda, a tailor, in Honolulu, and requested a loan of $100, stating that he would repay it on January 20th (R. 123, 124). Takeda gave accused $100 in cash and the latter gave Takeda in return his check for $105, bearing date January 20, 1930, drawn on the Bishop First National Bank of Honolulu, Schofield Barracks Branch, payable to Takeda. Accused offered to pay Takeda $5 additional to the amount loaned and Takeda declined to accept it, but when the check was drawn accused made it for $105 (R. 126). At the time Takeda accepted the check accused stated that he did not have sufficient funds on deposit to pay it (R. 29) but also stated that he would deposit sufficient funds for payment prior to January 20th (R. 130). Accused's balance in this bank on January 10th was $2.84. No deposits were made after January 10th (R. 135). Takeda presented the check to the bank for payment on January 20th but payment was refused on account of insufficient funds. The bank suggested that the check be again presented at the end of the month. This was done but payment was again refused. On February 25, 1930, the account

was closed (R. 135). At the time of trial the check had not been paid (R. 128; Specification 6, Charge I; Specification 3, Charge II).

Mr. Victor C. Schoenberg, Cashier and Manager of the Waipahu Branch, Bank of Hawaii, Ltd., testified that in the course of his business relations with accused he adopted what he described as a "helping attitude", for he did not believe that accused was acting with "criminal intent" (R. 95). In his conversations with accused he gained the impression that the latter was "nervous, high-strung, emotional", and a "sick man". On the occasion of the interview at witness' house, at which Lieutenant Turner was present, accused "broke down" and cried (R. 98). Lieutenant Turner testified that for some months prior to the check transactions accused had been suffering from ill health, was on a nonduty status for a considerable period, and appeared to be very depressed, the depression becoming marked in the latter part of November (R. 111). All of accused's teeth had been extracted. On one occasion accused came to witness' house and asked to be allowed to sleep there, stating that he could not sleep at his own quarters (R. 112).

There was introduced in evidence a report of a board of medical officers appointed to examine accused and report upon his mental condition (R. 17, 18; Ex. 1). The board found that accused was not insane but was a constitutional psychopath, with emotional instability manifested by his inability satisfactorily and adequately to adjust himself to his environment and circumstances. The board further found that accused had the ordinary understanding of right and wrong, had normal control of his actions and at the time of the rendition of the report, April 21, 1930, was capable of communicating intelligently with his counsel, understanding the nature of court proceedings and doing the things necessary for his defense (R. 18, 19; Ex. 1). None of the three members of this board were psychiatrists (R. 26), but the board had as a witness before it Major Earl D. Quinnell, Medical Corps, an expert in this speciality (R. 29). Major Quinnell testified that he examined accused and on the basis of this examination and accused's history "found no evidence of any gross physical deficiencies, no evidence of neurosis, and the only mental deficiency I could find was a slight depression easily accounted for by the situation in which the man finds himself. In my opinion, from my examination and the history of this case and the type of personality which this man exhibits, * * * this man is a Constitutional Psychopath, with moderate emotional instability". After receipt of the report of the board of medical officers and the testimony of the psychiatrist, the court found that at the time of the commission of the alleged offenses accused was capable of distinguishing right from wrong and of adhering to the right, and that at the time of trial he was in proper mental condition to undergo trial (R. 37, 37½).

4. Accused made the following unsworn statement:

"I became involved in financial difficulties in August, 1929 and went to the Waipahu branch of the Bank of Hawaii to obtain a loan. At that time I had an allotment of my pay running, amounting to Two hundred and fifty dollars payable to the Army National Bank of Fort Lewis, Washington.

At the time of obtaining this loan at Waipahu, I wrote to a party in Tacoma, Washington, from whom I had on previous occasions received loans in substantial amounts, requesting funds. I received a reply that that money would be forthcoming about the latter part of November. In the early part of December, I received information from the Tacoma source that it would be impossible to send the money which I had expected and upon which I had depended to help me out of my difficulties. This left me in rather a desperate financial situation.

All three notes had been made at the bank of Waipahu in good faith and before I knew that I would not receive the assistance from the mainland that I had reasonably expected.

Early in November, 1929, I was relieved of command of my battery for alleged excess veneral rate. This misfortune combined with my financial straits and poor health put me in great mental distress.

I never, at anytime, had any intention of defrauding anyone either on checks or loans and fully intended to meet all my obligations, and felt that I would be able to do so in time.

During the period my allotment was running with the Army National Bank at Fort Lewis, which was acting as trustee for the payment of obligations at that station and in Tacoma, I paid out more than six thousand dollars as was shown in a statement I received from the bank about April 15, 1930, and I believe that had I not been relieved of my command, knowledge of which apparently reached parties in Tacoma, I would have received the funds which I had applied for there.

While I may have made promises which I could not keep under the severe stress under which I was laboring, never have I made any statement or promise with intent to defraud and had a reasonable expectation of paying my way out in time."

5. The evidence, together with the pleas of guilty, shows that at the times and places alleged in Specifications 1, 2, 3 and 4, Charge I, and Specifications 4, 5, 6 and 7, Charge II, accused made and uttered as

good the series of checks described therein and obtained payment thereof as charged. It is clear that at the time these checks, drawn on the Bank of Hawaii, Ltd., were uttered, accused did not have sufficient funds in that bank to pay them. Not only was he fully aware of this fact, but it also fairly appears that he had no available source of income by which he might expect to cover them. Such being the fact, accused's deliberate utterance of the checks for the purpose of obtaining the proceeds thereof cannot be characterized otherwise than as fraudulent. In the opinion of the Board of Review the court was justified in finding as it did under Specifications 1, 2, 3 and 4, Charge I, that the checks were made and uttered with intent to defraud, and that the acts of accused amounted to dishonorable conduct unbecoming an officer and gentleman within the meaning of the 95th Article of War.

The evidence, together with the pleas of guilty, also sufficiently supports the findings of guilty of Specification 5, Charge I, alleging dishonorable failure to fulfill a promise to make a payment on the note for $775. It is to be noted in this connection that accused reaffirmed his pleas of guilty of the specifications and of violation of the 95th Article of War after the meaning and effect of such pleas had been especially called to his attention by the court (R. 15, 16). The evidence shows not only that accused did not comply with his written promise to the bank to make a payment of $200 on February 18, 1930, as alleged, but it also shows that his finances were in such a condition that he had no reasonable basis for believing that he could fulfill the promise.

The evidence, together with the pleas of guilty, further shows that accused made and uttered the check for $105 drawn on the Bishop First National Bank of Honolulu, described in Specification 6, Charge I, and Specification 3, Charge II, and obtained from Takeda the proceeds thereof as alleged. This check bore a date subsequent to that on which it was uttered and the evidence shows that accused explained to Takeda that he did not have sufficient funds in bank at the time to pay it. The evidence also shows, however, that he promised expressly to have funds in the bank sufficient to meet the check on the date which it bore, that is, January 20, 1930. Again it is clear that there was no reasonable basis for accused to expect that he could cover this check as agreed, and it must be inferred that at the time it was made and uttered he did not intend to have sufficient funds for its payment on deposit in the bank on which it was drawn, as found by the court. In this case also, the court was justified in finding that the transaction was fraudulent, that the check was made and uttered with intent to defraud, and that the acts of accused amounted to conduct unbecoming an officer and a gentleman within the meaning of the 95th Article of War.

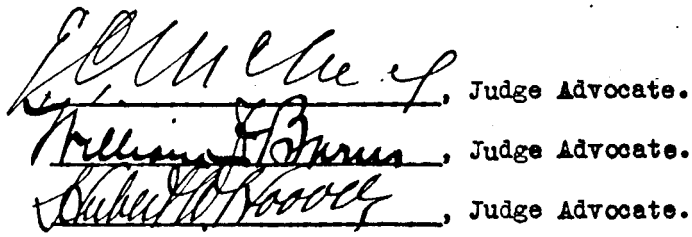
The allegations of Specifications 3, 4, 5, 6 and 7, Charge II, are substantial duplications of allegations contained in specifications under Charge I pertaining to the same series of checks. The offenses thus charged under the 95th and 96th Articles of War are, however, distinct (Carter vs. McClaughery, 183 U.S. 365; McRae vs. Henkes, 273 Fed. 108). Accused may properly be punished for his acts only in their most serious aspects (paragraph 80 a, M.C.M.). In view of the sentence, which is mandatory for the offenses laid under the 95th Article of War, it is clear that this rule as to punishment is not here violated.

6. A board of medical officers reported that accused suffered from a constitutional psychopathic state, with emotional instability. It also reported that this mental abnormality did not at the time of the trial or at the time of the commission of the offenses affect accused's capacity to distinguish between right and wrong and to control his actions, and the court was justified in so finding. In the opinion of the Board of Review the report of the board of medical officers contains nothing which affects the propriety of the findings or sentence.

7. The Army Register shows accused to be 41 years and 11 months of age, with the following service:

> "Capt. Kans. N.G. 5 Aug. 17; maj. Kans. N.G. 17 Apr. 18; accepted 27 Apr. 18; hon. dis. 27 Oct. 19.--Pvt., corp., and sgt., Btry. A, 6 F.A., and sgt. F.A. unasgd. 5 Nov., 08 to 11 July 17; sgt. D.E.M.L., F.A. unasgd. 16 Jan. 20 to 29 Nov. 20; 1 lt. of Inf. 1 July 20; accepted 30 Nov. 20; capt. 1 July 20; trfd. to F.A. 10 Mar. 21."

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War.



, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

AUG 30 1930

Military Justice
C. M. No. 192128

UNITED STATES	)	PANAMA CANAL DEPARTMENT
vs.	)	Trial by G. C. M., convened at Fort Amador, Canal Zone, June 2, 3, 4, 5, 6, 1930. Dismissal.
First Lieutenant EWART J. STRICKLAND (O-12715), Coast Artillery Corps.	)	

OPINION of the BOARD OF REVIEW -
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by OLLIVETTI, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, then Post Exchange Officer, Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about April 2, 1930, unlawfully and feloniously embezzle by fraudulently converting to his own use Two Thousand Dollars ($2,000.00), U. S. Currency, property of the Post Exchange, Fort Amador, C.Z., and entrusted to the care, custody and possession of the said Lieut. Ewart J. Strickland by virtue of his office as Post Exchange Officer.

Specification 2: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, then Recreation Officer, Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about December 16, 1929, unlawfully and feloniously embezzle by fraudulently converting to his own use

Three Hundred and Fifty Dollars ($350.00) U. S. Currency, property of the E. & R. Fund, Fort Amador, C.Z., and entrusted to the care, custody and possession of the said Lieut. Ewart J. Strickland by virtue of his office as Post Recreation Officer.

Specification 3: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, then Recreation Officer, Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about December 23, 1929, unlawfully and feloniously embezzle by fraudulently converting to his own use Two Hundred and Fifty Dollars ($250.00) U. S. Currency, property of the E. & R. Fund, Fort Amador, C.Z., and entrusted to the care, custody and possession of the said Lieut. Ewart J. Strickland by virtue of his office as Post Recreation Officer.

Specification 4: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, then Recreation Officer, Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about January 23, 1930, unlawfully and feloniously embezzle by fraudulently converting to his own use Two Hundred Dollars ($200.00) U. S. Currency, property of the E. & R. Fund, Fort Amador, C.Z., and entrusted to the care, custody and possession of the said Lieut. Ewart J. Strickland by virtue of his office as Post Recreation Officer.

Specification 5: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, then Recreation Officer, Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about February 19, 1930, unlawfully and feloniously embezzle by fraudulently converting to his own use Five Hundred Dollars ($500.00) U. S. Currency, property of the E. & R. Fund, Fort Amador, C. Z., and entrusted to the care, custody and possession of the said Lieut. Ewart J. Strickland by virtue of his office as Post Recreation Officer.

Specification 6: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, then Recreation Officer, Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about February 21, 1930, unlawfully and feloniously embezzle by fraudulently converting to his own use

Two Hundred Dollars ($200.00) U. S. Currency, property of the E. & R. Fund, Fort Amador, C.Z., and entrusted to the care, custody and possession of the said Lieut. Ewart J. Strickland by virtue of his office as Post Recreation Officer.

Specification 7: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, then Recreation Officer, Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about February 25, 1930, unlawfully and feloniously embezzle by fraudulently converting to his own use Fifty Eight Dollars and Seventy Nine Cents ($58.79) U.S. Currency, property of the E. & R. Fund, Fort Amador, C.Z., and entrusted to the care, custody and possession of the said Lieut. Ewart J. Strickland by virtue of his office as Post Recreation Officer.

Specification 8: (Finding of not guilty)

Specification 9: (Finding of not guilty)

Specification 10: (Finding of not guilty)

CHARGE II: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, being at the time the E. & R. Officer at Fort Amador, Canal Zone, did, at Fort Amador, Canal Zone, on or about February 28, 1930, with intent to deceive the officer duly designated to examine and audit his records and accounts as such E. & R. Officer and with intent to conceal from such auditor and others the true financial condition of the E. & R. Fund in his custody, wrongfully and willfully enter in the cash book of the said E. & R. Fund a balance of $1509.81 certifying over his official signature to the correctness thereof and in the check book of the said E. & R. Fund a balance of $1258.60, well knowing at the time that he then had in the Chase National Bank, Panama Branch, Republic of Panama, a balance of only $299.81 of the said E. & R. Fund.

CHARGE III: Violation of the 96th Article of War.

Specification: In that 1st Lieut. Ewart J. Strickland, Coast Artillery Corps, did, to the prejudice of good order and military discipline, at Fort Amador, Canal Zone, on or about April 2, 1930, borrow from Sergeant William H. Johnstone, Battery "F", 65th Coast Artillery, the sum of Two Thousand Five Hundred Dollars ($2,500.00).

ADDITIONAL CHARGE I: Violation of the 95th Article of War.

Specification: In that First Lieutenant Ewart J. Strickland, 4th Coast Artillery, did, as custodian of Battery Fund, Headquarters Battery, 4th Coast Artillery, at Fort Amador, Canal Zone, on or about February 28, 1930, with intent to deceive and with the intent to conceal the true financial condition of the Battery Fund, officially accomplish the following certificate in the Battery Fund Book, Headquarters Battery, 4th Coast Artillery, which certificate was known to him, the said First Lieutenant Ewart J. Strickland, to be untrue, namely -

> "I certify that the foregoing account for the month of February, 1930, is correct and that of the amount for which I am responsible, two-hundred ninety-nine dollars and twenty-six cents ($299.26), is deposited with The Chase National Bank, Panama Branch, Panama, R.P., to the credit of Battery Fund, Headquarters Battery, 4th C.A., and nothing ($000.00) in cash is in my personal possession."
>
> (Signed) E. J. Strickland,
> 1st Lieut., 4th C.A.,
> Commanding.

ADDITIONAL CHARGE II: (Finding of not guilty)

Specification: (Finding of not guilty)

Accused pleaded not guilty to the charges and specifications. He was found guilty of Charge I and Specifications 1,2,3,4,5,6, and 7 thereunder, of Charge II and Specification 2 thereunder except the words "in the cash book of the said E. and R. Fund a balance of $1509.81 certifying over his official signature to the correctness thereof and," of the excepted words, not guilty, of Charge II and the Specification thereunder, and of Additional Charge I and the Specification thereunder; and not guilty of the remaining charge and of the remaining specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed from the service. The reviewing authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. The evidence shows that during the months of December, 1929, and January, February, March and April, 1930, accused was on duty at Fort Amador, Canal Zone, as Post Exchange Officer, Recreation Officer, Secretary and Treasurer of the Fort Amador Golf Club, and Battery Commander of Headquarters Battery, 4th Coast Artillery, and was custodian of and responsible for the funds of these activities (R. 116,134,151).

