OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
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REVIEWS

VOL. 10

1939 - 1941

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume X

including

CM 211080 to CM 215536

(1939-1941)

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

Board of Review
CM 211080

FEB 9 1939

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Meade, South Dakota, December 21, 1938. Dishonorable discharge and confinement for six (6) months. Disciplinary barracks.
Private BENJAMIN W. BASHAM (6860849), Troop A, 4th Cavalry.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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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 on charges alleging loaning money at a usurious rate of interest, in violation of the 96th Article of War, and of larceny of $7.61, the property of Private Frank J. Stach, Troop A, 4th Cavalry, in violation of the 93d Article of War. He pleaded not guilty to both charges and specifications thereunder, was acquitted of the charge laid under the 96th Article of War and specification thereunder, and was convicted of the larceny charge and specification. Although the total amount stolen is small, the circumstances surrounding the theft are somewhat aggravated, in that the accused, a personal friend of Private Stach and a member of the same troop, stole the money of Stach from his private footlocker while he (Stach) was absent at drill, the accused having remained in the barracks as he was going on furlough. The evidence in support of the findings is clear and conclusive. The court improperly received, after reaching the findings, evidence of one previous conviction involving a twenty-seven day period

of absence without leave, and one conviction by civil court for drunkenness and disorderly conduct. The maximum sentence legally imposable was adjudged by the court. The Corps Area staff judge advocate and the assistant staff judge advocate disagreed as to the desirability of a reduction of the period of confinement because of the improper admission in evidence of the two previous convictions, supra, the staff judge advocate recommending against reduction. The reviewing authority concurred in the recommendation of the staff judge advocate and approved the sentence adjudged without any reduction in the period of confinement. In view of the aggravating circumstances surrounding the larceny of which the accused was convicted, the Board is of the opinion that the substantial rights of the accused were not infringed by the introduction in evidence of the previous convictions and the approval by the reviewing authority of the sentence imposed by the court.

3. The Board of Review holds the record legally sufficient to support the findings and sentence.

_____, Judge Advocate.

George A. Frazer, Judge Advocate.

Joseph B. Kaufman, Judge Advocate.

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

Board of Review
CM 211080

FEB 9 1939

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Meade, South Dakota, December 21, 1938. Dishonorable discharge and confinement for six (6) months. Disciplinary barracks.
Private BENJAMIN W. BASHAM (6860849), Troop A, 4th Cavalry.	)	

DISSENTING OPINION by KING, Judge Advocate.

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1. Accused has been convicted of larceny of $7.61, the property of Private Frank J. Stach, Troop A, 4th Cavalry, in violation of the 93d Article of War. The court imposed the maximum sentence permissible for larceny of property under $20 in value, namely, dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. The reviewing authority approved the sentence and the Board holds the record legally sufficient to support the sentence. I regret that I find myself unable to agree with my colleagues in so holding.

2. As is pointed out in the review of the assistant Corps Area judge advocate, the record contains numerous errors and irregularities, notwithstanding which the evidence of accused's guilt of the charge and specification of which he has been convicted is such as to compel conviction. I therefore concur with the Board that the record is legally sufficient to support the findings.

3. There are, however, in the record three instances of receipt of inadmissible evidence which, in my opinion, injuriously affected the substantial rights of accused with respect to the sentence, as follows:

a. On page 28 the prosecution sought to introduce by the

testimony of Private Kemper evidence of a loan at usurious interest by accused to Kemper. A member of the court objected to the introduction of that testimony and the prosecution said:

> "* * * It is the intent of the Trial Judge advocate to establish the fact that this man has made it a practice of lending his money at what the court might consider a usurious rate of interest."

The law member overruled the objection and the evidence was received. This was evidence of an offense other than those on which accused was being tried and was wholly inadmissible (M.C.M., par. 112 b, p. 112).

b. After the court had made its findings, it received evidence of a previous conviction of accused, presumably by court-martial, though the name of the court is not definitely stated, of absence without leave from August 3, 1937, to August 30, 1937. As this period was more than one year before the date of commission of the offense of which accused was found guilty in the present trial, it was wholly inadmissible (M.C.M. pars. 79 c, 80 a).

c. The court also received evidence of the conviction by accused in some civil court not definitely described of drunkenness and disorderly conduct. There is no authority whatever for the introduction in such a case as the present of evidence of a previous conviction by a civil court.

4. It is noted that the sentence which the court imposed and which the Commanding General, Seventh Corps Area, approved is the maximum permissible for the offense of which accused has been convicted, namely, larceny of $7.61, notwithstanding that the value of the money stolen was small. Each of the inadmissible items of evidence was a blackening of accused's character, and the cumulative effect of all three cannot have failed to convince the court that it had before it a thoroughly worthless soldier for whom the maximum punishment was none too severe. I believe it altogether probable that the court imposed the maximum penalty for larceny of such a small amount because of the erroneous receipt of the three items of evidence above enumerated.

5. The rule followed by the Board of Review and The Judge Advocate General for many years with respect to the effect of the admission of inadmissible evidence upon the validity of a finding of guilty is thus stated in Dig. Ops. JAG 1912-30, section 1284:

"It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C.M. 127490 (1919).

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C. M. 130415 (1919)."

6. When the inadmissible matter received in evidence affects, not the findings, but the sentence, as here; the Board should, in my judgment, be no less careful to guard the rights of an accused. In such a case the record ought not to be passed as legally sufficient unless the Board can say that "conscientious and reasonable men", upon consideration of the admissible evidence alone, could not have imposed a milder sentence. I do not feel that that can be said in the case now under consideration. The files of this office contain many petty larceny cases substantially similar to the present, in which sentences milder than that here involved were imposed and approved. A search of the files since January 1, 1938, discloses the following cases, all convictions of larceny only. In each is given the nature and value of the property stolen and the sentence imposed and approved.

a. CM 208689, Bingham.
Specification 1: Flashlight, 90¢.
Specification 2: Cigarettes, 15¢.

Confinement for four months and forfeiture of $14 per month for a like period.
Larceny from the lockers of two other soldiers.

b. CM 208734, Allgire.
$1 cash.
Dishonorable discharge, and four months confinement.
Larceny from the pocket of another soldier.

c. CM 208738, Rosenbaum.
Cigarettes, $3.50.
Dishonorable discharge, and five months confinement.

d. CM 208887, Smith.
Slacks, $10.50.
Dishonorable discharge only.

e. CM 209067, Orange.
Coupon book, 42¢.
Six months confinement, and forfeiture of $14 per month for a like period.
Larceny from the locker of another soldier.

f. CM 209169, Fannan.
Cigarettes, 15¢.
Six months confinement, and forfeiture of $14 per month for a like period.
Larceny from the locker of another soldier.

g. CM 209306, Curry.
Scarf, 50¢, and overcoat, $10.
Dishonorable discharge, and four months confinement.
Larceny from the locker of another soldier.

h. CM 209318, Coen.
Post exchange coupons, $2.
Confinement for four months, and forfeiture of $13.83 per month for a like period.
Larceny from the pocket of another soldier.

i. CM 209473, Manous.
Specification 1: Camera, $15.95.
Specification 2: Pocketbook containing $2.

Confinement for six months, and forfeiture of $18 per month for a like period. The camera was stolen from the locker of another soldier.

j. CM 209511, Braxton.
$15 cash.
Dishonorable discharge, and four months confinement.
Larceny from under the pillow of another soldier.

k. CM 209648, Pier.
Watch, $35.
Confinement for six months, and forfeiture of $14 per month for a like period.
Larceny from the locker of another soldier.

l. CM 209686, Mars.
Slacks, $8.
Dishonorable discharge, and four months confinement.
Larceny from the bunk of another soldier.

m. CM 209802, Drobenak.
Wrist watch, $17.50.
Confinement for six months, and forfeiture of $14 per month for a like period.
Larceny from the locker of a civilian employee of the Post hospital.

n. CM 209877, Krasher.
Revolver, $16.15, and holster, $1.50.
Dishonorable discharge, and five months confinement.

o. CM 209878, Traylor.
Wrist watch, $37.50.
Dishonorable discharge, no confinement.
Larceny from the bunk of another soldier. Prompt return and confession.

p. CM 209955, Gaddy.
4 gallons gasoline, 46¢.
Confinement for six months, and forfeiture of $14 per month for a like period.

q. CM 210060, Hawelka.
Field glasses, $5.

Confinement for five months, and forfeiture of $14 per month for a like period.

r. CM 210085, Austin.
50¢ cash.
Confinement for six months, and forfeiture of $14 per month for a like period.
Larceny from the bunk of another soldier.

s. CM 210301, Brown.
Coupon book of U.S.A.M.P.S., $1, and Post Exchange barber tickets, 45¢.
Confinement for six months, and forfeiture of $14 per month for a like period.
Owner's wallet fell out of his pants when the owner was drunk and accused took it.

t. CM 210353, Windham.
Clothing, $5.
Dishonorable discharge, and one month confinement.
Larceny from the locker of another soldier.

u. CM 210563, Martin.
Bottle of liquor, $2.
Confinement for two months, and forfeiture of $14 per month for a like period.

v. CM 210590, Baker.
Civilian suit, $15.
Confinement for six months, and forfeiture of $14 per month for a like period.
Larceny from the locker of another soldier.

w. CM 210817, Brown.
Khaki trousers, $1.97.
Dishonorable discharge, and three months confinement.
Larceny from the locker of another soldier.

x. CM 210839, Dambra.
Clothing, $9.65.
Confinement for three months, and forfeiture of $14 per month for a like period.

7. There are in the files cases in which the receipt after the making of findings and before the imposition of sentence of evidence of one or more inadmissible previous convictions has been rightly held to be a harmless error, because it is certain that, even without such evidence, the court would have imposed the same sentence. Notwithstanding the circumstances to which my colleagues have alluded in their holding, the precedents just cited show that this case does not fall within that category.

8. In CM 201724, Gabel and Prokopf, two general prisoners were jointly convicted of escape. There was introduced after the findings and before sentence evidence of the previous conviction of each accused of sodomy with the other, which was inadmissible because the previous offense took place before the two became general prisoners. The court sentenced both to one year's additional confinement and the reviewing authority approved the sentences. The Judge Advocate General held the evidence of previous convictions inadmissible in view of paragraph 79 c, Manual for Courts-Martial, and thus addressed The Adjutant General:

> "In view of the fact that the confinement imposed is the maximum authorized under the Executive Order (Par. 104, MCM, 1928) and of the nature of the previous offenses, evidence of conviction of which was received, it is the opinion of this office that the admission of such evidence was prejudicial.
>
> "4. It is therefore recommended that six months of the confinement imposed as to each of the above named general prisoners be remitted."

9. At the close of hostilities in the World War, the charge was publicly and vigorously made that the rights of soldiers tried by court-martial were not sufficiently protected. Article of War 50½, setting up the Board of Review, was enacted June 4, 1920, as a result of that agitation, with the express object of giving greater protection than had previously been afforded. In other words, the reason for the existence of the Board of Review is to see that the accused in serious cases have had a fair trial. I am willing to go a long way in passing under the 37th Article of War procedural errors which do not affect the substantial rights of accused; but, when I recall the occasion of the Board's creation and the reason for its existence, I am unwilling to destroy its usefulness and powers by too great an ex-

tension of the "compelling evidence" rule. I feel sure that my colleagues will agree that the Board's first duty is to see that every accused has had a fair trial, a "run for his money". I do not believe that this accused had a fair trial when the minds of the members of the court were darkened by incompetent evidence so great in quantity and so damaging in character.

10. For the reasons already stated, I conclude that the erroneous receipt in evidence of the three items to which I have alluded (ante, par. 3 a, b, c), injuriously affected the substantial rights of accused as to the sentence, and that the record of trial is legally insufficient to support the sentence imposed by the court and approved by the reviewing authority.

11. I was at first disposed to believe that the errors to which I have referred might be cured by a reduction of the sentence by the reviewing authority or The Adjutant General, as The Judge Advocate General recommended be done in the case of Gabel and Prokopf, cited ante, paragraph 8. The same course might properly be followed in this case if it were possible to say, with the certainty that should attend a quasi-judicial determination, that the sentence in this case in the absence of the inadmissible matter, would have been of at least a certain minimum severity. It might then be reduced to that minimum and the record passed as legally sufficient to support the sentence so reduced. Some cases may, no doubt, be so handled with propriety and with justice to the accused, but the list of precedents in paragraph 6, ante, shows sentences in cases similar to the present ranging all the way from dishonorable discharge without any confinement (Smith, subpar. d; Traylor, subpar. o) to dishonorable discharge and five months confinement (Rosenbaum, subpar. c; Krasher, subpar. n) and garrison sentences involving confinement and forfeiture of $14 per month for periods ranging from two months (Martin, subpar. u) to six months (Orange, subpar. e, and other cases). It seems, therefore, impossible for anyone other than the court itself to say with any assurance of even approximate correctness what sentence the court would have imposed if only admissible evidence had been received.

12. However, the Manual for Courts-Martial points out a method whereby such an error may be corrected. In paragraph 87 b, middle of page 75, it is said:

"If a previous conviction was erroneously considered by the court, and it is believed that the consideration of such conviction influenced the court in its sentence, the reviewing authority may return the record to the court to reconsider the sentence without regard to the previous conviction."

As the sentence has not been published, it is still within the control of the reviewing authority. One way to handle the case would therefore be for The Judge Advocate General to address a letter to the Commanding General, Seventh Corps Area, inviting attention to the court's errors and recommending that he cancel his action on the record of trial and return the record to the court for reconsideration of the sentence without regard to the inadmissible matters which I have enumerated in paragraph 3, ante. If The Judge Advocate General does not think proper to adopt that course, or if, after he shall have done so, the Commanding General, Seventh Corps Area, shall decline to follow the advice tendered, my opinion is that the record is legally insufficient to support the findings and sentence.

Archibald King
_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAR 6 1939 - To the Commanding General, Seventh Corps Area, Omaha, Nebraska.

1. In the case of Private Benjamin W. Basham (6860849), Troop A, 4th Cavalry, 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 211080. 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. 211080).

Allen W. Gullion,
Major General,
The Judge Advocate General.

RECD. AGO TO... HQ. 7TH CA OMAHA, NEBR. 8 30 AM 9 - MAR 39

RECD. ... J. A. Office, 7th Corps Area

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

(13)

Board of Review
CM 211095

Feb. 21, 1939

UNITED STATES	)	NINTH CORPS AREA
v.	)	
Second Lieutenant LEO LICHTBLAU (0-333021), Infantry-Reserve, 305th Infantry.	)	Trial by G.C.M., convened at Fort Douglas, Utah, November 14, 15, 16, 17, 18, 19, 21, 22, 23, 25, 26, 1938. Dismissal.

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

---

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 69th Article of War.

Specification: In that Second Lieutenant Leo Lichtblau, Inf-Res., having been duly placed in arrest at Camp SCS-9, Black Canyon, Emmett, Idaho, on or about August 29, 1938, did, at Camp SCS-9, on or about September 21, 1938, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: (Finding of not guilty).

Specification 6: (Finding of not guilty).

Specification 7: (Finding of not guilty).

Specification 8: (Finding of not guilty).

Specification 9: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Leo Lichtblau, Inf-Res., did, at Boise, Idaho, on or about August 25, 1938, with intent to deceive Captain W. S. Conrow, District Executive Officer, officially state to the said District Executive Officer that he had returned the Camp Exchange records pertaining to CCC Company 1271 to that company by mail, on or about August 15, 1938, while stationed at Camp DG-110, Three Creek, Idaho, which statement was known by the said Second Lieutenant Leo Lichtblau to be untrue, in that he was at that time still in possession of the said records, and had them hidden in his foot locker at Camp DG-110, Three Creek, Idaho.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to all charges and specifications and was found not guilty of all specifications of Charge II and of Charge II; not guilty of Specification 1, Charge III, and not guilty of all specifications of Charge IV and of Charge IV. He was found guilty of Charge I and the specification thereunder; guilty of Specification 2, Charge

III, except the words "and had them hidden in his foot locker at Camp DG-110, Three Creek, Idaho", and not guilty of Charge III, but guilty of violation of the 96th Article of War. 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 action under the 48th Article of War.

3. The evidence in support of the specifications and the charges of which the accused was found guilty will be summarized with respect to each specification.

With reference to Charge I and the specification thereunder, the evidence may be summarized as follows:

Major Lloyd Hamilton, 15th Infantry, Fort Lewis, Washington, testified that he placed accused in arrest at Camp SCS-9, Black Canyon, Idaho, about August 26, 1938, by personally notifying him verbally that he was in arrest for the offense of mishandling Government funds. Major Hamilton further testified that he signed a letter which was written by a subordinate of his, officially notifying Lieutenant Lichtblau he was in arrest, and that while he does not have the original of this letter with the acknowledgment thereon of its receipt by accused, he presumes it is at District Headquarters, Boise, Idaho. Major Hamilton denied categorically that he stated to accused on August 29, 1938, that if the missing Camp Exchange records were found he would change his place of arrest from Emmett, Idaho, to Ontario, Oregon (R. 16, 133, Exs. 6, 45). There was introduced in evidence a true copy of a letter from the office of the District Commander of Boise District, Civilian Conservation Corps, Boise, Idaho, dated August 29, 1938, signed by Lloyd L. Hamilton, Major, Infantry, (D.O.L.), District Commander, to Second Lieutenant Leo Lichtblau, Infantry-Reserve, Boise District, Civilian Conservation Corps, Boise, Idaho, as follows:

> "1. Evidence of your misconduct in the handling of semi-public funds and falsification of official records for which you were responsible having come to the official attention of the undersigned, you are hereby placed in arrest at Camp SCS-9, Black Canyon, Idaho, effective this date.
>
> "2. By this arrest you are restricted to the limits of the camp proper, you will not visit with other officers or enrollees, nor received guests without the permission

of the Camp Commander in each instance. During the period of this arrest, you will not be required to perform duty, nor will you be permitted to exercise command in any case. You will not leave the confines of Camp SCS-9 at any time except by specific orders from this headquarters until you are set at liberty by proper authority. All personal mail will be sent by the Camp Commander to this headquarters for censor before delivery to you.

"3. You are further advised that any violation of the terms of this arrest will be considered an additional offense, and you will be subject to punishment therefor.

"4. You will acknowledge receipt of this order by indorsement hereon, such indorsement to state definitely that the directives contained herein are understood."

This letter bears a 1st Indorsement from accused, dated August 29, 1938, in reply thereto, and signed by him as follows:

"Receipt acknowledged, contents read and understood." (R. 16, Ex. 6.)

Major Charles W. Jones, Infantry (D.O.L.), Headquarters, Boise District, Civilian Conservation Corps, Boise, Idaho, testified that Major Lloyd L. Hamilton was in command of the Boise District, Civilian Conservation Corps, on or about August 29, 1938; that he returned from leave on September 4, 1938, and again assumed command of the District, at which time he was informed of the action taken against accused. Major Jones also testified that accused with his permission visited him in his office on or about September 8, 1938, and requested that he release the stoppage against his pay and allowances. He also requested to be released from arrest or that the place of arrest be changed from Emmett, Idaho, to Ontario, Oregon. These requests of accused were flatly refused. Major Jones further testified that he received a letter from the wife of accused on or about September 17, 1938, which he answered in full; he does not remember whether accused requested the right to consult counsel in the interview of September 8.

In behalf of accused Major Jones testified that prior to his return from leave on September 4, 1938, he considered accused a very excellent officer and that he told Mr. Bowen, Special Investigator for Robert C. Fechner, Director of the Civilian Conservation Corps, when he reported the excellent condition of Company 1271, on or about

June 28, 1938, that it was largely due to accused, then acting Company Commander (R. 106, Ex. 42).

First Lieutenant Richard Stolle, Field Artillery-Reserve, 338th Infantry, Camp SCS-9, Black Canyon, Emmett, Idaho, commanding officer from August 29 to September 21, 1938, testified that accused was in arrest on September 21, 1938, he had been placed in arrest on or about August 29, 1938, at Camp SCS-9 and confined to quarters there by Captain Conrow, District Executive Officer. Captain Conrow telephoned and informed him of the arrest of accused. On the night of September 21, 1938, when Lieutenant Stolle returned to Officers' Quarters, Camp SCS-9, the accused was there. Lieutenant Stolle left the Officers' Quarters again about 6 p.m., and later on about 9:30 p.m., it was reported to him that accused was absent from the Officers' Quarters. Accompanied by Lieutenant Lehman, Camp Surgeon, and Mr. Deal, Educational Adviser, an investigation was made and the camp searched. Accused could not be located. About 9:45 p.m., Captain Conrow, District Executive Officer in Boise, Idaho, was notified by telephone of the absence of accused (R. 9, Ex. 1).

Captain William S. Conrow, Cavalry (D.O.L.), Executive Officer, Boise District, Civilian Conservation Corps, Boise, Idaho, testified that he has known accused about one year; that on September 21, 1938, about 10:30 p.m., he was informed that the accused, who had been placed in arrest at Camp SCS-9, Black Canyon, Idaho, had broken arrest, removed all his clothing and belongings and could not be located in camp. Captain Conrow notified the sheriffs of Gem and Ada counties of the disappearance and directed his apprehension. He also called Captain Dave H. McAuley, Infantry-Reserve, at Ontario, Oregon, informed him of the offense of accused, gave his description, and directed Captain McAuley to inform the Oregon State Police and request the police to go to the home of the wife of the accused, the location of which was known, and place accused in arrest. About 11:30 p.m., the same night, September 21, 1938, Captain Conrow received a telephone message that accused had been apprehended in Ontario, Oregon (R. 11, Ex. 2).

Captain Dave H. McAuley, Infantry-Reserve, 7th CASC, Civilian Conservation Corps Company 4788, Camp BR-42, Ontario, Oregon, testified that he had known accused about one year; that on September 21, 1938, about 10:30 p.m., he received a call from Captain Conrow with the in-

formation that the accused had broken arrest and instructions to get in touch with local police authorities, contact the home of accused, locate him and pick him up. Captain McAuley went to the City Hall, got the assistance of Sergeant Chambers of the Oregon Police, and a man named Thibadeau, Special Agent of the Union Pacific Railroad Company. A radio call was put in for accused. The three men went to the home of the wife of accused and surrounded it. The policeman and Captain McAuley went to the front door, the Special Police Agent to the back door. After knocking, Mrs. Lichtblau, the wife of accused, came to the door, was questioned and denied knowing the whereabouts of accused. As they were in the act of leaving, Thibadeau came around the house with the accused in his custody. Accused was taken to the police station and held there until the following morning, when Captain McAuley took him to Boise (R. 11, Ex. 3). The presence of W. W. Thibadeau and T. R. Chambers and their assistance in the apprehension of the accused in the manner and at the time and place alleged are corroborated by them. Thibadeau testified that with the aid of a flashlight he discovered accused on a porch at the rear of his house, apprehended him and turned him over to Sergeant Chambers. Sergeant Chambers loaded him in the car, took him to the City Hall and placed him in the Ontario City Jail. Sergeant Chambers further testified that he held accused in the city jail at the request of Captain Conrow of the Boise District Headquarters; that accused submitted to arrest and all demands willingly, but did question the witness' authority to make the arrest. Accused was turned over to Captain McAuley the next morning at 9 a.m., along with all property and papers, which included two Government checks that had been taken from his person (R. 12, Exs. 4, 5).

4. The evidence with reference to Specification 2, Charge III, may be summarized as follows:

Captain William Stilwell Conrow, Cavalry (D.O.L.), Executive Officer, Boise District, Civilian Conservation Corps, Boise, Idaho, testified that on or about August 25, 1938, accused stated officially to him as District Executive Officer, that he had returned the Camp Exchange records pertaining to Civilian Conservation Corps Company 1271 by mail on or about August 15, 1938; that these records had been mailed from Three Creek, Idaho; that this statement was false and untrue, since the said records were later recovered from the footlocker of accused at Ontario, Oregon, and had not been mailed as he stated (R. 11, Ex. 2).

Second Lieutenant John F. Lukens, 38th Infantry-Reserve, testified that on or about August 26, 1938, he found the Camp Exchange records of Camp BR-43, Company 1271, Nyssa, Oregon, in the footlocker of the accused in Ontario, Oregon; that he, in the capacity of an inspector under instructions of Captain Conrow had been trying to find these records for about three days; that he had made a thorough search of Company 1271 and Camp DG-110, Three Creek, Idaho, and that he placed tracers on the records in the Post Offices of Nyssa and Three Creek. He was told by the accused on or about the 26th that he had possession of the records and had had them all the time; accompanied by accused he proceeded to Ontario and recovered the records from the footlocker of accused (R. 108, 109).

Previously accused had expressed great surprise that the records had not arrived at Camp 1271, he stated that he had mailed them from Three Creek Post Office, he later told the witness that he had not mailed them but had given them to a truck driver and stated that the truck driver had mailed them from Three Creek Post Office. These stories were told by accused on August 25th and August 26, 1938 (R. 109).

Lieutenant Lukens and the accused then went from Nyssa to Hagerman, then to Three Creek, where Lukens interviewed the truck driver who informed him that he had mailed the records from Twin Falls. Lukens and accused then started for McCall, Idaho, and on the way up there accused stated that all previous statements were untrue, that the records were in Ontario. After completing some business in McCall, Lukens and accused, next morning, went to Ontario and got the records from his locker (R. 110 , 111, 112, 196). The footlocker from which the records in question pertaining to Company 1271 were taken was in the back end of the car of accused parked out on the lawn at the back of his house (R. 115, 118). The accused stated in a sworn statement dated September 1, 1938, that with reference to the records of the Camp Exchange he falsely stated to the District Executive Officer in answer to a direct question that he had mailed these records to Company 1271, when as a matter of fact, the books had not been mailed at all (R. 28, Ex. 11).

The accused at his own request was sworn and testified that on October 11, 1937, he arrived at Nyssa, Oregon, with Company 1271 which came from the Second Corps Area. He details at great length the many vicissitudes attending his service and family affairs from that date to the date of trial (R. 175-231).

The testimony of accused, with reference to the specifications and charges of which he was found guilty, may be briefly summarized as follows:

The accused testified that on or about August 4th while in Boise, Idaho, he requested a three days' leave of absence, effective August 8th. He wanted to spend this leave at home with his family. The leave had been approved. However, upon his return to camp, Lieutenant Onffroy greeted him with these words:

> "' Capt. Conrow called and told me to tell you to get the hell out of here and go to Three Creek and take over there.' He said get packed and get down there. I said O.K. but how about the inventory. Lt. Onffroy told me to turn over the Exchange to him and to take the books with me and that he would take the inventory and that I could take the books and have them audited. It was against regulations to take them from one camp to another, but this message indicated that something terrible had happened and that it was very important that I should get out as fast as I could. * * *." (R. 187, 188.)

Accused also testified that at Boise on or about August 23, 1938, he told Captain Conrow that he had mailed the books in question to Lieutenant Onffroy (R. 193, 194); that later on the way to McCall told Lieutenant Lukens that the records were in his footlocker (R. 195); that on the morning of August 29th, accused was placed in arrest at Camp SCS-9, Black Canyon, Emmett, Idaho (R. 195, 196), sometime after which he tried to get permission to go to see his wife, her baby had been born in the latter part of June and he had not seen her during July or August, and he did want to get home and see her. She was worried about what was going on and he made a number of requests and even asked for an armed guard to take him home. His personal funds had run out, his pay and allowances had been stopped (R. 197), and he could not give her a definite answer about funds. On September 3, 1938, accused wrote a letter to Lieutenant Lukens in which he requested an opportunity to see Major Jones, in order to arrange a transfer of his arrest to Ontario, he stated that his wife was really breaking down under the strain and that he was afraid that unless the investigation was ~~not~~ expedited she would really have a breakdown of a serious nature (R. 87, 88, Ex. 34). Accused was granted permission to see Major Jones and saw him on September 8th, on which occasion

Major Jones was requested by accused to release his pay and allowances. This request was flatly refused as was the request of accused to have the place of arrest changed from Emmett, Idaho, to Ontario, Oregon (Ex. 42). Following the denial of these requests he received a call from his wife on September 21st and decided that he had to leave the camp, he just had to get home. He felt then that even if he was cutting off his head he just had to leave. He left about six o'clock, he did not sneak or run out of camp, just walked out, went to the highway and was fortunate enough to pick up a couple of rides, right to his door (R. 198).

5. The evidence shows beyond a reasonable doubt that the accused broke arrest and made a false official statement as alleged. The breach of arrest and the making of false statement were admitted by accused in a letter (Ex. 11) and also shown in his testimony before the court (R. 194, 198). The accused offers in explanation and extenuation for his false statement about mailing the records, his lack of confidence in Captain Conrow; and for his breach of arrest his anxiety about his wife and baby. His wife was ill and penniless and had recently given birth to a baby. He was denied the privilege of leave prior to being placed in arrest and subsequent to arrest a stoppage was placed against his pay. After he broke arrest, he was confined in a cell in the guardhouse at Fort Douglas. He was not permitted to draw any pay from July 31, 1938, to the date of trial. His wife and child, with a new baby born, were in a state of destitution. The letter confirming the arrest of accused (Ex. 41) contains certain matters relating to his receipt of mail which impose improper and unreasonable conditions. The extenuating circumstances offered, and unreasonable conditions imposed, are not such as to affect the validity of the arrest nor remove the guilt of accused in making the false statements.

6. Accused was, with his own consent, ordered to active duty which expired by its terms on December 19, 1938. The proceedings by the court were completed prior to the last-mentioned date. Jurisdiction of the court-martial having attached while the individual was on active duty, and therefore subject to military law, it continued for all purposes of trial, sentence and execution of the sentence (CM 203869, Lienhard, and cases cited; CM 210678, Sharp).

7. The data on the charge sheet, dated September 27, 1938, show the accused to be age 28, rate of pay $125 per month, no allotments to

dependents, no Government insurance, and to rank from 5-24-37. Summer Training Camps: Camp Dix, New Jersey, from 7-8-35 to 7-21-35; Camp Dix, New Jersey, 7-5-36 to 7-18-36; Second Corps Area, Civilian Conservation Corps, from 6-21-37 to 10-10-37; Boise District, Civilian Conservation Corps, 10-11-37 to date.

8. 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 of guilty and the sentence. Dismissal is authorized upon conviction of violation of the 96th Article of War.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

Wayne B. Campbell, Judge Advocate.

Board of Review
CM 211095 1st Ind.