Specification 1, Charge I; Charge III and its Specification:

At about 9:30 a.m., April 2, 1930 (R. 14), accused cashed from his Post Exchange funds his own check for $2000 on the Panama Branch of the Chase National Bank, Panama City, Republic of Panama, and placed the check with his other Post Exchange funds. Taking the $2000 in currency (R. 13,14), he left the post and disposed of the money in a private business transaction, the nature of which does not appear (R. 145,171). During this day, up to about 3:45 p.m., he had insufficient funds in his personal account in the Chase National Bank to cover the check (R. 19,73,146,171,173). A deposit slip was prepared in accused's office covering the checks and monies belonging to the Post Exchange, in the aggregate amount of about $6000 (this amount had accumulated owing to a delay in making deposits caused by a correction in a discrepancy in the accounts), to be deposited on that date in the Chase National Bank, and accused's check was listed thereon (R. 13,14,145). At about 2:30 p.m. accused took this deposit slip and the checks and monies listed to the bank where he made the deposit to the credit of the Post Exchange Fund (R. 18,19). He then interviewed Mr. Carl B. Brunner, assistant manager of the bank, and asked him to discount a $2500 note made by himself and indorsed by Captain George W. Dunn, 4th Coast Artillery, and Mr. J. Logan Stillwell, Field Director, American Red Cross (R. 19), but Brunner refused to accept the note (R. 29,30). Brunner testified that accused then informed him that he had drawn the check, that he expected that it would be presented, and that he had to raise funds to cover it inasmuch as it overdrew his account.

Brunner informed accused that though the bank closed for business at 3 p.m., accused would be admitted up to 4 p.m. for the purpose of making a deposit (R. 22). Accused thereupon left the bank (R. 22), approached Sergeant William S. Johnstone, Battery F, 65th Coast Artillery, stationed at Fort Amador, and requested and obtained a loan of $2500 (R. 86). Accused returned to the bank at about 3:45 p.m. and deposited the proceeds of the Johnstone loan in his personal account, thereby covering the overdraft (R. 19,21).

About April 1, 1930, accused had obtained the indorsements of Stillwell and Dunn on the $2500 note to the Chase National Bank, advising them of his intention to borrow that sum from the bank (R. 24,39,40). Stillwell testified, in response to a question as to whether accused told him at this time that "this particular transaction" had been approved by anyone, that accused stated that he had talked it over with Brunner and that "Brunner thought that the matter was all right" (R. 24,25). Brunner testified that prior to the presentation of the note on April 2, 1930, accused had not made any preliminary arrangements with the bank for the negotiation of such a loan (R. 20). An inspector general testified that during an investigation accused stated that at the time he drew and cashed the check he had a "complete arrangement whereby the sum of $2500 was to have been deposited to my account before the close of banking hours that day" (R. 63,74).

Accused testified with respect to these incidents that in March, 1930, he became interested in a stock deal which he discussed with Brunner, and that the latter stated that the bank would not loan any money on the stock involved. Accused thereupon told Brunner that he would be obliged to borrow $2500 on a note and that he had discussed the matter with Stillwell and Dunn who had agreed to indorse a thirty-day note in this amount for him. He also told Brunner that Dunn had only a small amount of money available but had certain holdings in the States. At this time they did not discuss Stillwell's financial credit as it had theretofore been discussed by them a number of times. Brunner assured him that the loan would be made by the bank and gave him two or three blank note forms. Sometime thereafter, but before March 31st, accused made out and signed the thirty-day note and procured indorsements thereon by Stillwell and Dunn, after which he placed the note in his desk where it remained until the afternoon of April 2d. After making the Post Exchange deposit, he presented the note to Brunner stating that it concerned the matter which they had theretofore discussed. Brunner asked, "Is this the stock deal you were speaking about to me?" The two then discussed the matter for several minutes and after a private discussion between Stillwell, who had come to the bank, and Brunner, the latter advised accused that he would not discount the note. Accused thereupon told Brunner that he had deposited the check for $2000, thereby overdrawing his personal account, and had presumed

that the note would be accepted as promised in their previous conversation. Accused requested that the matter be suspended until the next day so that he could cable to the United States for sufficient money to cover the check but Brunner refused to make such an arrangement, stating, however, that he would remain at the bank until 4 o'clock and if accused could raise the money by that hour he could deposit it. Accused replied that he would attempt to get the money, left the bank and searched for the person to whom he had transferred the $2000, but being unable to locate him, returned to Fort Amador where someone suggested that Johnstone kept large sums of money available and that it might be possible to secure a loan from him. Accused, knowing Johnstone "more or less" and having talked to him a number of times, approached him stating that he had to get some money before the bank closed to cover his check cashed at the Post Exchange for which he had insufficient funds. Johnstone made the loan (R. 146). Some days later accused and Brunner discussed "the whole incident" and Brunner stated that the loan had been refused because of Stillwell's over-extended credit. Accused asked Brunner if he thought that accused had "strong-armed" Stillwell into signing the note and Brunner replied, "Oh, no, not at all, I am convinced of your good faith in this transaction * * * your credit is still good." Neither in this nor in any other conversation did Brunner deny that accused had made preliminary arrangements for the loan. The subject was not, however, discussed. Four or five days after the Johnstone loan was made, accused repaid it (R. 148). About April 4th accused was told by another officer that the banks had recently informed officials at Quarry Heights relative to officers' personal bank transactions, and as a result accused believed that it would be desirable to report his difficulties (R. 148). Accordingly, he went to Post Headquarters at about 8 a.m. the next day and explained the matter in some detail to the Post Adjutant, Captain Hickey, and to the Post Commander, Colonel Wyllie, but did not disclose at this time that he had secured the loan from Sergeant Johnstone. He did state, among other things, that he had cashed his check at the Post Exchange (R. 149).

Second Lieutenant Cyril H. McGuire, 4th Coast Artillery, testified (by stipulation) that Brunner told accused in witness' presence that Stillwell had impaired his credit at the bank by certain transactions but that accused's credit was still good and would not be impaired. Sometime later accused told witness that he believed that Stillwell, after indorsing the note, asked the bank to refuse it, and that this was the only explanation accused could give for Brunner's inconsistent action (R. 132).

Captain D. W. Hickey, Jr., 4th Coast Artillery, Adjutant of Fort Amador, testified that (R. 111) about April 4th accused came into his office and told him that he had recently cashed his $2000 check from

the Post Exchange Fund at a time when he had insufficient funds in his personal account to meet the check; that he had prior thereto presented to the bank "a paper" which it had agreed to accept, and which if it had been accepted, would have covered the check; and that after he cashed this check and presented "the paper", the bank refused to accept the latter, whereupon accused obtained money from another source to cover the check (R. 112).

Colonel Robert E. Wyllie, 4th Coast Artillery, commanding officer of Fort Amador, testified that accused stated to him that he had negotiated a loan upon his note which the bank agreed to accept, and, relying on this agreement, had drawn the check on his personal account; and that when he attempted to discount the note the bank refused to accept it, thereby causing him considerable difficulty "in covering" the check which he had drawn (R. 133). He stated that he wanted witness to know about it because the bank officials were aware of it and accused thought "possibly something might come up later about it" (R. 134). Accused did not state to witness that the check had been cashed by the Post Exchange (R. 136,137).

Specifications 1 to 7, inclusive, Charge I; Specification 2, Charge II; Additional Charge I and its Specification:

In the course of an annual survey of Fort Amador commenced about April 23, 1930, and a resulting audit of the E. and R. Fund of that post, it was noted by an inspector that the bank statements pertaining to this fund for the months of December, 1929, and January, February and March, 1930, were missing. The inspector obtained duplicate copies of the statements (Ex. 4) from the Chase National Bank, the depository, and checked them against the E. and R. check book (Ex. 2) and E. and R. cash book (Ex. 3), discovering that checks as follows had been drawn by accused and paid by the bank out of the E. and R. Fund: $350, December 16, 1929 (Specification 2, Charge I); $250, December 23, 1929 (Specification 3, Charge I); $200, January 23, 1930 (Specification 4, Charge I); $500, February 19, 1930 (Specification 5, Charge I); $200, February 21, 1930 (Specification 6, Charge I); and $58.79, February 25, 1930 (Specification 7, Charge I), but that none of these checks was recorded in the E. and R. cash book, and none was pasted in the check book, as was the case with other checks. The bank statements also showed a deposit of $600 on December 28th to the credit of the E. and R. Fund (this amount equaling the total of the $350 and $250 checks of December, 1929, above mentioned). The deposit was not shown in either the cash or check book (R. 43-46). The account, on its face, because of the deposit, balanced as of December 31, 1929, the date on which the fund would normally be audited (R. 45,46). The account was actually audited on January 21, 1930 (R. 46). After the check for $200 was drawn on January 23, 1930, the account did not balance. The shortage

continued and accumulated in the amount of the other unrecorded checks until March 31, 1930, the close of the first quarter and the normal auditing date, when accused made deposits of $1200 and $41.10, thereby balancing the fund. Neither of these deposits of $1200 and $41.10 was entered in the check or cash book (R. 47). The books were audited by Major Robert C. Garrett, 4th Coast Artillery, on April 12th and found to be properly balanced (R. 46). Major Garrett testified that, as he recalled, the bank statements were presented at the time of this audit (R. 142,143).

The check book of the E. and R. Fund (Ex. 2-q) shows a balance in bank of $1258.60 as of February 28, 1930 (Specification 2, Charge I). The bank statements obtained by the inspector showed that the actual balance in bank on this date was $299.81, the difference of $958.79 being the aggregate amount of the suppressed checks cashed by accused from the fund during January and February, 1930 (R. 47) (Specifications 4,5,6 and 7, Charge I). In a certificate found in the cash book accused stated that the balance of the fund for which he was accountable on February 28th was $1509.81 (R. 47; Ex. 3-o).

During the survey of Fort Amador, accused's battery (Headquarters Battery, 4th Coast Artillery) fund was also audited. The audit showed that the council book contained a certificate by accused as of February 28, 1930, in the form set forth in the Specification, Additional Charge I, to the effect that his account for February, 1930, was correct and that of the amount for which he was responsible the sum of $299.26 was on deposit with the Chase National Bank, Panama City, Republic of Panama, and that nothing was in his personal possession in the form of cash (Ex. 7; R. 94). Accused, as President of the Council of Administration, also certified to the correctness of the account and of his certificate. No other officer signed the certificate of the Council (Ex. 7). There was nothing on deposit in this account at this bank on February 28th, after deductions of outstanding checks, there being, on the other hand, a debit of 74 cents (R. 95). On February 25, 1930, a check against the account in the amount of $114.61 was cashed by the bank, but notation of the check was not entered in either the check book, council book, or any other battery record (R.96). When the fund was audited on April 25, 1930, there was no shortage (R.99).

In the course of the investigation of accused's accounts he stated, after having been advised that he was not required to make a statement, and that whatever he said might be used against him, that he had used the E. and R. funds as represented by the various checks to pay Golf Club bills and to cover a shortage in Golf Club funds (R. 97,99).

Accused testified that about December 15, 1929, he discovered a shortage in the funds of the Golf Club, the steward, a Private Lindley,

admitting that he was responsible therefor. The amount of the shortage was not known but after some computations and conversations with Lindley accused estimated that it was about $350. Shortly after, in making up a deposit of Golf Club funds, accused drew a check on his E. and R. Fund for $350 and deposited the proceeds to the credit of the Golf Club. Additional shortages in the Golf Club Fund were discovered and about December 20th a second check, this time for $250, was drawn on the E. and R. Fund and the proceeds deposited to the credit of the Golf Club Fund (R. 149,150). Accused expected that an audit of the Golf Club Fund would be made about December 23d and accordingly used additional E. and R. funds which he had in the form of cash for the purpose of building up the Golf Club Fund. The commanding officer did not, however, direct an audit as expected and accused accordingly decided to balance his Golf Club account as of December 30th, this in order that he might have sufficient funds "to make the Recreation Fund right on the 31st, at which time, of course, I was due for audit again" (R. 150). The Golf Club Fund having been balanced as of December 30th, accused deposited on December 31st to the credit of the E. and R. Fund, Golf Club and personal funds in the amount of $600, representing the amount of the two checks above mentioned (R. 150,180). Accused thus made his Golf Club Fund balance as of December 30th and his E. and R. Fund balance as of December 31st. He felt confident that he would be able to make up the shortage in the Golf Club funds before March 31st when he would normally be due for another audit. About January 23, 1930, accused found it necessary to draw back from the Recreation Fund for his own personal expenses some of the money which he had used to make up the $600 deposit on December 31st, and accordingly cashed a third check on the E. and R. Fund for $200, placing a check against the Golf Club Fund in like amount in his safe to be kept for the benefit of the E. and R. Fund (R. 150,156). The Golf Club bank account was overdrawn and as a result the check could not be cashed. However, the Golf Club had assets in January of the value of somewhat less than $2500 (R. 177) and accused believed that if the Golf Club check had been presented to the bank it would have been honored inasmuch as he had an understanding with the bank permitting overdrafts (R. 178). After cashing this third check for $200 from E. and R. funds, accused allowed receipts of the Golf Club to accumulate in cash. In order to have sufficient funds to pay current running expenses of the Golf Club and to accumulate enough cash to make one of the two accounts balance if suddenly called upon to turn one of them over, accused cashed a fourth check on the E. and R. Fund, "sometime in February", for $500 (R. 150,168,180-184). A little later Colonel Wyllie told accused that he might relieve him from "one or both of my jobs". In order to balance both funds at this time accused needed approximately $300, so cashed from the Headquarters Battery Fund a check for $114.61, which, together with cash battery collections

which he had in his possession, gave him the necessary total. At about this time accused also cashed a fifth check, for $200, from the E. and R. funds and added the proceeds to the cash fund he was accumulating for the purpose of balancing all his accounts if necessary (R. 150,151). About the end of February he struck a preliminary balance of his funds and finding that he needed $58.79 to enhance his cash fund to $1200, which was the amount he believed was owing to the Recreation Fund, he cashed a sixth check, for $58.79, from the E. and R. Fund (R. 156). As he had done in the case of the January check for $200, he drew against the Golf Club bank account and placed in his safe checks to cover the amounts of all the later withdrawals from the E. and R. Fund. None of these checks was cashed due to the fact that the Golf Club account was overdrawn (R. 156). On March 31st, accused, having accumulated sufficient funds, including part of the proceeds of his pay check, made deposits sufficient to balance the Golf Club, E. and R., and Headquarters Battery accounts (R. 151). Of the six checks drawn on the E. and R. Fund, as above described, some were "counter checks" and some were "regular checks" taken from the back of the E. and R. check book (R. 166). When the canceled checks were returned from the bank accused destroyed them (R. 181,182). None of the checks was shown to the auditor for the reason that accused was "trying to conceal this operation from the auditor and from everyone else. I am not denying I was trying to conceal the whole transaction" (R. 166). Instead of concealing the shortage in the Golf Club Fund, accused could have borrowed money from the bank to cover it but undertook to conceal it for the reason that he

> "simply didn't want it known, sir. Several reasons, first, it is a reflection on my administration that the shortage existed; second, the steward had acted in a manly way about it, he admitted he was short and he didn't conceal anything, he offered to help me and so I undertook to cover it that way. The third reason was, the real reason why, I did it through these funds instead of outside sources, I was concealing it from my family, my wife didn't know about this shortage, that I had made it up until just before this trial, and I couldn't raise any money that she would not know about it, so I kept it from everybody." (R. 152.)