War Department, J.A.G.O., Mar. 13, 1939 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Leo Lichtblau, Infantry-Reserve, 305th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence. I recommend that the sentence be confirmed but, in view of extenuating circumstances disclosed in the record of trial, that the sentence be remitted.

3. Inclosed herewith is a draft of a letter for your signature, transmitting the record to the President for his action, together with a form of Executive action confirming and remitting the sentence.

Allen W. Gullion,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Drft. of let. for sig. Sec. of War.
Incl 3 - Form of Executive action.

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

Board of Review
CM 211218

Feb. 23, 1939

UNITED STATES	)	PHILIPPINE DEPARTMENT
v.	)	Trial by G.C.M., convened at Manila, P. I., December 6, 1938. Dishonorable discharge and confinement for one (1) year. Disciplinary barracks.
Private CLYDE W. FLEMING (6881630), Base Headquarters & 20th Air Base Squadron.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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 84th Article of War.

Specification: In that Private Clyde W. Fleming, Base Headquarters & 20th Air Base Squadron, did, at or near Nichols Field, Rizal, P. I., on or about Sept. 15, 1938, wrongfully dispose of by selling one (1) cotton khaki coat of the value of $3.67; twenty (20) cotton drawers of the value of $5.20; two (2) O. D. flannel shirts of the value of $6.32; two (2) denim working trousers of the value of $1.84; two (2) denim working jumpers of the value of $1.74; twenty (20) cotton undershirts of the value of $3.60; two (2) rayon hat cords of the value of $0.12; eight (8) cotton khaki trousers of the value of $14.16; two (2) U. S. collar insignias of the value of $0.14; one (1) new pattern, rubberized, dismounted raincoat of the value of $3.53; one (1) pair of spiral leggings of the value of $0.81; one (1) pair of garrison shoes of the value of $4.11; two (2) pairs of service shoes of the value of $6.66; two (2) waist belts of the value of $0.26; two (2) pair of woolen o.d. gloves of the value of $1.26; sixteen (16) cotton handkerchiefs

of the value of $0.64; two (2) o.d. service hats of the value of $4.54; one (1) black necktie of the value of $0.26; ten (10) pairs of cotton socks of the value of $1.00; eight (8) pairs of light wool socks of the value of $1.60; one (1) leather belt, with keeper, of the value of $0.76; one (1) pair of heavy leather gloves of the value of $0.71; one (1) denim working hat of the value of $0.22; twenty-one (21) yards of khaki cloth, shade "F", of the value of $10.08; - total value about $73.23, issued for use in the military service of the United States.

He pleaded not guilty to and was convicted of the specification and charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. The reviewing authority approved the sentence and transmitted the record under Article of War 50½.

3. The Board notes a number of irregularities, as follows:

a. The original order appointing the court, paragraph 1, Special Orders No. 250, Headquarters Philippine Department, November 25, 1938, lists thirteen persons as members of the court or of the personnel of the prosecution or defense. Three days later an amendatory order was issued, paragraph 1, Special Orders No. 252, November 28, 1938, making changes as to six of those persons. On the same day still another amendatory order was issued, paragraph 3, Special Orders No. 252, November 28, 1938, detailing two additional members for the trial of this case only. The next amendatory order, four days later, paragraph 2, Special Orders No. 254, December 1, 1938, relieved one of the members added four days before and substituted another officer for him. Four days later, still another order, the fifth relating to this court, paragraph 2, Special Orders No. 257, December 5, 1938, made still another substitution. In the Manual for Courts-Martial, Appendix 2, footnote on page 231, it is said:

> "A succession of orders modifying an order appointing a court-martial is liable to result in serious errors. When practicable it should be avoided by appointing a new court."

The Board thinks that the caution just quoted from the Manual should have been heeded in the present case.

b. The order of reference for trial is as follows:

"1st Ind.

"Headquarters Philippine Department, Manila, P. I., November 23, 1938.

"Referred for trial to Captain Robert L. Schoenlein, Air Corps, Nichols Field, P. I., trial judge advocate of the general court-martial appointed by paragraph 1, Special Orders No. 250, Headquarters Philippine Department, November 25, 1938, as amended.

"Employment of an enlisted reporter is authorized.

"By command of Major General HUGHES:

"H. H. Sepulveda
"H. H. SEPULVEDA,
"Major, A.G.D.,
"Assistant Adjutant General."
(Underscoring supplied.)

The above indorsement is dated November 23, 1938, but refers the charges to a court appointed November 25, 1938, two days later. Furthermore, Captain Schoenlein was not trial judge advocate of this court on either November 23, for the court had not then been appointed, nor on the 25th, for Captain Porch was then trial judge advocate. Captain Schoenlein did not become trial judge advocate until November 28, on which date an order was issued detailing him to that duty. The court met on December 6. It has been held that if a court to which a case has not been referred tries it, the reviewing authority may ratify the court's action in so doing and act upon the sentence (Dig. Ops. JAG 1912-30, Supp. VII, sec. 1318). By like reasoning, the irregularities mentioned in this subparagraph are not fatal.

c. The prosecution introduced evidence of a confession before any evidence of the corpus delicti (p. 9). (M.C.M., par. 114 a, page 115, lines 27, 28.) This irregularity would not have been serious if the prosecution had later introduced proper proof of the corpus delicti aliunde the confession.

4. The Board concludes that the foregoing irregularities, regrettable as they may be, did not injuriously affect the substantial rights of accused or destroy the validity of the findings and sentence.

5. The Board considers it unnecessary to set out the evidence in detail, but it may be thus summarized:

a. The clothing enumerated in the specification of the value alleged was issued to accused.

b. On September 26, 1938, accused voluntarily confessed that he had sold all his clothing, and that he was too drunk to remember to whom he had sold it. At the time of his confession accused was sober but showed after effects of alcohol.

c. Upon inspection, accused's lockers contained no clothing whatever. He admitted that the coveralls which he was then wearing were borrowed.

d. Accused voluntarily took the stand and testified that he left the post Friday, September 23, wearing a borrowed uniform because he had none of his own that was clean, and leaving his own clothing in his barrack bag, and remained absent drinking until Saturday at retreat, when he returned to his barrack and went to bed. When he awoke Sunday, his clothing was missing. He reported that fact Monday morning to the first sergeant, and, in answer to the latter's question, said that he had sold it. On the stand he denied that he had done so.

6. The most important question presented by the record is whether there was sufficient proof of the corpus delicti aliunde the confession. The Manual for Courts-Martial, paragraph 114 a, says:

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * *. This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the of-

fense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. * * * In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule."

7. Four previous cases have been before the Board of Review in which accused was convicted of unlawful sale of Government property and in which the evidence was substantially the same as that here adduced, i.e., proof of a shortage in property issued to accused, plus a confession by accused that he had sold such property (CM 159283, Nelson; CM 187168, Greene; CM 188211, Hornsby; CM 193828, Morande and Mingo). In those cases it was held that proof of the corpus delicti was insufficient and the convictions were set aside. In the case last cited, the Board said:

"In the instant case there is not a scintilla of evidence of record, other than the confessions, to indicate that the blankets were probably sold. The mere facts that the property was missing and that the accused had an opportunity to take it are circumstances which do not logically touch the corpus delicti, i.e., the sale, and under the rule announced in the Daeche case, supra, are, in the opinion of the Board of Review, insufficient as corroborative of the confessions in this case. * * *."

In each of the cases cited, the Board, with the approval of The Judge Advocate General, held the record legally insufficient to support the findings and sentence. In the case last cited, final action vacating the sentence was taken by the President of the United States. To the same effect in principle are Goff v. United States (257 Fed. 294); and People v. Jones (55 Pac. 698).

8. The Board can find no ground for differentiation between the present case and the four cases cited in the preceding paragraph. It therefore follows them and holds the record of trial legally insufficient to support the findings and sentence.

Archibald King, Judge Advocate.

George H. Frazer, Judge Advocate.

George B. Vampfell, Judge Advocate.

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

Board of Review
CM 211223

Mar. 7, 1939

UNITED STATES)	FOURTH CORPS AREA
)	
vs)	Trial by GCM, convened at Fort
)	McPherson, Georgia, January 16,
Private JOHN D. WYATT)	1939. Dishonorable discharge,
(6147285), Infantry,)	total forfeitures, and confinement
Unassigned.)	for one (1) year. Disciplinary
	Barracks.

HOLDING by the BOARD OF REVIEW
KING, FRAZER, and CAMPBELL, Judge Advocates.

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 93rd Article of War.

Specification: In that Private John D. Wyatt, Infantry (Unasgd) Hawaii, did, at Fort McPherson, Georgia, on or about November 11, 1938, commit the crime of sodomy, by feloniously and against the order of nature have carnal connection, per anus, with General Prisoner Albert H. Reisinger.

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, and confinement at hard labor for one (1) 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 transmitted the record of trial for action under Article of War 50½.

3. The evidence in chief for the prosecution consists of the testimony of two witnesses only, Privates McPherson and Timanus, who were at the time of the alleged offense fellow prisoners with accused and General Prisoner Reisinger in the guard house at Fort McPherson. McPherson testified (p. 4) that accused and Reisinger went to one of the solitary cells, where they committed sodomy in the sight of five to nine other prisoners; that the witness pushed through the crowd into the cell and observed the act from two feet away; that Wyatt first played with Reisinger's penis, then dropped his (Wyatt's) shorts; that Reisinger then committed sodomy upon Wyatt per anum; that the witness is sure that penetration occurred. No force was used on Wyatt. On cross-examination the witness denied that he drank any liquor while a prisoner. He admitted that, when called before Major Gordon with other prisoners, he had said that he had seen nothing; that he had said so because he was afraid of being mistreated by other prisoners by whom he had been threatened, and that men had been beaten up and had their jaws broken in the guard house and nothing done about it, that there is a gang there that takes matters into their own hands, and that when the witness got out of the guard house he told the truth.

4. The other witness for the prosecution, Private Timanus testified (p. 15) that on the evening in question a crowd gathered around the next to the last solitary cell, but that he (the witness) could not see what was going on inside, that he heard men holler, "Shove it in deeper," and "Fuck him," and stuff like that. The witness then went to the shower room; and, while he was taking a bath there Reisinger came in and wiped his penis with the witness' sock. Reisinger's penis was not then erect. Later, accused came in and took a bath.

5. For the defense, General Prisoner Conklin (p. 21) testified that on the night of November 11 McPherson was half drunk. He saw accused, Reisinger, and McPherson in the solitary cell together. He heard McPherson say, "Let me at him. I have got a cock he can't take." At the time McPherson had his hand in the vicinity of his own penis and seemed to be playing with it. The witness knew of no trouble between accused and McPherson. The witness is not sure of the date that these events occurred. When the witness walked into the solitary cell, accused and Reisinger were facing each other, accused in a stooping posture with his face on a level with Reisinger's hips. Accused leaped up abruptly and the witness grabbed him by the shirt. Reisinger ran out. McPherson was standing at the left with his penis in his hand. Prisoners Allen and Adams were outside the cell peering through a crack in the door.

6. General Prisoner Reisinger called by the defense, denied (p. 29) that he committed sodomy with accused, but said that he saw accused and McPherson do so. He testified that McPherson was very intoxicated. On cross-examination the witness admitted that this is his third time in the

guard house, and that he had been there fifteen months. He admitted taking a shower the night of November 11, but denied seeing Timanus or picking up anything in the shower room except soap.

7. Accused at his own request testified (p.33) that on the night of November 11 he went to the last solitary cell with Reisinger, talked with him there, and traded a pocket book for tobacco and a stamp, but denied committing sodomy. No one else was with them.

8. The court thereupon called as its witnesses the first sergeant of McPherson's company (Patrick, p. 43) and the corporal of his squad (White, p. 45), both of whom testified favorably as to McPherson's veracity and character.

9. The defense offered, after the findings of guilty and before imposition of sentence, the report of a board of medical officers on the mental condition of accused (Exhibit 1 for the defense); which found him sane, competent to differentiate between right and wrong, and intelligent. The clinical record indicates the diagnosis to have been (1) no mental disease found, (2) constitutional psychopathic state, inadequate personality, without psychosis. Attached to the report is correspondence with the State Hospital, Worcester, Massachusetts, showing observation and treatment therein on several occasions and a diagnosis of psychopathic personality without psychosis.

10. There is an error in English grammar in the specification, in that it uses the present tense, "have", when it should use the present participle, "having". The specification also alleges sodomy "per anus", though as a matter of Latin grammar, the noun should be in the accusative case, "per anum". As the meaning is clear, these grammatical errors are of no legal importance.

11. General Prisoner Reisinger, though denying that accused and he committed sodomy, as alleged in the specification, testified that he saw accused and McPherson do so (p. 29). Such testimony was improper, in that it related to a supposed offense by accused other than that for which he was being tried. MCM par. 112b, page 112, lines 8-15. However, as the improper statement was brought out by a direct and specific question of the defense (top p. 29), the Board feels that under the principle, "Volenti non fit injuria", accused's substantial rights were not injured.

12. It is well established by numerous decisions of the courts that, if witness A is contradicted by witness B, called by the opposite party, the party who called A to the stand may not introduce evidence of A's good reputation for veracity, as mere contradiction of a witness does not constitute impeachment of him and A's reputation has not been impeached and must be assumed to be good (Bishop of Durham v. Beaumont, 1 Campbell 206; Louisville &. Nashville R. R. Co. v. McClish, 115 Fed. 268; Ford v. United

States (3 Fed. (2d) 104); Harris v. United States (16 Fed. (2d) 117); Greenleaf on Evidence (16th ed., secs. 469, 469 a); Wigmore on Evidence (sec. 1109, and cases cited in note 1); cases cited in note, 12 L.R.A. N.S. 364). Also the Board of Review and The Judge Advocate General have so held in many cases (Dig. Ops. JAG 1912-30, sec. 1291; Supp. VII to above, sec. 1291; CM 190259, Sheffield; CM 195687, Stansbury; CM 196371, Steenberg; CM 198865, Sosebee; CM 201710, Reynolds; CM 201997, Mellon; CM 202250, de Ramos). In its opinion in the Mellon case, the Board discussed the question on principle and authority in some detail.

13. The Board was at first disposed to think that the present case fell within the same class as those cited, and that, following them, the conviction should be set aside. It is true that there are found in the present case, as in those cited, an affirmative statement by a witness, followed by a direct contradiction by one or more witnesses called by the opposite party. If this were all that there was in the record affecting the question involved, the same conclusion would follow as was reached in the cases cited, namely, that since the first witness had not been impeached, but merely contradicted, no evidence of his good character is necessary or admissible. But an additional element is found in the present case. As has been shown (ante, par. 2, this holding; record, pp. 9, 10), McPherson, the principal witness for the prosecution, admitted on cross-examination that he had previously stated to Major Gordon that he "didn't see anything". In other words, the witness admitted on cross-examination making prior statements contradicted by his present testimony. Does admission or proof of prior inconsistent statements by a witness allow the party calling him to attempt to rehabilitate him by evidence of his good reputation for veracity? That is the question presented by this case, a different question from that decided in the cases cited. So far as the Board can ascertain, the question has never been decided by the Board itself, The Judge Advocate General, or the Federal courts. The Circuit Court of Appeals for the Sixth Circuit has, however, intimated its opinion on the subject. In Spurr v. United States (87 Fed. 701), after the defendant had testified in his own behalf, his counsel contended that defendant's character had been impeached by the cross-examination to which he had been subjected and offered evidence of his good reputation for veracity, which was excluded. Apparently, no prior inconsistent statements were proved. The Circuit Court of Appeals said (p. 714):

> "* * * A careful reading of defendant's cross-examination fails to disclose any ground for the admission of evidence of his general reputation for truth and veracity. The fact that contradictions exist between his testimony and that of other witnesses affords no ground for its admission.

> 1 Greenl. Ev. sec. 469. In his character as a witness, defendant is not entitled to any privilege not extended to other witnesses. Reagan v. U. S., 157 U. S. 301, 305, 15 Sup. Ct. 610; U. S. v. Hollis, 43 Fed. 248. In general, where no attempt has been made to impeach him by evidence of bad character, or of contradictory statements, or by the cross-examination, he cannot corroborate his testimony or give it weight by evidence of his general reputation for truthfulness; nor will his own view of the effect of his cross-examination make such testimony competent. * * *." (Underscoring supplied.)

It is proper to infer from the words underscored that the court was of opinion that, if it had been shown that the defendant had previously made contradictory statements, he might afterward offer evidence of his good reputation for truthfulness. The above passage was quoted with approval in a later opinion of the same court by Day, J., later a justice of the Supreme Court, in Louisville &. Nashville R. R. Co. v. McClish (115 Fed. 268, 270). In view of the silence of the Manual for Courts-Martial on this point and the reference in the 38th Article of War to "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States", even an inference or dictum of a Federal court on a question of evidence is of weight.

14. According to Professor Wigmore's treatise on Evidence, section 1108 and note 1 (where the cases are collected), the authorities are about equally divided on the point whether admission or proof of previous statements inconsistent with a witness' testimony allows the party calling the witness to introduce evidence of his good reputation for veracity. A leading case is People v. Rector (19 Wendell (N.Y.) 583), in which the Supreme Court of Judicature of New York in 1838, by a vote of two judges to one, admitted such evidence. That was a murder case in which one Gillespie testified as an eye-witness for the defense. The prosecution brought out that on a previous occasion Gillespie had "disavowed all knowledge of the transaction". The defense thereupon offered to prove Gillespie's good reputation for truth, which testimony the trial court rejected. The Board makes the following quotations from the opinion of the two judges comprising the majority of the Supreme Court:

Cowen, J. (p. 583): -

"* * * But with great deference, I ask, do not discrepancies of statement in themselves go to general character? They are not like a contradicting witness on the fact itself, nor do they bring the matter to a mere test of memory. How do they operate in common understanding? Either to evince a dangerous levity and versatility, or down right dishonesty in representing a matter of fact. * * *."

Nelson, C. J. (pp. 611, 612): -

"Now, what is the ground and reason for allowing a party to introduce general evidence in reply to fortify and support a witness who has been impeached? It surely is not because the impeachment has been effected by the testimony of witnesses, or by general evidence as to character, or in a particular way - all this of itself can be of no great importance - but it is because the impeachment, the effect of the proof, in whatever way introduced, tends directly to overcome the presumption of good character upon which the party had a right in the first instance to rely; because a material part of his proof is struck at by shaking confidence in the integrity and truth of the witness upon whom it depends. For this reason the presumption of good character may no longer exist; it may have been overthrown by the force of affirmative evidence, and the facts which were proved, and material to the support of the principal issue, before dependant upon this presumption, must stand or fall by evidence rebutting the impeachment; if that can be removed, the presumption revives, and the facts are again sustained upon the good character of the witness.

"Regarding then the principle upon which testimony in reply to the impeachment of a witness is admitted, and the grounds and reasons upon which it rests, the court should rather look to the effect of the impeachment, than to the mode and manner in which it is brought about. It can be of little concern to a party whether the moral character of his witness is destroyed by the testimony of others called to speak to it, or by a cross-examination. The effect upon him, to the extent of the impeachment, is exactly the same; he loses the benefit of the evidence in both cases, and for the same cause - the discredit of his witness. If it be

competent then to rebut the effect of the impeachment in the one case, and thereby reinstate the character and credit of the witness, I am incapable of comprehending the distinction that would deny the like indulgence to the other. * * *."

15. In another case involving the same point, Clem v. State (33 Ind. 418), the court, speaking by Frazer, J., said (pp. 427, 428):

"Evidence of the general good character of a witness for the State was allowed, over the defendant's objection, after the defense had impeached the witness by proof of statements made by him contradictory of the facts to which he had testified. This action of the court below was in accordance with the decision of this court in Clark v. Bond, 29 Ind. 555, which we are asked to reconsider. The sole object in asking a witness whether he had made statements elsewhere not in accordance with his testimony, and upon his denial, calling other witnesses to show that he did make such statements, is to create the belief that he is not a credible witness. Impeachment of a witness by proof of his bad character is intended to accomplish exactly and only the same thing. The statements and the bad character are alike immaterial, except for the single purpose of affecting the credit of the witness, and it is not easy to say that the two methods are not about equally efficient in accomplishing the end. In either case, the credibility of the witness is impaired; nor is this incidental, as in the case of a contradiction between witnesses as to a material fact. If it is just in the one case that a party should be permitted to establish the credit of his witness by showing his good character, it is alike just in the other case. The sole question in each is, what credit should be given to the impeached witness? And any distinction between them as to the kind of evidence allowable, or which admits it in one case and excludes it in the other, is technical, and, it seems to us, without any foundation in justice, and is not even supported by the argument of convenience. * * *."

16. In State v. Maggard (250 Mo. 355, 157 S.W. 354), in which the defendant was tried for the larceny of two horses, the court said:

"* * * The defense had sought to impeach the testimony of the witness Compton by almost every means known to the law of evidence, * * *. The defense had proven the conviction of Compton of petit larceny; they had shown many variant statements in pais as having been made by him; and the theory of the defense, which was fully developed, was that Compton had himself stolen the two horses and sold them to defendant and Will Maggard. This was both the shadow and the substance (the woof and the warp) of defendant's case. They assailed him with 'horse, foot, and dragoons,' figuratively (and, as it may be said upon the facts here, literally also), alone omitting, in their efforts to impeach him and break him down, impeachment by witnesses as to his general reputation for truth and veracity.

"Conceding the general rule of inadmissibility as applying ordinarily to the evidence elicited, does the well-known exception apply upon the doctrine of sustaining or rehabilitating an impeached witness? We need not here pick and choose with care and nicety the varying methods known to the doctrine of rehabilitation as dependent upon the manner of impeachment used or sought so to be. All attacks save one, to wit, impeachment by witnesses for bad reputation for truth and veracity, were used. Where a witness is impeached by proof of variant acts or statements, relevant evidence of the witness' prior statements, correspondent with his testimony, are admissible for the purpose of rehabilitation. * * *

"On the cognate point raised by defendant that it was error to permit the state in rebuttal to offer the testimony of witnesses as to the general reputation of the witness Compton, in the absence of defendant's <u>offering witnesses</u> to impeach said Compton, we likewise hold that, since the defense had sought to impeach this witness in every other legal way except by offering witnesses as to his general reputation for honesty and truth and veracity, evidence by witnesses called by the state in rebuttal on the general reputation of Compton was admissible. * * *."

17. <u>State</u> v. <u>Roe</u> (12 Vt. 93) was a trial for arson, the burning of a church, at which one Scott testified for the prosecution that on the night of the fire (but before it) he followed the defendant and another person from his (the witness') house to the vicinity of the

church, and saw them enter the churchyard. On cross-examination the witness admitted that before "the court of enquiry" he had omitted that part of his present testimony to the effect that the defendant went to the immediate neighborhood of the church and entered the churchyard. On redirect examination he stated that the reason for this omission was that he had been threatened and was afraid of personal injury. The prosecution then offered to prove by several witnesses the witness' good reputation for veracity, and, over the objection of the defense, such evidence was received. The Supreme Court of Vermont held the evidence to have been proper. The similarity of that case and the present will be noted. In each the defense brought out on cross-examination of an important witness for the prosecution that he had on a preliminary inquiry into the very case kept silent as to the facts concerning which he now testifies. In each case, the witness further stated that the reason for such silence was fear of injury to himself. In the Roe case, it was held that the prosecution might then introduce evidence of the witness' good reputation for veracity. Unless the Roe case is to be rejected as unsound, the same result must follow in the present case.

18. As has been said, there is no precedent binding the Board and the authorities are evenly divided. In such a situation the Board is at liberty to follow those cases which appeal to it as most reasonable and just. After mature consideration, it follows the cases already cited, for the reasons given by Chief Justice Nelson and Justice Cowen in the Rector case and by Justice Frazer in the Clem case, and holds the evidence of First Sergeant Patrick and Corporal White as to the good reputation of McPherson for veracity to have been admissible.

19. The Board has not overlooked the fact that Professor Wigmore prefers the opposite view (sec. 1108), but it thinks the reasoning of the opinions which it has quoted convincing. It notes also that Professor Wigmore's objection to such evidence is not that it is unjust to the opposite party, but that it is too remote and "it is not worth while to cumber the trial with it". The Board does not agree with the view that the evidence is too remote; but, even if that view be sound, the receipt of evidence objectionable solely because too remote is unlikely to injure the substantial rights of an accused under the 37th Article of War.

20. There is another consideration specially applicable to courts-martial which favors the receipt of such evidence. The law member, trial

judge advocate, and defense counsel of courts-martial are seldom trained lawyers, and it is most necessary that our system of military law be not so technical as to be unworkable by such persons. The tendency of persons not lawyers filling such positions is to admit much matter which the strict rules of the law of evidence would exclude as objectionable for one reason or another. When, therefore, the precedents are evenly divided, as here; the Board thinks it preferable to follow those admitting the evidence in question, in order to reduce the errors and reversals, if no consideration of logic or justice requires the opposite course.

21. The Board has not overlooked the form of the questions put to First Sergeant Patrick. After proving how long Sergeant Patrick had known McPherson, the prosecution continued its direct examination of him as follows:

"Q. Sergeant, what is Private McPherson's worthiness of belief?

"A. I believe it is just as good as you could get from a man in the service, sir.

"Q. What character would you give him?

"A. I would give him superior, sir."

According to the weight of authority in the United States, the trial judge advocate should have asked First Sergeant Patrick, not his own opinion of McPherson, but what was McPherson's reputation in his company as to veracity (M.C.M., par. 124 b, p. 133, lines 9-23; Wigmore on Evidence, secs. 1610, 1985). A few lines further (p. 44), the witness was asked:

"Q. Is he worthy of belief?

"A. Yes, sir.

"Q. Do you believe if he took oath to tell the truth, he would tell the truth?

"A. Yes, sir."

According to the weight of American authority, the above questions should have been prefixed by "Knowing his reputation", or "From your knowledge of such reputation" (same citations). But the Board thinks that the answers of the witness would not have been different if the questions had been in the proper form, and that the variance from that form, though regrettable, did not injuriously affect the substantial rights of accused. The questions to Corporal White more nearly approached the proper form (pp. 45, 46).

22. For the reasons above stated, the Board of Review concludes that the record of trial contains no errors injuriously affecting the substantial rights of accused, and holds it to be legally sufficient to support the findings and sentence.

Archibald King, Judge Advocate.

George H. Fraser, Judge Advocate.

George B. Trimble, Judge Advocate.

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

Board of Review
CM 211260

Mar. 23, 1939

UNITED STATES	)	FIRST DIVISION
v.	)	Trial by G.C.M., convened at Fort Wadsworth, Staten Island, New York, January 3, 1939. Dishonorable discharge and confinement for ten (10) months. Disciplinary barracks.
Private FRANK J. GROCHOWIAK (6902781), Company L, 18th Infantry.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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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. Accused was tried upon the following charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Frank J. Grochowiak, Co. L, 18th Infantry did at Camp Perry, Ohio, on or about August 25, 1938, feloniously take, steal, and carry away one Pistol Automatic, Cal. 45 Government Model 1911 A-1 No. C 141418 with holster, value about ($30.00) thirty Dollars, the property of Mr. John Zupko.

Specification 2: In that Private Frank J. Grochowiak, Co. L, 18th Infantry did at Camp Perry, Ohio, on or about September 6, 1938, feloniously take, steal, and carry away one revolver Cal. 38 No. 603377-E with name Martin Taylor engraved on right side, with holster, value about ($35.00) thirty five dollars, the property of Mr. Martin Taylor.

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 dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year. The reviewing authority approved the sentence, remitted two months of the confinement imposed, designated the United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and transmitted the record of trial for action under Article of War 50½.

3. On page 23 in the testimony of Captain McNamee appears the notion, unfortunately widespread in the Army but wholly fallacious, that testimony of a witness as to what another person told him, otherwise inadmissible as hearsay, becomes admissible if the statement constituted an official report. It cannot be too often repeated that, subject to a few exceptions mentioned in the Manual for Courts-Martial, a witness should testify to what he has observed by means of his own five senses, and not as to what somebody told him or officially reported to him (M.C.M. par. 113; Dig. Ops. JAG 1912-30, sec. 1300). This error, though regrettable, did not in this particular case injuriously affect the substantial rights of accused.

4. The admissible evidence fully proved the commission by accused of the offenses of which he has been convicted, and the Board considers it unnecessary to set it out in detail. It shows that Zupko and Taylor were civilian competitors in the pistol matches at Camp Perry, Ohio, in August and September, 1938; that each had a pistol of the description and value alleged, respectively, in his baggage in his tent there; that the pistols disappeared on the dates alleged; that accused was then on duty at Camp Perry as a telephone operator; that on September 14, 1938, accused started to leave his barrack at Fort Wadsworth carrying a shoe box; that in answer to a question he said that the box contained old clothes; that accused was reluctant to open the box, saying that it was too much trouble and he was in a hurry; that when opened the box was found to contain two pistols, later shown to be those missed by Zupko and Taylor.

5. The only serious question in the case is raised by a plea of former jeopardy (p. 8 et seq., p. 27). Accused had previously been tried and convicted by summary court on the following charge and specification:

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

"Specification I: In that Private FRANK J. GROCHOWIAK, Co L, 18th Infantry, did at Fort Wadsworth, N.Y. on or about Sept. 14, 1938, have in his possession one Revolver Cal. 38,

No.603377-E and one Pistol Automatic Cal. 45 No. C-141418 in violation of Par. 2 (a) Sec IX Post Regulations, Fort Wadsworth, N. Y. dated Jan 1, 1935, and did fail to report the same."

The above specification is faulty in that it alleges two offenses (M.C.M., par. 29 b); one, having the pistols in his possession in violation of post regulations; and the other, failing to report the pistols. Accused should lose no rights because of faulty pleading by his accuser, so his plea must be considered as though he had previously been convicted of two specifications, each covering one of the above offenses. The supposed specification alleging failure to report is immaterial to the issue of former jeopardy. Was the present trial barred by the fact that accused had previously been convicted of a specification alleging wrongful possession in violation of post regulations of the identical pistols which he has now been convicted of stealing?

6. Article of War 40 says:

"No person shall, without his consent, be tried a second time for the same offense; * * *."

The Manual for Courts-Martial, paragraph 68, says:

"In general, once a person is tried in the sense of A. W. 40 for an offense, he can not without his consent be tried for another offense if either offense is necessarily included in the other. Thus, a trial for manslaughter may be pleaded in bar of trial for the same homicide charged as murder, and the trial of an enlisted man for absence without leave (A. W. 61) bars trial for the same absence charged as desertion and vice versa * * *."

Attention is particularly invited to the clause, "if either offense is necessarily included in the other". Is unlawful possession of certain articles in violation of post regulations necessarily included in larceny of the same articles? The argument for an affirmative answer to this question may be thus stated: A thief has possession of the articles stolen, otherwise the larceny would be incomplete. The Manual for Courts-Martial, paragraph 149 g, says: "* * * possession by the thief must be complete. Thus, possession is not complete while the property is secured by a chain. * * *." Therefore, the offense of which accused was previously convicted is a lesser offense included in that offense which he has now been convicted.

7. Nor can the above reasoning be overthrown by the contention that the larcenies occurred at Camp Perry, Ohio, August 25 and September 6, 1938; and the illegal possession at Fort Wadsworth, New York, six hundred miles away, on September 14th, several days later. Unlawful possession is a continuing offense, and the Supreme Court has held that a continuing offense may not be split up by the prosecution into several offenses, each for a particular period of time, but must be charged and considered as a single offense from its beginning until the date of the indictment. In In re Snow (120 U.S. 274), on December 5, 1885, three indictments were found against the defendant, all alike except the dates. Each charged unlawful cohabitation with the same seven women, one from January 1 to December 31, 1883, another from January 1 to December 31, 1884, and a third from January 1 to December 1, 1885. The defendant was tried, convicted and sentenced separately on each indictment, and the court directed that the sentences run consecutively. The defendant served the first sentence, and while serving the second, applied for the writ of habeas corpus. The Supreme Court said (pp. 281-283):

> "It [unlawful cohabitation] is, inherently, a continuous offence, having duration; and not an offence consisting of an isolated act. That it was intended in that sense in these indictments is shown by the fact that in each the charge laid is that the defendant did on the day named and 'thereafter and continuously', for the time specified, 'live and cohabit with more than one woman, to wit, with' the seven women named, and 'during all the period aforesaid' 'did unlawfully claim, live and cohabit with all of said women as his wives'. Thus, in each indictment, the offence is laid as a continuing one, and a single one, for all the time covered by the indictment; and, taking the three indictments together, there is charged a continuing offence for the entire time covered by all three of the indictments. There was but a single offence committed prior to the time the indictments were found. * * * The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on, ad infinitum, for smaller periods of time. It is to prevent such an application of penal laws, that the rule has

obtained that a continuing offence of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted. * * *

"No case is cited where what has been done in the present case has been held to be lawful. But the uniform current of authority is to the contrary, both in England and in the United States."

The Snow case was cited and followed in In re Nielsen (131 U.S. 176).

8. In Dig. Ops. JAG 1912-30, section 1487 (2), the Board of Review with the approval of The Judge Advocate General held in substance as follows:

"Accused were charged with the larceny of an automobile and were found guilty of unlawfully having it in their possession. Held, That the latter offense is not included in the offense of larceny, it being possible that such unlawful possession was not of the kind necessarily included in larceny. C. M. 151032 (1922)."

The Judge Advocate General followed the above holding in a later case thus digested (Dig. Ops. JAG 1912-30, Supp. VII, sec. 1578 (1)):

"Accused was charged with larceny of six Y. M. C. A. coupon books, under A. W. 93, and found not guilty of larceny but guilty of wrongful possession of them, under A. W. 96. The court by its finding acquitted him of larceny. The findings do not indicate how he acquired possession of the tickets which they describe as 'wrongfully' in his possession, but undoubtedly the court was not convinced that he came into possession of the property by trespass. Trespass being eliminated and the kind of wrongful possession not being specified, it cannot be said that the offense found was necessarily included in that charged, viz, larceny. There may be wrongful possession which is in no way connected with larceny, and not a lesser included offense of larceny. C. M. 198798 (1932)."

9. If the foregoing holdings be sound, unlawful possession is not a lesser offense included in larceny, and the plea of former jeopardy was properly overruled in the present case. However, the Board feels doubt as to the correctness of some of the reasoning in the opinions

above cited and therefore proceeds to further consideration of the question presented in the case under consideration, namely, whether the accused's plea of former jeopardy was properly overruled.

10. A leading case on former jeopardy is Morey v. Commonwealth (108 Mass. 433), in which the opinion was written by Gray, J., afterwards a justice of the Supreme Court of the United States. In that case, two indictments were found against the defendant. The first alleged that he and Bridget Kennedy on October 1, 1866, and from that day continually to August 1, 1867, did lewdly and lasciviously associate and cohabit together, not being married to each other. The second charged in three counts that on January 1, June 1, and August 1, 1867, the defendant committed adultery with Bridget Kennedy, he being a married man, and having a wife other than the said Bridget. The defendant and Bridget were tried together on the first indictment, convicted, and sentenced. The defendant was then tried, convicted, and sentenced on the second indictment, and the court directed that the sentences run consecutively. The defendant raised the question of former jeopardy. The court said (p. 434):

> "* * * The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

Applying this test to the facts before it, the court said (pp. 435, 436):

> "* * * The indictment for lewd and lascivious cohabitation contained no averment and required no proof that either of the parties was married, but did require proof that they dwelt or lived together, and would not be supported by proof of a single secret act of unlawful intercourse. Commonwealth v. Calef, 10 Mass. 153. The indictment for adultery alleged and required proof that the plaintiff in error was married to another woman, and would be satisfied by proof of that fact and of a single act of unlawful intercourse. Proof of unlawful intercourse was indeed necessary to support each indictment. But the plaintiff in error could not have been convicted upon the

first indictment by proof of such intercourse and of his marriage, without proof of continuous unlawful cohabitation; nor upon the second indictment by proof of such cohabitation, without proof of his marriage. Full proof of the offense charged in either indictment would not therefore of itself have warranted any conviction upon the other. The necessary consequence is, that, assuming that proof of the same act or acts of unlawful intercourse was introduced on the trial of both indictments, the conviction upon the first indictment was no bar to a conviction and sentence upon the second; and that there is no error in the judgment, for which it can be reversed."

The above case, though not a decision by a federal court, has been cited or quoted by the Supreme Court of the United States in In re Nielsen (131 U.S. 176, 187); Carter v. McClaughry (183 U.S. 365, 395); Gavieres v. United States (220 U.S. 338, 342); Ebeling v. Morgan (237 U.S. 625, 630); and Blockburger v. United States (284 U.S. 299, 304). In the case last cited, the Supreme Court quoted and made its ratio decidendi the passage first quoted herein from the Morey case.

11. In the Gavieres case, above cited, the defendant was first convicted of violating an ordinance of the city of Manila punishing anyone drunk or behaving in a rude or indecent manner in a public place; second, of violating a section of the Philippine Penal Code denouncing those who insult or threaten public officials. Both charges grew out of an altercation with a policeman on a streetcar. After quoting the test laid down in the Morey case, the court said (pp. 343, 344):

"Applying these principles, it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence or in a writing addressed to him. Without such charge and proof there could have been no conviction in the second case. The requirement of insult to a public official was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the offense was committed in a public place open to public view; the insult to a public official need only be in his presence

or addressed to him in writing. Each offense required proof of a fact, which the other did not. Consequently a conviction of one would not bar a prosecution for the other."

12. In the Blockburger case, there were two counts; one alleging sale of morphine not in the original package, in violation of section 1 of the Harrison Act (26 U.S.C. 692); and the other alleging the same sale not in pursuance of a written order, in violation of section 2 of the same act (26 U.S.C. 696). The court said (p. 304):

"* * * The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. * * *."

It therefore held that there was no double punishment of accused.

13. It will be noted that the test laid down in the Morey case, (ante, par. 10) and approved by the Supreme Court of the United States in the cases cited is, in substance, the same as that given in the passage from the Manual for Courts-Martial, paragraph 68, quoted ante, paragraph 6, this holding. If each of two offenses contains an element not found in the other, it is obvious that neither can be included in the other. Let us apply the test given in the Morey case and several times approved by the Supreme Court of the United States to the facts in the present case. Let it be admitted that the element of possession of the stolen pistols is the same in the two specifications of which the present accused has been convicted. Nevertheless, the former specification required elements of proof not required to convict of the latter, namely, existence of a post regulation with respect to possession of pistols and knowledge by accused of the prohibition involved in that regulation. Also, the specification of which accused has been convicted in the trial under consideration required elements of proof not required to convict of the former, namely, trespass and asportation. The Board therefore concludes that each offense contained elements not found in the other, that neither was included in the other, and that the plea of former jeopardy was properly overruled.

14. Several other cases support the Board's view. In Albrecht v. United States (273 U.S. 1), a case arising during the prohibition era, the defendant was indicted, convicted, and sentenced under four counts alleging illegal possession of liquor and four alleging sale of the same liquor. He contended that this amounted to double punishment, but the Supreme Court overruled this contention.

15. In United States ex rel. Simkoff v. Mulligan (67 Fed. (2d) 321), the relator had pleaded guilty to two counts, the first alleging possession of a counterfeit federal reserve note, and the second uttering the same note on the same day. The two offenses were denounced in separate clauses of the same section of the code (18 U.S.C. 265). The United States District Court for the Southern District of New York sentenced the relator on the first count to one year and six months' imprisonment and on the second to two years' probation. He served the imprisonment, but during the probationary period he was arrested for violation of the terms of his probation, the probation was revoked, and the court sentenced him to two years' confinement on the second count. While he was confined under that sentence, Simkoff applied for the writ of habeas corpus on the ground of double punishment. The District Court dismissed the writ and the Circuit Court of Appeals for the Second Circuit affirmed the dismissal.

16. Though the questions which arose in the two cases last cited are not precisely the same as that presented by the case before the Board, the similarity is obvious.

17. Other cases, which it is unnecessary to discuss in detail, but which tend to support the Board's view, are Lee Choy v. United States (293 Fed. 582); Coy v. United States (5 Fed. (2d) 309); Haggerty v. United States (52 Fed. (2d) 11); United States v. Miro (60 Fed. (2d) 58); and Fleisher v. United States (91 Fed. (2d) 404), reversed on another point (302 U.S. 218).

18. For the reasons above set out, the Board of Review concludes that accused's plea of former jeopardy was properly overruled and holds that the record of trial is legally sufficient to support the sentence.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

George S. Blanchard, Judge Advocate.

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

Board of Review
CM 211261

MAR 8 1939

UNITED STATES	)	FIRST DIVISION
v.	)	Trial by G.C.M., convened at Fort Jay, New York, January 13, 1939. Dishonorable discharge and confinement for six (6) months.
Private MICHAEL A. SEDLAK (6708121), Detachment, Medical Department, Fort Jay, New York.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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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. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 84th Article of War.

Specification: In that Private Michael A. Sedlak, Det. Med. Dept. did, at Ft. Jay, N.Y., on or about November 26, 1938, wrongfully dispose of by giving away 2 pair of trousers elastique, value about $11.92, 2 pair of shoes service, value about $6.66 and 22 pair of drawers, value about $5.72, of a total value of $24.30, issued for use in the military service of the United States.

Accused pleaded not guilty to and was convicted of the specification and charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. The reviewing authority ap-

proved the sentence, but remitted six months of the confinement, and transmitted the record under Article of War 50½.

3. The prosecution called to the stand Corporal William Tinsman, "supply man" of the medical detachment, and attempted to prove by him the issue of the clothing in question (p. 13, et seq.). The prosecution also introduced three clothing slips (Exhibits A, B, and C), each bearing what purports to be the signature of accused. The prosecution asked Tinsman if he was "familiar" with the signatures of accused and Lieutenant Kempf, the witnessing officer, and Tinsman answered in the affirmative. On redirect examination (p. 22) the prosecution brought out that Tinsman personally made the entries on the clothing slip and saw Lieutenant Kempf sign it. The prosecution did not ask Tinsman whether he personally issued the clothing or saw it issued, or whether he saw accused sign his name on these slips or on any other occasion. Hence, up to the time that the court began its examination of Tinsman, his testimony contains no complete and proper proof of the issue of clothing to accused (M.C.M., par. 116). However, the court asked Tinsman if he was present when the clothing listed on the slip was issued by the quartermaster to accused, and he answered in the affirmative (p. 25). Furthermore, the clothing slips themselves are prima facie proof of the issue, under the principle stated in the Manual for Courts-Martial, paragraph 117 a, top of page 121, which is the principle under which absence without leave is proved by a morning report. That principle is given wider application by the act of June 20, 1936 (49 Stat. 1561; 28 U.S.C. 695). The Board concludes that the issue of the clothing is proved.

4. The Board considers it unnecessary to set out the evidence in detail, but it may be thus summarized:

a. Certain clothing was issued to accused. As to proof of this point, attention is invited to the preceding paragraph.

b. When accused's clothing was checked on December 14, 1938, the clothing mentioned in the specification, being a part of that shown to have been issued, was missing (p. 6, and elsewhere).

c. After proper warning, accused confessed that he had given the missing clothing to a cousin who lived in Yonkers. Accused's commanding officer thereupon offered to send accused to Yonkers to get it

back, but accused said that he did not care to take it away from his cousin (pp. 7, 8).

5. The most important question presented by the record is whether there was sufficient proof of the corpus delicti aliunde the confession. The Manual for Courts-Martial, paragraph 114 a, says:

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. * * * In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule."

6. Four cases have been before the Board of Review in which accused was convicted of unlawful sale of Government property and in which the evidence consisted of proof of a shortage in property issued to accused, plus a confession by accused that he had sold such property (CM 159283, Nelson; CM 187168, Greene; CM 188211, Hornsby; CM 193828, Morande and Mingo). In those cases it was held that proof of the corpus delicti was insufficient and the convictions were set aside. In the case last cited, the Board said:

> "In the instant case there is not a scintilla of evidence of record, other than the confessions, to indicate that the blankets were probably sold. The mere facts that the property was missing and that the accused had an opportunity to take it are circumstances which do not logically touch the corpus delicti, i.e., the sale, and under the rule an-

nounced in the Daeche case, supra, are, in the opinion of the Board of Review, insufficient as corroborative of the confessions in this case. * * *."

In each of the cases cited, the Board, with the approval of The Judge Advocate General, held the record legally insufficient to support the findings and sentence. In the case last cited, final action vacating the sentence was taken by the President of the United States. In the recent case of Fleming (CM 211218), the evidence was substantially the same as in those cited and the Board made the same holding, but The Judge Advocate General has not yet acted on the case. To the same effect in principle are Goff v. United States (257 Fed. 294); and People v. Jones (55 Pac. 698).

7. The court-martial cases cited were all cases of unlawful sale of Government property and the present is a case of unlawful gift of such property. If, however, the principle of the cases cited is sound, it should apply to the one as much as to the other. The Board can find no logical reason for differentiation between the cases cited in the preceding paragraph and that before it. It therefore follows them, concludes that the record contains insufficient proof of the corpus delicti aliunde accused's confession, and holds that the record of trial is legally insufficient to support the findings and sentence.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

George B. Crumpacker, Judge Advocate.

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

Board of Review
CM 211377

MAR 23 1939

UNITED STATES	)	SECOND DIVISION
v.	)	Trial by G.C.M., convened at Fort Sam Houston, Texas, February 16, 1939. Dishonorable discharge and confinement for six (6) months. Fort Sam Houston, Texas.
Private DAIR M. SHORT (6261289), Company G, 2nd Medical Regiment.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial 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 Private Dair M. Short, Company G, 2nd Medical Regiment, did, at Fort Sam Houston, Texas, on or about December 20th, 1938, feloniously take, steal, and carry away two photographs, value about five cents each, and one token, value about 5¢, the property of Captain John Gross.

Specification 2: In that Private Dair M. Short, Company G, 2nd Medical Regiment, did, at Fort Sam Houston, Texas, on or about January 27th, 1939, feloniously take, steal, and carry away one Colliers magazine, value about 5¢, property of Captain R. T. Mitchell.

Specification 3: In that Private Dair M. Short, Company G, 2nd Medical Regiment, did, at Fort Sam Houston, Texas, on or about January 9th, 1939, feloniously

take, steal, and carry away one picture, value about 25¢ and 50¢, United States currency, property of Alma Woolfolk.

He pleaded not guilty to the charge and all specifications thereunder and was found not guilty of Specifications 1 and 2. As to Specification 3, the court made the following finding:

"As amended by the court GUILTY, 'In that Private Dair M. Short, Company "G", 2d Medical Regiment, did, at Fort Sam Houston, Texas, on or about January 9, 1939, feloniously embezzle by fraudulently converting to his own use one picture, value about 25¢, and 50¢ United States currency, property of Alma Woolfolk, entrusted to him by the said, Alma Woolfolk'."

The court found accused guilty of the charge and sentenced him to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six (6) months. The reviewing authority approved the sentence, designated Fort Sam Houston, Texas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Upon completion of the introduction of the evidence for the prosecution and the defense, the court was closed for deliberation on the findings. Upon being opened the following proceedings, recorded on pages 34, 35 and 36 of the record of trial, were had:

"PRESIDENT AND LAW MEMBER: The court desires to ask the defense that if Specification 3, of the charge were amended to except the words 'feloniously take, steal, and carry away, one picture, value about 25¢; and one 50¢ piece, United States currency, property of Alma Woolfolk' substituting therefor, respectively, the words, 'feloniously embezzle, by fraudulently converting to his own use one picture, value about 25¢ and 50¢ United States currency, property of Alma Woolfolk, entrusted to him by the said Alma Woolfolk', would the defense desire to waive objection or to have further time to prepare for the defense under charge of Specification 3, of embezzlement instead of larceny?

"DEFENSE: The word larceny is not referred to in the charges, sir.

"PRESIDENT AND LAW MEMBER: The wording of the specification is 'feloniously, take, steal, and carry away' which is the wording of a specification for larceny.
"DEFENSE: How are you going to amend that, sir.
"PRESIDENT AND LAW MEMBER: With the different specification under the general charge, under embezzlement. The specification as amended would read: 'In that Private Dair M. Short, Company "G", 2d Medical Regiment, did, at Fort Sam Houston, Texas, on or about January 9, 1939, feloniously embezzle by fraudulently converting to his own use one picture, value about 25¢, and 50¢ United States currency, property of Alma Woolfolk, entrusted to him by the said, Alma Woolfolk'.
"DEFENSE: Where is it in the book, sir?
"PRESIDENT AND LAW MEMBER: The model specification is on page 250 of the Manual.
"DEFENSE: I see no objection on the part of the defense for changing the specification and the defense has no further evidence to offer in this case with the specification changed. The defense has no objection to that. In other words, that applies only to the 3rd specification?
"PRESIDENT AND LAW MEMBER: Yes, that is right.
"DEFENSE: I have no objection, because I have no grounds for objection.
"PRESIDENT AND LAW MEMBER: The specification is still laid under the 93rd Article of War.
"DEFENSE: The defense has no objection.
"PRESIDENT AND LAW MEMBER: The court will be closed."

The court was then closed and found the accused guilty of Specification 3, as amended, and of the charge.

Defense counsel's consent was nugatory, because consent cannot confer jurisdiction when none otherwise exists. Moreover, it is clear from the foregoing that the defense counsel, in his ignorance of the law as indicated by the reason stated by him for waiving objection to the proposed amendment, did not give intelligent consent to the change.

4. It is the holding of the Board of Review that the apparent inartificial effort of the court to amend Specification 3, with the consent thereto of counsel for the accused, was violative of paragraphs 66 and 73, Manual for Courts-Martial, 1928, which authorize an amendment to the pleadings as to matters of <u>form only</u>, and that, therefore,

the purported amendment, being a substantial change in the specification, was a nullity. It is the further holding of the Board that, irrespective of the evidence adduced before the court, the finding of guilty of embezzlement reached and announced in open court being for an offense entirely separate and distinct from the offense charged, the record of trial is legally insufficient to sustain the findings and the sentence. That a court may not legally find an accused guilty of an offense with which he has not been charged in the arraignment and which does not comprise a lesser included offense therein, is deemed too elementary a question of law to require discussion (CM 124780, Fitzgerald; CM 193191, Hosmer; secs. 1405, 1459, 1533 (6), 1534 (2), Dig. Ops. JAG 1912-30; secs. 1534, 1535, 1578, Dig. Ops. JAG 1912-30, Supp. VII).

Archibald K. King, Judge Advocate.

George A. Frazer, Judge Advocate.

George B. Campbell, Judge Advocate.

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

Board of Review
CM 211420

APR 18 1939

UNITED STATES	)	NINTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort MacArthur, California, February 10, 1939. Dishonorable discharge and confinement for one (1) year. Fort MacArthur, California.
Private CHARLES L. McDONALD (6576123), Company A, 4th Infantry.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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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 charges and specifications:

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

Specification: In that Private Charles L. McDonald, Company A, Fourth Infantry, did, without proper leave, absent himself from his proper station, at Fort Missoula, Montana, from about January 3, 1939 to about January 13, 1939.

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

Specification: In that Private Charles L. McDonald, Company A, Fourth Infantry, did, at Los Angeles, California, on or about January 9, 1939, unlawfully and feloniously have carnal knowledge of one June Linhart, a female under the age of 16 years, in violation of Section 458, Title 18, United States Code.

Accused pleaded guilty to Charge I and the specification thereunder, and not guilty to Charge II and the specification thereunder; and was found guilty of all charges and specifications. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. The reviewing authority approved the sentence,

designated Fort MacArthur, California, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The conviction of the offense alleged in the specification of Charge I needs no discussion, the proof being beyond question. Some discussion, however, may well be given to the finding of guilty of the specification of Charge II. The evidence clearly proves the carnal knowledge alleged, and that June Linhart was at the time fourteen years of age. Does such proof support the specification and does the specification state an offense triable by court-martial?

4. The specification alleges a violation of 18 U.S.C. 458, which makes carnal knowledge of a female under sixteen a felony. The Board of Review is of the opinion that that section is not applicable to the offense of which the accused was found guilty for the reason that the said section is applicable only to offenses therein named when committed at sea or on land under the exclusive jurisdiction of the United States (18 U.S.C. 451; secs. 272, 279, Fed. Penal Code, 1910). Los Angeles, California, is not land under the exclusive jurisdiction or control of the United States.

5. In view of the foregoing, the question arises whether the accused in doing the act alleged committed an offense cognizable by courts-martial. In order that a court-martial may legally punish a soldier for an offense , one of the following conditions must be present:

a. The act must be one specifically denounced as an offense by some article of war other than Article of War 96.

b. If not included in a, supra, the act must be an offense punishable under the 96th Article of War as -

(1) A disorder or neglect to the prejudice of good order and military discipline;

(2) Conduct of a nature to bring discredit upon the military service;

(3) A crime or offense not capital.

6. In the instant case the girl was willing and therefore the act committed by the accused was not rape as denounced by the 92nd Article of War and so did not come within paragraph 5 a, supra.

7. It is said in paragraph 152 c, Manual for Courts-Martial, that the "crimes or offenses not capital" referred to in the 96th

Article of War are crimes committed in violation of an act of Congress or of legislation enacted under the authority of Congress. As stated in paragraph 4, supra, accused was not triable for violation of the section of the United States Code alleged in the specification of Charge II, because the act was not committed on land under the exclusive jurisdiction of the United States. Because the offense was not committed on a Federal reservation, jurisdiction was not conferred by the provisions of the assimilating statute (sec. 289, Fed. Penal Code, 1910; 18 U.S.C. 468), making the violation on a Federal reservation of a state law a Federal offense, notwithstanding the existence on the statute books of California of a law providing that sexual intercourse with a female not the wife of the perpetrator and under the age of eighteen years shall constitute the offense of rape (sec. 261, Penal Code of California, 1937). It follows, therefore, that the act of the accused was not an offense coming within paragraph 5 b, (3), supra.

8. The question remains whether the act committed by accused falls within paragraph 5 b (2), supra, conduct of a nature calculated to bring discredit upon the military service. In paragraph 152 b, Manual for Courts-Martial, in discussing that part of the 96th Article of War denouncing "conduct of a nature to bring discredit upon the military service", it is said:

> "'Discredit' as here used means 'to injure the reputation of.' Instances of such conduct on the part of persons subject to military law may include acts in violation of local law committed under such circumstances as to bring discredit upon the military service."

9. It is unnecessary for the Board to decide whether every instance of sexual connection out of wedlock between a soldier and a girl under the age of consent would constitute conduct of a nature to bring discredit upon the military service, but it is of opinion that the accused's act was such under the circumstances disclosed by the evidence in the present case. Accused was known to the girl's parents to be a soldier and was admitted by them to their home and to the company of their fourteen year old daughter. He took advantage of their confidence in him and of her youth and inexperience. The Board therefore concludes that the act of accused constituted an offense cognizable by court-martial coming within the classification of paragraph 5 b (2), supra, being conduct of a nature to bring discredit upon the military service. In this view so much of the specif-

ication as referred to the Federal statute was error but harmless in that it constituted mere surplusage. The remaining part of the specification states an offense and was proved. The specification uses the words "unlawfully and feloniously". It is unnecessary that it allege in so many words that accused's conduct brought discredit upon the military service.

10. In connection with the foregoing discussion, the Board deems it desirable to advert to the case of Walter D. McMahon (CM 139323; sec. 1485, Dig. Ops. JAG 1912-30). In that case accused was convicted of a specification alleging carnal knowledge of a girl of fourteen in Louisville, Kentucky. The specification cited no statute either Federal or state. The Board of Review mentioned section 1155, Carroll's Kentucky Statutes, making carnal knowledge of a girl under sixteen a crime, but said that it was unnecessary to discuss it because section 279, United States Penal Code, now 18 U.S.C. 458, was applicable. The Board held that the specification stated an offense cognizable by court-martial under the 96th Article of War and sustained the conviction. The present Board concurs in the result in that case, but disagrees with the reasoning by which that result was reached, because 18 U.S.C. 458 is inapplicable to an offense occurring on land not under the exclusive jurisdiction of the United States. The view taken by the Board in the McMahon case, decided in 1920, was followed in section 446 (III), Manual for Courts-Martial, edition of 1921, but is repudiated by paragraph 152 c, 1928 edition of the Manual, now in force.

11. The Board considers the phrase in the specification, Charge II, "in violation of Section 458, Title 18, United States Code", erroneous, as that section is inapplicable; but the phrase may be treated as surplusage. The Board of Review holds the record of trial legally sufficient to support the findings and sentence.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

George B. Campbell, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General.

Board of Review
CM 211432

MAR 29 1939

UNITED STATES	HAWAIIAN DIVISION
v.	Trial by G.C.M., convened at Schofield Barracks, T. H., February 17, 1939. Dismissal.
First Lieutenant GEORGE W. PERRY (0-18204), 19th Infantry.	

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial in the case of the officer named above 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: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant George W. Perry, Nineteenth Infantry, was, at Schofield Barracks, T. H., on or about December 23, 1938, drunk in quarters.

Specification 2: In that First Lieutenant George W. Perry, Nineteenth Infantry, did, at Schofield Barracks, T. H., on or about December 23, 1938, through voluntary indulgence in intoxicating liquor as a beverage, willfully incapacitate himself for the performance of military duty.

Specification 3: In that First Lieutenant George W. Perry, Nineteenth Infantry, was at Schofield Barracks, T. H., on or about December 31, 1938, drunk in quarters.

Specification 4: In that First Lieutenant George W. Perry, Nineteenth Infantry, did, at Schofield Barracks, T. H.,

on or about December 31, 1938, through voluntary indulgence in intoxicating liquor as a beverage, willfully incapacitate himself for the performance of military duty.

Specification 5: (Finding of not guilty).

Specification 6: (Finding of not guilty).

Specification 7: In that First Lieutenant George W. Perry, Nineteenth Infantry, was, at Schofield Barracks, T. H., on or about January 30, 1939, drunk in quarters.

Specification 8: In that First Lieutenant George W. Perry, Nineteenth Infantry, did, at Schofield Barracks, T. H., on or about January 30, 1939, through voluntary indulgence in intoxicating liquor as a beverage, willfully incapacitate himself for the performance of military duty.

Upon arraignment the defense submitted a plea in bar of trial, alleging that at the time of the commission of the several offenses and at the time of trial accused was "laboring under an alcoholic physchosis equivalent in its present results to a state of unsound mind". Thus, the question of the sanity of the accused became an issue. After hearing evidence with respect to this plea, the court overruled the plea and held that accused was mentally responsible both at the time of the commission of the offenses charged and at the time of trial and that the plea in bar was not sustained. He pleaded not guilty to the charge and specifications; was found guilty of the charge and Specifications 1, 2, 3, 4, 7 and 8 and not guilty of Specifications 5 and 6. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence relating to Specifications 1 and 2 of the Charge may be summarized as follows:

Lieutenant Colonel William L. Starnes, 11th Medical Regiment, was on duty at the Station Hospital during December 1938, and January 1939, and on December 23, 1938, saw the accused in his quarters. Accused was drunk. He was intoxicated to such a degree as to be unfit to perform military duty and was admitted to the hospital (R. 16, 17).

4. The evidence relating to Specifications 3 and 4 of the Charge may be summarized as follows:

Lieutenant Colonel Augustus B. Jones, 11th Medical Regiment, saw accused in his quarters on December 31, 1938. An examination showed that the accused was drunk (R. 18, 19), and unfit for military duty (R. 24).

Colonel Paul W. Gibson, 11th Medical Regiment, Commanding Officer of the Station Hospital, Schofield Barracks, T. H., saw the accused in his quarters on December 31, 1938, examined him and found him to be so drunk that he could not wake him up. The accused was unfit for military duty (R. 20), caused in his opinion by whiskey (R. 23).

5. The evidence relating to Specifications 7 and 8 of the Charge may be summarized as follows:

Major Fred O. Wickham, 19th Infantry, saw the accused in his quarters, No. 433, Schofield Barracks, T. H., between five and six o'clock on the afternoon of January 30, 1939. Accused was drunk and unfit for military duty, due to the consumption of intoxicating liquor of some sort (R. 26, 27).

First Lieutenant Joseph C. Stancook, 19th Infantry, on January 31, 1939, about 10 a.m., was summoned by Major Wickham from the rifle range and directed by Colonel Bonesteel to go to the quarters of the accused and take him to the hospital. When Lieutenant Stancook arrived at accused's quarters, he found him to be drunk (R. 28, 29).

Lieutenant Colonel Starnes, Medical Corps, saw accused on January 31, 1939, in his ward at the Station Hospital, made an examination, took a blood test, and found him to be unfit for military duty "because of intoxication - alcoholism" (R. 29, 30).