It was further his desire to protect the club which had a mixed membership of civilians and officers from any scandal or loss, "particularly so since I felt guilty of contributory negligence; that is, that I had not performed my duties as punctiliously as I might have or the shortage would not have grown so large" (R. 152). The shortage in the Golf Club Fund was never over $600 (R. 180). The amount taken from the E. and R. Fund in December was returned to it on December 31st

and sums exceeding $600 were thereafter drawn from the E. and R. fund, the difference between the shortage and the amounts drawn being used in paying current running expenses of the Golf Club (R. 180,181). Lindley, the steward, made up about $180 of the shortage and accused made up about $300 in cash from his own funds (R. 152). During the period in which the shortage existed accused had assets of such quantity that he could have borrowed sufficient money to cover all of the amounts involved in all of the charges (R. 184,185).

With respect to the entries in the E. and R. Fund cash book, accused testified that the entry of the balance of $1258.60 as of February 28, 1930, was made in regular course and was correct provided the unrecorded checks which he had drawn were not taken into consideration. He "could not make that check book represent a correct balance in any way without inserting those checks, so I simply let that balance stand and made no other entries in the check book until I had actually brought the Fund back into adjustment, as I have testified, on March 31st" (R. 160). Accused further testified that when the E. and R. Fund was audited as of March 31, 1930, the bank statements for January, February and March, 1930, were present. He made no attempt to conceal these statements except that he did not put the checks in question in the book. He testified that "I might say that having gone through a great many audits of accounts in the Army, I knew there was a very remote chance that any auditor would take those bank statements in detail" (R. 161). Had the auditor checked the entires on the bank statements against the checks shown in the check book, he would have found that the six suppressed checks had been cashed (R. 161).

With respect to the false entry in the Headquarters Battery council book, accused testified that at the time he made his certificate he knew the state of the fund but "through carelessness or through haste in closing up the fund" made the certificate incorrectly show the funds in bank (R. 162). The certificate was made "in all honesty, with no intention of deceiving" (R. 157).

Two enlisted men testified for the defense that on or about April 1, 1930, they saw accused writing up his battery council book and that at this time accused stated in their presence that he was preparing it for the two months of February and March, 1930 (R. 123,126).

Mrs. E. J. Strickland, the wife of accused, testified that she was absent from the Canal Zone from about March 15, 1930, to April 18, 1930. During this period she had securities on deposit at the Chase National Bank in the amount of about $3000 and had negotiable assets of much greater value in El Paso, Texas (R. 196,197). She would have been glad to have used these securities to assist accused if she had

known of his financial difficulties (R. 198). He did not disclose to her the shortage in Golf Club funds and she heard of it as "a bit of gossip" just prior to the trial (R. 197). Colonel Wyllie testified that accused "is an excellent artilleryman" (R. 134).

4. With respect to Specification 1, Charge I, the evidence shows that at the time and place alleged accused took from the Post Exchange funds which had been entrusted to him the sum of $2000 in cash, and wrongfully applied it to his own personal use. This application of the money amounted to a fraudulent conversion or appropriation thereof within the law of embezzlement. The specific intent to defraud must be implied from the breach of trust and the deliberately wrongful character of the acts. To be true, accused, in applying the money to his own use, placed with the funds of the Post Exchange his personal check for the amount involved. Had this check been good, the transaction might not perhaps have borne a criminal taint, for it might have been, in effect, a bona fide sale of the check or exchange of funds in differing forms. But the check was, in reality, known not to be worth its face value at the time it was turned over in lieu of cash, for accused had insufficient funds in bank to pay it. Whatever may have been his purpose with respect to covering the check or his confidence that he could cover it, the fact remains that the check was not actually a valuable consideration for the payment of the money, and was known not to be. The check might be treated as security, but deposit of security, known to be actually valueless, contemporaneously with the wrongful appropriation of funds does not take the transaction out of the category of embezzlement (Wharton's Criminal Law, Sec. 1283). Accused testified that he honestly believed that he could secure funds to cover the check and to this end had made arrangements with Brunner for a loan. Brunner denied that the arrangements for a loan had been made. In so far as the record shows Brunner had no motive to testify falsely and his testimony appears to be entitled to credence. In this connection it may be noted that the reviewing authority made written remarks upon the review of the staff judge advocate, to the effect that he believed the testimony of the witness Brunner. But in so far as accused's guilt is concerned, it is not necessary to determine which of the two, accused or Brunner, told the truth, for it is clear that the testimony, taken in the aspect most favorable to accused, shows, at most, that he intended promptly to restore the amount appropriated, and that he did restore it after a lapse of five or six hours. Such good purposes are not a defense. Accused's acts were none the less embezzlement though he intended at the time of taking the money to use it only temporarily and to restore it to the Exchange in the future. As was stated by The Judge Advocate General in C. M. 167487, Nihoof:

"The accused in the instant case had, of course, no right or authority to borrow from himself or to convert to his own use the trust funds in his possession. The wrongful conversion of the money was an act in its nature evil, and the statement of the act imports the evil intent. Wrongful acts knowingly committed cannot be excused on the ground of innocent intent (O'Brien vs. U.S., 27 App. D.C. 263-269; Patterson vs. U.S., 39 App. D.C. 89). The wrongful conversion having been shown, an intention of the accused to restore the money at some future time is immaterial and is no defense."

See also Vives v. U.S., 92 Fed. 355; Agnew v. U.S., 165 U.S. 36, 57.

Likewise the evidence shows the embezzlement by accused of the monies belonging to the E. and R. Fund, described in Specifications 2 to 7 inclusive, Charge I, proceeds of the series of E. and R. checks aggregating $1558.79. In these cases the monies were secretly used to cover and conceal a shortage in funds of the Golf Club for which accused was, admittedly, answerable. His use of the monies for this purpose was manifestly for his own benefit, though for the benefit also of the Golf Club. Again, he may have intended to and did restore the money after a lapse of time but, as observed above, this is not a valid defense. His deposit of Golf Club checks in the cases of the conversion of the proceeds of the four checks last drawn was, in view of the admitted depletion of the Golf Club bank account, of no effect upon the essentially fraudulent nature of the transactions.

As to Specification 2, Charge II, the evidence shows that accused entered in his E. and R. Fund check book a false balance of $1258.60. In view of the concealment and destruction of the checks not accounted for in this balance, and his testimony that he could not otherwise make the check book balance correct on its face, and that he deliberately sought to conceal the whole matter of the advances to the Golf Club, there can be no doubt that the false entry was made with intent to deceive the auditor and others. The falsity was of such a nature that it might readily have been discovered on the first audit of the funds, but accused testified that he believed it would not be discovered and the concealment and deceit intended was in fact accomplished for a time. This false official statement, having been made with deliverate intent to deceive, was, in the opinion of the Board of Review, conduct unbecoming an officer and a gentleman within the meaning of the 95th Article of War, as found by the court.

Accused's certificate as set forth in the Specification, Additional Charge I, was admittedly false in that it certified that money in the

amount of $299.26 belonging to the battery fund was on deposit with the Chase National Bank in Panama City, whereas the bank account, taking into consideration outstanding checks, was actually overdrawn on the date on which the certificate was purported to have been made. Accused testified that this certificate was made inadvertently and that he did not intend thereby to deceive. In view of the fact that he knew the statement as to the condition of the bank balance to be false and that he held approximately $300 of battery funds in cash in his personal possession in order that with them he might, if he felt called upon to doso, wrongfully use this money to balance other funds in which there were shortages for which he was responsible, there was ample justification for the court to find, as it did, that the false certificate was made with intent to deceive and to conceal the true status of the fund. Such being the case the accomplishment of the certificate amounted to conduct unbecoming an officer and a gentleman, and was a violation of the 95th Article of War.

The evidence also shows that at the time and place alleged in the Specification, Charge III, accused borrowed money from an enlisted man in order to meet the $2000 check cashed on April 2, 1930. This, in view of the military relations between officers and men, the casual acquaintance of accused and Sergeant Johnstone, and the fact that the two were serving on the same post, was, in the opinion of the Board, conduct prejudicial to good order and military discipline within the meaning of the 96th Article of War (Dig. Ops. J.A.G. 1919, pp. 44,439) (C.M. 117782, C.M. 130989).

5. A written argument or brief was submitted by accused and forwarded with the record of trial. The points raised therein have been carefully considered by the Board of Review. Without exception the Board believes that they are without merit in so far as they concern the legal sufficiency of the record to support the findings of guilty and the sentence. Among other things, accused contends that (1) certain laws of Congress mentioned by the trial judge advocate in his argument before the court, making acts of public officials embezzlement, prima facie, were not applicable in his case, but that it was necessary under the charges as laid to prove specific intent to defraud in connection with the unlawful conversions alleged; (2) that embezzlement was not committed in any case for the reason that it was not shown that accused intended to defraud in the sense that he intended permanently to deprive the various funds of the monies converted; (3) that the erroneous entries in his books could have been easily detected by proper audits; (4) that his act in borrowing money from an enlisted man was not, under all the circumstances, prejudicial to good order and military discipline; and (5) that there were inconsistencies in the findings, the court having found accused not guilty of certain offenses arising out of transactions involving other offenses of which he was found guilty.

As to the first contention, the record shows that the trial judge advocate read to the court in his final argument sections 89 and 91 of the Federal Penal Code which, in effect, make embezzlement prima facie where an official of the United States fails to render accounts or fails to deposit specific monies which have come into his possession. He stated that he read these statutes not because they were controlling, but because of the analogy between the situations covered thereby and the position of accused. In this connection he invited special attention to the provisions of the Manual for Courts-Martial covering the subject of embezzlement and argued the case upon the theory that the evidence established intent to defraud. The Board of Review believes that it was necessary in this case to prove specific fraudulent intent with respect to the various embezzlements charged, by direct or circumstantial evidence. As appears above, it is convinced that the proof establishes this element of the offenses beyond reasonable doubt.

It is true that the court found accused not guilty of specifications alleging certain offenses growing out of the series of transactions forming the basis of the offenses of which he was found guilty. In each case, however, the Board is of the opinion that the offenses of which accused was found guilty are distinct and separate from the offenses of which he was found not guilty, and that there is no inconsistency in law or reason in the findings.

It is believed that the remaining points raised by accused are disposed of in the discussion of the evidence as it appears above. At the conclusion of his argument, accused makes the following statement:

> "In consideration of the damage already done his life and in further consideration of the fact that the accused had at all times in these transactions nothing but a sincere desire that those activities, which had been entrusted to his administration, prosper, it is requested that the convictions in this case be wholly disapproved and that the accused be permitted to separate himself from the service, honorably and with a clean record, by his resignation."

6. Two of the eight members of the court submitted to the trial judge advocate a recommendation that the sentence be mitigated to reduction on the promotion list 500 files. One of these two members recommended also that the findings of guilty of Charge I and Specifications 1 to 7 thereunder inclusive, Charge II and Specification 2 thereunder, and Additional Charge I and its Specification, "be dropped" upon the grounds, in general, that the agencies which accused represented did not suffer any actual loss by his acts; that the erroneous

nature of the entry of the balance of $1258.60 in the E. and R. check book could have been readily discovered by a careful audit; and that there was insufficient evidence to show that the erroneous certificate in the Headquarters Battery council book was made with intent to deceive. This member also suggested that the post commander and the field officer who audited accused's accounts were in some degree responsible for accused's derelictions in that they failed to discover the irregularities and to require correction thereof. The other member of the court who recommended clemency agreed with the views expressed by the first member except that he stated that he did not agree that Specifications 2 to 7 inclusive, Charge I, should be disapproved.

7. The Army Register shows that accused was born October 23, 1898, and has had military service as follows: "Pvt. 78 Co. C.A.C. and Btry. H 8 Prov. and 53 Regts. C.A.C. 19 Apr. 17 to 16 June 18.--Cadet M.A. 17 June 18; (a) 2 lt. C.A.C. 2 July 20; 1 lt. 2 July 20; (b) 2 lt. (Dec. 15,22); 1 lt. 6 July 25".

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War, and is authorized for violation of the 93d and 96th Articles of War.

(Signed) W. A. TURNBULL, Judge Advocate.

(Signed) WILLIAM F. BURNS, Judge Advocate.

(Signed) HUBERT D. HOOVER, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington

Military Justice
C. M. No. 192169

AUG 5 - 1930

UNITED STATES v. Second Lieutenant HUDSON CHADWICK, Jr. (0-17855), Air Corps.	EIGHTH CORPS AREA Trial by G.C.M. convened at The Field Artillery School, Fort Sill, Oklahoma, May 31, 1930. Dismissal.

OPINION of the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that 2nd Lieutenant Hudson Chadwick, Jr., Air Corps, a student officer of the Field Artillery School, did, at Fort Sill, Oklahoma, on or about April 28, 1930, during a prescribed written examination at said school which he was duly required to take and answer, wrongfully and knowingly obtain unauthorized assistance in preparing and submitting his answers to certain questions contained in said examination by looking over and then adopting in substance as his own answers the written answers to said questions of another student officer, to-wit: 1st Lieutenant Leslie L. Hittle, Field Artillery.

Accused pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. The evidence shows that on April 28, 1930, between the hours of 8 a.m. and 10 a.m., at Fort Sill, Oklahoma, accused, while a member of the battery officers' class of the Field Artillery School, took a written examination given by the gunnery department on the subject of rolling barrage (R. 19,22,24). During the examination accused sat in the rear part of the classroom across the aisle, and about two and one-half or three feet from First Lieutenant Leslie L. Hittle, Field Artillery, another member of the class (R. 16,20,40). Two instructors of the class, suspecting that accused would attempt to secure unauthorized assistance, watched him during the course of the examination (R. 35), and observed that "continually" during the period "he would raise up, raise his body and look over" at Hittle's desk and thereupon return to his own seat and write on his own examination paper (R. 25,41). At one time when one of the instructors entered the room he observed that accused watched him but that as soon as the instructor turned away, accused again commenced to look at Hittle's paper and thereafter write on his own (R. 25). Hittle testified that he did not intentionally expose his examination paper in such a way that accused could see it and did not observe that accused looked at his paper (R. 22). At sometime about the beginning of the school year, in September, 1929, instructions had been given the class that the members were not to give or receive aid during examinations (R. 18). Students were not required to sign certificates that they had not received assistance (R. 34). At times during examinations they had been allowed to discuss various problems among themselves (R. 19). Accused's examination paper (Ex. II), as well as a reexamination paper submitted by him on the same day (Ex. III), together with Hittle's examination paper (Ex. I), were received in evidence.