Captain Arthur S. Peterson, 19th Infantry, Schofield Barracks, T. H., testified that he was the Commanding Officer of the Service Company and as such the custodian of the sick report book carrying the officers of the Regimental Headquarters and Band upon which was included the name of the accused. This record showed entries therein pertaining to accused for December 23, 31, 1938, and January 31, 1939, show accused as hospitalized not in line of duty (R. 30-31-37; Ex. 2).

Captain Jenner G. Jones, 11th Medical Regiment, Schofield Barracks, T. H., and Lieutenant Colonel Augustus B. Jones examined

Exhibit 2 and the entries with reference to the accused and testified that the remarks therein were true (R. 33, 35).

6. The defense introduced Lieutenant Colonel Starnes, Medical Corps, who identified a written statement made by him at the investigation as follows:

> "Since November 1, 1938, I have observed Lieutenant Perry on numerous occasions. In most instances he was suffering from acute alcoholism. In my opinion and from his history he has indulged in the excessive use of alcoholics for a number of years and I have diagnosed him as a chronic alcoholic. This prolonged indulgence had undoubtedly lessened his resistance to alcohol and at the present time I am convinced that it would take an extraordinary effort or incentive for him to abstain from the use of alcohol."

Colonel Starnes further testified that chronic alcoholism is a diseas that acute alcoholism is not a disease, but an upset from indulgence. That accused could be expected to resist liquor after treatment from six months to one year.

7. The accused made an unsworn statement through counsel in which he outlined his history as an athlete at the Military Academy and his connection with sports after being commissioned. He states that injuries received in football and his contacts and associations in connection with sports caused, he believes, his indulgence in drink. On one occasion he entered a sanitarium for a cure of this drinking habit, but this proved a failure and he was later treated at Walter Reed General Hospital. Upon his arrival at Schofield Barracks, he at first controlled the habit, but recently his "resistance has gone from bad to worse".

8. The evidence shows beyond a reasonable doubt that accused was drunk in quarters on the dates and at the places as alleged. It was also proved without contradiction that accused was as a result of the drunkenness incapacitated for the performance of military duty.

9. Accused is 31 years of age. The Army Register shows his service as follows:

Cadet M. A. 1 July 25 to 23 Jan. 26 and from 30 Aug. 26; 2 lt. of Inf. 12 June 30; 1 lt. 1 Aug. 35.

There was received in evidence one previous conviction. He was tried at Schofield Barracks on December 22, 1938, for violation of the 85th Article of War. He was found guilty of being drunk while on duty as a company commander on December 9, 1938, and sentenced to forfeit $50 of his pay per month for four months, which sentence was approved by the Commanding General, Hawaiian Division, and ordered executed.

10. 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 authorized for violation of the 96th Article of War.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

George B. Campbell, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUL 29 1939 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant George W. Perry (0-18204), 19th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof.

3. I recommend that the sentence be confirmed but, in view of all the circumstances of the case, the previous military record of accused, the fact that the drunkenness did not occur in public, and the fact that the alcoholic psychosis from which he has suffered has now responded to medical treatment with apparent complete recovery, I recommend that the execution of the sentence be suspended during the pleasure of the President.

4. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but to suspend the execution thereof, should such action meet with approval.

Allen W. Gullion,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Drft. of let. for sig. Sec. of War.
Incl 3 - Form of Executive action.

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

Board of Review
CM 211557

July 8, 1939

UNITED STATES	)	FIRST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bliss, Texas, January 16,
Captain JOSEPH W. HUNTRESS,	)	February 14, 15, 16 and 17, 1939.
Jr., Quartermaster Corps.	)	Dismissal.

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial in the case of the officer named above 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: In that Captain Joseph W. Huntress, Jr., Q. M. C., in conjunction with Mrs. Joseph W. Huntress, his wife, with intent to defraud did at San Antonio, Texas and at El Paso, Texas from about December 1, 1937 to about September 1, 1938, operating under the names of Barbara Warren, Warren Products Co., Barbara Warren Products, B. W. Products, and J. W. Huntress, Manager, engage in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of 18 U. S. C. 338 and 339 which said scheme was in substance and effect as follows:

Said concerns and parties, operating as aforesaid, were obtaining and attempting to obtain various remittances of money through the mails from divers persons for preparations called "Trim", "Dri-Tex" and "Special W. T. Treatment

Tablets" upon pretenses, representations and promises contained in written and printed matter sent through the mails to the effect:

That the said so-called "Trim", when used as directed, will reduce all obese persons to a "slender figure" without diet or exercise; that the said so-called "Trim", when used as directed by obese persons, will produce a reduction of their excess weight "quickly, naturally and safely"; that the said so-called "Trim" is not a laxative; that not over two of the "full treatment size" packages of "Trim", when taken as directed, are required to reduce any obese person to their "regular normal weight"; that the said so-called "Dri-Tex", when used as directed, is "always effective" and is a "safe and thorough protection" against pregnancy; that the effects of the said so-called "Dri-Tex", when used as directed are "highly germicidal" and will "annihilate and destroy" germ life "almost instantly"; that the use of the said so-called "Dri-Tex" as directed will insure users against "disease, irritation, inflamation and various conditions of germ origin"; that the said so-called "Special W. T. Treatment Tablets", when used as directed; will produce normal menstruation in all women suffering from delayed menstruation regardless of the cause thereof and "even in the most stubborn cases"; and that the continued use as directed of the said so-called "Special W. T. Treatment Tablets" will always prove effective in the restoration of delayed menstruation.

Whereas, in truth and fact, as said concerns and parties well knew, all of the aforesaid pretenses, representations and promises were false and fraudulent.

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

Specification: In that Captain Joseph W. Huntress, Jr., Q. M. C., did at El Paso, Texas, on or about December 8, 1937, having received a letter, headed "Lumber City, Georgia, December 3, 1937" addressed to "Barbara Warren, Dept. M.M., 933 Wyoming St., San Antonio, Texas" purporting to be from an unmarried woman named Eugenia Salyer whose menstrual period was over due and who was worried because she felt sure that her association with a certain man was the cause of her trouble; wrongfully furnish for monetary compensation a remedy called "Special W. T. Treatment Tablets" together with literature

claiming that these tablets were a certain and effective means of restoring normal menstruation and did further write her a letter purporting to give her personal medical advice with respect to relieving delayed menstruation.

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

Specification: In that Captain Joseph W. Huntress, Jr., Q. M. C., in conjunction with his wife, Mrs. Joseph W. Huntress, did, dishonorably and wrongfully, at San Antonio, Texas and at El Paso, Texas, from about December 1, 1937 to about September 1, 1938, operate under the names of Barbara Warren, Warren Products Co., Barbara Warren Products, B. W. Products, and J. W. Huntress, Manager, a mail order drug business selling preparations called "Trim", "Dri-Tex" and "Special W. T. Treatment Tablets" upon pretenses, representations and promises contained in written and printed matter sent through the mails to the effect: That the said so called "Trim", when used as directed, will reduce all obese persons to a "slender figure" without diet or exercise; that the said so called "Trim", when used as directed by obese persons, will produce a reduction of their excess weight "quickly, naturally and safely"; that the said so-called "Trim" is not a laxative; that not over two of the "full treatment size" packages of "Trim", when taken as directed, are required to reduce any obese person to their "regular normal weight"; that the said so-called "Dri-Tex", when used as directed, is "always effective" and is a "safe and thorough protection" against pregnancy; that the effects of the said so-called "Dri-Tex", when used as directed are "highly germicidal" and will "annihilate and destroy" germ life "almost instantly"; that the use of the said so-called "Dri-Tex" as directed will insure users against "disease, irritation, inflamation and various conditions of germ origin"; that the said so-called "Special W. T. Treatment Tablets", when used as directed, will produce normal menstruation in all women suffering from delayed menstruation regardless of the cause thereof and "even in the most stubborn cases"; and that the continued use as directed of the said so-called "Special W. T. Treatment Tablets" will always prove effective in the restoration of delayed menstruation.

He pleaded not guilty to all charges and specifications, and was found guilty of Charge II and the Additional Charge and their specifications, and not guilty of Charge I and the specification thereunder. 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 action under Article of War 48.

3. Following pleas to the general issue counsel for the accused entered a motion to strike the Additional Charge and the specification thereunder on the ground of indefiniteness and lack of particularity in the allegation, contending that it is not therein specifically set forth that the business conducted, was operated in a dishonorable manner, was in itself unlawful, or was violative of any law, state or national; also that the said specification fails to allege that the pretenses, representations and promises therein charged were false and fraudulent. The court denied the motion and directed that the trial proceed (R. 8, 12).

It is the opinion of the Board that the objection by defense counsel to the pleading as technically faulty and as not alleging an offense cognizable under the 95th Article of War, was not well taken and that the ruling of the law member was correct. The Board considers the language of the specification sufficiently clear and definite to inform the accused of the allegations.

The court having acquitted the accused of Charge I and the specification thereunder, a discussion of the law and evidence pertaining thereto is deemed unnecessary.

4. An examination of the record of trial discloses that the accused was stationed at Fort Ringgold, Texas, from approximately May, 1935, to May, 1937, on which latter date he was transferred to Fort Bliss, Texas (R. 154, 243). His wife resided with him. In September, 1936, or thereabouts, Mrs. Huntress, the wife of accused, having some money inherited from her grandmother, and finding life at Ringgold inactive, became interested in selling through mail orders a book on beauty culture, under the name of B. H. Egger, her maiden name (R. 155, 243, 245, 246, 271). While occupying her time in this activity, which proved rather unremunerative, she received in the mail a circular letter advertising a book by one John Fiescher of Chicago, Illinois, costing approximately $1.50 and containing about forty different mail order plans. After discussing the matter together, the accused at the request of Mrs. Huntress, secured the book from Mr. Fiescher. Upon receiving and examining the book and considering for sometime the various plans of mail order business presented, Mrs. Huntress, following the advice of Mr. Fiescher, selected a plan to sell by mail two products called "Trim" and "Dri-Tex". The products were manufactured by The Sanisept Company, Evanston, Illinois, a suburb of Chicago. The drug called "Trim" was designed to cause a reduction in weight of persons using it and "Dri-Tex" was a contraceptive preparation inserted in the vagina prior to the act of sexual intercourse.

Strong claims were set forth in advertising circulars regarding the medicinal value and remedial efficacy of the two drugs. All circulars were prepared by Mr. Fiescher, who forwarded to Mrs. Huntress both the advertising matter and drugs for redistribution and sale in retail quantities to persons placing orders with her (R. 155, 156, 244, 245, 261; Ex. L). Under date of September 24, 1936, Mrs. Huntress registered the mail order business with the state of Texas under the trade name of "B. H. Egger" (Exs. 2, 3). During the month of January or February, 1937, the advertising matter and other preparations for the operation of the mail order business having been completed, circulars advertising the said products were sent out from Rio Grande City, Texas. Believing that Rio Grande City was too small to use as a headquarters in the advertisements, Mrs. Huntress obtained permission of a friend, Mr. John Hill, to use his address and so thereafter advertised 933 Wyoming Street, San Antonio, Texas, as the place of business (R. 156). At the time of change of station from Fort Ringgold to Fort Bliss in the spring of 1937, Captain Huntress secured a leave of absence, effective in March or April, during which period he and his wife visited his father, Mr. Joseph W. Huntress, Sr., in Boston, Massachusetts (R. 157, 246). While there arrangements were made to have the father of the accused operate an eastern office of the business under the name of "Barbara Warren Products" and J. W. Huntress, Mgr." At this time a new drug was added to the products previously sold called "W. T. Treatment Tablets" advertised as a drug effective in "functional menstrual disturbances" restoring a normal flow "even in the most stubborn cases". The eastern office address is shown as 20 Rosewood Street, Mattapan, Boston, Massachusetts (R. 157, 163; Ex. L). The Boston office operated until January or February, 1938, at which time it discontinued sales and Mr. Huntress Sr., turned all supplies and advertising matter over to Mrs. Huntress who was at that time operating the business from El Paso, Texas (R. 151, 166, 236, 247; Exs. 4, 5, 17, 20). A complete report of the business finances was submitted to Mrs. Huntress (Ex. 17, 20). Upon termination of his leave of absence, about May, 1937, the accused reported to Fort Bliss, Texas, first residing at Colonial Terrace, El Paso, Texas, for a period of about two months, after which he moved to 3117 Federal Street, El Paso, from which latter address the mail order business was continued until its termination on or about September 1, 1938 (R. 165, 248, 252).

There is in the record considerable testimony with reference to the unsatisfactory results obtained from the first Trim sales, whereupon a new product was compounded and sold under the same name; also, that a Mr. Simpson of Durham, North Carolina, an advertising expert, was visited by the accused and his wife while en route from Boston to their new station, Fort Bliss, and his services employed to prepare

advertising circulars to replace those prepared by Mr. Fiescher of Chicago. Advertisements and considerable testimony appear in the record relating to "Pure Herb Tablets", "Women's Tonic Tablets", "Protax", and a preparation for the cure of asthma. In view of the fact that these products are not specified in the allegations and that the employment of Mr. Simpson is relatively unimportant, only a reference in passing will be made thereto (R. 247, 251, 304, Ex. 18).

It seems apparent in examining the testimony and exhibits that "Pure Herb Tablets" and "Women's Tonic Tablets" are identical drugs with "W. T. Treatment Tablets" and that "Protax" is similar to "Dri-tex". Circular advertising was distributed soliciting local agents on a commission basis to be financed by the Barbara Warren Products and also an advertisement reading in part as follows:

> "Accept this invitation now.
> "Free Sex Charts & Dictionary
> "With your copy of 'Nature's Discovery'
> " you receive a valuable supplement illustrating male and female sex organs and defining their functions. Equal in instructive value to relatively high-priced, detailed accounts. Contains sex knowledge that should be in possession of every adult." (R. 45, 130; Ex. L.)

Advertisements of the products sold by "Barbara Warren" and under other similar trade names were carried in the following publications:

> "Good Stories," Augusta, Maine.
> "Home Circle", Winona, Minnesota.
> "Cupid's International Messenger", Ashland, Virginia.
> "Variety", a monthly publication by Barbara Warren Products, Mattapan, Boston, Massachusetts.
> "Comfort Magazine", Augusta, Maine (R. 21, 135, 136; Ex. J).

There was also circulated a letter signed "(Miss) J. Hoffman", purporting to be a personal testimony to the effectiveness of Trim. Both the testimony and the name signed thereto were wholly fictitious (R. 221, 222, Ex. Q). Also the printed advertising matter circulated contained a certificate in heavy type to the effectiveness of Dri-Tex from United States Medical Laboratory. Such laboratory was entirely unrelated to any Government department or agency (Ex. K, A-2).

Shortly after the arrival of Captain and Mrs. Huntress at Fort Bliss, and the establishment of a residence at El Paso, Mrs. Huntress purchased a drug store at 400 E. San Antonio Street, El Paso,

Texas, and operated it under the name of Gateway Drug Store, Inc., signing correspondence as "Barbara Huntress, President". The accused joined in the conveyance of sale and the chattel mortgage trust, executed to secure the unpaid balance on the purchase price, pro forma as husband of the owner (R. 197, 289, Ex. 14). One of the drugs compounded and sold there was the asthma product concerning which the accused admits considerable interest and activity (R. 260, 267). A Mr. Benefield was employed in the drug store as pharmacist; but, because of some difficulty that arose, Mr. Benefield was discharged, whereupon he reported to the military authorities at Fort Bliss that Captain Huntress was involved in the drug business and owed him $800 which he declined to pay. This report, made May 31, 1938, resulted in an official investigation of the business activities of accused by Colonel H. C. Dagley, I.G.D. (R. 18, 66, 94, 100, 169, 171, 172, 255, 290). There is considerable evidence of record with respect to the operation of the drug store, the preparation and sale thereat of an asthma remedy and the trouble with Mr. Benefield, but, inasmuch as neither the drug store nor the asthma remedy are included in the specifications of the charges, only brief reference is made thereto; primarily to show the first knowledge had by the military authorities of the outside business activities of the accused, the manner of receiving such information and the subsequent official investigation conducted by an officer of The Inspector General's Department, which was partly the basis upon which the instant charges were preferred. The report of the Post Office Department made available to the War Department also furnished information indicating a need for the trial of Captain Huntress.

As a result of the advertisements appearing in the publications hereinabove set forth, the Post Office Department became interested in the business with a view to ascertaining whether the company was violating the Federal statute against sending through the mails fraudulent matter. Two Post Office inspectors were assigned to the investigation into the Barbara Warren Products Company business - Mr. L. J. White and Mr. Karl M. Foust. There were two inspectors assigned to the case for the reason that the investigation led into the territory of both inspectors, Mr. White having the territory including the New England states and Mr. Foust the southern area (R. 152). In accordance with the established method followed by the Post Office Department of investigating advertisers, each of the above-named inspectors proceeded to answer various advertisements through local postmasters giving fictitious names as customers seeking information concerning the efficacy of the drugs advertised and medical advice, and also purchasing some of the product advertised. These letters, known as test letters (R. 137) were mailed out through various postmasters and on the dates shown below.

Names & address of Post Masters	Date of Test Letter	Signature	Exhibit
J. R. Nease, Lumber City, Georgia.	December 3, 1937	Miss Eugenia Salyer	A, B, K
Norman J. Hutchinson, Cordova, Md.	October 21, 1937	Mrs. Maurice King	C,D,L,16
Homer L. Simmons, Chartley, Mass.	December 17, 1937	Mrs. Wesley Jordon	E
Ben G. Pollard, Eminence, Ky.	May 10, 1937	Mr. Philip Pender	F
John M.O. Littlefield, Crosbyton, Texas.	May 12, 1938	Eleanor A. Connan	G
Owen W. Phillips, Glenmore, La.	April 12, 1937	Mrs. Goldie Hobson	H
W. E. McClintock, Mt. Pleasant, Texas	April 11, 1937	Mrs. Lula Seats	I

The first four test letters above shown were sent out by Inspector White and the last three by Inspector Foust. During the course of the investigation and development of the case by the Post Office Department, Inspector White held an interview with the father of the accused in Boston on April 12, 1938, during which Mr. Huntress stated that since May 1, 1937, he had acted as distributing agent for his daughter-in-law, the wife of accused, selling by mail order certain drugs as advertised but that on or about February 16, 1938, he had discontinued the business and returned to Mrs. Huntress all literature and products (R. 147, 151; Ex. 20, letter of Mr. White attached to back of record).

Inspector Foust visited El Paso, Texas, and held an interview with the accused in the office of Inspector Curtis of El Paso on July 23, 1938, after fully advising him as to his rights in the premises. (R. 27, 65, 75, Ex. 1). Subsequently, on July 24, 1938, the accused wrote a letter to Mr. Foust explaining and amplifying his testimony of the previous day (Ex. X). The investigation by Mr. Foust originated from an advertisement of the company products contained in the January, 1937, issue of Good Stories magazine (R. 18, 19, 65, 104). The Government's investigation having been completed, a hearing was set to be held in Washington, D. C., on September 21, 1938, on a request of Mr. Foust for a citation to show cause why a fraud order should not be issued against the business (R. 105; Ex. R). To obviate such a hearing the accused and his wife filed affidavits with Mr. W. C. O'Brien, an attorney in the office of The Solicitor, Post Office Department, announcing their complete discontinuance of the business. They also held at their own request a personal interview with Mr. O'Brien in his office in Washington on September 1, 1938, during which they asserted their innocence and pleaded for a withdrawal of the proposed citation for fraud on their assurance that the business had been finally and definitely terminated (R. 252, 254; Ex. R, Z). That the products had little or no medicinal value, falling far short of their advertised claims, is definitely established by medical testimony introduced by the prosecution as well as by a physician testifying in behalf of the defense (R. 181, 182, 189, 190; Exs. A-2, A-3, A-4, A-5). Numerous depositions of satisfied customers were introduced showing that the products sold by the Barbara Warren Company were used by them with results advertised; or, if not effective, the purchase price promptly returned upon request (Exs. 11, 21, 22, 23, 24, 25, 26).

However, as proof with reference to the genuineness and medicinal value of the drugs sold relates solely to the allegations of fraud contained in the specification of Charge I of which accused was acquitted, no discussion of such evidence is considered necessary.

5. There having been set forth in the preceding paragraph a brief chronological history of the case, we shall now pass on to a more specific discussion and analysis of the evidence as it pertains to the two charges and specifications thereunder of which the accused was found guilty.

With respect to the specification of Charge II, it appears that Inspector White of the Post Office Department, Washington, D. C., having had brought to his attention an advertisement from Comfort Magazine, September issue, 1937, framed a letter to which he signed the fictitious name of Eugenia Salyer, seeking information as to whether the advertised product would restore delayed menstruation, particularly when failure to menstruate was due to pregnancy, thereby claiming it to be an abortifacient. The advertisement, the letter of Inspector White and reply thereto, voluntarily admitted by the accused to be in his own handwriting, read as follows:

"WOMEN IN DOUBT--END WORRY.
When Nature fails use reliable W. T. Special Tablets; quick acting. For difficult, abnormal, unusual delays. Highest effective strength only. Special treatment $1.00; also free treatise about safe, modern methods of feminine hygiene, and facts about liberal guarantee. B. W. Products, 88 M St. So. Boston, Mass. or Box 269-c, El Paso, Tex." (Ex. J.)

"Barbara Warren Dept MM Dec. 3, 1937

933 Wyoming Street

San Antonio Texas

Dear Miss Warren:

"I saw your advertisement about women in doubt and I wish you would send me your free treatise.

"Seeing you are a woman I have need of talking to a woman right now since I am an unmarried girl away from home with no one to confide in. I'll tell you about my case and if you sell something for me you can send it COD. It is like this. You see my last period has been overdue two weeks and I am terribly worried and am afraid I'll lose my new job. I've always been regular until I moved here six weeks ago.

My weight has been going down fast may be from worry. I sure am in doubt but I feel sure my association with a certain man is the cause of my trouble. If you sell something to bring me around I'll pay anything to get right again.

"Please let me hear right away as I am so worried.

Yours truly,

Eugenia Salyer
Gen Del. Lumber City, Georgia." (Ex. K)

"Dear Miss Salyer: Dec. 8, 1937.

"Have sent an air mail to have a $2.00 box of Special W. T. Treatment Tablets sent to you C.O.D.

"Worrying causes a contraction of the muscles and would cause the flow to be held back even under normal condition.

"Hoping you will be O.K.

Your friend

Barbara Warren

P.S. If you use Dri-Tex it kills all germs." (Ex. K.)

There is ample documentary and testimonial evidence of record showing that the above-quoted test letter signed "Eugenia Salyer" and addressed to the Barbara Warren Company in San Antonio, Texas, was received, and that the accused in his own handwriting replied thereto, informing the "customer" that an air mail letter had been sent (meaning from the Boston office) directing a $2.00 box of Special W. T. Treatment Tablets be sent C.O.D. and advising that "worrying causes a contraction of the muscles and would cause the flow to be held back even under normal condition"; also "If you use Dri-Tex it kills all germs". A money order in the amount of $2.06 was paid for the tablets upon delivery of them to Mr. White by the Post Office (R. 64, 127, 128, 131, 138, 140, 141, 142, 253; Exs. A, B, K, V).

The competent evidence of record regarding the Salyer case discloses conduct on the part of the accused of a highly discreditable character in several respects as enumerated below:

a. The sale, for monetary gain or otherwise, of drugs advertised as a remedy for delayed menstruation and as a contraceptive, clearly is an activity most unseemly and reprehensible in a commissioned officer of the Regular Army.

b. The giving of personal medical advice to the public through the mail obviously is an activity outside of the knowledge or duties of

an officer of the Quartermaster Corps who admittedly has had no medical training whatsoever, and carries with it a possible element of danger to the "patient".

c. The fact that Miss Salyer was represented to the accused as an unmarried woman believing herself to be pregnant because of illicit sexual intercourse, thereby causing a normal suspension of menstruation periods, makes it clear that the tablets were sold for the specific purpose of effecting an abortion and the product offered for use as an abortive agent. Such conduct, on the part of the accused, beyond any shadow of doubt, was not only immoral but illegal and also unbecoming an officer and gentleman.

d. The advice or suggestion to Miss Salyer to use Dri-Tex, a contraceptive drug sold by the Barbara Warren Company, can be viewed only as advice and encouragement to an unmarried woman to continue in her acts of fornication in order that the sale of the contraceptive drug might be increased. The fact that the girl in the instant case was a fictitious character does not make the donduct of the accused any the less reprehensible as he fully believed her to be a living female person, as is evidenced by his acceptance of monetary compensation for the drug and personal medical advice forwarded in response to the order received by him through the mail.

There exist two elements of proof in the specification under consideration which, because of their presence also in the specification of the Additional Charge, will be given special consideration in a separate paragraph of this review. The elements referred to are:

(1) The extent to which, if at all, the accused was personally involved in or connected with the sale of contraceptive and other drugs, sold through the mail by the Barbara Warren Company, and in the distribution of advertising literature pertaining to such business, in conjunction with his wife.

(2) Whether the activity of the accused in connection with the business constituted conduct unbecoming an officer and a gentleman as contemplated by the 95th Article of War making dismissal from the service a mandatory punishment upon conviction of an offense alleged thereunder.

6. With respect to the specification of the Additional Charge, there is ample competent evidence of record supporting the allegation that the accused, in conjunction with his wife, did at the places and for the period alleged operate a mail order business under the names set forth in the specification (R. 18, 22, 24, 28, 67, 68, 69, 107, 108, 208; Exs. J, R & A-4). That the drugs sold through the mail were called "Trim", "Dri-Tex", and "W. T. Treatment Tablets" and were represented, when used as directed, as a sure remedy to produce a reduction in excess weight,

prevent conception after sexual intercourse and restore delayed menstruation, respectively, is overwhelming supported by documentary evidence received by the court. The claims pertaining to the drugs where quoted in the specification are extracts from advertising circulars comprising a portion of Exhibits K, L, and Q.

The advertising literature does not specifically state that "Dri-Tex" will prevent pregnancy, as alleged, but the inference from the language employed that such is its effect, is inescapable. For example, on the pink sheet advertisement comprising a part of Exhibit L the following language appears with respect to "Dri-Tex". In heavy type there appear the words "Dri-Tex guarantees the women of today * * *". There appears also the language:

> "It is immediately effective, offering safe and thorough protection. Immediate results are noticeable, you experience a warm, pleasant sensation directly after insertion, which indicates that the dissolving, cleansing and protection action has begun. In a short time this substance pervades and saturates every fold and crevice of the vaginal tract."

The product is referred to as a "dry douche" and as "* * * safe to use, harmless to delicate tissues and it is always effective". The implications of such language can mean but one thing, that is, that "Dri-Tex" is a contraceptive and will prevent pregnancy following sexual intercourse. This inference is conclusively supported by the correspondence in the King case (Exs. 16, L(6-o), T) and by the contents of depositions 24 and 25.

During the trial considerable time was devoted to the language in the specification under discussion alleging that the "Special W. T. Treatment Tablets" will produce normal menstruation in all women suffering from delayed menstruation "regardless of cause thereof". The defense contended that evidence was lacking in support of the language quoted. It is true that such language does not affirmatively appear in the advertisement. The most closely related language employed in the advertisement is that normal flow will be restored "in the most stubborn cases" (Ex. K). Dr. George Turner, a witness for the defense, testified with respect to the product claimed as effective in functional menstrual disturbances "even in the most stubborn cases" that -

> "I rather doubt that. In the most stubborn cases, as I said before, the laxative effect and the mild tonic stimulant to the involuntary muscles might in a low physiologic state have some effect in bringing about a normal period." (R. 189.)

Also, the doctor testified:

> "* * * To say that one particular thing is going to bring about a normal menstrual flow in all types of cases is absurd. * * *." (R. 190.)

The Board believes, while the language employed in the advertisement furnished a basis for a reasonable inference that the tablets were represented as restoring menstrual flow where delayed "regardless of cause thereof", that the correspondence in the King and Salyer cases removes all doubt as to the extent of the claim held out to the public by the Barbara Warren Company. In both of the cases referred to the cessation of flow sought to be relieved was due to the belief of pregnancy on the part of the patient; and in each case, with full knowledge of the probable pregnancy, the Barbara Warren Company sold "W. T. Treatment Tablets" to restore the flow. Such action not only supports the allegation respecting the effectiveness of the drug "regardless of cause" of the delayed menstruation, but establishes the fact that the product was being represented and sold as an abortive agent.

The ineffectiveness of the various products named in the specification to fulfill the extravagant claims made for them in the advertising matter and correspondence, although testified to by physicians called as witnesses for both the prosecution and the defense, is not pertinent to the specification of the Additional Charge because it is not therein alleged that the products were ineffective or the business fraudulent. The accused was acquitted of the fraud charge (Specif. of Charge I). The allegations in the specification that the accused was connected with the operation of the mail order business and that the activity on his part was dishonorable, being conduct unbecoming an officer and a gentleman, will be given detailed consideration in a subsequent paragraph. In view of this fact, considered together with the summation of the case contained in paragraph 4 of this review, no further discussion of the specification under consideration need here be given.

7. With respect to the elements of both specifications and charges of which the accused was found guilty, referred to above and set forth more fully at the conclusion of paragraph 5, supra, consideration will first be given to the allegation that the accused was engaged in the operation of the mail order business. That Mrs. Huntress, the wife of accused, was the main operator of the mail order business, and that the father of the accused operated a branch office in Boston, Massachusetts, over a period of time, are too obvious from the testimony appearing throughout the record to require discussion. Moreover, the defense frequently admitted the proprietorship in the business of Mrs. Huntess. But the prosecution must establish, beyond a reasonable doubt, that the accused was a willing and intentional participant in the business. The accused, in his testimony, freely admits his interest in the asthma product prepared at and sold by the Gateway Drug Store, Inc., of which Mrs. Huntress was the president. But as neither the asthma product nor the Gateway Drug Store, Inc., is included in the charges and specifications, his connection therewith is immaterial to the issue. What, if any, connection did the accused have with the mail order business of which Mrs. Huntress was the proprietor, selling "Trim", "Dri-Tex", and "Special W. T. Treatment Tablets"? The

record contains considerable evidence on this point.