The examination was in the nature of an exercise in computing firing data for a rolling barrage, and certain data as to map coordinates of gun positions and of the limits of the firing had been furnished the class in advance with the expectation that the given data would be plotted on maps before the examination and brought to class (R. 16,24,36). Among other things, computations of deflection and range were required, the results in numerous cases being reached by simple addition or subtraction of two, three or four factors. In numerous instances accused's examination paper as submitted carries the same total results as those on Lieutenant Hittle's paper, the factors furnished by the students and added or subtracted being, however, different and accused's computations of totals being incorrect. For example, the following (one of several similar cases) with respect to the assumed Number 2 gun of the assumed battery appears on accused's paper:

"

Deflection				Range				
Gun Map Deflection	Corrections: Drift and Do	Corrections: Wind	Corrected Deflection	Map Range	Corrections: Position and V-Vo	Corrections: Weight	Corrections: Weather	Corrected Range
#2 BDL 271	+4	+6	BDL 289	3280	+72	-13	-17	3327

(Ex. IIa) (Underscoring supplied.)

It is noted that accused's totals of 289 and 3327 are incorrect by addition and subtraction, but they are identical with the totals on Lieutenant Hittle's paper (Ex. Ia). His BDL (basis deflection left) is, however, "279" and his Map Range is "3285", figures which make his totals arithmetically correct. Again, in the computation of differences in deflection between the initial and final limits of the barrage, accused's paper (one of several instances) shows the figure "47" as the difference between "280" and "337" (correct difference 57) (Ex. IIa). The erroneous difference (47) is identical with that shown on Lieutenant Hittle's paper, the latter officer's factors, however, being such that his difference is mathematically correct (Ex. Ia). Under changes in deflection per "jump", accused's paper contains figures which, according to the testimony of an instructor, are meaningless in the connection in which used (R. 28). These figures correspond, however, in visual appearance to figures and words on Lieutenant Hittle's paper. For example, Hittle's paper contains (one of several instances) the writing "7 at 5, 3 at 4", etc., the "a" as written somewhat resembling an "o" and the "t" somewhat resembling a plus sign "+" (Ex. Ia). Accused's paper, in corresponding place, contains the figures "(70 + 5) (30 + 4)" (Ex. IIa). Again, under a subject "Effects", Lieutenant Hittle's paper shows erasures of figures in certain columns and the entering of the same figures in other columns (Exs. Ic and Id). Accused's paper, in corresponding places, shows similar and corresponding erasures and entries (Exs. IIc and IId). For example, Hittle's paper shows an erasure of the figure "23", representing density, in the plus column of "Position and Material" and an entry of that figure in the plus column of "Weather" (Ex. Ic); and accused's paper shows a corresponding erasure and entry of the figure "22" (Ex. IIc).

When accused turned in his examination paper he also submitted an unplotted map, stating that "he hadn't plotted any data on the map which he had with him; that he had plotted it at home and taken the data off the map and brought this other map to class with him". An instructor testified in this

connection that it was possible but not probable that the examination could have been completed without having at hand a map on which had been plotted the given data (R. 26,38).

About 25 minutes after accused had turned in his original examination paper, one of the instructors, pursuant to instructions from the director of the class, gave accused the same examination again (R. 48-51). The reexamination paper submitted was not satisfactory (R. 55). The results were not, in general, the same as those shown by the first paper. Similar, but not identical, meaningless figures were placed in the column for changes in deflection per "jump". In one case there was a shifting of figures in the columns under "Effects" (Exs. III, IIIb,IIIc).

Accused was not at the time of the incidents above described a regularly detailed student at the Field Artillery School (R. 7), but was a member of the 88th Observation Squadron on duty there. He had, however, volunteered to attend some of the courses in addition to his regular duties as a pilot, in order that he might thereby improve himself professionally (R. 6,8), and, with the consent of the Commandant of the Field Artillery School, had been detailed to take the work (R. 6,10) and had been enrolled in the gunnery course (R. 34). Had accused not attended the classes he would have been required to take garrison school instruction (R. 8). His squadron commander told him that if his work in the courses was satisfactorily completed he would ask the Commandant of the school to give accused "some expression of appreciation" for his work and that the squadron commander would rate him on his efficiency reports superior in attention to duty (R. 8). During the school year the squadron commander was advised on two occasions that accused apparently had too much work to do, and he asked accused on each occasion if he wished to be relieved. Each time accused replied that he desired to continue with the course because he "felt he was bettering himself" (R. 7).

4. Accused made an unsworn statement through his counsel as follows:

"The accused was assigned to duty with the 88th Observation Squadron at Fort Sill, Oklahoma, and reported for duty on or about July 1st, 1929. In carrying on his duties with the 88th Observation Squadron he found it hard to work with the school. He was told that if he could attend certain classes at the school he could fit himself to more efficiently carry on his work; that up to the time the incident occurred for which the accused is being tried he

did try to carry out those matters to the best of his ability. He was over at the school for information and he considered that he was over there for information and to get it in any way that he could. At all times he was trying to get that information. He didn't realize so he says that any moral turpitude was involved in the manner in which he got that information. He was over there to better fit himself to carry on his duties as an observer or pilot in the 88th Observation Squadron and that is what he was trying to do." (R. 66.)

5. The direct evidence contained in the testimony of the instructors, together with the circumstantial evidence found in the similarity of entries and otherwise on the two examination papers, shows beyond doubt that at the time and place alleged, during a prescribed written examination, accused wrongfully and knowingly obtained unauthorized assistance in preparing and submitting at least some of his answers by looking at and adopting in substance as his own answers, the written answers of Lieutenant Hittle, as charged. The defense was based upon the proposition that since accused was not a regularly detailed student at the Field Artillery School but was a volunteer member of the class, his acts in securing unauthorized assistance were not cognizable as an offense. It is true that accused was not a regularly detailed student and that, therefore, his actions could not avail to secure him higher official ratings as such. He was, however, a member of the class in the sense that he had been detailed to take the work as a part of his military duties, and knew that his attendance relieved him of other school duties and that his successful completion of the course would result in commendatory remarks on his efficiency reports and perhaps on his official records otherwise. The fact that his work was undertaken voluntarily and without official direction by the War Department did not relieve him from the necessity of observing the ordinary standards of honesty. Not only did he disobey the express instructions given with respect to obtaining unauthorized assistance but, by attempting surreptitiously to secure and use to his own advantage and as his own production, the results of another officer's knowledge and labor, he fell below the standards of behavior expected of officers of the Army in the performance of their duties regardless of their nature. In the opinion of the Board of Review, the acts of accused under all the circumstances amounted to conduct unbecoming an officer and a gentleman in violation of the 95th Article of War.

6. Upon arraignment the defense entered a plea in bar of trial upon the

ground that inasmuch as accused was not a regularly detailed student at the Field Artillery School he could not legally be charged with an offense under the Articles of War arising out of acts committed while a member of a class thereat. After receiving testimony as indicated above with respect to accused's status, the court directed that the specification as originally drawn be amended by striking out an allegation that at the time of his acts accused was "a student officer of the Field Artillery School". The defense thereupon renewed its plea in bar of trial upon the ground that accused could not have been legally required to take the examination in question. Both pleas in bar were properly overruled for, as observed in the discussion above, accused's acts amounted to violation of the 95th Article of War. The action of the court in amending the specification was not improper in view of the fact that the specification as amended conforms to the proof. Following the amendment counsel did not ask for a continuance for the purpose of further preparing the defense.

7. The members of the court submitted to the reviewing authority a recommendation for clemency as follows:

> "1. In recommending clemency in the above case the undersigned members of the court consider the following:
>
> Educational qualifications;
>
> The age and service of the accused;
>
> The fact that the experience of the accused prior to his entry into the service, as well as his lack of instruction in legal matters and in customs of the service since his entry, makes it probable that he did not fully comprehend the seriousness of his offense;
>
> The fact that the accused was not a regularly detailed student at the Field Artillery School; that his completing the course would not result in his receiving a certificate of graduation and that he was taking instruction voluntarily with a view to increasing his value to the service.
>
> 2. It is recommended that the sentence be commuted to a reprimand."

8. The Army Register shows that the accused was born August 17, 1906; and that his service is as follows: "Flying Cadet A.C. 9 Apr. 28 to 27 June 29; 2 lt. Air Res. 22 June 29; accepted 22 June 29; active duty 28 June 29

to 7 Oct. 29; 2 lt. A.C. 4 Sept. 29; accepted 8 Oct. 29".

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. Dismissal is mandatory upon conviction of the 95th Article of War. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and warrants confirmation thereof.

E. B. McNeil, Judge Advocate.
William E. Burns, Judge Advocate.
Robert O. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192335.

AUG 7 - 1930

UNITED STATES vs. Corporal LEO R. CLARK (6517137), Company E, 1st Engineers.	)	FIRST DIVISION Trial by G.C.M. convened at Camp Dix, N.J., May 20, 1930. Reduction, dishonorable discharge, and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Corporal Leo R. Clark, Company E, 1st Engineers, did, at Fort DuPont, Delaware, on or about October 25, 1929, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Private Joseph C. Priory, Company E, 1st Engineers.

Specification 2: (Finding of guilty disapproved by reviewing authority).

Accused pleaded not guilty to the Charge and both specifications and was found guilty of Specification 1, except the words "commit" and "having", substituting therefor, respectively, the words "attempt to commit" and "attempting to have", of the excepted words not guilty, of the substituted words guilty; guilty of Specification 2 and of the Charge "as to specification 1: not guilty, but guilty of violation of the 96th Article of War. As to specification 2: Guilty." No evidence of previous convictions was introduced. He was sentenced to reduction to the grade of private, dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority disapproved the finding of guilty of Specification 2, approved the sentence, designated

the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. By Specification 1 of the Charge, as amended by the findings, there is described an offense which is alleged and is shown by the evidence to have been committed on or about October 25, 1929. The papers accompanying the record of trial, and the records of the War Department in the Office of The Adjutant General, of which the Board of Review may, under the circumstances of this case, take judicial notice, show that accused was on January 2, 1930, honorably discharged from the enlistment under which he was serving at the time of the commission of the offense alleged. This trial took place on May 20, 1930, during a later enlistment and subsequent to such separation from the service. The charges were preferred on March 27, 1930.

The Manual for Courts-Martial, Paragraph 10, states:

> "The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States, ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service."

It has been held by the Board of Review and The Judge Advocate General that a court-martial is without jurisdiction to try a person subject to military law for sodomy committed in a prior enlistment terminated by honorable discharge prior to the preferment of charges and trial. (C.M. 171874 Finnimore). The Judge Advocate General has expressed opinions to the same effect in cases wherein soldiers were dishonorably discharged, but not held in confinement, prior to trial for desertions committed in the enlistments terminated by the discharges (Ops. J.A.G. 250.419, April 6, 1926, October 23, 1926). In the opinion of the Board of Review the court that tried this accused was without jurisdiction to try him for the offense involved in Specification 1 of the Charge.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Charge and Specification 1 thereunder and the sentence.

_____ Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

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WAR DEPARTMENT
In the Office Of The Judge Advocate General
Washington

Military Justice
C.M. 192408

AUG 15, 1930

UNITED STATES	)	PANAMA CANAL DIVISION
vs.	)	Trial by G.C.M. convened at Fort Clayton, Canal Zone, June 16, 1930. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private CHARLES E. CARR (6802751), Company D, 11th Engineers.	)	

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BEER, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 94th Article of War.

Specification: In that Private Charles E. Carr, Company D, 11th Engineers, did, at Campana, R. de P., on or about February 20th, 1930, feloniously take, steal, and carry away one paid of shoes, service, of the value of about $3.73, property of the United States furnished and intended for the military service thereof.

CHARGE II: Violation of the 64th Article of War.

Specification 1: In that Private Charles E. Carr, Company D, 11th Engineers, did, at Campana, R. de P., on or about February 20th, 1930, unlawfully sell to Alcides Quintero, a native of Campana, R. de P., a pair of shoes, service, of the value of $3.73, issued for use in the military service of the United States.

Specification 2: In that Private Charles E. Carr, Company D, 11th Engineers, did, at Campana, R. de P., on or about April 1, 1930, through neglect, lose: 1. belt waist 14¢ 1. Cord hat 10¢. 4. Drawers Cotton 28¢ ea. 1. necktie 18¢

3. Drawers woolen $1.25 ea. 7. handkerchiefs 6¢ ea. 2. shirts cotton $1.12 ea. 3. shirts flannel $2.37 ea. 1. Pair of shoes Service $3.73. 1. Pair shoes garrison $4.41. 1. pair of socks cotton 10¢. 3. Undershirts woolen $1.25 ea. of the value of $27.05, issued for use in the military service of the United States.

He pleaded not guilty to the charges and specifications and was found guilty of Charge I and its Specification and of Charge II and Specification 1 thereunder, and guilty of Specification 2, Charge II except the words and figures "4 drawers cotton, 28¢ ea." and "$27.05", substituting for the latter the figures "$25.93", of the excepted words not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months. The reviewing authority approved the sentence, remitted six months of the term of confinement, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. In February, 1930, while Company D, 11th Engineers was at Campana, R. de P., Private Phillip G. Gallagher of that company missed from under his bunk a pair of service shoes, list price $3.73, which had been issued to him for use in the military service (R. 13, 14). About February 20, 1930 Sergeant Edward Esteban, of the company, found these shoes on the feet of a native of Campana, Torres (R. 10, 11), and took them from him (R. 10, Ex. 2). Torres had purchased the shoes from one Alcides Quintero. Quintero testified by deposition, that he knew accused "only by sight", and, in response to a leading question, testified that accused sold him the shoes for $1.40 about February 20, 1930 (Ex. 3). Esteban testified that Quintero told him that he got the shoes from a soldier whose name he did not know-"a tall skinny man working in the kitchen"; and that, as accused "was working in the kitchen all the time", witness took him before Quintero who "recognized the man he bought the shoes from" (R. 8, 10). Another soldier, Cisco, testified that he was present at a conversation in Spanish between Quintero and Esteban, and that the latter told witness that Quintero said that he bought the shoes from accused (R. 12). (Charge I and its Specification; Charge II and Specification 1 thereunder).

The evidence also shows that about May 1, 1930, (R. 15, 19, 23) upon the return of Company D, 11th Engineers, from field service, accused's clothing was checked and it was thereupon discovered that a waistbelt, value $.14; a hat cord, value $.10; a necktie, value $.18; three drawers woolen, value $1.25 each; seven handkerchiefs, value $.06 each; two shirts cotton, value $1.12 each; three shirts woolen, value $2.37 each; a pair of shoes service, value $3.75; a pair of shoes garrison, value $4.41; a pair of socks cotton, value $.10; and three undershirts woolen, value $1.25 each, of a total value of $25.93, all of which had been issued to him for use in the military service, were missing (R. 19, 21, 22; Exs. 4, 5). Values stated are list prices as

published in A.R. 30-3000, May 20, 1930 (R. 21). Few of the articles were used on field service and clothing of this kind had been kept under lock and key (R. 19, 20). Of the articles lost the belt, hat cord, necktie, one drawers cotton, three drawers woolen, 4 handkerchiefs, one shirt woolen, the shoes garrison and three undershirts woolen had been issued to accused on July 17, 1929, the socks cotton had been issued to him on March 20, 1930, and the remaining articles had been issued to him on July 17, 1929 or March 20, 1930 (Ex. 5). (Specification 2, Charge II).

Accused made the following unsworn statement through his counsel:

"The company was in the field mapping and had been out for four months. I drew clothes in the field. I came in to go to the hospital and brought these clothes in to the company barracks and put them in my locker. I didn't have a key to my locker so I couldn't lock it. The company came in about five days before I got in. When I came in I looked for my clothes and found almost everything gone, almost everything in my locker missing. During the time the company was in the field, there were several men who were discharged and sent back to the States." (R. 28).

4. The evidence sufficiently shows that at about the time and place alleged in the Specification, Charge I and Specification 1, Charge II, the service shoes described were stolen from Gallagher and sold by someone to Quintero. Quintero testified by deposition, in response to a leading question, that he purchased the shoes from accused, but he also testified that he knew accused only by sight. Since the deposition was taken on written interrogatories it must be assumed that accused was not present when Quintero testified. The deposition as a whole cannot therefore farily be accepted as proof of more than the purchase by Quintero of the shoes from a person who was known to witness only by sight and was not seen at the time the testimony was given or as proof that it was accused who sold the shoes. The testimony of Esteban to the effect that Quintero told him that he had bought the shoes from accused was mere hearsay and incompetent, as was the testimony of Cisco that Esteban told him that Quintero had said that accused was the seller (Par. 113 a, M.C.M.; Wharton's Criminal Evidence, Sec. 273). Esteban's identification of accused as the tall, lean soldier who worked in the kitchen, being based only on Quintero's hearsay statement, was also incompetent. There is no substantial competent evidence that accused was ever in possession of the stolen property and there is no evidence, direct or circumstantial, that he took the property from Gallagher's possession or sold it. It follows that the evidence is legally insufficient to support the findings of guilty of larceny and unlawful sale of government property, as charged.

The evidence sufficiently shows the loss by accused through neglect, of the articles of government property described in Specification 2, Charge II. Neglect is to be presumed from the loss, without any convincing explanation, of the issued property (Par. 144b, M.C.M.). No evidence, other than as to the list price of the articles, bearing upon their actual value at the time of their loss was introduced. There is nothing in the record from which an

inference may be drawn that the property was in such condition as to be of values comparatively equivalent to the official list price of new articles; and it positively appears that much of the property had been issued many months prior to its loss, and had therefore probably been used to some extent before its loss. Such being the facts it cannot reasonably be said that the proof shows that the lost property was of value equal to its list price. Inasmuch as the articles were issued for use and, presumptively, were still useful at the time of loss it may be assumed that they were of some value (C.M. 189745, Millerick; 188766, Ramsey; CM 185034, Pitt; C.M. 183954, Jackson). The maximum punishment authorized by paragraph 104c of the Manual for Courts-Martial for this offense, that is, the loss through neglect of clothing, issued for use in the military service, of some value is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

5. The charge sheet shows accused enlisted October 22, 1929 with no prior service and that he was 18 years of age at the time of the commission of the offense.

6. For the reasons hereinabove stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification and of Specification 1, Charge II; and legally sufficient to support the findings of guilty of Charge II and Specification 2 thereunder, and so much only of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds of pay per month for a like period.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Military Justice
C. M. No. 192451

SEP 23

UNITED STATES	)	PANAMA CANAL DIVISION
	)	
v.	)	Trial by G.C.M. convened at Fort Davis, Canal Zone, June 9, 1930. Dishonorable discharge, suspended, and confinement for eighteen (18) months. Disciplinary Barracks.
Private FRANK J. HAJEK (R-1048064), Battery A, 2d Field Artillery.	)	

OPINION of the BOARD OF REVIEW
McNEIL, CLINE and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BEER, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Private Frank J. Hajek, Battery A 2nd Field Artillery, was at Colon R de P. on or about May 1, 1930, drunk and disorderly.

Specification 2: In that Private Frank J. Hajek, Battery A 2nd Field Artillery, having received a lawful order from 1st Lieut. John M. Whistler, 2nd F.A., to return to his quarters and stay there, the said 1st Lieut. John M. Whistler being in the execution of his office, did, at Fort Davis, Canal Zone, on or about May 1, 1930, fail to obey the same.

CHARGE II: Violation of the 63d Article of War.

Specification: In that Private Frank J. Hajek, Battery A 2nd Field Artillery, did, at Colon R de P., on or about May 1, 1930, behave himself with disrespect toward 1st Lieut. John M. Whistler, 2nd Field Artillery, his superior officer, by saying to him "I will get you if it is the last thing that I ever do, that is threatening talk and there are a lot of witnesses here to prove it", or words to that effect.

CHARGE III: Violation of the 69th Article of War.

Specification: In that Private Frank J. Hajek, Battery A 2nd Field Artillery, having been duly placed in confinement in the Artillery Guard House, Fort Davis, Canal Zone, on or about May 1, 1930, escape from confinement before he was set at liberty by proper authority.

He pleaded not guilty to the charges and specifications. He was found guilty of Charges I and III and their specifications, and of Charge II, and guilty of the Specification, Charge II, except the words "Colon, R. de P.", substituting therefor the words "Cristobal, Canal Zone", of the excepted words, not guilty, of the substituted words, guilty. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for eighteen months. The reviewing authority approved only so much of the finding of guilty of Specification 1, Charge I, "as involves a finding of disorder only", approved the remaining findings of guilty, approved the sentence and directed its execution, but suspended the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement. The sentence was published in General Court-Martial Order No. 57, Headquarters Panama Canal Division, July 21, 1930.

3. Witnesses for the prosecution, enlisted members of the Provost Guard in Colon, R. de P., on the night of May 1, 1930, and others, testified in substance that at about 8 p.m. on May 1st First Lieutenant John M. Whistler, 2d Field Artillery, approached accused in Colon and told him to "drink his beer and get on the bus

and go home" (R. 22,24). Accused thereupon mounted the bus but soon jumped from it and ran away (R. 23) and did not get on it again (R. 25). Between 8 and 9 p.m., however, he reported to the noncommissioned officer in charge of his battery quarters that he had been ordered into arrest in quarters by Lieutenant Whistler. At about 9:15 accused reported to the noncommissioned officer in charge of quarters that he was going to bed but at midnight call he was not in quarters (R. 20,31). (Specification 2, Charge I.)

At about 10:45 p.m., May 1st, accused reappeared in Colon and Lieutenant Whistler told him to get into what appears to have been a patrol car used by the Provost Guard (R. 10,14) and told a noncommissioned officer to take accused to the guardhouse at Gatun (R. 10,23). At this time accused talked loudly and "acted in a sort of loud manner" which noncommissioned officers of the Provost Guard characterized as "disorderly" (R. 10,11,15). At this time accused said to Lieutenant Whistler in effect that he would "get" Whistler when he was released from confinement even if he were confined ten years. He added that the words he was using were threatening and that Whistler had "plenty of witnesses" (R. 10,15, 17). At about the same time he remarked that Whistler would probably say that accused was a "snow-bird" (R. 17). All witnesses who testified to the foregoing stated that accused acted in a manner which was abnormal for him (R. 10,15,18,24). One witness stated that accused acted as if he were "doped up" (R. 24) and two witnesses testified that they believed that he was not capable of normal mental control (R. 18,24). Accused testified in this connection that for three or four months prior to the transactions described he had been using cocaine; that on the night in question he had taken "one shot" in an attempt to sober up and that he did not recall what he had said or done in the presence of Lieutenant Whistler (R. 30,31). (Specification 1, Charge I; Charge II and its Specification.)

When accused was placed in the car the second time he was handcuffed (R. 23) and taken to the guardhouse, where, by Lieutenant Whistler's orders, he was confined (R. 25). Having been taken inside the guardhouse, he was put in charge of a corporal of the guard. The noncommissioned officer who was on duty as sergeant of the guard testified that at that time accused appeared to be sober and "knew what he was doing" (R. 26). The handcuffs were removed and while accused was in the guardhouse he asked for and was given a cup of coffee. Thereafter the corporal started to take him to the cell room. Accused passed through a door which was suddenly

closed between him and the corporal and the latter next saw accused going "round the corner of the canteen" (R. 27), which was about ten yards distant. The corporal did not see accused thereafter until about two days later (R. 28). Accused testified that "I practically didn't know nothing until I woke up the next day, and I called to a fellow who was going to work and asked him what I had pulled off. I couldn't remember that I had went and run away, and I don't remember exactly what I did do" (R. 32). (Charge III and its Specification.)

4. At the trial the prosecution introduced in evidence a deposition by Lieutenant Whistler, the officer named above, stating that the witness, who was the accuser, had returned to the United States (R. 9). When the record of trial was received in the office of The Judge Advocate General the deposition of Lieutenant Whistler did not accompany it. In lieu thereof there were forwarded with the record certificates by the president and trial judge advocate of the court to the effect that the deposition had been introduced. The Division Judge Advocate, in his review, states that the deposition was introduced in evidence and used by the court in its deliberations "but following the close of the trial the deposition has not been seen and could not be found by any of the court personnel". It appears that the missing deposition has been lost or destroyed and that further effort to the end of obtaining it and including it in the record of trial would be futile. The contents of the deposition do not appear, except that in his argument the trial judge advocate stated:

> "We have as evidence the deposition of Lieutenant Whistler - beginning 'I accompanied an M.P.' etc., and finishing with 'in a drunken condition'. This was at the start of the evening, the first indication that the accused had had anything to do with liquor. Lieutenant Whistler testifies that Hajek was drunk".

It fairly appears from that portion of the record before the Board of Review that Lieutenant Whistler had first-hand knowledge of material facts pertaining to Charges I and II and their specifications, but that he did not have personal knowledge of the events which resulted in the offense of escape alleged by Charge III and its specification. The original charge shows that Lieutenant Whistler, in subscribing the charges, took oath that he had personal

knowledge of the matters set forth in the specifications of Charge I and Charge II, and that he had investigated the matters set forth in the Specification of Charge III (escape) and that it was true to the best of his knowledge and belief.

5. The 33d Article of War, among other things, requires that "Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it". The Manual for Courts-Martial, paragraph 85 b, requires that the record of a general court-martial "set forth a complete history of the proceedings had in open court". It is clear that the record now before the Board of Review is incomplete with respect to Charges I and II and their specifications in that the deposition of a witness, the full contents of which are not known but which must have pertained to these charges and specifications and must have had material bearing on accused's guilt or innocence thereunder, is not included therein. The express requirements of the Article of War and the Manual for Courts-Martial with respect to the keeping of a record of the proceedings of the court have not, therefore, to the extent noted, been complied with in this case.

The sentence to dishonorable discharge having been suspended, it was not necessary, prior to a finding by the office of The Judge Advocate General of its legal insufficiency, that the record of trial be passed upon by the Board of Review and The Judge Advocate General, but under the 6th subparagraph of Article of War. 50½, examination of the record in the office of The Judge Advocate General was required for the purpose of determining, on appellate review, its legal sufficiency to support the findings and sentence. It is evident that this statutory review could not be performed in this case with respect to the convictions of the offenses involved in Charges I and II and their specifications for the reason that there is no complete record of trial upon these charges and specifications within the contemplation of either Article of War 33 or Article of War 50½. Not having the entire proceedings as to these charges and specifications before it, it would be impossible for this office, the Board of Review, or The Judge Advocate General to reach a determination under Article of War 37 as to whether the missing evidence was properly admitted by the court or whether the substantial rights of accused were adversely affected thereby. Through no fault of his, accused has been, by the deficiency of the record, deprived of the right conferred by law to have the complete proceedings at his trial upon these charges and specifications reviewed in an appellate

capacity. This right is of a highly substantial character, and it must be concluded that its denial to him is fatally injurious within the contemplation of the 37th Article of War. In cases in which records of trial were incomplete in the sense that it appeared that they had been in part prepared from unauthorized sources, it has been held by the Board of Review, with the concurrence of The Judge Advocate General, that the records were legally insufficient to support the findings and sentences adjudged (C. M. 156085, Mayo; 156084, Alsup). It has been held by state courts in cases in which there was not an automatic appellate review as is provided for by Article of War 50½, that if, by reason of the loss of an important part of a record, a defendant is unable through no fault of his to perfect his appeal, the judgment will be reversed (State vs. McCarver, 20 S.W. (Mo.) 1058).

With respect to Charge III and its specification, it cannot be said that there is any reasonable possibility that the missing deposition had any material bearing upon the guilt or innocence of accused of the offense of escape charged therein, or that the admission in evidence of the deposition or any rulings thereon could have influenced the court in reaching its findings upon this charge and specification. The record of trial, in so far as it concerns this charge and specification, appears to be complete and without defect which in any way prevents or hinders appellate review of the record of the conviction of escape and so much of the sentence as is based thereon, or prevents or hinders a determination under Article of War 37 as to whether any error in the admission or rejection of evidence or in procedure injuriously affected the substantial rights of accused.

The maximum sentence authorized by paragraph 104 c of the Manual for Courts-Martial for escape, the offense involved in Charge III and its specification, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charges I and II and their specifications, and legally sufficient to support the findings of guilty of Charge III and its Specification and so much only of the sentence as

includes dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

E. C. McNeil, Judge Advocate.

Walter D. Cline, Judge Advocate.

Robert W. Hoover, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192456.

OCT 9 - 1930

UNITED STATES vs. Private SAMUEL CLAMBRONE (R-2955879), Headquarters Battery and Combat Train, 1st Battalion, 2nd Field Artillery.	PANAMA CANAL DIVISION Trial by G.C.M. convened at Fort Davis, Canal Zone, July 15, 1930. Dishonorable discharge and confinement for two (2) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
McNEIL, CLINE and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by HOOVER, Judge Advocate

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support the findings of guilty.

It appearing from the evidence that the identity of the man who participated with accused in the offense was not known and was not susceptible of proof, the failure of the specification to allege his name and the absence of proof thereof at the trial did not affect the legal sufficiency of the conviction (C.M. 192319, Lindsay).

2. Confinement in a penitentiary in this case is not authorized under the 42nd Article of War, the offense not being punishable by confinement for more than one year by any statute of the United States (C.M. 147074, Murphy; C.M. 159285, Millett).

3. For the reasons hereinabove stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and con-

finement at hard labor for two years, at a place other than a penitentiary.

Judge Advocate.

Dissent by Clint Judge Advocate.

Judge Advocate.

Military Justice
C.M. 192456. 1st Ind.

War Department, J.A.G.O., OCT 9 - 1930 - To the Commanding General, Panama Canal Division, Fort Amador, Canal Zone.

1. In the case of Private Samuel Ciambrone (R-2955879), Headquarters Battery and Combat Train, 1st Battalion, 2nd Field Artillery (C.M. 192456), I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that a place of confinement other than a United States Penitentiary be designated. Thereupon, under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is 192456. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order, as follows:

(J.A.G.O. No. 192456).

E.A. Kreger,
Major General,
The Judge Advocate General.

OCT 18 1930

1 Incl.-record of trial.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192456.

OCT 9 - 1930

UNITED STATES vs. Private SAMUEL CIAMBRONE (R-2955879), Headquarters Battery and Combat Train, 1st Battalion, 2nd Field Artillery.	)	PANAMA CANAL DIVISION Trial by G.C.M. convened at Fort Davis, Canal Zone, July 15, 1930. Dishonorable discharge, and confinement for two (2) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
McNEIL, CLINE and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by HOOVER, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support the findings of guilty.

It appearing from the evidence that the identity of the man who participated with accused in the offense was not known and was not susceptible of proof, the failure of the specification to allege his name and the absence of proof thereof at the trial did not affect the legal sufficiency of the conviction (C.M. 192319, Lindsay).