The prosecution called as its first witness Mr. Karl M. Foust, Washington, D. C., who testified that he was a Post Office inspector and that during the course of his investigation of the mail order business of the Barbara Warren Company he interviewed the accused at the office of Inspector Curtis, domiciled at El Paso, Texas, on the afternoon of July 23, 1938. The accused was fully apprised of his rights in the premises, and was also advised by Mr. Foust that he might employ an attorney to be present if he desired; that he might remain silent; and that any answers given by him must be voluntarily given and would be held against him and used in any proceedings that might be brought before the Solicitor of the Post Office Department to show cause why a fraud order should not be issued or other criminal proceedings (R. 27). The accused thereupon expressed a desire to answer fully any inquiries propounded. During the interview the accused related the history of the business and stated his wife was the owner but he assisted in the conduct of the business and was a joint proprietor; that he prepared the advertising literature which was later edited and completed for circulation by Mr. John Fiescher of Chicago; that some of his money had been placed into the mail order business; that he and the children opened the mail, answered letters, prepared packages of medicines for shipment, and performed various other duties incidental to the operation of the business (R. 28, 29, 67, 68, 69, 72, 75, 76, 77, 83). The day following the interview with Mr. Foust the accused wrote a letter to him amplifying his oral statements of the previous day (Ex. X). In this statement he made no unqualified, direct admission of partnership in the business but employed language therein repeatedly from which the conclusion is inescapable that he was actively interested in the business and urged Mr. Foust to withhold any formal charges as such action would "mean the end of my career" in the Army.

In a printed questionnaire filled in by Mr. Foust during the interview with the accused, and introduced in evidence by the defense, (Def. Ex. 1), the following questions and answers appear:

> "Your position with concern? Husband of proprietor & contributed cash from salary to pay adv. etc."
>
> "Who prepares your literature, advertisements, circulars, etc.? Capt. Huntress - wrote it up - John Fischer - Chicago, Ill. (edited)"
>
> "Who passes upon the symptoms? Capt. Huntress - Druggist. "Has this person any medical training? No."
>
> "In what <u>other</u> business or profession is each officer (owner) engaged? Capt. Huntress - Q.M.C. U.S. Army." (Ex. 1.)

Upon completion of the interview the notes thereon made by Mr. Foust were shown to the accused who made no objection thereto (R. 72, 277).

Mr. Charles E. Curtis, Post Office Inspector, El Paso, Texas, in whose office the interview with accused by Mr. Foust was held, testified that he was present and heard the accused state, after being advised of his rights in the premises, that the business was jointly operated by himself and his wife; that he furnished money for advertisements; that he and his children prepared advertisements to be sent to persons whose names had been secured from some mailing concern (R. 87, 88).

Colonel H. C. Dagley, I.G.D., a witness for the prosecution, testified that he was present on the afternoon of May 31, 1938, at an interview in the office of General Lear at Fort Bliss, Texas, when a Mr. Benefield complained concerning certain alleged business relations he had had with the accused. Incidently, the whereabouts of Mr. Benefield could not be ascertained in order that he might be subpoenaed as a witness at the trial. The accused was called into the office of General Lear during the interview and stated, without being first warned as to his rights (R. 102), that he had no connection with the business personally, but that at times he helped his wife wrap packages containing products being sold through the mail (R. 94, 95, 97). On November 7, 1938, during an official investigation of the business by witness, after due warning as to his right to remain silent and that anything said by him may be used against him in any subsequent proceedings or trial, the accused stated that he had personally written two letters then exhibited to him in connection with the business. One letter was written April 19, 1937, to a Mrs. Hobson, Glenmore, Louisiana; the other to a Miss Salyer, Lumber City, Georgia, under date of December 8, 1937 (R. 95, 97, 100; Exs. K and P).

The Barbara Warren Products having been notified on August 15, 1938, to appear at a hearing in Washington, D. C., on September 21, 1938, to show cause why a fraud order should not be issued against the business, the accused and his wife appeared in the office of Mr. William C. O'Brien, Office of the Solicitor, Post Office Department, Washington, D. C., on September 1, 1938, and there the accused stated he had rendered occasional assistance to his wife to the extent of filling a few orders and handling some of the correspondence; that he was not the owner but only a collaborator in the business (Ex. R). The accused and his wife on the occasion of the said interview, executed a joint affidavit dated September 1, 1938, prepared by Mr. Ralph B. Manherz, an attorney in the office of the Solicitor, Post Office Department, wherein they agreed to desist from any and all further operation of the mail order business. On the basis of this affidavit the Post Office Department dismissed the hearing set for September 21, 1938 (Ex. R). On August 15, 1938, two weeks prior to the conference with Mr. O'Brien, the accused wrote a letter to him, urging that the fraud proceedings be dropped, stating in part as follows:

"If possible would you please prevent a notice in reference to a fraud order from being sent to me as serious trouble in the Army could develop. I am willing to agree to any stipulation that may be required in order to prevent further action by your office.

"I can assure you that there never was any fraudulent intent on the part of Mrs. Huntress, myself or my father of Boston, Mass. and I believe that where there was a money back guarantee, that the money was always returned upon request." (Ex. Z.)

Inclosed with the above-quoted letter was the affidavit of accused dated August 15, 1938, reading in the body thereof as follows:

"That I am a resident of El Paso, Texas;
"That I have discontinued all connections with any mail order business:
"That I have no intention of resuming any such connections in the future."

An affidavit of similar import was also inclosed executed by Mrs. Huntress (Ex. Z.).

The prosecution introduced in evidence the deposition of Captain Victor L. Robinson, Q.M.C., Fort Riley, Kansas, in which he deposes and says that while in conversation with the accused at Fort Bliss about April, 1937, he (accused) stated that he worked at night answering inquiries regarding prescriptions that his relatives were putting up and selling through a mail order business; that the business was not in his name and he received no income therefrom; that the accused exhibited to him certain articles he was having printed for advertising purposes (Ex. A-1).

It appears from a defense exhibit consisting of a pen and ink report in 1937 on the branch office activities of the Boston office that certain items of payment relative to the business were "paid by Jr." and such other entries as:

"Items on Joe's letter dated June 18th.
"Alvin for 500 labels - $1.00
"R.R. Ex. Co. Bill of laden
from Chicago
755 ..... .32
"Letter dated June 29
"Chk. to Good Stories 30.00"

and other similar entries indicating the interest of the accused in the business (Ex. 17). The accused on the stand freely admitted that the

references in his father's report were to him (R. 294, 295).

8. For the defense numerous witnesses were called and depositions put in evidence. By deposition the father of the accused testified that, so far as he knew, the accused was in no way connected with the mail order business, the wife of the accused, deponent's daughter-in-law, being the sole owner thereof (Ex. 20).

The accused filed an affidavit with Colonel Dagley, I.G.D., Fort Bliss, Texas, dated November 2, 1938, in which he denied ownership of the mail order business and stated that his participation in the business was limited to writing a few letters for his wife and occasionally signing the name of Barbara Warren at the end of a printed form letter; that he received no financial reward for his service and that $200 which he gave Mrs. Huntress and which was put into the business was not a gift but was the return of a loan she had previously made to him; that the products used were manufactured by reputable concerns and had been in use for manyyears (Ex. Y).

The accused testified at his own request and denied that he was officially or financially connected with the business. He stated that his wife, using her own money, was the sole owner of the business and that her activity was over his protest; that such activity as he engaged in was in connection with the asthma remedy only (R. 245, 253, 254, 259, 260, 266, 279, 296, Ex. Y). The accused further testified that such assistance as he might have given his wife, to the limited extent of writing only a few letters for her during the entire period of operation, was merely as her husband and not as a business partner, as he considered the business "unethical" for an officer of the Army (R. 259, 260, 291, 293, 296, 297). The accused admitted writing the Salyer and Hobson letters (Exs. K, P) but only at the dictation of his wife. He testified that he never saw the original Salyer letter until November 1, 1938, and took down the reply as dictated by Mrs. Huntress and wrote the Hobson letter substantially as told him by Mrs. Huntress (R. 253, 254, 259, 281, 282). He denied that he sent Miss Salyer the "W. T. Treatment Tablets", as alleged, although his letter of December 8, 1937, states that he did do so and the tablets were later received through the mail (R. 262, 263, 264; Ex. V). With regard to the deposition of Captain Robinson, the accused testified that he did have such a conversation as Captain Robinson testified to but that the product referred to therein was the asthma remedy only and not the products referred to in the charges (R. 268, 269). He denied that Mr. Foust showed him the notes taken at their interview of July 23, 1938, and denied that he said to Mr. Foust that the children answered company letters. He did tell Mr. Foust that the children placed some asthma form letters in envelopes and mailed them but nothing more. He denied stating that he was a druggist or that he prepared the advertising (R. 270, 273, 274, 277). He wrote only about three business letters during the whole period of operation of the mail order business, helping out only as a husband assisting his wife (R. 291, 293).

The accused testified further that his wife had a separate bank account "but lots of times I would write a check out for anything she wanted for any part of the business, to send to some advertising man or something, my own checks" (R. 295). He also testified that he made out a joint Federal income tax return and that his wife made a separate corporation return. When informed that she testified on the stand that she had made no separate income tax return for the business he replied: "The next time it is due she will have to", because she had acquired a drug store (R. 303).

Mrs. Huntress, wife of accused, testified, with respect to the writing of the letter (Ex. K) to Miss Salyer by the accused, that she had received the letter on the previous afternoon and sent it immediately to Mr. Huntress in Boston to fill the order; that she desired that the customer be promptly advised of her action and not having yet arisen for the day, she requested her husband to write, telling him substantially what to say but not showing him the letter of Miss Salyer (R. 175, 176, 214). She also testified that the accused "did wrap a few packages for me to get ready to ship and then some of the form letters that I sent out, I believe he signed the name to some of them for me, and also the advertising, just before I got ready to send it to Mr. Simpson he helped me with that, I think", but that this was in connection with the asthma remedy only (R. 199); that she never filed application with the state of Texas to do business as a femme sole, and never filed a separate income tax return for the business (R. 212, 228); that the drug store she operated and the Warren Products were entirely unrelated (Note: R. 228, 229; Ex. 11 and letter to a Chicago laboratory in 1938 (Ex. 12) indicate otherwise), and that her only business associate was her father-in-law, Mr. Huntress, Sr. (R. 224, 234).

Dr. George Turner, El Paso, Texas, a practicing physician, was called as a witness for the defense, and testified that "there is no contraceptive, strictly speaking"; that Dri-Tex is but a slightly acid douche; that as regards Dri-Tex "The astringent action might have some contraceptive effect"; that the "Women's Tonic Tablets" were primarily a laxative, which is a "good thing" for delayed menstruation; that the "Trim" also was a laxative; that none of the drugs sold by Barbara Products Company were harmful but were "just counter drugs that you can buy at any drug store" (R. 181-183).

The defense put in evidence a number of depositions from various satisfied customers who testified that the products purchased were effective in accomplishing the results advertised or that in case of failure the money paid for such drugs was promptly returned by the company (Exs. 21, 22, 23, 24, 25, 26).

9. In view of the letters admittedly written by the accused to prospective customers for the drugs being sold by mail order, and in view

of his admissions against interest contained in his interview with Mr. Foust on July 23, 1938, and subsequent letter to him, and in his affidavit filed with Mr. O'Brien, dated September 1, 1938, considered together with the other evidence adduced at the trial by both the prosecution and defense briefly summarized hereinabove, more particularly in paragraph 7, supra, it is the opinion of the Board of Review that the connection of the accused with the Warren Products Company, as alleged, is amply substantiated by competent evidence.

10. The next question presented for determination is whether the participation of the accused in the mail order business of the Barbara Warren Products selling drugs claimed to be effective in reducing excessive weight, restoring delayed menstruation to normal periodical flow, as a contraceptive, and as an abortifacient, constituted conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. In this connection there must be considered also the conduct of the accused in writing the letter to Miss Salyer, believed by him to be an unmarried female person who through indulgence in illicit sexual intercourse believed herself to be pregnant as evidenced by delayed menstruation, and advising her medically that worrying would cause a muscle contraction sufficient to delay flow and encouraging her to use Dri-Tex when having sexual intercourse in the future. Also there must be considered the letter to Mrs. Hobson, believed by the accuser to be the mother of an ill seven year old girl, advising her as to the proper medical treatment of the case (Exs. K, P). Sending out advertisements of the products sold containing therein references of approval thereof by the United States Medical Laboratory thereby implying the indorsement of the product by the United States Government, when such was not the fact; circulating an offer to give to customers a gift of sex charts and dictionary "illustrating male and female sex organs and defining their functions"; the use of a signed letter for advertising purposes testifying to the efficacy of the drugs advertised when no such person existed, the name signed being entire fictitious; these and other similar actions in connection with the operation of the business must be considered as determinative in considering the applicability of the 95th Article of War in the instant case. The accused was directly active in preparing the advertising which was finally completed with the assistance of Mr. Simpson of Durham, North Carolina, and Mr. Fiescher of Chicago, Illinois. The letters to Miss Salyer and Mrs. Hobson, above referred to, were in the handwriting of the accused. He does not deny this. The Manual for Courts-Martial, 1928, paragraph 151, provides that the 95th Article of War denouncing conduct unbecoming an officer and a gentleman is -

> " * * * action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentlemen, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Underscoring supplied)

Also -

> "There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, * * *. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness." (Underscoring supplied)

There appear to be no cases in this office the circumstances of which are in any sense parallel to or on all fours with the facts in the instant case. However, in the case of Captain William R. Fleming, 14th Infantry (CM 196426), tried by general court-martial in 1931 under the 95th Article of War for being drunk and disorderly in uniform while in Colon, Republic of Panama, the question of conduct unbecoming an officer and a gentleman as denounced by the 95th Article of War was given full discussion. Captain Fleming was seen by officers, soldiers, and civilians in uniform and manifestly under the influence of intoxicating liquor on the date and at the places alleged. He employed some profane and abusive language. Some of his actions and remarks were testified to as "funny", greatly amusing the bystanders. He engaged in no fighting or loud, conspicuous, boisterous conduct. He was found guilty of violating the 95th Article of War and sentenced to dismissal. Nine of the eleven members of the court recommended clemency, reducing the sentence to a loss of 400 files on the Promotion List and restriction to post limits for three months. The Board of Review held that -

> " * * * While his conduct was clearly 'of a nature to bring discredit upon the military service' and therefore a violation of the 96th Article of War, the record contains no substantial evidence of what the Board of Review would consider gross drunkenness or conspicuous disorderly conduct."

The opinion of the Board was expressed that the record of trial was legally sufficient to support only so much of the findings as finds the accused guilty of the 96th Article of War and recommended that the President commute the sentence to that recommended in the clemency plea.

The Judge Advocate General (General Winship) did not concur in the opinion of the Board of Review and in his indorsement to the Secretary of War said:

> " * * * To hold that conduct such as Captain Fleming's was not within the meaning of the Article mentioned would, in my opinion, be placing an undue limitation upon the meaning of such Article and the acts constituting offenses thereunder and would establish an undesirable and unwarranted precedent. * * *."

Also that -

> "To declare the conduct of this officer not 'unbecoming an officer and gentleman' would be, in my opinion, a distinct step backward in the consideration of cases of this character."

The President followed the opinion and recommendation of The Judge Advocate General and ordered the sentence carried into execution. In Colonel Winthrop's discussion of "conduct unbecoming an officer and gentleman", in his authoritative work on "Military Law and Precedents", the following passages appear:

> "'Unbecoming,' as here employed, is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but morally unbefitting and unworthy." (Reprint, p. 711)
>
> * * * * *
>
> " * * * Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." (Underscoring supplied) (Reprint, p. 711)

Applying the rule laid down in the Fleming case and in the authorities above quoted to the established facts in the instant case, with especial reference to the questionable advertising concerning sex relations, which resulted in a criminal investigation and the forced cessation of the business by the United States Government, the Board of Review expresses the opinion that the conduct of which the accused was found guilty properly falls within the provisions of the 95th Article of War and is appropriate thereto.

11. The defense objected to numerous portions of the testimony of Inspector Foust identifying and relating to papers of investigation prepared by Inspector White, on the grounds that his testimony was purely hearsay. The objection, in the opinion of the Board, was in each instance, well taken and the adverse ruling thereon by the law member might have been serious error, except for the fact that later during the trial Inspector White was subpoenaed from Washington and his testimony secured with respect to the matters objected to. The defense also objected to the introduction in evidence of paragraphs 4 to 32, inclusive, of the report of Dr. Norris (Ex. A-2) on the grounds that the matter therein contained was beyond the scope of expert opinion and was conclusion as to matters in issue (R. 119-125). An objection on the same grounds was made to certain portions of the testimony of Dr. Turner, a witness for the defense, relating to whether the products would accomplish the things claimed for them in the advertisements. The law member overruled both objections (R. 125, 187). Inasmuch as both objections pertain solely to the fraudulent conduct alleged in the specifica-

tion of Charge I, of which specification the accused was acquitted, consideration by the Board of the objections and rulings thereon is deemed unnecessary.

12. The defense counsel in his closing argument and in section IV, page 22 of his brief attached to the record, raised the question of entrapment as a defense, contending that the test letters prepared by the Post Office inspectors, in response to magazine advertisements, caused the accused to write the Salyer and Hobson letters. If such should be the case, it would apply to Charge II and the specification thereunder only, as the Additional Charge and specification set forth a continuing offense during the period December 1, 1937, to September 1, 1938, which was clearly independent of and dissociated from the test letters.

[It is contended by counsel for the defense that the case of Sorrells v. United States (287 U.S. 435, 77 L-ed. 413) enunciates a rule that is determinative in the instant case completely exonerating the accused of all guilt; that the conduct of the Government in writing the test letter resulting in the Salyer reply by accused invoked the rule of estoppel against a criminal prosecution in the interest of public policy. The language of the Supreme Court (p. 454) in expounding the rule referred to is as follows:

> "There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. * * *." (Underscoring supplied)]

The Board is of the opinion that the facts in the instant case, as established by competent evidence, do not come within the rule set forth. Certainly it cannot be reasonably contended that the Barbara Warren Products Company had not intended prior to the receipt of the Salyer test letter to sell Special W. T, Treatment Tablets to restore normal menstruation. That was their advertised business, the operation of which had been carried on in Texas and Massachusetts by the accused, his wife and his father, one or all, over a period of approximately two years. Nor can it be said that the Post Office inspector writing the letter envisaged and planned the offenses of which the accused was found guilty, or any of them, for the sole purpose of obtaining a victim in the accused. To the contrary, the action of the Post Office agent was extremely impersonal and in accordance with the accepted and ordinary practice of the Post Office Department. He replied to an advertisement containing suspicious language to ascertain whether the company was violating the Federal Fraud Statute by sending fraudulent matter through the mail. That was legitimate, lawful procedure and one followed daily by the Post Office Department.

How else could frauds be exposed and the public protected from those who would make a living by perpetrating such frauds upon the ignorant, gullible and unwary by means of highly colored and attractive advertisements soliciting mail orders for the product so advertised? In the Sorrells case above cited, a prohibition agent had gone into a mountainous section of North Carolina and had developed a pretended friendship with a mountaineer. Both were World War veterans and members of the 30th Division, A.E.F.; this tie was used to invite a closer friendship and to inspire confidence. The agent finally requested the defendant to secure him a small quantity of whiskey which request was fulfilled, whereupon the arrest was effected. Under such circumstances the Supreme Court of the United States held entrapment a valid defense. The Board feels that there exists no similarity between the facts in that case and in the instant case. Chief Justice Hughes in his opinion handed down in the October term, 1932, said in part:

> "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. * * *." (p. 441)

Following the citation of numerous Supreme Court cases the opinion with respect to use of decoys, continues:

> "The appropriate object of this <u>permitted activity</u>, frequently <u>essential</u> to the <u>enforcement of the law</u>, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, <u>the fraudulent use of the mails</u>, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." (pp. 441, 442) (Underscoring supplied)

See also the case of <u>Butts</u> v. <u>United States</u>, 273 Fed. 35, 37. To the same effect are holdings of the Board of Review and The Judge Advocate General that where the defendant, otherwise innocent, is induced and lured into the commission of the offense, entrapment constitutes a complete defense, on the ground of public policy, but only under the circumstances stated, which clearly do not exist in the case under consideration (Dig. Ops. JAG, 1929, sec. 1248, CM 187319, and Dig. Ops. JAG, 1937, Supp. VII, sec. 1248, CM 207652). In January, 1933, the joint trial of Privates Irving and Morris, stationed in the Hawaiian Department, was completed, involving charges of larceny of certain Government property, including military maps and photographs, and conspiring to deliver same to a representative of a foreign nation. Both accused were convicted and sentenced to five years' imprisonment in a penitentiary. The soldiers being under suspicion, a trap was set in which Mr. Frisen, civilian

employee of the Ordnance Department, was used as a contact man. On October 25, 1932, Mr. Frisen falsely represented to the accused that he had made an appointment with a foreign agent to meet with them that night for further negotiations and settlement of pay details. The meeting was had and negotiations entered into. The foreign agent was in fact Captain Wheeler of the Army. The accused produced the desired materials and the "agent" paid them $100, whereupon the soldiers were arrested. Counsel for accused argued that the accused were entrapped into the commission of the offenses of which they were found guilty. The Board of Review and The Judge Advocate General upheld the reviewing authority in its approval of the case and the absence of entrapment as a valid defense, citing Newman v. United States (299 Fed. 128, 131), where the court said that it is well settled that decoys may be used to entrap criminals and to present opportunity to one intending or willing to commit a crime (Irving & Morris, CM 200161). There are numerous decisions upholding the sending of test or decoy letters to those persons suspected of being engaged in fraudulent practices. In Freeman v. United States (243 Fed. 353, 356), the defendant was operating a business under the name of Dr. Jordan, L. J. Jordan Company, and Jordan Museum of Anatomy, offering by advertisements carried through the mail, to cure diseases of men. The fraud was exposed by means of test letters written by inspectors of the Post Office Department employing fictitious names. The defense of entrapment was advanced. The lower court instructed the jury as follows:

> "It is not material that such letter or letters was addressed to fictitious persons and sent in response to test letters, to decoy letters sent them by the post office inspectors. It is the business of the executive officers of the government to see that this law is enforced, and when the Post Office Department, through its representatives, in the discharge of their duty, learn or suspect that any scheme to defraud is being operated through the United States mails, it is their duty to see that the fraud is uncovered."

No exception being taken to the instructions the appellate court held objection could not be used on appeal. The court further held that in a prosecution for using the mails in the execution of a scheme to defraud, it was not a defense that the letters charged to have been mailed were mailed in reply to decoy letters sent by Post Office inspectors, where the decoy letters were not sent for the purpose of suggesting the commission of a crime, but for the purpose of ascertaining whether the defendant was engaged in using the mails in a scheme to defraud. (Petition for a writ of certiorari denied by the Supreme Court, 249 U.S. 600.)

In the case of Grimm v. United States (156 U.S. 604), one Robert W. McAfee, an inspector in the Post Office Department, suspecting

that defendant was engaged in a business offensive to good morals, wrote a decoy letter signed Herman Huntress, in which he represented himself as a traveling man and desired to purchase for resale a supply of pictures of an obscene, lewd, and lascivious character. The defendant acknowledged receipt of the Huntress letter and replied:

> " * * * I will let you have them for $2.00 per doz. & $12.50 per 100. I have about 200 negatives of actresses."

Entrapment was contended by defense counsel. The court held that when a Government detective, suspecting that a person is engaged in a business offensive to good morals, seeks information under an assumed name directly from him, and that person responding thereto, violates a law of the United States by using the mails to convey such information, he cannot when indicted for that offense, set up that he would not have violated the law, if the inquiry had not been made of him by the Government official.

In Samuels v. United States (232 Fed. 536) in a prosecution for using mails to defraud, the court held that the fact that letters sent by defendant through the mails were in response to decoy letters sent by Post Office inspectors did not render them inadmissible.

In the case of Kemp v. United States (41 App. D.C., 539; 51 L.R.A. (NS) 825), a detective in the employ of the Post Office Department wrote to the defendant signing a fictitious name and representing himself as a married man but the father of an unborn child by a girl other than his wife and asking defendant, a Washington physician, to perform an abortion. Defendant replied that he could perform the operation for about $200. With respect to the claim of entrapment the court said:

> " * * * It does not appear that it was his purpose to induce defendant to commit a crime, but to ascertain whether he was engaged in an unlawful business. It is no defense that the letter written by defendant was in answer to a decoy letter written, as in this case, by a government detective. * * *."

A case directly in point with the instant case is that of Ackley v. United States (200 Fed. 217). It appears that the defendant advertised a contraceptive remedy and a Post Office inspector, reading the advertisement, wrote to defendant under the fictitious name of Mary Eichenoner. After stating that the writer had seen his advertisements, the letter recites:

> "I am writing you to know whether you have a remedy that will keep me from getting in a family way. If you have such a remedy or can tell me where to get it I will be very grateful to you. Please send your reply in a plain envelope."

Two days thereafter defendant mailed to the inspector a pamphlet and advertisements describing the "Ackley Ladies' Syringe" and "Dr. Ackley's Sanitary Powder". A subsequent letter was mailed to defendant inclosing a $3.50 money order requesting that the syringe be sent, whereupon the defendant mailed the syringe to the writer giving full particulars as to its use. With respect to the question of entrapment the court, on page 222 of the opinion, after stating that a party who persuades another to commit a crime is an accessory, sets forth the following:

> " * * * But when officers, or even a private citizen desirous of enforcing the laws, believes from general information, and as in this case, from the pamphlet reciting 'Woman's Doctor,' 'Woman's Friend,' 'Woman's Syringes,' 'Woman's Antiseptic Germ Killing Powders,' 'Consultations only at my offices,' 'Syringes sent by freight only,' then the officer had the legal, as he had the moral right to send 'decoy letters.'" (Underscoring supplied)

At this point the opinion cites many decisions of the United States Supreme Court and of the Circuit Court of Appeals.

The Board of Review feels that further discussion of the defense of entrapment and decisions with respect thereto is unnecessary in view of the circumstances of the case under consideration and cases cited and expresses the opinion that entrapment cannot be properly considered as a valid defense to the charges and specifications of which the accused officer has been found guilty.

13. Four of the nine members of the court signed a recommendation for clemency, attached to the record of trial, only insofar as it will serve to modify the sentence so that the dismissal adjudged on February 16, 1939, be not executed, but be commuted to punishment not involving dismissal. The reason given for the recommendation for clemency is the belief on the part of the four members signing it that "the mandatory sentence of dismissal is too severe in view of the extenuating circumstances in this case".

In approving the sentence, the reviewing authority stated in his action:

> "Because of the clearly shown conduct of this officer in an enterprise unbecoming and unworthy of one in the military service, the recommendation of four members of the court for clemency is not approved."

14. Whatever might be the Board's view if that element were absent, one element in the case constrains it to concur in the above quotation and to recommend against clemency. That element is this: Though the printed matter published in magazine advertisements and in circulars carefully

avoided such unseemly words as "abortion" or "abortifacient"; such matter was, in the opinion of the Board, intended to be understood by the reader and prospective customer as claiming that the W. T. Treatment Tablets would produce an abortion. If there were any doubt of this, that doubt would be removed by the Salyer correspondence (Ex. K), in which in unmistakable terms the author of the test letter requested an abortifacient and accused in answer sold him W. T. Treatment Tablets, not calling them an abortifacient, it is true, but by the plainest implication giving his correspondent to understand that they were such. The Army has no place for an officer who peddles abortifacients.

15. Accompanying the record of trial is a letter from Congressman Marvin Jones of Texas, dated May 3, 1939, and copies of two letters to Congressman R. E. Thomason from Dr. George Turner, a defense witness, and Mr. Joseph G. Bennis, individual defense counsel, dated May 2 and 3, 1939, respectively. Each and all of the said letters seek a reduction in the sentence imposed by the court. The communications above referred to have been given careful and sympathetic consideration by the Board of Review.

16. A brief of the case signed by individual defense counsel and by the military defense counsel and his assistant, and attached to the record of trial, has been carefully examined by the Board. In addition to discussing the merits of the findings and sentence, counsel point out irregularities and errors in the proceedings in several particulars. All assignments of irregularity and error have been carefully examined and found to be without legal merit.

17. The accused is 42 years of age. The Army Register shows his service as follows:

> "Pvt. 47 Co. 7 Bn. 131 Dep. Brig. 2 Sept. 18 to 4 Dec. 18 - 2.lt Q. M. C. 4 Aug. 21; accepted 20 Aug. 21; 1 lt. 4 Aug. 21 (a) 2 lt. (Dec. 15, 22); 1 lt. 27 June 26; capt. 1 Aug. 35."

18. 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 upon conviction of violation of the 95th Article of War.

Archibald King, Judge Advocate

George T. Fraser, Judge Advocate

George B. Campbell, Judge Advocate.

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

Board of Review
CM 211561

MAY 2 1939

UNITED STATES	)	FIRST CAVALRY DIVISION
v.	)	Trial by G.C.M., convened at Fort McIntosh, Texas, March 20, 1939. Dishonorable discharge and confinement for one (1) year. Fort McIntosh, Texas.
Private EDWARD SELF (6283732), Troop B, 8th Engineer Squadron.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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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. Accused was tried upon the following charge and specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Edward Self, Troop B, 8th Engineer Squadron, did, at Fort McIntosh, Texas on or about February 23, 1939 feloniously take, steal, and carry away three blankets, woolen O.D., 4 pounds, of the value of about Ten dollars and five cents, ($10.05), property of the United States furnished for the military service thereof.

Specification 2: In that Private Edward Self, Troop B, 8th Engineer Squadron, did, at Nuevo Laredo, Tamaulipas, Mexico, on or about February 23, 1939, wrongfully and knowingly sell six blankets, woolen, O.D. 4 pounds, of the value of about Twenty Dollars and Ten Cents, ($20.10), property of the United States furnished for the Military Service thereof.

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 dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year. The reviewing authority approved the sentence, designated Fort McIntosh, Texas, as the place of confinement, and transmitted the record of trial for action under Article of War 50½.

3. The order appointing the court before which this case was tried (par. 1, S.O. 2, Hdqs. 1st Cav. Div., Jan. 6, 1939), designated Captain John O. Colonna, 8th Engineers, as trial judge advocate, and Second Lieutenant John D. Holm, Jr., 8th Engineers, as assistant trial judge advocate. Captain Colonna preferred the charges and was a witness for the prosecution.

4. The 1st Indorsement on page 3 of the charge sheet is as follows:

"1st Ind.

Headquarters First Cavalry Division, Fort Bliss, Texas, March 7, 1939

"Referred for trial to 2nd Lt. John D. Holm, Jr., 8th Engrs., Assistant Trial Judge Advocate

"general court-martial appointed by paragraph 1, Special Orders No. 2, Headquarters First Cavalry Division, Fort Bliss, Texas, January 6, 1939. Sec. IX, Cir. 1, Hq 8th C.A. 1939, extract copy attached, will be complied with.