2. The table of maximum punishments contained in paragraph 104c of the Manual for Courts-Martial does not list or otherwise specially provide for the offense of attempting to commit sodomy, of which accused stands convicted. The paragraph mentioned provides generally, however, as follows:

> "The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense <u>if not so listed</u>, and for any offense closely related to either, <u>if not so listed. Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service</u>." (Underscoring supplied) (Page 96, M.C.M.).

The offense of attempting to commit sodomy not being "thus provided for" - that is not being "so listed" as the Board of Review interprets the language used, resort to statute or custom of the service is to be had for the purpose of determining the maximum punishment authorized. Such statute is found in Section 906 of the Code of the District of Columbia, which fixes one year as the maximum authorized confinement for attempt to commit sodomy. By reference thereto the Board of Review, with the concurrence of The Judge Advocate General, has repeatedly held that the maximum authorized punishment by court-martial by confinement for the offense in question is one year (C.M. 145266, Baker; C.M. 147074, Murphy; C.M. 153772, Owens; C.M. 159285, Millett). It was expressly stated by the Manual for Courts-Martial, 1921, following the preceding manual, - and the rule does not appear to have been abrogated by the present manual (See introduction to present manual),-that:

> "the jurisdiction granted to courts-martial to punish offenses of a civil nature is not to be exercised with greater harshness than is practiced under the criminal jurisdiction of the United States courts" (Par. 337 (2), M.C.M. 1921).

The limitations by reference to statute, as set forth in the present manual are, no doubt, predicated on this rule.

The clauses of the manual first above quoted appear to impose two distinct general limitations on punishment for offenses not listed, the first as authorized for any listed offense which includes the offense not listed, or is closely related thereto; the second as authorized by statute or custom of the service. In cases in which both limitations may be applicable, it is but reasonable to apply the limitation of least severity. Inasmuch as there is a maximum limitation by statute and perhaps by custom of the service for attempt to commit sodomy, the maximum of which is of less severity than the maximum (5 years confinement as for the including offense of sodomy) fixed by the other limitation, the limitation by reference to statute prevails in this case.

The interpretation of the language of the present manual as here expressed is that which has, without exception, been accepted by the Board of Review and The Judge Advocate General since the manual became effective. To take the language as meaning otherwise, that is to construe it to authorize punishment of included

offenses with severity equal to that authorized for the including offenses despite the existence of a federal legislative expression as to the appropriate maximum punishment for the included offense, would result not only in abandoning long established precedents, but would result in greatly narrowing, if not obliterating in practical application, the established rule, which cannot but be salutary from the standpoint of justice and broad military policy, that punishments imposed by courts-martial for offenses of a civil nature are not to be more harsh than under the practice of the federal civil criminal courts. Express or clearly implied limitation or abrogation of the rule is not to be found in the Manual, and in the absence of a plain expression or implication of such intent with respect to the rule, the Board of Review finds no legal justification for concluding that such limitation or abrogation was contemplated by the President in promulgating the present Manual for Courts-Martial. It is noteworthy, in this connection that the question here involved is not to be confused with, and is wholly unrelated to that of the legal propriety of convicting persons subject to military law of violations of statutes of the United States of local application in cases in which the wrongful acts are committed in places to which the statutes do not apply. An express inhibition against such practice is contained in paragraph 152 c of the Manual, which defines the "crimes or offenses not capital", punishable under the 96th Article of War. The question relating to the legality of such convictions under an assumed principle of extraterritoriality has been settled by the paragraph last mentioned, but it differs radically from the question of policy involved in the rule generally restricting punishments of offenses of civil nature to the level of the practice of federal civil criminal courts.

To limit or obliterate this rule of restriction would, moreover, result in unprecedented authorizations of severe punishment in certain cases. For example, unless specifically listed in the table of punishments, all attempts to commit offenses would because they are included in the offenses attempted, be punishable as for the completed offenses. This though the authorizations would not be in accord with the general legislative practice, federal and state, and though, among the attempts listed in the table of punishments set forth in the Manual for Courts-Martial, not a single one is punishable with severity equal to that authorized for the completed offense. Moreover, an "included offense" is necessarily a lesser offense and to prescribe limitations which are the same for the greater and lesser offenses regardless of statutory guides available, that is, frankly to refrain from gauging punishments within this class of cases by the

relative seriousness of the offenses affected, would, on its face, be difficult of justification from the standpoints of common sense and justice. Such effects should certainly not be permitted unless a clear executive intent to that end appears. Such intent, in the opinion of the Board, cannot be found in the language of paragraph 104 c of the Manual when read in connection with the remainder of that Manual and established precedents and principles, as it must be read if the ordinary rules of legal interpretation are to be observed.

3. Confinement in a penitentiary in this case is not authorized under the 42nd Article of War, the offense not being punishable by confinement for more than one year by any statute of the United States (C.M. 147074, Murphy; C.M. 159285, Millett).

4. For the reasons hereinabove stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, at a place other than a penitentiary.

_____ Judge Advocate.

Walter D. Olmes Judge Advocate.

AUG 27 1930

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192503.

U N I T E D S T A T E S	)	EIGHTH CORPS AREA
	)	
vs.	)	Trial by G.C.M. convened at Fort Brown, Texas, July 10, 1930.
Private LOUIS NEESE, JR., (R-41763), Quartermaster Corps.	)	Dishonorable discharge, suspended, and confinement for one (1) year. Disciplinary Barracks.

OPINION by the BOARD OF REVIEW
GRAHAM, CLINE and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BEER, Judge Advocate.

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1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally sufficient to support the findings and sentence in part only, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th & Harrison Streets, or in the immediate vicinity thereof, in Brownsville, Cameron County, Texas, on or about 16 April, 1930, while on furlough, for the purpose of selling, engage in the manufacture of intoxicating liquor, to wit, domestic beer (home brew), this to the prejudice of good order and military discipline.

Specification 2: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th &

Harrison Streets, or in the immediate vicinity thereof, Brownsville, Cameron County, Texas, on or about 5 May, 1930, unlawfully sell to one Gustavo Von Hattem, intoxicating liquor, to-wit, domestic beer, this to the prejudice of good order and military discipline.

Specification 3: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th & Harrison Streets, or in the immediate vicinity thereof, Brownsville, Cameron County, Texas, on or about 17 May, 1930, unlawfully sell to one Gustavo Von Hattem, intoxicating liquor, to-wit, domestic beer, this to the prejudice of good order and military discipline.

Specification 4: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th & Harrison Streets, or in the immediate vicinity thereof, Brownsville, Cameron County, Texas, on or about 16 April, 1930, unlawfully sell to one William H. Langley, intoxicating liquor, to-wit, domestic beer, this to the prejudice of good order and military discipline.

Specification 5: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th & Harrison Streets, or in the immediate vicinity thereof, Brownsville, Cameron County, Texas, on or about 16 April, 1930, unlawfully sell to one Glen E. Board, intoxicating liquor, to-wit, domestic beer, this to the prejudice of good order and military discipline.

Specification 6: (Not Guilty).

Specification 7: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th & Harrison Streets, or in the immediate vicinity thereof, Brownsville, Cameron County, Texas, on or about 16 April, 1930, unlawfully sell to one Robert H. Roman, intoxicating liquor, to-wit, domestic beer, this to the prejudice of good order and military discipline.

Specification 8: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th & Harrison Streets, or in the immediate vicinity thereof, in Brownsville, Cameron County, Texas, on or about 26 November, 1929, unlawfully sell to one William Boyle, intoxicating liquor, to-wit, domestic beer, this to the prejudice of good order and military discipline.

Specification 9: In that Private Louis Neese, Quartermaster Corps, did, at a dwelling located at 19th & Harrison Streets, or in the immediate vicinity thereof, in Brownsville, Cameron County, Texas, on or about 15 November, 1929, unlawfully sell to one Elphege J. Bergeron, intoxicating liquor, to-wit, domestic beer, this to the prejudice of good order and military discipline.

Specification 10: In that Private Louis Neese, Quartermaster Corps, was, at Fort Brown, Texas, on or about 3 June, 1930, drunk.

He pleaded not guilty to the Charge and all specifications thereunder and was found guilty of the Charge and all specifications except Specification 6, of which he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 451, Headquarters Eighth Corps Area, July 26, 1930.

3. The evidence may be summarized as follows:

Specification 10: Captain Albert Lobitz, Q.M.C., saw the accused, who was at that time on furlough, at Fort Brown, Texas, about 1 P.M., June 3rd, observed that he was under the influence of intoxicating liquor, recalled the unexpired portion of his furlough, ordered him into arrest and sent him to the hospital for examination by a medical officer (R 8). When accused reached the hospital he was examined by an officer of the Medical Corps, who made in his case a diagnosis of chronic alcoholism (R 20). In other words, his condition was one of drunkenness (R 21).

Specification 1: Captain Lobitz "had been informed" that accused "had been manufacturing and selling intoxicating liquor" at a dwelling located at 19th and Harrison Streets, Brownsville, Texas. He procured from accused the key to the premises and accompanied by A.A. Champion, Mounted Customs Inspector, Brownsville, Texas, who was armed with a search warrant, proceeded to the described premises and there found two bottles of "home brew", a small bottle of mescal, 215 bottles "that had contained beer", five pounds of caps, a capping device, crock and keg and a book containing certain names and tallies, but in which neither the words "beer" nor "home brew" appeared (R 8-11). The two bottles alleged to contain home brew, a bag containing caps and the book above referred to were, without objection by the defense, introduced in evidence as Exhibits 1, 2 and 3, to be withdrawn at the end of the case (R 10). The bottle of mescal was not introduced in evidence, does not appear to have been analyzed as to its alcoholic content, and was apparently destroyed (R 13). Customs Inspector Champion testified that at the time of the search they destroyed on the premises "two hundred and fifteen empty beer bottles" (R 12). He further testified that while he "could not swear" to the fact that the alleged beer or home brew seized at this time contained more than one-half of one percent alcohol "we have analyzed several hundred specimens, and we have never found one that contains less. Usually it is over that, and has been as high as 7%." (R 14).

Specifications 2 and 3: About May 5, 1930 Gustavo Von Hattem was at accused's house and purchased about nine bottles of home brew from him, paying $1.35 for the nine bottles (R 15). About May 17, 1930 Von Hattem was again at the accused's house and at that time, purchased six bottles of home brew on credit (R 15). This beer did not make him drunk. He felt no effects after drinking a bottle (R 16).

Specification 4: About April 16, 1930 Private 1st Class William H. Langley, Q.M.C., drank six bottles of home brew at accused's house, intending to pay accused "for his trouble of making it" (R 16-17). The drinking of this beer produced no effect upon him. It was "just like going down and drinking a soft drink" (R 18). Private Langley identified the two bottles of alleged home brew in evidence as two bottles he had seen at the home of accused and gave the following testimony respecting them (R 17).

"I was there and there was a fellow brought these two bottles in to Private Neese's house, on the 16th of April, and he said to Neese, 'I will give you these two bottles of beer.' Neese didn't have any at the time. Neese said, 'I don't want to drink it; it don't look good to me.' I don't think Neese ever put beer in these kind of bottles."

Specification 5: Private Glen E. Board, Q.M.C., was also at accused's house about April 16, 1930 and at that time purchased six or seven bottles of "supposedly home brew" for which he paid later on. His drinking of this beverage did not produce drunkenness or any other effect, although in his opinion the drinking of six bottles of real beer would make him drunk (R 21-23).

Specification 6: The court reached a finding of not guilty as to this specification.

Specification 7: Private Robert H. Roman, Q.M.C., was also present at accused's house on April 16, 1930 and got about nine bottles of home brew, paying for them on pay day-"enough for the making of the beer", an arrangement he had followed for about three months, accused keeping in a book an account of what was drunk. Private Roman felt no alcoholic effect from the drinking of this beverage (R 25-26).

Specification 8: Private William Boyle, Troop B, 12th Cavalry, was at accused's house on November 26, 1929 and at that time obtained three bottles of home brew for which he neither paid nor agreed to pay. He felt no alcoholic effects from the drinking of this beverage (R 27-28). He did not get the three bottles from accused himself but from Private Jameson (R 28).

Specification 9: Private Elphege J. Bergeron, Troop A, 12th Cavalry, had "a faint recollection" of being in accused's house about November 15, 1929 at which time he asked for home brew, but was unable to say what he got as he was already "somewhat under the influence of liquor" (R 29).

4. At the close of the case for the prosecution the trial judge advocate inquired whether or not the court desired to remove the caps from the two bottles in evidence, to which defense counsel objected on the ground that testimony had been given to the effect that these bottles did not contain beer alleged to

have been made by the accused. He stated further that he had himself tried to get these bottles from the judge advocate for the purpose of having their contents analyzed, but added

> "If the court wants to put itself up as an expert witness on the alcoholic contents of these bottles, I have no objection." (The trial judge advocate then offered the following explanation) (R 30)-"May it please the court, the prosecution does not want to open these bottles for the purpose of having the Court determine the contents, but in order that the court could look inside and see what is in the bottles. Like with the bag of caps, I don't want them to take my word. If they see and smell the contents, they might know. I repeat the question: Does the court desire the prosecution to take the caps off these two bottles?"

To the question with which this excerpt from the record concludes, the President of the Court answered in the affirmative, The record then shows as follows (R 31):

> "The Prosecution opened the two bottles and placed them before the Court. PROSECUTION: The Prosecution rests."

At this point the defense counsel moved for a finding of not guilty as to all specifications except Specification 10, upon the ground that no competent evidence as to the alcoholic content of the beverage alleged to have been made and sold by accused was before the court. The court on hearing argument by the prosecution denied this motion (R 31-34).

In the opinion of the Board of Review, the court erred in denying this motion. The record does not contain sufficient competent evidence to support any of the specifications of the Charge with the exception of Specification 10, alleging that accused was drunk at Fort Brown, Texas, on June 3, 1930. The evidence is clearly insufficient to support the finding of guilty of specification 1, alleging that the accused engaged in the manufacture of "intoxicating liquor, to-wit, domestic beer (home brew)", for the reason that while it appears that there was found on the premises of accused certain paraphernalia which might conceivably have been used for the manufacture of intoxicating liquor, the record contains no competent proof that any beverage was in fact manufactured by the accused which had an alcoholic content of more than one-half of one percent. Neither is there any direct evidence in the record that anything was manufactured by the accused at any

time. The record nowhere discloses any competent evidence that any liquid, whether sold by accused, given away by him, or found in his house, had any alcoholic content whatever. The prosecution's witnesses in the main testified that the beverage they obtained at accused's house was not in fact intoxicating. No presumption arises against the accused that the liquids in question were intoxicating. No inference unfavorable to accused can be drawn from the clearly inadmissible statements of Customs Inspector Champion (R 14), as to results of analysés in other cases. The record does not show any action by the court with respect to the two bottles of alleged home brew found in accused's house, received in evidence, and later placed before the court with the caps removed. Courts cannot take judicial notice that "home brew beer" is an intoxicating liquor without proof of its alcoholic content (Keen vs. United States 11 F. (2d) 260; Proulx vs. United States 32 F. (2d) 760). The bottle of alleged mescal found in accused's house was not introduced in evidence, does not appear to have been analyzed as to its alcoholic content, and was apparently destroyed (R 13). However, not being mentioned in the charge and specifications, it has no apparent bearing on the case, except in so far as its possession may serve as some explanation of accused's drunken condition as alleged in specification 10. The alcoholic content of the beverage alleged to have been manufactured and sold by the accused not being shown, nothing remains in the pertinent specifications upon which to predicate conduct to the prejudice of good order and military discipline in violation of the 96th Article of War. Accused was on furlough at the time of the alleged offense and no disorder or conduct subversive of military discipline is shown in connection with his alleged transactions.

The maximum punishment authorized by paragraph 104c, of the Manual for Courts-Martial, for the offense of drunkenness alleged in specification 10 of the charge, of which accused was found guilty, is forfeiture of pay not to exceed 15 days.

5. The charge sheet shows accused enlisted April 13, 1930 with approximately 12 years prior service and that he was 45 years of age at the time of the commission of the alleged offenses.

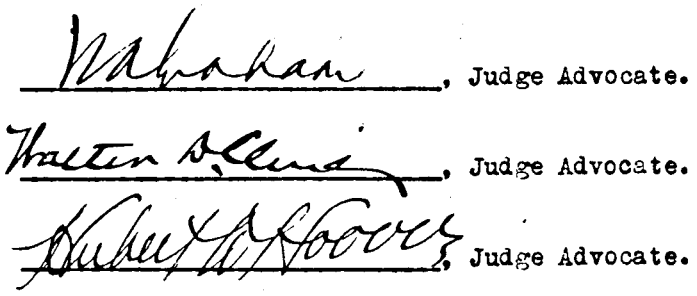
6. All members of the court who sat at the trial of this case joined in a recommendation to clemency addressed to the reviewing authority in which it is stated that:

"This sentence was adjudged to serve as an example and deterrent to others, and the members of the court who have signed this appeal for clemency believe the sentence severe in this particular case."

Their specific recommendation was that -

"so much of the sentence as affects dishonorable discharge, forfeiture of over fifteen dollars ($15.00) per month for six (6) months, and confinement at hard labor for more than six (6) months, be suspended."

7. For the reasons hereinabove stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and of Specification 10 thereunder, but legally insufficient to support the findings of guilty of Specifications 1, 2, 3, 4, 5, 7, 8 and 9, and legally sufficient to support only so much of the sentence as involves forfeiture of fifteen (15) days pay.



_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Military Justice
C. M. 192530.

23 1930

UNITED STATES	)	THIRD CORPS AREA
	)	
v.	)	Trial by G. C. M., convened at
	)	Baltimore, Maryland, July 30,
Captain FRANCIS C. BROWNE,	)	1930. Dismissal and total
12th Infantry.	)	forfeitures.

OPINION of the BOARD OF REVIEW
McNEIL, CLINE and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

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1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that Captain Francis C. Browne, 12th Infantry, then the commanding officer of Company B, 12th Infantry, did, at, to wit, Fort Howard, Maryland, on or about April 30, 1930, feloniously take, steal and embezzle by fraudulently converting to his own use funds and monies to the amount and of the value of, to wit, Four Hundred Twenty-four and 60/100 Dollars ($424.60), the property of that company, whereof, for the purpose of applying the same for the use and benefit of the enlisted men thereof, he, the said Captain Francis C. Browne, was entrusted with the possession, pursuant to Army Regulations.

Specification 2: In that Captain Francis C. Browne, 12th Infantry, then the commanding officer of Company B, 12th Infantry, and, pursuant to Army Regulations the custodian of the company fund of said Company B, did at Fort Howard, Maryland, on or about April 16, 1930, with intent to defraud, falsely make in its entirety and falsely utter and pass as true and genuine a certain entry, which was wholly false and was a writing of a private nature which might operate to the prejudice of another, in the following words and figures, to wit,

"Apr. 16 K $366.20"

in the bank book or pass book issued by the Title Guarantee and Trust Company of Baltimore, Maryland, containing statements of deposits in that bank to the credit of such company fund, Company B, 12th Infantry, and which bank book or pass book was then in the custody of him, the said Captain Francis C. Browne as such custodian of such fund.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that Captain Francis C. Browne, 12th Infantry, then commanding officer of Company B, 12th Infantry, and pursuant to Army Regulations the custodian of its company fund, did, at Fort Howard, Maryland, on or about April 16, 1930, with intent to defraud, make a certain false and fraudulent entry upon the check book of said company fund in the following words and figures, to wit,

"Deposited 4-16/30 $366.20"

and did also at or about the same time and place falsely and fraudulently make in its entirety an entry, in the bank book or pass book issued by the Title Guarantee and Trust Company of Baltimore, Maryland, containing entries and deposits to the credit of said company fund, a certain false and

forged entry in words and figures as follows, to wit,

"Apr. 16 K $366.20"

then well knowing that both of said entries were false and untrue in that, to his personal knowledge, no such deposit had been made in said bank to the credit of said company fund and said entry in said bank book or pass book purporting to be made by such bank was wholly false and forged.

Specification 2: In that Captain Francis C. Browne, 12th Infantry, did at Fort Howard, Maryland, on or about April 16, 1930, with intent to deceive, officially state to Major Frank L. Purdon, 12th Infantry, that a deposit of Three Hundred Sixty-six and 20/100 Dollars ($366.20) was made to the credit of the company fund account of Company B, 12th Infantry, on April 16, 1930, which said statement was untrue and was known by the said Captain Francis C. Browne to be untrue in that no such deposit had in fact been made.

Specification 3: In that Captain Francis C. Browne, 12th Infantry, then commanding officer of Company B, 12th Infantry, and, pursuant to Army Regulations, the custodian of its company fund, did, at Fort Howard, Maryland, at various times between, to wit, March 26, 1929, and May 15, 1930, make various false entries and false erasures in the books in his custody showing the account of said company fund with the Title Guarantee and Trust Company of Baltimore, Maryland, the bank in which the monies of said company fund were deposited, to wit, in the check book and the bank book or pass book for said company fund and in the monthly statements received from said bank, all for the purpose of concealing his, the said Captain Francis C. Browne's continuing peculations from said company fund and of securing the passing of his monthly accounts pertaining to said fund by auditors appointed pursuant to Army Regulations, and did

> during said period of time by means of such false entries and erasures and by means of failing to make proper entries on said check book of checks drawn by him from time to time against said fund and by the use of false and fraudulent checks, falsely make his account in said fund appear to be complete and correct, and to be passed as true and correct by auditors thereof, whereas in truth and in fact during all of said period of time he was short in his accounts and was indebted to said fund in varying amounts for monies which he had from time to time unlawfully abstracted therefrom and fraudulently converted to his own use.

Accused pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due and to become due. The reviewing authority approved the sentence, stated in his action "I find no grounds, in this record or outside of it, on which to exercise or recommend clemency", and forwarded the record for the action of the President under the 48th Article of War.

3. The evidence shows that from August, 1927 (R. 10,94,102), to June 4, 1930, accused commanded Company B, 12th Infantry, stationed at Fort Howard, Maryland (R. 10), and in this capacity was custodian of the company fund and records of that organization (R. 11,76). He personally kept the company council book and fund check book and made all entries in these documents with the exception of certain occasions in 1929 when one of his lieutenants made the entries in the council book and prepared checks for accused's signature (R. 76). After September, 1929, Major Frank L. Purdon, as battalion commander, regularly audited the company fund (R. 11). Between April 29, 1930, and the latter part of May, Major Purdon, at the direction of his regimental commander, conducted a special investigation of the fund, all company and bank records pertaining to the fund from the early part of 1929 to date being examined during the course of the investigation (R. 12,23). As a result of his audit of the fund, Major Purdon discovered a shortage which he computed at $401 and "some cents" (R. 18,22). No errors were discovered in the council book (R. 20). The company fund was deposited in the Title Guarantee & Trust Company of Baltimore,

Maryland (R. 25), while accused maintained his personal account at the Provident Savings Bank of Sparrows Point, Maryland (R. 45,51).

The evidence, more fully detailed below, shows repeated irregularities, after March, 1929, in accused's records of his fund account, principally in his check book and monthly statements of account rendered by the Title Guarantee & Trust Company; and these irregularities indicate recurring or continuing and perhaps growing shortages in the fund. From the nature of the irregularities it is to be inferred that to cover these shortages accused frequently made deposits on the last day of the month with worthless personal checks of his own or with money drawn from the company fund earlier in the month. As an example of the latter practice, on April 2, 1930, he drew $432.03 from the fund bank account and on April 30th deposited to the credit of the fund this amount in cash, concealing the transactions by erasing the charge and deposit notations from the bank statement, and by refraining from entering them in the check book. On April 30th, the day of the deposit of $432.03, he drew a somewhat lesser amount from the fund account as will appear below. The worthless personal checks, when protested and returned, were charged against the company fund account in which they had been deposited, but were not made good by the accused before the end of the month, which permitted him to use these sums throughout the month.

Specification 1, Charge I.

On April 30, 1930, accused cashed at the Provident Savings Bank (R. 46; Ex. S) an unnumbered check (Ex. E-a) dated April 30, 1930, drawn on the Title Guarantee & Trust Company, payable to cash, for $424.60, and signed by him as custodian of the Company Fund, Company B, 12th Infantry. The lower left-hand corner of the check bears the notation "For Separate Rations - E.M. April". The check is similar in form to other company fund checks contained in the fund check book, and there are a number of blank stubs in the back of this book (Ex. 2). No record of the check appears in the check book (Ex. 2), and no entry corresponding to the amount involved appears in the council book (Ex. 1). A careful examination of the council book, however, indicates that none of this money was accounted for as cash expenditures on behalf of the company, or in payments to enlisted men. Accused's practice was to pay commutation

of rations to men rationed separately by means of checks payable to the individual drawn on the company fund. Checks and stubs introduced in evidence show that $227.89 was so paid on April 10th for March rations, which agrees with the council book which shows that $227.89 was expended for "Separate Rations". Although not all stubs or checks paid in May for April rations were introduced, the check book, together with the bank statements, shows that an amount approximately equal to the $233.58 entered in the council book as expended for this purpose, was actually paid from the fund in May by checks payable to individuals (Exs. 1,2,E,G). Whether the proceeds of this check or any part thereof were used to make up the deposit on April 30th of $432.03, above referred to, - that is, to make up a previous shortage, does not appear. The $424.60 check appears as a charge against the company fund on the bank statement for May (Ex. E). This statement was obtained directly from the bank by Major Purdon during the course of his investigation (R. 16). About May 17, 1930, in the course of the investigation by Major Purdon, accused stated, after having been warned that he need not say anything and that whatever he might say would be used against him (R. 61, 64), that

> "I have known for some time that there has been a discrepancy, and it has not been very comfortable for me, knowing that it might be found out" (R. 61,65).

About May 29, 1930, accused delivered to Major Purdon "$401.00 plus", the amount of the then existing shortage in the company fund. At the time of trial accused was not indebted to the fund (R. 23-24).

Accused testified that creditors were pressing him during his service at Fort Howard (R. 97) and this caused him to "go into this company fund" (R. 96), but that it was never his intention to embezzle the fund. On the contrary, he knew the exact amount of his shortage (R. 94) and intended to make full restitution (R. 98). He used the money to pay bills contracted while on Organized Reserve duty (R. 97). In this connection he stated that in 1923 he was ordered to Albany, New York, for duty with the Organized Reserves. While stationed in Albany two of his children were born. No Army medical attention being available he was forced to secure the services of civilian doctors and to pay all expenses incident to the births (R. 94). In 1926 he was ordered to duty at Fort

Benning, Georgia (R. 93), and in 1927 to Fort Howard. At that time he was heavily in debt as a result of his services at Albany (R. 96). Upon arrival at Fort Howard he had to maintain his wife and three children at a hotel for about ten days at a cost of approximately $16 per day. Later his wife went to Detroit for a necessary operation which cost him about $350 (R. 102). His present pay, less insurance deductions and with no rental allowance, is about $230 (R. 100) and he has no other income (R. 102). No one is dependent upon him other than his immediate family (R. 100). He does not gamble and has not lost money through the use of alcoholics (R. 97). Due to his practice of economy his indebtedness had steadily decreased since his arrival at Fort Howard, and at the time of trial amounted to about $300. His military clothing consisted of three pairs of cotton breeches and one badly worn uniform (R. 99). The money used to reimburse the fund was received from an insurance company "one or two days before this thing broke" in settlement on account of an automobile accident. Until that time he did not have the money to make good the shortage (R. 103). However, during the period that the shortage existed he was through error overpaid $400 on a check by the Provident Savings Bank and when asked by the bank officials if he had been overpaid he replied in the affirmative (R. 98) and returned the $400 to the bank (R. 99). This latter statement was corroborated by the testimony of a bank official (R. 50).

Specification 2, Charge I; Specifications 1 and 2, Charge II.

In the course of Major Purdon's audit of the company fund, that officer discovered that accused's council book for March, 1930, showed cash in accused's personal possession to the amount of about $367. Major Purdon warned accused against the practice of so keeping large sums of cash (R. 22; Ex. 1). About April 16 or 17, 1930, on an occasion on which he again presented his council book for audit, he stated to Major Purdon, in substance, that prior to the time of presenting the book for audit,

> "the amount of $366.20 had been deposited in the bank; therefore there was no cash to show me, and the book was given me as evidence of the deposit of that amount" (R. 89).

He handed to Major Purdon the pass book of the company fund covering the account with the Title Guarantee & Trust Company (R. 89).

The final deposit entry to the credit of the company fund in the book was as follows: "Apr. 16 K $366.20". This entry was made by accused (R. 65,66,67,68-75,87,88,90,91,94), and no such sum was actually deposited on April 16th or at any other time to the credit of the fund (R. 39,81,94; Exs. D,D-1). No record of such a deposit appears in the council book (Ex. 1), but in the check book, on the stub to check No. 1093, accused entered "Deposited 4-16/20 366 20", and on the back of an opposite stub made the following entry:

"Deposited 4-16-30	
Rations Savings	$231.04
Post Ex. Div.	76.74
Co. Collect.	58.42
	$366.20" (R. 68-75,77; Ex. 2).

About May 17, 1930, in the course of the investigation and after accused had been warned as noted above, and had been told by Major Purdon that the deposit in question had not been entered on the records of the bank, accused stated that he had been late in mailing the deposit but that it "had gone to the bank now" (R. 64). Major Purdon then showed accused certain bank records, including the pass book, and said that the bank records did not show the $366.20 deposit, and accused, referring to the entry in the pass book, said, "I put that there but I don't want to say anything more about it now" (R. 65). About the middle of June, 1930, accused, after having been "properly warned", stated to Lieutenant Colonel Charles C. Burt, an investigating officer, that he, accused, had made the entry (R. 87,88).

Accused testified that he made the entry in the pass book because "I knew to the penny all the time the amount of money that I had not put back and I did not know what to do and I put it there, made that entry in there, to try and get by for another month until I got my money altogether and put it back all at once" (R. 94,95).

Specification 3, Charge II.

The evidence further shows that on the statement of his fund account rendered to accused by the Title Guarantee & Trust Company for March, 1929, two erasures, one on the debit and one on the credit side, were made at sometime before the audit (Ex. A-1). The manager of the bookkeeping department of the bank testified

that erasures on statements such as these are not permitted by the bank, but that one might be "committed once in a while" (R. 82). Not only were these erasures made on the statement but the usual entries of balances do not appear, the right and left margins of the statement which carried this information having been torn off (Ex. A-1). A ledger sheet of the Title Guarantee & Trust Company shows under date of March 26, 1929, a charge against the fund of $97.61, and a deposit of the same amount on March 30, 1929 (Ex. A-a). The charge represented "something other than a regular check. It would be either a charge against the account or a return item, something of that sort" (R. 31). Neither the charge nor the deposit appears on the bank statement, but the erasures appear in positions on the statement which would have been occupied by entries of the charge and deposit had these items been placed in their chronological order (Ex. A-1). No record of the charge or deposit appears in either the council book (Ex. 1) or check book (Ex. 2).