"By command of Brigadier General JOYCE:

(Sgd.) Raymond Stone, Jr. Adjutant

RAYMOND STONE Jr.,
Captain, A. G. D.,
Asst. Adjutant General.

2nd Lieut. Holmes F. Troutman, 8th Engrs., is relieved as member of the court appointed by the above mentioned order for the trial of this case only.

Captain John O. Colonna is relieved as T.J.A. of the court appointed by the above mentioned order for the trial of this case only."

5. The record of trial lists as present, "2d Lt. John D. Holm, Jr., 8th Engrs., Assistant Trial Judge Advocate"; and as absent, "Capt. John O. Colonna, 8th Engrs., (relieved as Trial Judge Advocate for this case only)" (p. 2). The record is signed, "John D. Holm, Second Lieutenant,

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JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

8th Engineers, Assistant Trial Judge Advocate" (p. 29). Was the above unusual procedure legal? What effect, if any, did it have upon the validity of the findings and sentence? Those are the serious questions presented by this record of trial.

6. It will be noted that by the 1st Indorsement on the charge sheet, the Commanding General, First Cavalry Division, did not excuse Captain Colonna from attendance, but "relieved" him for the trial of this particular case. "Relieve" is thus defined in Webster's New International Dictionary:

> "To release from a post, station, or duty; to put another in place of, or to take the place of, in the bearing of any burden, or discharge of any duty; as, to relieve a sentry."

In Wilhelm's Military Dictionary, is the following:

> "Relieve, To. Is to take a man or a body of men off any kind of duty; as, to relieve a sentinel; to relieve the guard, etc.; also to succor, to deliver; as, to relieve a besieged town."

7. It is clear both from the above definitions and from common usage in the service, that when the verb, "relieved", is used with reference to a member of the detail for a court-martial, it means that he is taken off the court entirely. The Board therefore concludes that, for the purposes of this case, Captain Colonna was wholly and completely removed as trial judge advocate, and that there was no trial judge advocate of the court unless Lieutenant Holm was such.

8. Article of War 11 is as follows:

> "For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: * * *."

9. That an assistant trial judge advocate may legally try a case when the trial judge advocate has not been relieved, but is merely absent because of some fortuitous circumstance, is well settled. If, as in the present case, the trial judge advocate has been relieved from the court, but the assistant trial judge advocate is present and discharging the duties usually performed by the trial judge advocate, may the court lawfully proceed with its business? That is the next question for consideration.

10. The authority for the appointment of an assistant trial judge advocate is found in Article of War 11, already quoted, ante, paragraph 8. The powers of an assistant trial judge advocate are stated in the 116th Article of War, as follows:

> "An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused."

11. It may be argued that, broad as the language just quoted may be, it presupposes the existence of a trial judge advocate of the same court; that there cannot as a matter of law be an assistant trial judge advocate unless there is a trial judge advocate for him to assist; and that Article 11, quoted, ante, paragraph 8, authorizes the detail of a trial judge advocate "and" one or more assistants when necessary, and not of a trial judge advocate "or" an assistant.

12. That there is much force in the above arguments cannot be denied. It may also be admitted that prior to the creation by the present articles of war of the position of assistant trial judge, no general court could function legally without a trial judge advocate. But the situation is now changed. Article of War 5 says: "General courts-martial may consist of any number of officers not less than five." It follows from that article that the trial judge advocate is not a member of the court, though it is indispensable to the lawful functioning of the court that someone be present who can perform the duties of a trial judge advocate, such as the swearing of the court and the witnesses, the presentation of the prosecution's case, and the authentication of the record. But the assistant trial judge advocate may lawfully do all these things, as, according to the 116th Article, he "shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court". This language is as broad and inclusive as could be written. As it contains no exception or limitation, no one is authorized to write any into it. It is also to be noted that at present one article of war, the 11th, provides for the appointment of the trial judge advocate and assistants, and the defense counsel and assistants, in identical language; and another article, the 116th, provides in identical language that the as-

sistant trial judge advocate and the assistant defense counsel shall be competent to perform any duty of the trial judge advocate or the defense counsel, respectively. If, therefore, a court cannot legally operate without the existence of a trial judge advocate, even though an assistant be present; it would seem to be necessarily true that it cannot legally operate without the existence of a defense counsel, even though an assistant be present. Yet few would contend for the latter proposition.

13. There are also reasons of policy in favor of the view that a court may operate without the existence of a trial judge advocate, if an assistant be present. Let there be imagined a general court-martial in time of war at a distance from the convening authority, with communication difficult or broken. Let it further be supposed that the trial judge advocate of this court dies, perhaps is killed in action. If the court cannot operate without the existence of a trial judge advocate, it cannot operate at all; if an assistant trial judge advocate can perform the duties of trial judge advocate, the court may proceed with its business. It may be most necessary that it do so.

14. For the foregoing reasons, the Board concludes that a general court-martial may legally operate even though the trial judge advocate has been relieved, if an assistant trial judge advocate is present.

15. The problem may be approached from another angle. Let it be admitted for the sake of argument that the existence of a trial judge advocate is indispensable to a general court-martial. A trial judge advocate is usually detailed by a special order, either that appointing the court or one of later date, but that is not the only legal method of appointment. Any manner by which the convening authority chooses to express his will is legal. Many cases have occurred in which, because of illness, change of station,or exigency of the service, changes in the detail for a general court-martial have become unexpectedly necessary and have been made by telegram or telephone message from the headquarters of the convening authority to the post at which the court is sitting. It is true that such messages have been confirmed by special orders, but the court has proceeded at once, without awaiting the confirmatory order. In other words, the telegram or telephone message has been held a legal designation, and the Board thinks properly so.

16. Would not an indorsement on a charge sheet, addressed to a certain officer as trial judge advocate of a certain court, who had

not previously been detailed as such, referring the charges on that sheet to him for trial, signed by the convening authority's adjutant by his command, constitute a legal detail of that officer as trial judge advocate of that court, without any other instrument or appointment? The Board thinks so.

17. Let the 1st Indorsement on the charge sheet in this case, quoted, ante, paragraph 4, be again examined carefully. The Board thinks that that indorsement, though in form most irregular, amounted in substance to the relief of Captain Colonna and the designation of Lieutenant Holm as trial judge advocate for trial of this case only. It refers the case to him by name "for trial", which means that he is to prosecute it. That means that he, and no one else, is to be trial judge advocate for this case. It is true that the same indorsement calls him "Assistant Trial Judge Advocate", but it is a well-recognized maxim that "falsa demonstratio non nocet", a false description does no harm (Broom's Legal Maxims, 8th ed., 483; 25 C.J. 435, and numerous cases cited in note 11). This maxim is stated by Broom (p. 484) to signify -

> "* * * that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise * * *."

18. As an example of this, there may be noted State Savings Bank v. Stewart (93 Va. 447, 25 S.E. 543), in which a deed described the property conveyed in two ways, as being two lots on the northwest corner of Trout Avenue and I Street, and as being lots 9 and 10 on a certain plat on file in the office of the clerk of court. The property which the parties meant to convey was lots 9 and 10 on the plat, but it was on the northwest corner of Trout Avenue and H Street, not I as described. The court relied upon the maxim already quoted, held that the misdescription of the property as being on the corner of I Street did no harm, and that the deed duly conveyed the property which the parties had in mind.

19. If this maxim be applied to the present case, it is seen that the erroneous description of Lieutenant Holm as assistant trial judge advocate does no harm. The reference to him "for trial" and the relief in the same indorsement of Captain Colonna show that the reviewing authority meant him (Lieutenant Holm) to be the trial judge advocate for the case thereby referred.

20. The 25th of Lord Bacon's maxims is the same in principle as the maxim already discussed and is even more directly applicable to the present problem. That maxim is, "Veritas nominis tollit errorem demonstrationis", the truth of the name takes away the error of the description, or, more freely, if a person's name is stated correctly, an error in the description of him may be disregarded. An illustration of this maxim is Doe v. Rouse (5 Common Bench 421, 136 English reprint 942), in which a testator by will made in 1845 left his house, money, plate, etc., "unto my dear wife Caroline". He had married in 1834 a woman named Mary from whom he does not appear to have been divorced and who survived him. In 1840 he went through a marriage ceremony with a woman named Caroline, with whom he lived until his death in 1845. Besides citing Lord Bacon's maxim above quoted, the court said:

> "* * * The testator devises the premises in question to his 'dear wife Caroline.' That is a devise to a person by name, and one which appears to be that of the lessor of the plaintiff. There is no competition with any one else of the same name, to whom it can be suggested, that the will intended to refer. The only question is, whether the lessor of the plaintiff, not being the lawful wife of the testator, properly fills the description of his 'dear wife Caroline.' * * * there can be no reasonable doubt that she was the person intended. It being conceded that it was the testator's intention that Caroline should have the property, and he having mentioned her by an apt description, I see no ground for holding, that, because the words 'my dear wife' are not strictly applicable to her, the intention of the testator should fail, and the property go to some one to whom he did not mean to give it. * * *."

21. So here, the indorsement correctly identifies Lieutenant Holm by name and rank, and directs him to try the case. That, coupled with the relief of Captain Colonna in the same indorsement, makes Lieutenant Holm, in the opinion of the Board, the trial judge advocate for the case so referred, and the erroneous description of him as assistant trial judge advocate does no harm.

22. Upon either the view that the existence of a trial judge advocate of a general court is not indispensable if an assistant trial judge advocate is present, or the view that the indorsement on the charge sheet appointed Lieutenant Holm trial judge advocate, the Board concludes that the court was legally constituted. This does not mean

that the Board thinks such an indorsement as that here made a proper one. On the contrary, it considers the indorsement most irregular and undesirable. The reviewing authority would have been better advised to relieve Captain Colonna and detail Lieutenant Holm or some other officer in his place as trial judge advocate by special order.

23. The evidence supports the findings and calls for no comment. The sentence is not in excess of that legally permissible.

24. The Board of Review holds that the record of trial is legally sufficient to support the sentence.

Archibald King, Judge Advocate.

George A. Hayes, Judge Advocate.

George B. Campbell, Judge Advocate.

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

Board of Review
CM 211586

May 10, 1939

UNITED STATES)	FIRST CORPS AREA
)	
v.)	Trial by G.C.M., convened at Fort Devens, Massachusetts, March 6 and 13, 1939. Dishonorable discharge and confinement for four (4) months. Fort Devens, Massachusetts.
)	
Private ISAAC S. GERBER (6139615), Medical Department, Unassigned.)	

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. The accused was tried on a single charge and specification, as follows:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Isaac S. Gerber, Medical Department, U. S. Army, unassigned, did, at O. D. and R. Depot, Brooklyn, New York, on or about November 12, 1938, desert the service of the United States and did remain absent in desertion until he surrendered himself at the Boston Army Base, Boston, Mass., on or about February 10, 1939.

He pleaded not guilty to and was found guilty of the charge and specification thereunder, 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 for seven months. The reviewing authority approved the sentence, but reduced the period of confinement to four months, and ordered it executed, subject to the suspension of the dishonorable discharge until the expiration of the period of confinement (G.C.M.O. No. 32, Headquarters First Corps Area, April 10, 1939).

3. The case for the prosecution in chief consisted of two items of evidence only:

a. Exhibit 1, certified extract copy of morning report of the Casual Company, Overseas Discharge and Replacement Depot, Brooklyn, New York, showing the following entries:

"11-13-38 RR	Pvt. Gerber, I.S. duty to AWOL 6:30 A.M. Nov. 12/38 MVB,
"12-5-38 RR	Pvt. Gerber, I.S. AWOL to desertion. HWM"

b. A stipulation (R. p. 7):

"* * * that if Master Sergeant Armand J. Lamoureaux, DEML-Headquarters Detachment, Headquarters First Corps Area, Boston Army Base, Boston, Mass., was present in court and sworn as a witness, he would testify in substance as follows:

"'At about 8:00 A.M., February 10, 1939, while on duty in the Office of the Headquarters Commandant, Headquarters First Corps Area, Boston Army Base, Boston, Mass., an individual dressed in civilian clothing entered the office. He identified himself as Private Isaac S. Gerber, 6139615, Medical Department-Unassigned, Overseas Discharge and Replacement Depot, Brooklyn, N.Y., and that he had been absent since about November 15, 1938.

"'Private Gerber was placed in confinement while awaiting motor transportation to Fort Devens, Mass.'"

4. The defense opened its case by placing accused on the stand and having him identify the following order which was introduced in evidence as Exhibit A:

"HEADQUARTERS HAWAIIAN
DEPARTMENT
"Fort Shafter, T. H., June 6, 1938

"Special Orders)
:
"No. 134)

"E X T R A C T

* * * *

"10. Pursuant to authority contained in radiogram, The Adjutant General's Office, Sergeant ISAAC S. GERBER, 6139615, Co D, 11th Med Regt, Schofield Barracks, T.H., is transferred IN GRADE, on or about October 1, 1938, to Medical Department, Fort Niagara, New York, and will be sent by the transport sailing from Honolulu on or about October 6, 1938, to San Francisco, California, where upon arrival he will report to the Commanding Officer, OD & RD, Fort McDowell, California. Sergeant GERBER is authorized ninety (90) days delay enroute effective at San Francisco and to travel by private automobile. The travel directed is necessary in the military service. FD 1401 P 50-0623 A 0410-9. QM 1600 P 61-0700 A 0525-9.

* * * *

By command of Major General HERRON:

THOS D. OSBORNE,
Colonel, General Staff Corps,
Chief of Staff.

OFFICIAL:

MADISON PEARSON,
Lieutenant Colonel, Adjutant General's Department,
Acting Adjutant General."

5. Accused further testified (p. 9): I never received any order revoking the above order. I left Honolulu October 6, 1938, in the grade of private. I was reduced because I had not had my promotion two years. My reduction was merely complying with regulations. I was informed of it two days before sailing. When I reached Fort McDowell, California, we were put in a large barrack awaiting orders. After four days there the sergeant in charge told me my name was on the sailing list on the transport REPUBLIC going to New York. I then showed him the orders that I had that I just read to the court. He said that he could not help that and for me to get my bags packed. I was on the boat all the way around to New York. When I reached New York I was assigned to sleeping quarters on the fifth floor. There were about eight hundred of us. I stayed about two weeks and there were about twenty remaining.

I went to see Major Buchanan, supposed to be in charge of all replacements. I showed him this same order and he said that there was something very funny about it and that he would see what could be done. That is all that I heard about it. I never received any written orders changing my assignment or revoking the order which I have presented to the court.

6. Accused also presented to the court his warrant as a sergeant and his honorable discharge from the Army as sergeant, Company D, 11th Medical Regiment, with character excellent, and no time lost under Article of War 107. Accused continued his testimony as follows: It was on or about November 10th that I went to see Major Buchanan. I left Brooklyn to try to find my mother whom I had not seen for fifteen years. I was under the impression that I was to go for duty to Fort Niagara. While at Brooklyn, I never applied for a leave of absence. On reporting at the Boston Army Base I requested transportation. When I left the Base in New York, it was my thought that I had ninety days coming. I went to Boston to look for my mother. I was there all the time except the time that it took to come from New York. I knew that there was an Army Base in Boston.

7. The defense then rested, and the prosecution introduced in evidence the following radiogram, indorsement thereon, and order:

"SIGNAL CORPS, UNITED STATES ARMY

Received at: Message Center,
New York Port of Embarkation,
Brooklyn, N. Y.

GI 4 64 WD FTDEVENS MASS MAR 6 1939 424P
C O OD AND RD BROOKLYN NY

REQUEST THIS HDQRS BE FURNISHED CERTIFIED COPY OF PARA ONE SPECIAL ORDERS NUMBER TWO HUNDRED SIX HQRS SCHOFIELDBARRACKS TH DATE UNKNOWN RETURNING PVT ISAAC S GERBER SIX ONE THREE NINE SIX ONE FIVE TO UNITEDSTATES FROM HD THIS ORDER TO BE USED TO DETERMINE WHETHER OR NOT NINETY DAYS DELAY GRANTED SOLDIER BY PARA TEN SPECIAL ORDERS NUMBER ONE HUNDRED THIRTY FOUR WAS REVOKED.

THOMLINSON 914A."

"201-Gerber, Isaac S (Enl) 1st Ind RR/hjg

"Headquarters Overseas Discharge and Replacement Depot, 58th Street and 1st Avenue, Brooklyn, New York, March 7, 1939.
To: Commanding Officer, Fort Devens, Massachusetts.

"1. There is no copy of paragraph 1, Special Orders number 206, Headquarters Schofield Barracks, T. H. on file at this headquarters.
"2. Attached is a true copy of paragraph 10, Special Orders number 134, Headquarters Hawaiian Department, June 6, 1938, and a true copy of paragraph 8, Special Orders number 235, Headquarters Hawaiian Department, September 30, 1938, revoking the former order.

"For the Commanding Officer:

(Signed) RANDOLPH RUSSELL,
RANDOLPH RUSSELL,
Major, Cavalry,
Adjutant."

"HEADQUARTERS HAWAIIAN
DEPARTMENT
"Fort Shafter, T. H., September 30, 1938

"Special Orders)
:
"No. 235)

"E X T R A C T

* * * *

"8. Paragraph 10, SO 134, this headquarters, cs, transferring Sergeant ISAAC S. GERBER, 6139615, Co D, 11th Med Regt, Schofield Barracks, T.H., in grade, to Medical Department, Fort Niagara, New York, is revoked.

* * * *

"By command of Major General HERRON:

THOS D. OSBORNE,
Colonel, General Staff Corps,
Chief of Staff.

OFFICIAL:
RAYMOND S. BAMBERGER,
Colonel, Adjutant General's Department,
Adjutant General."

8. The stipulation was received in evidence that accused arrived in New York November 3, 1938. The defense counsel said that he had made every effort to locate "the order in which this man was transferred, that is, Special Order No. 206", but there is no copy short of Hawaii.

9. In his indorsement on the holding of the Board of Review in CM 203511, Wedmore, the conclusions of which indorsement were approved by the President, The Judge Advocate General said:

> "The court and the reviewing authority must be satisfied of the guilt of an accused beyond a reasonable doubt. However, the Board of Review and The Judge Advocate General in the examination of records of trial, except in cases which require approval or confirmation of the sentence by the President, do not weigh the testimony to determine whether the offense has been proved beyond a reasonable doubt, but must be satisfied that there is some substantial evidence tending to prove each element of each offense (CM 152797, Viens) * * *."

10. [In the discharge of its statutory function, the Board's duty is to follow the above principle, not to weigh the evidence, not to substitute its opinion as to the guilt of accused for that of the court and the reviewing authority, not to let its sympathy for the unfortunate accused run away with its judgment, but solely to determine whether "there is some substantial evidence tending to prove each element of each offense."]

11. Accused has been convicted of a single offense, desertion. The elements of that offense in such a case as the present are (M.C.M., par. 130 a):

a. Absence without leave.

b. An intent not to return.

Is there in the record substantial evidence to prove each of the above elements? That is all that the Board has to decide.

12. The Board first considers how this question must be answered as to absence without leave. In M.C.M., paragraph 132, absence without leave is itself subdivided into the following elements:

a. "That the accused absented himself from his command, guard, quarters, station, or camp for a certain period, as alleged; and

b. "that such absence was without authority from anyone competent to give him leave."

That accused absented himself from his station, the Overseas Discharge and Replacement Depot, Brooklyn, New York, was fully proved (Ex. 1, and stipulation, p. 7), and admitted by him (record, pp. 11, 12). Is there in the record "some substantial evidence" that this absence was "without authority"? Yes, there is Exhibit 1, certified extract copy of morning report, showing the entry for November 12, 1938, with respect to accused, "duty to AWOL". Such an entry is not merely "some substantial evidence", but sufficient evidence alone to prove absence without leave (M.C.M., par. 130 a, p. 143, lines 18, 19). It has been so held in thousands of cases for scores of years.

13. Perhaps the Board might at this point say that the question which it put to itself, whether there is in the record some substantial evidence of absence without leave, has been answered in the affirmative, and pass on to the next element of proof. The Board refrains from deciding whether it might properly follow that course and proceeds to consider the evidence introduced by the defense and by the prosecution in rebuttal with respect to absence without leave. That evidence is in part documentary and in part the testimony of accused himself (pp. 8 et seq.).

14. The most important item of documentary evidence is Exhibit A, the special order quoted ante, paragraph 4 of this opinion. It was the theory of the defense that that order granted accused a delay of ninety days en route, that his absence lasted just that long, and that therefore he was not absent without leave. Though that argument was not made at the trial, it has since been suggested that the ninety days' delay granted to accused was the reenlistment furlough to which accused was entitled under paragraph 1 a (2), AR 615-275, May 25, 1937. That this delay was a reenlistment furlough is an assumption only, the record contains no proof of it. However, the regulation cited merely says that "a furlough of not to exceed three months may be granted upon reenlistment". This does not mean that a soldier may grant himself a furlough upon reenlistment. The use of the words "not to exceed" and "may" shows that the furlough is to be granted, if, when, and as the soldier's superiors decide that his services may be spared, and for such period only as they think proper.

15. Let the words of the special order (Ex. A, quoted ante, par. 4, this opinion) be again examined. It authorizes "ninety (90) days delay enroute effective at San Francisco". Accused got no delay en route at San Francisco. Perhaps this occurred through no fault of his own, perhaps he was wrongfully deprived of it. Nevertheless, neither that circumstance nor the order itself gave him any delay effective at Brooklyn.

16. The Board now turns to the testimonial evidence of accused himself. The court had the privileges, which the Board lacks, of seeing the accused and weighing his evidence. It may have disbelieved and rejected every word that he said. If so, the Board cannot reverse it; and, as has been said, the documentary evidence proves absence without leave. But even if the accused's testimony be accepted at its face value, it contains nothing inconsistent with the conclusion that he was absent without leave. The special order, as has been said, granted a delay effective at San Francisco and not at Brooklyn, and accused in his testimony showed no authority whatever to absent himself for ninety days from the latter place. Perhaps accused was wrongfully brought to Brooklyn, but he was there at the Overseas Discharge and Replacement Depot, subject to the orders of its commanding officer. That he realized this himself, and further realized that he had no authority to leave on his own initiative, is shown by the fact that he went to Major Buchanan for instructions. That officer said, according to accused (p. 10), that "he would see what could be done". That statement was equivalent to an order to accused to remain at the depot until he should hear further from Major Buchanan. Accused's interview with that officer took place about November 10th (p. 11). Accused went absent November 12th (Ex. 1). Even if Major Buchanan was remiss in not clearing up the situation within two days after it was brought to his attention, which the Board does not admit, that circumstance gave accused no right to leave on his own initiative and stay absent for ninety days.

17. The Board leaves out of account paragraph 8, S.O. 235, Headquarters Hawaiian Department, September 30, 1938 (Ex. 2), the revocation of accused's travel order, as it was not proved or even claimed that it was delivered to accused and he denies that he received it (p. 10). A special order is binding upon the person concerned only if delivered or made known to him (Dig. Ops. JAG 1912-30, Supp. VII, sec. 47 (2)). For the same reason and also because it was not introduced in evidence and its contents are wholly unknown, the Board leaves out of consideration the still later order (par. 1, S.O. 206, Hq. Schofield

Bks., date unknown), which it is supposed concerned accused.

18. The Board concludes, for the reasons above indicated, that the record contains "some substantial evidence" that accused's absence was without proper authority.

19. The only remaining element in the offense of desertion is an intent not to return. Is there "some substantial evidence" of such an intent? The Manual for Courts-Martial says, as the first sentence under the head of "intent" (M.C.M., par. 130 a):

> "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."

This accused was absent ninety days. Absences of equal or less duration have in many instances been held to justify the inference of an intent not to return. It is true that accused gave testimony tending to show an intent to return, but the court was not obliged to believe his testimony and apparently in this respect did not believe it. Whether the Board agrees with the court is beside the point. The Board cannot reach a contrary conclusion without weighing the evidence, which it has no right to do. The Board concludes that there is in the record "some substantial evidence" in support of an intent not to return.

20. In view of the foregoing, the Board of Review is of opinion that there is "some substantial evidence" in the record of trial tending to prove each element of the offense of which accused has been convicted, and that that record is therefore legally sufficient to support the findings and the sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

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

Board of Review
CM 211810

AUG 4 1939

UNITED STATES)	PHILIPPINE DEPARTMENT
)	
v.)	Trial by G.C.M., convened at
)	Manila, P. I., March 29, 1939.
Private First Class WILLIAM)	Dishonorable discharge and
T. HOUSTON, Jr. (6874281),)	confinement for six (6)
10th Signal Service Company.)	months. Disciplinary barracks.

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. The accused was tried on a single charge and specification, as follows:

CHARGE: Violation of the 94th Article of War.

Specification: In that Pvt 1cl Specl 3d Cl William T. Houston, Jr., 10th Signal Service Company, being at the time on duty in the Signal Corps Photographic Laboratory, Philippine Department, did, at Manila, Philippine Islands, on or about March 7, 1939, feloniously embezzle by fraudulently converting to his own use a photographic lens of the value of approximately One Hundred and Ten Dollars ($110.00), the property of the United States, furnished and intended for the military service thereof, intrusted to him the said Private William T. Houston by Captain Harold O. Bixby, Signal Corps.

Accused pleaded not guilty to and was found guilty of the charge and specification thereunder and was sentenced to dishonorable dis-

charge, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year. The reviewing authority approved the sentence, but remitted six (6) months of the confinement, and suspended the dishonorable discharge until the soldier's release from confinement (G.C.M.O. 11, Philippine Dept., Apr. 12, 1939).

3. The Board refrains from stating the evidence for the prosecution in detail but summarizes it as follows:

a. Accused was at the time of the alleged offense and had been since some time prior to April, 1938, assistant in the photographic laboratory of the Philippine Department at Manila. Sergeant Olive had previously been in charge of that laboratory; but, on May 11, 1938, Sergeant Dees arrived in the Philippines and on May 13th relieved Sergeant Olive, took charge of the laboratory, and signed a memorandum receipt for the property therein. Among the property belonging to the United States and in use in the laboratory before the arrival of Sergeant Dees was a photographic lens of the approximate value of $110, marked "Protar" and "3216760" (Ex. 2). Accused owned a photographic lens of the approximate value of $10 (Ex. 1). Shortly before the arrival of Sergeant Dees, accused took his own lens to H. E. Heacock Company, a commercial house in Manila, and had it engraved with the idential trade name and number which were on the more valuable Government lens.

b. About March, 1939, while Sergeant Dees was getting together some items for salvage, accused suggested that he (Sergeant Dees) send Exhibit 1 (the cheap lens) to salvage because it was no good. Sergeant Dees found that he was charged with a lens of the same number, but that the lens in his possession which accused had suggested be sent to salvage (Ex. 1) did not fit the description on his property record. Also he observed that the number was hand engraved, apparently at a recent date, whereas such numbers are usually machine stamped at the factory. The witness had seen an expensive lens which accused said was his personal property. Upon examination he found that lens (Ex. 2) to bear the same number as the cheap lens (Ex. 1). On March 5th, the witness looked for the expensive lens in the laboratory and could not find it. On March 6th the witness opened accused's locked trunk locker and found the expensive lens (Ex. 2) therein.

c. Following a report made to him by Sergeant Dees, Captain Bixby, the officer in charge of the laboratory, accompanied by Sergeant Dennis, property clerk, came to the laboratory on March 7, 1939, examinedthe cheap lens (Ex. 1), and conducted an investigation, during which he questioned accused and at the close of which he directed that neither Sergeant Dees nor accused leave the laboratory until further orders and that no property be removed from it. While held in the laboratory by this order, accused gave a wrapped package to Private Grimes and requested the latter to take it to the barrack for him. Grimes did so and placed it in accused's barrack bag there. The package contained the expensive lens (Ex. 2).

4. For the defense, the accused introduced considerable character evidence, in part testimonial and in part letters of commendation. It was also shown that there had been friction between Sergeant Dees and accused, and that the personnel of the Signal Corps were permitted to do photographic work for individuals for pay and to use Government equipment and supplies, provided they reimbursed the Government for supplies consumed. Accused testified that he had so used the expensive lens (Ex. 2), that he was afraid that Sergeant Dees would not allow him to continue doing so, and that he had the trade name and number of the expensive Government lens (Ex. 2) engraved on his own lens (Ex. 1) in case Sergeant Dees should make a check while accused had the Government lens in use on his personal jobs. Exhibit 2 was used both for Government and for accused's personal work, and the latter never interfered with the former. It was usually kept in a drying cabinet in the laboratory. Accused denied recommending to Sergeant Dees that his (accused's) lens (Ex. 1) be sent to salvage.

5. The evidence sufficiently proves that accused committed an offense with respect to the expensive Government lens (Ex. 2); but the serious question in the case is whether that offense was embezzlement, of which he has been convicted, or larceny.

6. The following passages from the Manual for Courts-Martial, defining and explaining larceny and embezzlement, are apposite:

a. Paragraph 149 g, Manual for Courts-Martial, on larceny:

"Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark.)."

* * *

"* * * The taking must be from the actual or constructive possession of the owner. * * *."

* * *

"* * * Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession, and the servant has the custody only and may commit larceny of them. A person, then, has the 'custody' of property, as distinguished from the 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property. * * *."

b. Paragraph 149 h, Manual for Courts-Martial, on embezzlement:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268)

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

7. Eminent legal writers all concur in the view above expressed as to conversion by an agent, employee, workman or servant of his master's property: -

a. 36 Corpus Juris 784-786:

"SERVANT OF OWNER - (1) CHATTELS TO WHICH SERVANT HAS ACCESS. A domestic servant, farm laborer, clerk in a store or office, teller, bookkeeper, or clerk in a bank, workman in a factory, brakeman on a railroad train, foreman of a railroad warehouse or a clerk therein, hostler, drayman, stevedore, weigher, or person employed in any other capacity as the servant of another, who feloniously takes and carries away the money or goods of his master, to which by reason of his employment he has access, is guilty of larceny, and not of embezzlement; and the fact that the taker was the regular custodian, or was temporarily in charge of the building, or was the master's agent in charge of the office from which the thing stolen was taken, does not affect his guilt, for in none of these cases did he have any possessory rights in the things committed to his care.