A photostatic copy of another ledger sheet of the same bank shows, under date of June 29, 1929, a deposit of $72.78 to the credit of the fund, and under date of July 9, 1929, a charge of $62.35 (Ex. B). No record of these transactions appears in either the council book (Ex. 1) or the check book (Ex. 2) other than a notation in the check book in accused's handwriting (R. 68-75,77), opposite checks 977 and 978, both dated September 10, 1929, as follows:

> "Note: The amount of $62.35 deducted from total amount, account check deposited 6/29/29 for $60.00 check returned unpaid a/c 'insufficient funds', protest fees $2.65 making total of $62.35 deducted by bank from Co. Fund account. This amount taken up in 'Cash on Hand'",

and a deduction of $62.35 from the stub balance (Ex. 2). For the months of July, August, and September, 1929, there is a difference of $62.35 between the true balance as shown by the council book (Ex. 1) and the balance as shown by the check book (Ex. 2). It was shown that on July 2, 1929, accused's personal check for $60 was dishonored by the Provident Savings Bank because of insufficient funds and that the protest fee on this check was $2.35, or a total of $62.35 (R. 57; Ex. W).

On the fund bank statement for October, 1929, under date of October 9, 1929, there appears in the deposit column an erasure over which has been written in longhand the figures "176.88", and erasures in the charge column, apparently of the date "Oct 19 '29" and of the figures "153.10" opposite (Ex. C-1). The bank ledger sheet shows no such deposit of $176.88, but, under date of October 9, 1929, shows a deposit of $329.98. Under date of October 19th it shows a charge of $153.10 (Ex. C), a "return item" or similar charge (R. 31). The sum $153.10 is the difference between the deposit of $329.98, actually made, and the deposit of $176.88 as written in longhand. No deposit of $329.98 or charge of $153.10 appears unerased on the bank statement. The erasures noted were not made at the bank (R. 85,86). The bank ledger sheet, under date of November 1, 1929, shows a deposit of $153.10 (Ex. C-a). On the bank statement for October there is a notation made by the assistant treasurer of the Title Guarantee & Trust Company that the deposit was made late on October 31st and would be credited on the books of the bank on November 1st (Ex. C-1). This notation was made at accused's request. The banker testified that for "several months" accused appeared at the bank after the close of business on the last days of the months and made deposits with the request that previously rendered bank statements be altered in order to show these deposits, stating that this was necessary to make his records balance (R. 26).

On the bank statement for November, 1929, there appears in the deposit column opposite the date November 1st, an erasure over which has been written in longhand the figures "110.86". The deposit of $153.10 does not appear on the statement. The difference between the deposit of $153.10, actually made, and the deposit of $110.86 shown in longhand, is $42.24. In the charge column of the bank statement appear erasures of entries showing the cashing of a check, apparently for $42.24, at sometime between November 1st and November 8th (Ex. C-2). Under date of November 4, 1929, accused's personal check for $39.89 was dishonored by the Provident Savings Bank. There was a protest fee on this check of $2.35, making a total of $42.24 (R. 57; Ex. X). In the fund check book, on the stub to check No. 1010, dated November 9th, $42.24 is added to the stub balance. There is an explanatory note on the back of the opposite stub to the effect that a check for $42.24 was returned unpaid on November 7th, and that currency to this amount was redeposited on November 30th (Ex. 2). The bank ledger sheet, under date of December 2, 1929, shows a deposit of $42.24 (Ex. C-a);

and the bank statement for November contains a notation by the banker of a deposit on November 30th of $42.24, the notation being similar to that made at the time of the $153.10 deposit (R. 26; Ex. C-2).

Other ledger sheets of the Title Guarantee & Trust Company show, under date of January 14, 1930, a deposit to the credit of the fund of $629.40 (Ex. C-a); and under date of January 21, 1930, a charge of $356.30 (Ex. D), a "return item" or similar charge (R. 31). Under date of January 17, 1930, accused's personal check for $353.95 was dishonored by the Provident Savings Bank because of insufficient funds (R. 53,54; Ex. U). The protest fee on this check was $2.35 (R. 57), or a total of $356.30, the amount of the charge just noted. The ledger sheets also show, under date of January 31, 1930, a deposit of $356.30 with the notation "hold 250 6 da." (Ex. D), this notation meaning that the deposit was "evidently on an out of town bank" and that it would not be available as cash for six days (R. 32). The notation was made by the bank for the reason that accused "had been depositing his own personal checks" to the credit of the fund and they had been "invariably" returned (R. 33) dishonored (R. 45).

The ledger sheets of the bank also show, under date of February 5, 1930, a charge of $245.31 (Ex. D), a "return item" or similar charge (R. 31). On "March" (probably February) 3, 1930, accused's personal check for $245.31 was dishonored by the Provident Savings Bank because of insufficient funds (Ex. V). The ledger sheet shows a deposit of $245.31 on February 28th with a notation "6 da." opposite the entry (Ex. D).

The ledger sheets also show a deposit, on February 19th, of $286.87, with a notation "5 da."; and, under date of February 24th, a charge of $289.22 (Ex. D), a "return item" or similar charge (R. 31). On February 21st accused's personal check for $286.87 was dishonored by the Provident Savings Bank because of insufficient funds (Ex. Z). The protest fee on this check was $2.35, making a total of $289.22 (R. 59). On February 28th there was made a deposit of $289.22, with a notation "6 da.". The ledger sheet further shows a charge on February (probably March) 5, 1930, of $539.23 (Ex. D). This latter sum equals the total of these deposits of $245.31 and $289.22, plus a protest fee of $2.35 on each deposit (R. 57).

Under date of March 5, 1930, the assistant secretary and treasurer of the Title Guarantee & Trust Company wrote accused a letter to the effect that the personal checks which accused had been depositing to the credit of his company fund were being returned dishonored and that in the future such checks must be certified (R. 43; Ex. R). Under date of March 31, 1930, two deposits were made of $92.80 and $539.23, both marked "cash" (Ex. D). On April 2d accused cashed a check against the fund for $432.03 (R. 48; Ex. T). On April 30th a deposit was made to the credit of the fund of $432.03, marked "cash" (Ex. D-a). Neither the withdrawal nor deposit of the $432.03 appears on the bank statement for the month of April, but in the charge and deposit columns of the statement in positions corresponding to the dates of April 2d and April 30th, there appear erasures (Ex. D-1) which were not made at the bank (R. 84). None of these transactions appears in the council book (Ex. 1), or in the check book other than that under date of March 31st the deposit of $92.80, made on that date, is added to the stub balance opposite check No. 1069 (Ex. 2).

On April 28, 1930, there was an overdraft against the fund of $5.05 (Ex. D). This overdraft does not show on the bank statement for April (Ex. D-1), but there is an erasure of an entry on that part of the statement where it would normally appear. This erasure was not made at the bank (R. 84).

Under date of April 30, 1930, there was deposited to the credit of the fund $293.74 (Exs. D-a,M), but this amount was not taken up in the check book (Ex. 2). However, opposite the stub to check No. 1094, accused made the following entry: "Note: check for $69.81 plus protest fees $2.65 making total of $72.46 deducted by bank from statement. Amount taken up in 'cash on hand'" (R. 77). The amount of $72.46 is deducted from the stub balance under check No. 1094, and all subsequent balances in the check book are lined out and the new balance in each case is that of the lined out figures, less $72.46 (Ex. 2). Neither the bank ledger sheets (Exs. D,D-a) for the period January 21st to May 10th, nor the bank statements (Exs. D-1,E) for the period April 12 to May 14, 1930, contain any entry relating to $72.46. It may be noted that this amount represents the difference between the alleged deposit of $366.20 shown by the forged entry in the pass book and the actual deposit of $293.74 on April 30th.

It was stipulated between the prosecution and the defense that until the beginning of the irregularities in the handling of his company fund accused bore an excellent reputation (R. 104). Colonel Claude S. Fries, Captain Frank E. Sharpless, and First Lieutenant Richard R. Courcey, all 12th Infantry, testified to accused's previous good reputation (R. 106,107,108).

4. As to Specification 1, Charge I, the evidence, including the admissions and testimony of accused, shows that about April 30, 1930, undoubtedly in continuance of his long course of fraudulent appropriations and manipulations, accused wrongfully took from his company fund, and applied to his own personal use either by making up his previous shortage or otherwise, the proceeds of the check for $424.60. The final shortage was not made good until after the offense had been revealed by an investigation, and accused had been confronted with the proof of his wrongdoing. He testified, in effect, that he did not intend to retain permanently the money taken from the fund. Assuming this testimony to be true, it does not create a valid defense to the offense of embezzlement as charged. The act of a custodian of such funds in borrowing them for even temporary personal use constitutes the offense of embezzlement. The fraudulent conversion, which is the essence of the offense of embezzlement, exists in such case despite the fact that accused may have intended to return the money (C.M. 167487, Nihoof; C.M. 192128, Strickland).

The evidence as to Specification 2, Charge I, including the admissions and testimony of accused, shows that at about the date alleged, at a time when his fund was being audited by a superior officer charged with that duty, accused falsely entered in the bank pass book of his company fund the deposit entry reading, "Apr. 16 K $366.20", and that this act was done with intent to mislead and deceive the officer charged with the duty of auditing the fund as to the true status thereof. The evidence further shows that this entry was presented by accused to the auditing officer and thus uttered. The entry, being in the nature of a receipt for money, might have operated to the prejudice of the bank as well as to the prejudice of the rightful owners of the fund. The offenses of forgery and uttering, as charged, are sufficiently proven.

As to Specification 1, Charge II, the evidence shows that at about the date alleged accused falsely entered in the bank pass book of his company fund the entry reading, "Apr. 16 K $366.20",

and in the check book an entry reading, "Deposited 4-16/20 366 20". As noted above the entry in the pass book was a forgery. It is clear from accused's own testimony that these entries were made with fraudulent intent and for the purpose of concealing from his superiors the true status of the fund. Such deceitful conduct was manifestly unbecoming an officer and gentleman and comes within the purview of the 95th Article of War.

The evidence shows as to Specification 2, Charge II, that on or about April 16, 1930, while Major Frank L. Purdon, 12th Infantry, was engaged in auditing the company fund of which accused was the lawful custodian, accused officially stated to him that the deposit of $366.20 had been made to the credit of the company fund. The evidence, including the testimony of accused, shows that this statement was false, was known by accused to be false and was made with intent to deceive. This was also conduct such as is denounced by the provisions of the 95th Article of War.

As to Specification 3, Charge II, the evidence shows that between the dates alleged various false entries and false erasures were made in the check book, pass book and monthly statements showing the status of the fund account with the Title Guarantee & Trust Company, and that these entries and erasures tended to conceal the true condition of the account and withdrawals of funds therefrom and tended to secure auditors' approvals of accused's monthly accounts. There is no direct evidence that accused made the false entries or erasures, but the circumstances, including his substantially uninterrupted custody of the records, the nature of the entries and erasures, and his general admissions of peculations, leave no doubt that the entries and erasures in question were, in fact, made by him. It also appears that accused failed to record in his check book checks which he drew from time to time. In view of all the circumstances heretofore detailed, it cannot be doubted that during the period embraced by this specification accused repeatedly drew money from his company fund and used it temporarily for his own purposes, in most cases making deposits to cover, sometimes with his own personal checks which were worthless, but which for the time concealed the irregularities. These manipulations of his fund were essentially fraudulent and were clearly intended, as was charged, to conceal the true status of the fund and to deceive the auditors. Because of the deliberate frauds involved, accused's acts must be characterized as conduct unbecoming an officer and gentleman within the meaning of the 95th Article of War.

5. Specification 1, Charge I, alleges that accused did "feloniously take, steal and embezzle by fraudulently converting to his own use" (underscoring supplied) the funds involved. The word "steal" was, no doubt, here used as meaning, according to its general signification, a wrongful taking or appropriation to one's own use (see Webster's Dictionary), and not as embracing the offense of larceny. The acts charged, as distinguished from legal conclusions or words of description, constitute embezzlement and do not involve any trespass which is of the essence of larceny. Such being the case it cannot reasonably be said that any possible ambiguity arising from the use of the word steal resulted in actually pleading two offenses. That accused and his counsel accepted the specification as alleging embezzlement and no other offense is apparent from the fact that they did not object to the form of the specification and quite obviously conducted the defense on the theory that only embezzlement was charged. But even assuming an error of duplicity in pleading, it is clear that the substantial rights of accused could not have been, under the circumstances, injuriously affected thereby (A.W. 37).

By Specification 2, Charge I, it is alleged that accused falsely made and uttered the entry described, all in violation of the 93d Article of War. The uttering of a forged instrument is properly chargeable as a violation of the 96th Article of War (Pars. 149 j and 152 c, M.C.M.). Although the specification thus charged two distinct offenses, violations of different Articles of War, it is apparent that the substantial rights of accused were not injuriously affected thereby, for the defense proceeded with the trial without objection to the form of the specification or to the evidence in support thereof. Both the forgery and uttering were clearly proven, and admitted by accused. Since the offense of uttering as charged and proven amounted to a violation of the 96th Article of War, the designation of a wrong Article was not material (Par. 28, M.C.M.; C.M. 191638, Giles; C.M. 147387, Sys).

By Specifications 1 and 3, Charge II, a number of distinct acts consisting of making false entries, erasures, etc., were alleged. Inasmuch as these specifications each involved courses of conduct properly chargeable as violative of the 95th Article of War, neither specification is, in the opinion of the Board of Review, subject to the criticism of duplicity in pleading.

6. During the course of the trial the defense objected to the testimony of an officer concerning statements made by accused,

on the ground that the witness officer had acted as counsel for accused (R. 62,63). The testimony related to statements made about May 17, 1930, and the officer who testified concerning them did not act as counsel for accused until subsequent to June 22, 1930. The objection was properly overruled, for the testimony of an attorney as to communications between him and his client is privileged only when the communications were made while the relation of attorney and client existed (Par. 123 b, M.C.M.).

7. The sentence in this case involves forfeiture of all pay and allowances. Since the accused has made restitution of the funds embezzled and inasmuch as the forfeiture would deprive him of all means of meeting his necessary living expenses while awaiting the result of trial, it is believed that this portion of the sentence should be remitted.

8. The Army Register shows that accused was born September 28, 1890, and has had military service as follows: "Corp. and sgt. Co. E, 31 Inf. Mich. N.G. 19 June 16 to 20 Jan. 17; 2 lt. Inf. Sec., O.R.C. 15 Aug. 17; accepted 15 Aug. 17; active duty 15 Aug. 17; 1 lt. of Inf., U.S.A. 24 Aug. 18; accepted 11 Sept. 18; hon. dis. 23 Sept. 19.- 1 lt. of Inf. 1 July 20; accepted 10 Sept. 20; capt. 1 July 20".

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War, and is authorized for violation of the 93d and 96th Articles of War.

E. C. McNeil, Judge Advocate.

Walter D. Olmie, Judge Advocate.

Hubert H. Hoover, Judge Advocate.

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