"(2) CHATTELS DELIVERED TO SERVANT BY MASTER - (a) IN GENERAL. From the legal conception of a servant as one who performs labor under the immediate direction and control of a master, the principle proceeds that the possession of the chattels with or concerning which the labor is performed remains in the master, and the servant, being the mere custodian of such of them as come within his control, is guilty of larceny if he feloniously misappropriates them to his own use."

* * *

"bb. CHATTELS TO BE USED. A servant to whom a master delivers materials to be incorporated in a structure in building which the servant is employed, or blue prints showing the work to be done, or coal for use in firing a boiler of which the servant has charge, or an animal to be used in plowing the master's land, or a horse and wagon to be used in hauling goods, or hay and grain for use in feeding of animals, acquires no possessory right in the chattels delivered to him, and is guilty of larceny if he feloniously converts them to his own use."

Every clause in the above quotation is supported by cases cited in the footnotes.

b. Bishop's New Criminal Law, section 824:

"1. POSSESSION AND CUSTODY - are in this branch of the law widely distinguishable. There can be no trespass against the custody; it is always against the possession, and it can be committed as well by the custodian as by any other person. For example, -

"2. SERVANT. - When a master's goods in possession come within the handling of the servant, the latter has in law no more than a custody of them, the possession remaining in the former. Therefore the servant may commit larceny of them; as, if a clerk in a store feloniously removes goods from it, this is larceny. * * *."

c. McClain on Criminal Law, section 556:

"LARCENY BY SERVANT OR MERE CUSTODIAN. - There is a well-recognized distinction between possession such as that of a bailee and mere custody as that of a servant, and the doctrine by which a bailee is held not guilty of larceny in misappropriating goods in his possession does not apply to the act of a servant in wrongfully converting or disposing of his master's property of which he has the mere custody. In such case there is a trespass, for the possession is in the master and not in the servant, and the servant may be guilty of larceny in the wrongful disposal of his master's property even though he has it at the time under his entire control. * * * A person who is engaged about the business of his employer, such as a clerk or salesman, is a servant within the doctrine of this section, and does not have possession of his employer's property, but only the custody of it, and therefore is guilty of larceny in fraudulently misappropriating it. So one who is employed in general labor, having control of his employer's property for that purpose, is guilty of larceny in wrongfully taking such property. * * *."

d. Wharton on Criminal Law, section 1195:

"LARCENY BY SERVANT HAVING BARE CHARGE TO CONVERT TO HIS OWN USE. If a servant or other agent who has

merely the care and oversight of the goods of his master - as the butler of plate, a messenger or runner of money or goods, a hostler of horses, the shepherd of sheep, and the like - convert such goods to his own use, without his master's consent, this is a larceny at common law; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, - the possession of the servant in such a case being the possession of the master. * * *."

8. The following cases from the Federal courts are illustrative of the principle stated in the preceding quotations:

a. United States v. Strong (2 Cranch C.C. 251, Fed. case 16,411, Circuit Court of the District of Columbia, 1821).

Larceny of copper bolts, property of the United States. Defendant was a workman at the Washington Navy Yard, whose duty it was to drive copper bolts into the hull of a ship under construction. He carried to his home some of the bolts delivered to him for that purpose and offered to sell them. It was contended for the defense that there was no trespass, but the court told the jury that if it was satisfied by the evidence of accused's guilt, his offense was larceny.

b. United States v. Clew (4 Wash. C.C. 700, Fed. case 14,819, Circuit Court for the Eastern District of Pennsylvania, 1827).

Larceny and embezzlement of two notes, property of the Bank of the United States. Defendant was captain of the watch and porter at the bank, and one of his duties was to carry notes from the safe to the note teller. He took two of the notes and passed them.

Held, a conviction of larceny is proper if the jury believes the evidence. As to the indictment for embezzlement, there is no evidence on which the defendant can be convicted. The notes were not intrusted to the defendant to keep, but merely to carry from one part of the bank to another.

c. United States v. Holland (Fed. case 15,378, U. S. District Court for the Southern District of New York, 1843).

Larceny on the high seas of foodstuffs, property of the owners of a certain merchant vessel on which defendant was steward and cook of the crew's mess. In that capacity, certain foodstuffs were delivered to him, some of which he sold to immigrant passengers to his own profit.

Held, the owner is deemed to retain possession of the foodstuffs, and there may have been a constructive taking from him. The question for the jury is whether that taking was felonious. Verdict, guilty.

d. (1) United States v. Hutchinson (7 Pa. Law J. 365, Fed. case 15,432, U. S. District Court for the Eastern District of Pennsylvania, 1848).

Embezzlement. Defendant was clerk to the Treasurer of the United States Mint at Philadelphia. He kept in the name of the Treasurer the books of the contingent fund of the mint, and kept the money of that fund in a closet within a larger safe. Defendant had the key to the closet but did not have the key or combination to the outer door of the safe. He made way with some of the money of the fund.

Held, defendant's offense was larceny and not embezzlement. A servant has mere charge, not possession, as a butler of his master's plate, a shepherd of his sheep, or a shopboy of goods in a shop.

(2) Though no report of a second trial is available to the Board, it is stated in note 1 to section 1199, Wharton's Criminal Law, that Hutchinson was subsequently tried for larceny and convicted.

(3) The similarity of the Hutchinson case and that before the Board is obvious. The Treasurer of the Mint had control of the contingent fund, was the person to whom the United States looked, and was in every sense responsible for it. Under his supervision, Hutchinson kept the books and had charge of the cash. In the present case, Sergeant Dees occupied a position analogous to that of the Treasurer. Sergeant Dees was in charge of the photographic laboratory, not accused Houston. Sergeant Dees, not Houston, signed memorandum receipts for the property in the laboratory and the United States looked to Dees

alone for the safekeeping of the property. Accused held a less responsible position than Hutchinson. Accused's duty was to assist Sergeant Dees in photographic work, but there is less ground for contending that he had possession of the property in the laboratory than for the contention that Hutchinson had possession of the contingent fund of the mint.

e. Talbert v. United States (42 App. D.C. 1, Court of Appeals of the District of Columbia, 1914).

Larceny of rings, property of Charles Schwartz. Schwartz, proprietor of a jewelry store, delivered certain rings to defendant, who did not return them. Defendant was to take the rings out of the store to show to prospective customers. The trial court instructed the jury that, if defendant had possession as a salesman with authority to pass title, his offense was embezzlement; but, if he was a mere servant to exhibit the rings and then bring them back with the name of the customer for approval of the sale, his offense was larceny. The Court of Appeals held the above instruction proper. If an article is delivered to a servant or agent with limited authority for a special purpose, and he appropriates it, his offense is larceny.

9. The Board next turns to certain cases arising in the state courts:

a. People v. Brenneauer (101 Misc. 156, 166 N.Y. Special Term, 1917).

Grand larceny of blue prints. Defendant was sales-manager of the Gurney Ball-Bearing Company of Jamestown, New York. Blue prints of its bearings contained information of great value to it or to a competitor. Defendant, secretly intending to leave the company's service and to seek employment with a competitor, asked and obtained of Barringer, one of its engineers, a set of blue prints and carried them to New York. The court said (p. 806):

> "In the case at bar the possession of the property taken was in the company. Barringer, a mere employe, to wit, the company's service engineer, had the care and custody of these prints. His possession was clearly the possession of his master, the company.

"The grand jury were well warranted in finding that when the defendant received these prints from Barringer he intended to appropriate them to his own use. They were delivered to him by another servant. His possession acquired under such circumstances was the possession of his master the company, and when he took the property under such circumstances animo furandi, and thereafter appropriated them to his own use, he committed the crime of larceny as it existed at common law, and before the adoption of the Penal Code.

"The learned counsel for the defendant urges that the defendant had access to these prints at all times, and that he was lawfully in possession thereof. 'Access' to the property certainly does not necessarily carry with it possession. The clerk in a store has access to the clothing on the shelves, and to the cash register, and to the property which it is his duty to sell, but if he appropriates it with felonious intent, it has never been doubted that he commits the crime of larceny at common law. So in the case at bar the defendant's access to these prints does not help him. These prints were in the possession of his master. Such possession as he got for the purpose of stealing them was his master's possession, and when he thereafter in fact carried out his original intent by taking them away and converting them to his own use, he committed the crime of larceny at common law."

In the present case, accused, like Brenneauer, had access to the lens in question, and rightfully nothing more than access, but access is not possession nor even custody.

b. Turner v. State (124 Ala. 59, 27 So. 272).

Larceny of money of James Bolling. Defendant was clerk in Bolling's store and slept in a room over it. The safe was opened at night and the money taken from it. Defendant had access to the safe at times. The court said (p. 275):

"It did not appear that the money came into the possession of defendant as the agent of Bolling. The mere fact that he was employed by Bolling in the store,

and had access at times to the safe where Bolling had deposited the money, did not devest Bolling of its possession, and consequently would not change the offense, if one was committed, to embezzlement. Holbrook v. State, 107 Ala. 154, 18 South. 176; Washington v. State, 106 Ala. 58, 17 South. 546."

c. State v. Jarvis (63 N.C. 556, 1869).

Larceny of bacon. Defendant was servant to the owner of the bacon, and was left in charge of the owner's premises when the owner went away for a few days. During that time defendant took the bacon. The court said (p. 557):

"The goods alleged in the indictment to have been stolen by the defendant belonged to the prosecutor, and had been in his actual possession. He entrusted them for a few days to the custody and care of the defendant, his servant. In contemplation of law the goods were in the possession of the owner, and the taking of them by the defendant, with the fraudulent purpose of converting them to his own use, was larceny, and the defendant was properly convicted. 2 East. P. C., 564, sec. 14."

10. The Board will not undertake to abstract in detail or to quote from any more cases, but will limit itself to stating the nature of the employment of the defendant and the article taken. In each case the offense was held to be larceny:

a. Crook v. State (39 Tex. Cr. 252, 45 S.W. 720).
State v. Self (1 Bay S. C. 242).
State v. Schingen (20 Wis. 79).
Crocheron v. State (86 Ala. 64, 5 So. 649).

Teamster, hostler, or farm hand. Horse.

b. Washington v. State (106 Ala. 58, 17 So. 58).
Teamster. Coal.

c. State v. Ugland (48 N. Dak. 841, 187 N.W. 237).
Man employed to assist in threshing and hauling. Flax.

d. Kirk v. Garrett (84 Md. 383, 35 Atl. 1089).
Employee of silversmiths. Spoons.

e. Aabel v. State (86 Neb. 711, 126 N.W. 316, 136 Am. St. Rep. 719).
Walker v. Commonwealth (8 Leigh (Va.) 743).
Clerk or salesman. Stock of store. Similar to Turner case, abstracted ante, paragraph 9 b.

f. Zysman v. State (42 Tex. Cr. 432, 60 S.W. 669).
Clerk to pawnbroker. Articles in shop.

g. People v. Perini (94 Calif. 573, 29 Pac. 1027).
People v. Dillon (36 Pac. (2d) 416 (Calif.)).
In the first case, assistant foreman; and, in the second, manager, of a warehouse. Goods in the warehouse.

h. People v. Kawananakoa (37 Cal. App. 433, 174 Pac. 686).
Caretaker of house for absent owner. Articles in the house. Similar to Jarvis case, ante, paragraph 9 c.

i. Daniels v. State (148 Ala. 663, 41 So. 525).
Engineer of pumping engine. Coal delivered to him to be used in running the engine.

11. The Board next applies the principles laid down in the above textbooks and decisions to the present case. It observes that accused was not, it is true, a domestic servant; but nevertheless was a servant as that term is used in legal parlance, one employed by the master in the master's business whom the master may direct in the details of his work. Accused was not even in charge of the laboratory or of the property in it, but was only a subordinate. He was as much a servant as any of the defendants in the cases above mentioned, and there is far less ground for the contention that he had possession of the lens than for a similar contention with respect to the defendants in many of those cases. Possession in this case as in the others lay in the master, and the servant's conversion of the articles constituted a trespass and his offense larceny and not embezzlement.

12. Let the case be examined from another angle. The specification alleges that accused embezzled a lens "intrusted to him the said Private William T. Houston by Captain Harold O.

Bixby, Signal Corps". Such an allegation of an "intrusting", a placing of trust in accused by another, is indispensable to a specification alleging embezzlement (par. 149 h, M.C.M., quoted ante, this opinion, par. 6 b; M.C.M., Appendix 4, forms 95, 111). Is that indispensable allegation proved? The record wholly fails to show any placing of trust in accused by Captain Bixby. On the contrary, the person whom Captain Bixby trusted, if anybody, was Sergeant Dees. Sergeant Dees was, according to Captain Bixby himself, "the noncommissioned officer in charge" (p. 24), and was "boss of the laboratory" (p. 54). Sergeant Dees, and not this accused, signed memorandum receipts for the property in the laboratory (Exs. 3, 4). Sergeant Dees himself says that the equipment in the laboratory was "entrusted to my care" (p. 9). It is true that both Sergeant Dees and accused had keys to the laboratory (p. 9), but that does not mean an intrusting of them jointly with the property, or that they had joint possession of it. Joint responsibility of two persons, especially two persons of different rank, for anything, would be unmilitary and contrary to the oldest customs of the service, and the testimony in the passages cited and elsewhere negatives any such thing. All that the possession of a key by accused means is that he had access to the property in the laboratory, not possession of it. The defendants in some of the cases already cited had access to the property taken through the possession of a key or otherwise; but, as those cases show, access is not enough to constitute possession or to make conversion embezzlement. See especially the cases of Hutchinson, ante, paragraph 8 d; Brenneauer, ante, paragraph 9 a; and Turner, ante, paragraph 9 b. The Board concludes that the indispensable allegation that Captain Bixby intrusted the lens to this accused is not supported by the evidence, and that failure of proof in this respect is fatal to the validity of the findings of guilty.

13. Must a contrary conclusion to that above stated be reached because of the holding in CM 197396, Christopher, digested in Dig. Ops. JAG 1912-30, Supp. VII, section 1533 (3)? In that case it was held that a soldier has possession, and not merely custody, of a blanket issued to him apparently for his entire enlistment; and that, when he converted it to his own use about two years after it had been issued to him, his offense was embezzlement and not larceny. The Board sees no reason either to question the correctness of that conclusion or to suppose it inconsistent with what it has said in the present case. But, in its opinion in the Christopher case, the Board of Review went further and said that Moore v. United States (160 U.S. 268) and Grin v. Shine (187 U.S. 181), "in effect, obliterate any distinction between bare custody and possession on the part of the offender as

a requisite of embezzlement". The Board has carefully examined the cases cited and does not think that they justify so sweeping, so revolutionary a statement as that they obliterate the distinction, drawn for generations in scores of authoritative textbooks and hundreds of opinions, between custody and possession. The Board furthermore thinks that that statement was not required for the decision in the Christopher case and must be considered as dictum.

14. Whether the statement quoted from the Christopher case be true or not as to other sorts of cases, which the Board does not undertake to decide, the Board concludes that it is inapplicable to the present case. The lens which accused has been convicted of embezzling was a mere tool of the photographer's trade, owned by the master and kept in his shop for use by his workmen in his business. It was no different from the hammer of the post carpenter or the solder-kettle of the post plumber. It was not even rightfully in accused's custody (still less in his possession) except when he was actually at work with it. When it was in the laboratory, all that accused had was access to it, not even custody of it. When he took the lens from the laboratory and gave it to Grimes to take to the barrack and put it in his bag, accused took it from the owner's possession, committed a trespass with respect to it, and his offense is larceny and not embezzlement.

15. Even if it be held that accused had something more than mere access, that he had custody of the lens, the Board does not think that the broad statement quoted from the holding in the Christopher case can be applied to the present case. The authorities cited, ante, paragraphs 6-9, are too numerous and too uniform to be thus summarily overruled.

16. Finally, the Board quotes again and makes the basis of its decision the passage already quoted from the Manual for Courts-Martial, paragraph 149 g, as follows:

> "* * * Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession, and the servant has the custody only and may commit larceny of them. A person, then, has the 'custody' of property, as distinguished from the

> 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property. * * *."

It would be difficult to imagine a case to which the passage quoted is more directly apposite than the present. The Manual for Courts-Martial is, by the Presidential order printed in it (p. IX), prescribed for the government of all concerned. In the face of the quotation just made from that Manual, the Board does not see how, at least with respect to such a case as the present, the distinction between custody and possession can be obliterated.

17. The Board observes that the action of the reviewing authority does not contain either in its heading or elsewhere the name of his command. The corrective action which might otherwise be necessary to cure that omission need not be taken in view of the conclusion which the Board has reached, that there exists a fatal variance between the allegation of embezzlement and the proof of larceny.

18. For the reasons above indicated, the Board is of opinion that the record is legally insufficient to support the findings and the sentence.

Archibald King, Judge Advocate.

George A. Frazier, Judge Advocate.

George D. Campbell, Judge Advocate.

To The Judge Advocate General.

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

(133)

Board of Review

C. M. No. 211829

June 13, 1939

UNITED STATES	)	EIGHTH CORPS AREA
vs.	)	Trial by G.C.M., convened at Fort Sill, Oklahoma, May 10, 1939. Dishonorable discharge and confinement for one (1) year. Fort Sill, Oklahoma.
Private R. C. PARNELL (6273001), Company C, 38th Infantry.	)	

HOLDING by the BOARD OF REVIEW

KING, FRAZER and CAMPBELL, Judge Advocates.

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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.

_____, Judge Advocate

George A. Frazer, Judge Advocate

Georg B. Campbell, Judge Advocate

1st Ind.

JUL 1 1939

War Department, J.A.G.O., - To the Secretary of War.

1. In the case of Private R. C. Parnell (6273001), Company C, 38th Infantry, attention is invited to the foregoing holding of the Board of Review, signed by two of its members, that the record of trial is legally sufficient to support the sentence, and to the inclosed dissenting opinion

by one member of the Board. The record of trial, accompanying papers, the foregoing holding, and the dissenting opinion are transmitted pursuant to Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724), for your action.

2. Accused was convicted of a single specification alleging forgery of the signature of another soldier, Private Julius Davis, Company L, 29th Infantry, to a receipt for a coupon book of the Army Motion Picture Service of the value of $1.40 in violation of the 93rd Article of War. That the signature was forged is undisputed, and the only serious question of fact at the trial was whether accused was the forger. Substantially the only evidence in the record to that effect is the testimony of two expert witnesses, as follows:

a. Sergeant Rudolph Perez, Battery C, 18th Field Artillery, on duty with the military police, testified that in his opinion the forged signature on the receipt was in the handwriting of accused, but admitted the existence in his mind of a reasonable doubt based upon the difficulty of identifying the maker of a disputed writing consisting of a signature only with only signatures for comparison.

b. George C. Whitten, bank teller, at first expressed the positive and unqualified opinion that the disputed signature was in the handwriting of accused; but afterward admitted that the disputed signature was disguised, and that if he had it in his bank as a specimen signature he would not cash a check signed as were the standards of accused's handwriting offered in evidence.

3. As has been said, the conviction rests solely upon the testimony of the two experts above summarized. The record contains no evidence whatever tending to show that accused had the opportunity to forge the disputed signature, that he ever had the receipt in question or the coupon book issued upon it in his possession, or tried to pass any of the coupons therein, or even that he was at Fort Sill on the date that the forged signature was written.

4. Albert S. Osborn, the leading handwriting expert in the United States, who testified in the Hauptmann and many other important trials, says in his work, "Questioned Documents" (2d ed., pp. 18, 19):

> "When a signature is shown to be fraudulent the question naturally arises as to who committed the forgery. This question is asked in nearly every case, but judging from the writing alone cannot often be answered with much certainty. It is much easier to show that a fraudulent signature is not genuine than it is to show that such a writing is actually the work of a particular writer. 'Who committed the forgery?' is, however, one of the most common questions asked regarding

disputed documents. As a rule the question cannot be answered for the reason that imitation of the handwriting of another is one of the most effective disguises of one's own handwriting. It would be strange indeed if in the few letters of a forged signature a forger would incorporate a sufficient number of the characteristics of his own writing actually to identify him.

"* * * Possession and the attempt to utter and profit by a forgery are usually the only means of connecting a particular person with the act.

"* * * When the attempt is made to disguise a quantity of writing as in anonymous letters the problem is a very different one and it is usually possible to show with much certainty who was the writer, * * *"

5. The disputed writing in the present case consists of a short signature only, and there is no evidence of possession or attempt to utter connecting accused with the crime.

6. For the reasons above indicated, I feel serious doubt of the guilt of accused; but the powers of the Board of Review and myself in such a case as the present are similar to those of an appellate court, that is to say, we may not weigh the evidence, but must pass the record of trial as legally sufficient to support the sentence if it contains some substantial evidence of each element of the offense charged and if there was committed no error injuriously affecting the substantial rights of accused. I should therefore feel obliged to lay aside my doubt as to accused's guilt and to pass the record as legally sufficient to support the sentence if it were not for the error mentioned by the dissenting member of the Board of Review, namely, the receipt by the court of testimony from Sergeant Perez (record, p.19) that he had conferred with another handwriting expert who had reached the same conclusion as the witness, i.e., that accused wrote the disputed signature. This testimony was wholly inadmissible as hearsay and as evidence of the opinion of a person not duly qualified as an expert nor under oath. The testimony was elicited by questions of a member of the court and presumably influenced the mind of that member and perhaps the minds of others. In a case in which, for the reasons already indicated, the accused's guilt is involved in such serious doubt, I feel that the inadmissible testimony received was prejudicial to the substantial rights of accused.

7. For the above reasons, I recommend that you disapprove the findings and sentence. I inclose alternative forms of action. If

you think proper to follow the recommendation which I have just made and disapprove the findings and sentence, I ask that you sign draft A; if, on the other hand, you approve the holding of the Board of Review, draft B is appropriate for your signature.

E. C. McNeil,
Colonel, J.A.G.D.,
Acting The Judge Advocate General.

4 Incls. -
Incl. 1-Record of trial & accompanying papers.
Incl. 2-Dissenting opinion by Lt.Col.King.
Incls. 3 & 4-Alternative forms of action (Drafts A and B).

Secretary of War agreed with Col. McNeil and Lt. Col. King.

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

Board of Review
CM 211829

JUN 1 7 1939

UNITED STATES	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sill, Oklahoma, May 10,
Private R. C. PARNELL	)	1939. Dishonorable discharge
(6273001), Company C,	)	and confinement for one (1)
38th Infantry.	)	year. Fort Sill, Oklahoma.

DISSENTING OPINION by KING, Judge Advocate.

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1. Accused was tried and convicted on charges and specifications which may be summarized as follows:

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

Specification: Forgery at Fort Sill, Oklahoma, March 12, 1939, of the following receipt:

"Station ..... Date Mar. 12, 1939
"Received One U. S. A. M. P. Coupon Book.
"Value $1.40, same to be deducted from my next pay.
"Signed Davis Julies
"Rank .....
"No. T-46721 Organization L-29."

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

Specification: Uttering the same instrument.

Accused pleaded not guilty to and was found guilty of both charges and specifications. The court sentenced him to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for two years. The reviewing authority disapproved the findings of guilty of Charge II and the specification thereunder, remitted one year of the confinement, and transmitted the record of trial for action under Article of War 50½. The majority of the Board of Review holds the record legally sufficient to support the findings and sentence as approved by the re-

viewing authority. With that conclusion I am unable to agree.

2. The evidence for the prosecution consisted solely of the following:

a. Sergeant Rudolph Perez, Battery C, 18th Field Artillery (p. 5): On March 19th I went to Dallas to return accused to Fort Sill as he had been reported A.W.O.L. In May, 1926, I took a course in fingerprinting and also as part of my course I had to take handwriting and I have my diploma on those two subjects. Since that time I have been making a study of fingerprinting and handwriting. My testimony has been accepted as a handwriting expert before general courts-martial. The accused voluntarily gave me samples of his handwriting (Exs. 2, 3). To the best of my opinion the handwriting on the receipt alleged to be forged (Ex. 1), and the handwriting on Exhibits 2 and 3 appear to be identical. The reason I checked Parnell and concentrated on him was because he was absent. He and Black left together. I was satisfied in my own mind after comparison of the writings. It is pretty slim owing to the fact you get very little handwriting. If you had a letter where there would be considerable, it would be much easier. There is a possibility that someone else beside accused might have written that slip. With a lot of handwriting it would be different, but in this particular case where there is only one signature it is possible someone else could have signed the slip. There is a reasonable doubt on handwriting from such a small signature. I can't say that he did positively, and swear to it, though in my opinion he did. Under examination by the court, the witness testified (p. 19):

"Q Did you confer with anybody else on this particular case, any other handwriting expert?

"A I did, sir.

"Q What was the conclusion of the other expert?

"A The same as I have stated, sir."

b. Exhibits as follows:

(1) The questioned receipt, which is the same as that set out in the specification, except that the given name is written "Julius" in the receipt and not "Julies", as alleged in the specification.

(2) and (3) Specimens of accused's handwriting.
(4) Specimen of handwriting said to be that of Private Julius E. Davis.

c. Stipulation (p. 19) that if Private Julius Davis were present he would testify that he did not sign the name on Exhibit 1 or authorize anyone else to do so.

d. George C. Whitten (p. 20): I am teller in the City National Bank, Lawton, Oklahoma. I am the last man it is checked to when they think a signature is wrong. I have qualified as an expert before a military court. I went to work as a bookkeeper on May 6, 1925. I have been comparing handwritings ever since. I have not pursued any course of instruction on the subject. In my opinion Exhibits 1, 2 and 3 were written by the same man, Exhibit 4 by some other man. There is no doubt in my mind. All I can give you is just my opinion. It doesn't seem to me that the writer tried to disguise the signature on Exhibits 2 and 3 at all. The man tried to disguise this one (Ex. 1).

3. The evidence for the defense may be thus summarized:

a. Andrew Crosby, the reporter of this case (p. 27): I am an attorney. I have seen two eminent handwriting experts disagree on a signature, one say that it is genuine, and one a forgery.

b. Stipulation (p. 27) that if Mr. Whitten were present he would testify that he had seen handwriting experts disagree.

c. Accused (p. 28): I did not sign the motion picture receipt No. T-46721. I never saw it until Sergeant Perez showed it to me. On March 19th I was in Dallas and started back to Fort Sill on that date. I did not have permission to be in Dallas. I left Fort Sill four or five days before. I was in town and got tight and took off. I was with Private Black. I didn't know anything about an investigation concerning movie tickets and post exchange tickets until I got back.

4. The leading handwriting expert in the United States, who testified in the Hauptmann and many other important cases, is Albert S. Osborn. In his authoritative book, "Questioned Documents" (2d ed., p. 18) that author says:

> "When a signature is shown to be fraudulent the question naturally arises as to who committed the forgery. This question is asked in nearly every case, but judging from the writ-

ing alone cannot often be answered with much certainty. It is much easier to show that a fraudulent signature is not genuine than it is to show that such a writing is actually the work of a particular writer. 'Who committed the forgery?' is, however, one of the most common questions asked regarding disputed documents. As a rule the question cannot be answered for the reason that imitation of the handwriting of another is one of the most effective disguises of one's own handwriting. It would be strange indeed if in the few letters of a forged signature a forger would incorporate a sufficient number of the characteristics of his own writing actually to identify him."

5. The receipt in question is all in print or rubber stamp impression except the signature and "L-29", which are written in pencil. "L-29" is apparently in a different hand from the signature. We are confronted therefore with precisely the case supposed by Mr. Osborn, a questioned writing consisting of a brief signature only. The learned author continues:

"Uninformed courts have reversed correct verdicts - uninformed is used advisedly - because it was not proved at the trial who actually committed a particular forgery. Some of these reviewers who would properly criticize a specialist for trying to do the impossible, thus indirectly criticize this same specialist because he did not do what cannot be done. Possession and the attempt to utter and profit by a forgery are usually the only means of connecting a particular person with the act."

6. This case is exceptional, almost unprecedented, among forgery cases, in that the record contains no evidence whatever of the sort to which Mr. Osborn refers in the sentence last quoted. Other than the expert testimony, there is nothing connecting accused with the forged document, nothing to show that he had an opportunity to forge it, or even that he was at Fort Sill when it was forged, nothing to show that he ever had it in his possession, or had any special motive for forging it. The findings of guilty rest upon the documentary evidence, i.e., the forged receipt and the specimens of accused's handwriting and of that of Private Davis, the stipulation that Davis did not write or authorize the disputed signature, and the opinion of two experts. It is substantially true that the conviction rests upon the opinion of the two experts alone, one of whom, Sergeant Perez, admitted that there was a reasonable doubt of accused's authorship of the forged document (pp. 18, 19).

7. Following the passages already quoted, the author continues:

"Where a writing is imitated by the writer of a different system or different nationality there may be incorporated in it certain qualities which point toward and strongly tend to identify the actual writer, but it is not often that it is possible to say more than that a particular writer 'may have written', or 'was qualified to write', a forged signature.

"When the attempt is made to disguise a quantity of writing as in anonymous letters the problem is a very different one and it is usually possible to show with much certainty who was the writer, but where only a signature is forged by imitation, and especially by tracing, it is usually very difficult, if not impossible, to discover from the writing itself who actually did write it, unless as occasionally happens the forgery is practically an undisguised specimen of the writing of the forger, but this, as a rule, only occurs when there was available no genuine signature to serve as a copy or model."

That Sergeant Perez' doubts were well founded is proved by the foregoing quotations.

8. Mr. Whitten, one of the expert witnesses, says (record, p. 25) that the writer of the disputed signature in the present case (Ex. 1) tried to disguise his handwriting. Therefore the case does not fall within the exception mentioned in the clause last quoted. Mr. Whitten has, however, been so bold as to do what Mr. Osborn, the leading authority in the country, says can rarely be done with certainty, i.e., express a definite, positive opinion as to the authorship of a questioned writing consisting of a signature alone.

9. Though I distrust my powers in a field in which I am not an expert, my own examination of the questioned and specimen writings does little to strengthen the attribution of the writings to accused. It is true that there is a certain similarity between the two capital letters in the questioned signature (Ex. 1) and those in the specimens of accused's handwriting (Exs. 2, 3); but, on the other hand, the last three letters of "Davis" in the questioned document are quite unlike the same letters in the specimen. One fact, a matter of spelling and not of handwriting, to evaluate which it is unnecessary to be an expert, seems to indicate that accused did <u>not</u> write the questioned signature. The writer of the questioned signature, whoever he was, correctly spelled Davis' given name, "Julius" (Ex. 1). Accused in his specimens, presumably after

being directed to write the name "Julius", twice wrote it "Julies". In one example "Julies" appears to be written over "Julios". In other words, the forger knew how to spell "Julius", but accused did not.

10. In the recent case of Gerber, CM 211586, after quoting from CM 203511, Wedmore, the Board said:

> "In the discharge of its statutory function, the Board's duty is to follow the above principle, not to weigh the evidence, not to substitute its opinion as to the guilt or accused for that of the court and the reviewing authority, not to let its sympathy for the unfortunate accused run away with its judgment, but solely to determine whether 'there is some substantial evidence tending to prove each element of each offense'."

11. The opinions of Sergeant Perez and Mr. Whitten, even though the former be qualified and the latter too positive, constitute "some substantial evidence" tending to prove the specification. Indeed, the documentary evidence alone is such. Hence, I should feel myself obliged to put aside my doubts and join my colleagues in holding the record legally sufficient to support the sentence except for two questions and answers found in the record at page 19 and quoted in this opinion at the end of paragraph 2 a, in which Sergeant Perez said that he had consulted another handwriting expert and found him or the same opinion as himself, i.e., that accused wrote the disputed signature. This was, of course, wholly inadmissible as hearsay, also as opinion evidence of a person not sworn, not proved to be an expert, and not subject to cross-examination. Though my colleagues on the Board of Review have not put their views into writing, I am told by them that they agree with me in this respect, but differ with me as to the effect of the receipt of this inadmissible testimony.

12. The question therefore becomes, under the 37th Article of War, did this error injuriously affect the substantial rights of accused?

13. In Dig. Ops. JAG 1912-30, section 1284, it is said:

> "It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice

to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C. M. 127490 (1919).

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C. M. 130415 (1919)."

14. Does the evidence in the present case satisfy the test above laid down? If the case were one in which, in addition to the opinion evidence which we now have, there was evidence showing the forged receipt to have been in accused's possession, and if there were no contradiction of the evidence for the prosecution; we might say that, even without the inadmissible matter, the court could not reasonably have reached any other conclusion, and that the error was therefore harmless. But, as I have pointed out in paragraphs 4-9, ante, the evidence actually presented by the prosecution is not at all strong, consisting almost exclusively of the opinions of two experts, one of whom admits the existence of a reasonable doubt and the other of whom undertakes to do what the leading handwriting authority says can rarely be done. This evidence is contradicted by the testimony of accused. In such a case, the minds of one or more members of the court may well have been swayed from doubt resulting in a vote of not guilty to a vote of guilty by the information that not two but three experts were of opinion that accused had written the disputed signature. I cannot escape the conclusion that the admissible evidence in the present case is far from compelling, that it fails to satisfy the test laid down in the passages quoted from the digest (ante, par. 13, this opinion), satisfaction of which test alone permits the disregard of the receipt of inadmissible evidence.

15. The view that the inadmissible evidence was damaging to accused is supported by another circumstance, namely, that that evidence was elicited by questions asked by a member of the court. There have been before the Board of Review several cases in which convictions have been set aside because testimony was introduced bolstering the reputation for veracity of one of the prosecution's witnesses when that reputation had not been attacked. In some of the cases, as here, inadmissible evi-

dence was elicited by questions of a member of the court. In CM 190259, Sheffield, the Board of Review said:

> "* * * 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. * * *."

In CM 202250, de Ramos, the Board said:

> "* * * In the present case, since one member of the court thought the prosecutrix's reputation for veracity to be of sufficient importance for him to ask questions about it, that member at least must have considered the answers which he elicited to be of some weight. Whether other members so thought it is impossible to tell, but, for all that is known, the vote of the member who asked the questions about Rosa's veracity may have determined the finding of the court against accused. The Board therefore concludes that the testimony of Dr. Rillo as to the prosecutrix's veracity was injurious to the substantial rights of accused."

CM 195687, Stansbury, and CM 198865, Sosebee, were similar cases.

16. By like reasoning, since one member of the court in the present case asked Sergeant Perez whether he had consulted another expert and what was that expert's conclusion, it is reasonable to infer that the member asking the questions thought the matter of some importance and that he was influenced by the answers which he elicited. That member's vote may have turned the scale against accused.

17. Though the offense charged in the one case is different from those charged in the other, the present case is like CM 210404, Cameron, in that in neither was there any eyewitness connecting the accused with the crime. In the Cameron case, the conviction rested upon inferences drawn from accused's presence near the scene of the offense at the time of its commission, a possible motive to commit it, and his possession after the offense of money similar in amount and denomination to that stolen. No such testimony is to be found in the present case, and the conviction must be supported, if at all, by the opinions of the two experts as to identity of handwriting. In each case the accused took the stand and denied his guilt. In each the court received inadmissible evidence. The question in the Cameron case was, as it is in this, did

the receipt of the inadmissible evidence injuriously affect the substantial rights of accused? In that case, as in this, a majority of the Board of Review answered that question in the negative; but I felt obliged to dissent, as I do in this. I admitted in that case, as I do in this, that, if the admissible evidence for the prosecution were stronger, the inadmissible matter might be disregarded as harmless and the record passed under the 37th Article of War; but I maintained in that case, as I maintain in this, that the admissible evidence fell far short of compelling conviction, and that the receipt in so doubtful a case of inadmissible matter constituted prejudicial error. The Judge Advocate General and the Secretary of War supported my views in the Cameron case, and I respectfully submit that consistency requires that they do so in the present case.

18. For the reasons stated, I conclude that the admission of the evidence quoted at the end of paragraph 2 a of this opinion (record, p. 19) constituted error prejudicial to the substantial rights of accused, and that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Archibald King, Judge Advocate.

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

Board of Review
CM 211866

JUN 2 3 1939

UNITED STATES	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Myer, Virginia, May 25, 1939. Karvajna: Dishonorable discharge and confinement for six (6) months; Hutton: Acquitted. Fort Myer, Virginia.
Privates JOSEPH A. KARVAJNA (R-3602674), DEML, Headquarters Company, Washington, D. C.; WILLIAM F. HUTTON (6836185), Company C, 8th Quartermaster Regiment.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial of the soldiers named above has been examined by the Board of Review.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William F. Hutton, Company "C", 8th Quartermaster Regiment, Washington, D. C., and Private Joseph A. Karvajna, DEML, Headquarters Company, Washington, D. C., acting jointly and in the pursuance of a common intent, did, at Washington, D.C., on or about May 1, 1939, feloniously take, steal and carry away one russet leather bag, value about $7.00, one steel automobile trunk, value about $3.00, one pair riding boots with boot-trees, value about $5.00, total value about $15.00 the property of the Women's Army and Navy League, an unincorporated society, Washington, D. C.

The accused each pleaded not guilty to the specification and charge. The court found Hutton not guilty of the specification and charge. With respect to Karvajna, it made the following findings (record, p. 35):

"Of the specification...GUILTY, except the words 'Private William F. Hutton, Company C, 8th Quartermaster Regiment, Washington, D. C., and' and 'acting jointly and in the pursuance of a common intent' and 'take, steal and carry away;' substituting for the words 'take, steal and carry away' the words 'embezzle by fraudulently converting to his own use;' of the excepted words NOT GUILTY; of the substituted words GUILTY.
"Of the charge .....GUILTY."

The court sentenced Karvajna to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six (6) months. The reviewing authority approved the sentence imposed upon Karvajna and transmitted the record of trial for action under Article of War 50½.

3. Because of the error mentioned in paragraph 4, post, the Board of Review finds it unnecessary to set out the evidence. In addition to that error, the record of trial shows on almost every page receipt of evidence inadmissible as hearsay, conclusion, or otherwise. It is doubtful whether the prosecution proved legal title to the articles mentioned in the specification to have been in the Women's Army and Navy League at the time of the alleged offense. It is also doubtful whether it proved the nondelivery by accused of the articles at the rummage sale conducted by that league and excluded the possibility that they had bought them at that sale. The foregoing errors and omissions are so numerous and grave that the Board doubts whether it could hold the record legally sufficient to support the sentence imposed upon Karvajna even if the fatal error hereinafter discussed had not been committed, but the Board finds it unnecessary to make a definite decision as to the other errors and omissions and proceeds to discuss the error which it considers fatal.

4. That error is the finding of the court as to Karvajna excepting from the specification words alleging larceny and substituting those alleging embezzlement.

5. According to paragraph 78 c, Manual for Courts-Martial, and the custom of the service, a court-martial may make findings with exceptions and substitutions: -

a. As to figures, dates, amounts, or other details "provided that such action does not change the nature or identity of any offense charged"; or

b. If the evidence fails to prove the commission of the offense charged but proves the commission of a lesser offense included within it.

6. By way of illustration of these principles, the Board refers to Dig. Ops. JAG 1912-30, sections 1459, 1533 (6); same, Supp. VII, sections 1459, 1518 (2), 1535, 1578 (1).

7. The exceptions and substitutions made by the court in the present case do not relate merely to details. They go to the substance and change the identity of the offense. Larceny and embezzlement are distinct in history as in nature. Larceny is a common law offense of the greatest antiquity, one of whose elements is a trespass by accused upon personal property of another. This left unpunished the wrongdoer who came into possession of another's personal property with the consent of the owner and afterward applied it to his own use in violation of the terms upon which it was intrusted to him. Such a man was not guilty of larceny, since he committed no trespass, and at common law he could not be punished at all. To fill this gap in the criminal law, the English parliament, followed by the legislatures of our states and by Congress, enacted statutes creating and defining the crime of embezzlement, the most important element of which is, not trespass, but breach of a trust by the accused with respect to property placed in his possession by another.

8. Nor, in the opinion of the Board, can the substitutions made by the court be supported on the theory that embezzlement is a lesser offense included in larceny. As has been pointed out in the preceding paragraph, embezzlement includes as its most important element a breach of trust by accused. Larceny contains no such element. A cannot be contained in B if A includes an element not found in B.

9. The staff judge advocate cites Dig. Ops. JAG 1919, page 439, as supporting the view that embezzlement is a lesser offense included in larceny. In that case, CM 135839, De Graff, accused was convicted, inter alia, of two specifications in violation of the 93rd Article of War, one alleging larceny of two transportation requests, and the other fraudulent conversion of the same requests to his own use. The later specification contained no allegation that the transportation requests were intrusted to accused or that they came into his possession by virtue of his employment. The Board of Review said:

> "As to Specification 2, Charge I, the theft of the requests for transportation necessarily included their conversion to the use of the thief. The conversion oc-

curred when the theft occurred, and was included in the charge of larceny. There is no reason for charging it in a separate specification."

The Board held the record legally insufficient to support the conviction of Specification 2, Charge I, alleging conversion. Conversion is an element common to larceny and to embezzlement; but, as has already been pointed out, there is at least one element in each offense not found in the other. Unless it was done inferentially by the use of the word "fraudulent" before "conversion", Specification 2, Charge I, in the De Graff case did not allege embezzlement, since it did not allege a breach of trust. A wrongful conversion not involving a breach of trust may be a lesser offense included in larceny (Dig. Ops. JAG 1912-30, Supp. VII, sec. 1488 a). If the De Graff case can be construed as holding that embezzlement is a lesser offense included in larceny, the Board of Review feels it its duty to overrule it; but the Board does not think that such is the correct interpretation of that case.

9. The precedent most nearly in point is the recent case of Short, CM 211377, in which, before voting on the findings, the court undertook with the consent of the defense counsel to amend the specification by substituting words alleging embezzlement for those alleging larceny. The Board of Review said in that case:

> "It is the holding of the Board of Review that the apparent inartificial effort of the court to amend Specification 3, with the consent thereto of counsel for the accused, was violative of paragraphs 66 and 73, Manual for Courts-Martial, 1928, which authorize an amendment to the pleadings as to matters of form only, and that, therefore, the purported amendment, being a substantial change in the specification, was a nullity. It is the further holding of the Board that, irrespective of the evidence adduced before the court, the finding of guilty of embezzlement reached and announced in open court being for an offense entirely separate and distinct from the offense charged, the record of trial is legally insufficient to sustain the findings and the sentence. That a court may not legally find an accused guilty of an offense with which he has not been charged in the arraignment and which does not comprise a lesser included offense therein, is deemed too elementary a question of law to require discussion (CM 124780, Fitzgerald; CM 193191, Hosmer; secs. 1405, 1459, 1533 (6), 1534 (2), Dig. Ops. JAG 1912-30; secs. 1534, 1535, 1578, Dig. Ops. JAG 1912-30, Supp. VII)."

10. The only difference between the Short case and that now before the Board is the time when and manner in which the court amended the specification. The change made was the same, and the precedent is in principle applicable to the present case, and should be followed.

11. For the reasons stated, the Board holds that the record of trial is legally insufficient to support the findings made by the court with respect to Private Karvajna and the sentence imposed by it upon him.

Archibald King, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 211898

JUL 8 1939

UNITED STATES	)	EIGHTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, May 22, 1939. Dishonorable discharge and confinement for one (1) year. Fort Bliss, Texas.
Private JAMES C. SHELTON (6286212), Service Battery, 82d Field Artillery	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private James C Shelton, Service Battery, 82d Field Artillery, did, at or near Fort Bliss, Texas, on or about February 25, 1939, neglect to take proper prophylactic treatment after illicit sexual intercourse and did thereby develop a venereal disease, to wit: "NEW" Syphilis, primary.

Specification 2: In that Private James C Shelton, Service Battery, 82d Field Artillery, did, at or near Fort Bliss, Texas, on or about February 25, 1939, wrongfully unfit himself for military duty by contracting a venereal disease, to wit: "NEW" Syphilis, primary.

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

Specification: In that Private James C. Shelton, Service Battery, 82d Field Artillery, did, at Fort Bliss, Texas on or about March 20, 1939, desert the service of the United States and did remain absent in desertion until

he was apprehended at Naco, Arizona, on or about March 20, 1939.

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

Specification: In that Private James C. Shelton, Service Battery, 82nd Field Artillery, having been restricted to the limits of Post by Standing Orders, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about March 20, 1939, break said restriction, by going to Naco, Arizona.

3. Accused submitted a plea in abatement to Specification 2, Charge I, and to Additional Charge II and the specification thereunder on the ground that they were redundant, citing Manual for Courts-Martial, paragraphs 27 and 66. The court denied the plea as to Specification 2, Charge I, but allowed it as to Charge II and the specification thereunder alleging breach of restriction. Accused then pleaded not guilty to the charges and specifications left standing against him. The court found him not guilty of Specification I, Charge I, alleging neglect to take prophylaxis, and guilty of the remaining charges and specifications. The court sentenced accused to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year. The reviewing authority approved the sentence, designated Fort Bliss, Texas, as the place of confinement, suspended the execution of the sentence, and transmitted the record of trial for action under Article of War 50½.

4. It results from the foregoing summary that accused stands convicted of two charges and two specifications only:

a. Charge I (Violation of Article of war 96) and Specification 2 thereunder, alleging that accused wrongfully unfitted himself for duty by contracting syphilis; and

b. Additional Charge I (Violation of Article of War 58) and the specification thereunder, alleging desertion.

5. The Board first considers the specification mentioned in subparagraph a, Specification 2, Charge I, alleging that accused wrongfully unfitted himself for military duty by contracting syphilis. The specification is set out in full in paragraph 2, ante. Does it state an offense? This question was at first involved in doubt (C 23429, June 8, 1908, JAG 250.451, Oct. 20, 1921), but later decisions authorize an affirmative answer to the question (JAG 710, Nov. 27, 1923; JAG 250, 451, Feb. 5, 1924; JAG 250.451, Oct. 17, 1928; JAG 250.3, Nov. 27, 1928;

JAG 710, Aug. 19, 1935). Along with the opinions above mentioned there are others expressing doubt of the wisdom and policy of punishing a soldier for incapacitating himself by acquiring a venereal disease (JAG 250.451, Oct. 20, 1921; JAG 333.1, March 3, 1938; JAG 726.1, June 9, 1938). The opinion last cited thus sums up the result of the previous opinions as well as the views of its author:

> "Although punitive action against a soldier who renders himself unfit to perform his military duties by contracting a venereal disease has been upheld as legal, such type of action is not in general use, and it is believed should not supersede the prevailing one of punishment for failure to employ a prophylactic treatment. Emphasis is given the matter of employment of prophylactics by punishment in proper cases of neglect and thus fits in as a natural part of the educational program relative to venereal diseases."

6. The Board of Review concludes that, as a strict matter of law, the specification under consideration states an offense, but the question remains whether or not it is proved. Apart from two inadmissible statements by the first sergeant and another soldier of his battery that accused had been in hospital undergoing treatment for venereal disease (Ex. C, Q. 4; Ex. D, Q.4), the only evidence in support of the finding of guilty of the specification under consideration is:

a. A stipulation in the following language (record, p. 6):

> "That this paper I hold in my hand is the registration card of Private James C. Shelton, the accused, made at the time of his entrance in William Beaumont General Hospital; that the data entered thereon shows the medical record of accused as follows: '1. 'NEW' Syphilis, primary Diagnosis; manifested by demonstration of T.P. in ulcer on prepuce of penis. Line of duty, No AR 35-1440. Date of appearance of initial symptoms, March 1, 1939.' That said medical record was made by Captain Joseph S. Cirlot, and that the signature appearing on this record of William Beaumont General Hospital, is his signature."

b. Exhibit A, as follows:

> "William Beaumont General Hospital
> El Paso, Texas
> March 11, 1939
> (Date)
>
> SUBJECT: VENEREAL DISEASE.
> To: The C.O. Serv. Btry. 82nd FA
> Fort Bliss, Texas

The following named man of your organization was admitted to hospital,
March 1, 1939
(Date)
Shelton, James C. (6286212) Private
(Name) Serial No. (Rank)
1. 'NEW' Syphilis, primary,
Diagnosis: manifested by demonstration of T.P. in ulcer on prepuce of penis.
LINE OF DUTY: NO AR 35-1440.
Date of appearance of initial symptoms
March 1, 1939
Any change in the line of Duty in this case, while in hospital will be reported.
For The Commanding Officer:
/s/ Joseph S. Cirlot
Joseph S. Cirlot, Capt., MC, Registrar."

It should be noted that the foregoing stipulation does not say that Captain Cirlot had treated or even examined accused, or that he would testify to certain facts as to accused's condition. It is merely a stipulation as to the existence and contents of a certain record, and can have no more evidential value than the record itself. There is no evidence or stipulation showing what, if any, knowledge of accused's condition was had by Captain Cirlot, the maker of the record. Except for the fact that the record is on a mimeographed form, there is no evidence that it was made in the regular course of business of the hospital. For the reasons suggested, the admissibility of the record (Ex. A) is open to doubt; but, if that objection be passed over, what does the record show as to accused's condition? Merely that on March 11, 1939, accused was admitted to William Beaumont General Hospital, suffering from a new case of syphilis manifested by an ulcer on the prepuce of his penis. But one necessary element of proof is the wrongfulness of accused's conduct in unfitting himself for duty by acquiring syphilis. Even if it be inferred from the location of the ulcer that the syphilis was acquired by sexual connection, there is no proof that that connection was illicit. There is in the record no evidence whatever to show that accused was unmarried or that he did not acquire the infection from lawful intercourse with his wife, or that the disease was not contracted in some lawful manner. CM 208730, Fish. There must be some evidence of this sort before the Board can hold such a specification as that under consideration to be proved.

7. The Board next considers additional Charge I and the specification thereunder, alleging desertion at Fort Bliss, Texas, March 20, 1939, terminated by apprehension at Naco, Arizona, the same day. The initial absence without leave was properly proved by a certified extract copy of the morning report of Service Battery, 82d Field Artillery (Ex. B), showing the following entry:

"March, 1939:
20th: Pvt Shelton duty to AWOL 6:00 AM."

The prosecution undertook to prove the date, place, and circumstances of the termination of accused's absence by a deposition of Julian C. Collier, Patrol Inspector, United States Immigration and Naturalization Service Border Patrol (Exhibit E), and by a printed form headed "Receipt for Persons and Contraband" filled in by carbon copy of typewriting (Ex. F). The first part of the form appears to be a report of apprehension of accused and purports to be signed by Mr. Collier. The second part is a receipt for accused and is signed by "William W. Lloyd, Captain, 25th Inf., Adjutant". Captain Lloyd (p. 9) testified that Mr.Collier of the Border Patrol came into his office March 20 and said that he had a soldier outside in his car and handed the witness a typewritten report. The witness went outside, saw accused sitting in the car, and turned him over to the bugler of the guard to be confined. The witness identified his own signature on Exhibit F, and stated that he signed the original and made three copies, two of which he returned to Mr. Collier. Exhibit F was received in evidence over the objection of the defense. The paper should have been excluded. Mr. Collier's signature to it was not identified; it was not shown, unless by inference from the fact that it was on a printed form, that it was made in the regular course of business; and it was a mere repetition of Mr. Collier's deposition. This last fact renders harmless the error in receiving Exhibit F in evidence.

8. In Exhibit E, the deposition of Mr. Collier of the Border Patrol, the deponent says that he found accused on a west bound freight train at Naco, Arizona, on March 20, wearing several articles of Army clothing. Accused denied being in the military service, and in answer to a question said that he had borrowed the Army clothing from a discharged soldier with whom he was traveling. So much of the deponent's testimony was clearly admissible. He next testified that accused's companion told him that all he had lent accused was a pair of boots. This was inadmissible as hearsay. The deponent then continued (Q.7):

> "* * * I then questioned the accused further and tried to explain to him why it would be better to give himself up & admit the truth, go back to the Army & take punishment & start over with a clear slate, than to continue lying, as I was going to deliver him any way to Ft. Huachuca as I was convinced that he was a deserter. * * *"

9. As what followed amounted to a confession of desertion, the question is presented whether the statements made by Mr. Collier to

accused, as set out in the above quotation, made the confession involuntary and therefore inadmissible. In M.C.M., par. 114a, it is said:

> "Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. * * *" (Underscoring supplied)

10. If Mr. Collier had told accused that he would lock him up in the town jail or prosecute him before the civil courts, unless accused admitted being a soldier, it might plausibly be argued that he had power to do what he threatened and that a confession thus obtained was involuntary. But Mr.Collier told accused that he was going to deliver him at Fort Huachuca anyway, and any soldier would know that a civilian border patrolman would be incompetent to effectuate (to use the language of the Manual) any change in the disposition of his case by the military authorities.

11. In section 1293(1), Dig.Ops.JAG 1912-30, it is said:

> "After the accused had been arrested by the civil authorities, he was told by them that they 'had the goods on him, and that he just as well come clean, but no promise of any kind was made.' Paragraph 3, Manual for Courts-Martial (par. 114a, M.C.M., 1928), enjoins upon courts-martial an affirmative showing that the confession was voluntary on the part of the accused. It is not shown that this confession was voluntary. The corpus delicti was not proved. Conviction is disapproved. C.M. 121458 (1918)."

The reference to paragraph 3, M.C.M., is an obvious error for paragraph 225, M.C.M., edition of 1916. That paragraph goes further than paragraph 114a of the 1928 edition of the Manual for Courts-Martial in requiring affirmative proof of the voluntary character of a confession. The Board has examined the case digested. There was another and better reason for rejecting the confession in that case, also discussed in the review, namely absence of proof of the corpus delicti. The Board doubts if it would today go so far in rejecting a confession as to follow strictly the digest paragraph. Be that as it may, in the case digested the deputy sheriffs were dealing with a civil offense which it was supposed would be tried in a state court, and concerning which it might be supposed they had some authority; whereas in the present case the

patrolman was a civilian talking to accused about a military offense concerning the disposition of which he could not speak with authority.

12. In the recent case of Alexander, CM 210693, the Board said:

"* * * Here again the Board finds a rule of evidence excluding involuntary confessions, on the theory that, if involuntary, the confession is likely to be false, i.e., the statement of an innocent man falsely accusing himself. The rule is of undoubted utility in preventing the use of confessions obtained by torture or so-called third degree methods, but of these there is no suggestion in the present case. As applied in other cases, the rule is of doubtful utility, as the Board considers the likelihood of an innocent soldier falsely accusing himself, except as a result of torture or other very strong pressure, so remote as to be negligible. The rule is, of course, too well established for the Board to overthrow, and it makes no attempt to do so; but the Board is unwilling to extend the rule in doubtful cases further than the precedents require."

13. The Board concludes that accused's confession was admissible, and that the record supports the conviction of desertion.

14. The Board holds the record of trial legally insufficient to support the findings of guilty of Charge I and the specifications thereunder, but legally sufficient to support the findings of guilty of Additional Charge I and the finding thereunder and the sentence.

Archibald K. Judge Advocate

George A. Fraser Judge Advocate

George B. Crawford Judge Advocate.

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

(161)

Board of Review
CM 211900

AUG 1 7 1939

UNITED STATES	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, June 5, 1939. Dishonorable discharge and confinement for six (6) months. Langley Field, Virginia.
Private First Class PRESTON A. EDWARDS (6348482), Operations Section, Base Headquarters and 1st Air Base Squadron, GHQ, Air Force.	)	

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. The accused was tried on a single charge and specification, as follows:

CHARGE: Violation of the 94th Article of War.

Specification: In that Pvt.1cl. PRESTON A. EDWARDS, Operations Section, Base Hq & 1st Air Base Squadron, GHQ Air Force, being at the time First Cook on Duty, did, at Langley Field, Virginia, on or about May 16, 1939, feloniously embezzle by fraudulently converting to his own use BACON, Issue (Slab, approximately eight (8) pounds) of the value of approximately One Dollar and Fifty Two cents ($1.52), the property of the United States furnished for use in the Military Service thereof, intrusted to him, the said First Cook on Duty by the Mess Sergeant, St/Sgt ALPHONSE POTVIN, Operations Section, Base Hq & 1st Air Base Squadron, GHQ Air Force.

Accused pleaded not guilty to and was found guilty of the charge and specification thereunder and was sentenced to dishonorable

discharge, forfeiture of all pay and allowances, and confinement at hard labor for six (6) months. The reviewing authority approved the sentence and suspended the dishonorable discharge until the soldier's release from confinement (G.C.M.O. 83, Third Corps Area, Baltimore, Maryland, June 17, 1939).

3. The Board refrains from stating the evidence for the prosecution in detail but summarizes it as follows:

a. Accused was one of the cooks in the mess of the Operations Section, Base Headquarters and 1st Air Base Squadron, GHQ Air Force, Langley Field, Virginia. Staff Sergeant Potvin, mess sergeant of that organization, drew and signed for bacon issued to the mess by the commissary, but the cooks had keys to everything. The evening of May 15th there were eleven slabs of bacon on hand, and on the morning of the 16th only four. Accused told Sergeant Potvin that five slabs had been used for breakfast. Five or six slabs is the most used at a meal. Upon these matters being reported to him, Lieutenant Gephart opened accused's wall locker and found therein a slab of bacon of the kind issued by the commissary. He left it there and had the room watched to see that nothing was taken from it. Accused entered the room several times, took a shower, changed his clothes, and went to the day room. Lieutenant Gephart again examined accused's locker and found no bacon therein. He then summoned accused and asked him what he had done with the bacon recently in his locker. Accused pointed to a barrack bag on his foot locker, in which were found two halves of a slab of bacon, which accused admitted he had gotten in the kitchen. It was stipulated that the bacon in question weighed eight pounds and was of the value of $1.52.

b. Accused was then taken to the provost marshal's office, where, after proper and repeated warnings, he made the following confession (Ex. B):

> "'I took the Bacon out of the Mess Hall about 4:00 A.M. May 16, 1939 and put it in my wall locker in my room intending to use the Bacon for my own use. * * *.'"

4. The case raises the question whether the offense shown to have been committed by accused was embezzlement, as charged, or larceny.

5. CM 206567, Sneeden and Press, was a case of the wrongful taking by two enlisted cooks of food from the refrigerator and other containers in the Army kitchen in which they worked. A conviction of larceny was upheld.

6. In the recent case of Houston, CM 211810, accused was convicted of embezzlement of a photographic lens, property of the United States furnished and intended for the military service, in violation of Article of War 94. The evidence showed that the accused in that case was an enlisted man employed as assistant in an Army photographic laboratory. Sergeant Dees was in charge of the laboratory and signed memorandum receipts for the property therein. Accused substituted a cheap lens owned by him for an expensive lens owned by the Government and used in the laboratory and elsewhere, and requested another soldier to carry the Government lens to the barrack and put it in accused's barrack bag there, which the other soldier did. After a detailed examination of the authorities, the Board of Review held, with the approval of The Judge Advocate General and the Secretary of War, that accused, as a photographer, had access to the Government lens, but not possession of it, that his taking of it constituted a trespass, and that his offense was larceny and not embezzlement. The conviction of embezzlement was therefore set aside and vacated.

7. In the present case, Staff Sergeant Potvin testified (p. 10) that he, as mess sergeant, personally drew and signed receipts for the bacon issued to the organization, and that the cooks "have the keys to everything". That means that accused had mere access to the food in the storeroom or refrigerator and not possession of it. Sergeant Potvin in the present case occupied a position like that of Sergeant Dees in the Houston case, and the present accused one like that of Houston. The Board concludes that the Sneeden and Houston cases cannot be differentiated from the present and are controlling, that accused's taking of the bacon involved a trespass, and that his offense was larceny and not embezzlement.

8. The prosecution offered in evidence a confession by accused, ante, paragraph 3 b, made after warning given and in answer to questions put by Sergeant Roof. The receipt of this confession was vigorously opposed by the defense on the ground that it was obtained under duress. One witness, Lieutenant Busse (p. 23), was present when Sergeant Roof gave the warning

and put the questions to accused, and testified with reference thereto. Another witness, Corporal Winbourne (p. 27), was present when accused signed the confession and so testified. On page 27, the record shows the following colloquy:

> "Court to trial judge advocate: Do you plan to call Sergeant Roof?
> "Trial Judge Advocate: That is impossible. Sergeant Roof is in the hospital."

9. In view of the repeated accusations by the defense of duress by Sergeant Roof, the Board is inclined to believe that the prosecution ought to have obtained his testimony unless he was so seriously ill as to make it, in the opinion of the medical officers attending him, harmful to him to give it. The mere fact that he was in the post hospital was not a bar to doing so. The court might have adjourned to the hospital and heard Sergeant Roof's testimony in some room there to which he might have been brought, or it might have assembled round his bed and heard his testimony. If these courses had been considered inadvisable for medical reasons, the medical officers might have consented to the taking of his testimony by deposition. However, the failure to obtain Sergeant Roof's testimony did not constitute prejudicial error, as Lieutenant Busse and Corporal Winbourne testified to the circumstances attendant upon the making of the confession. Their testimony indicates that it was voluntarily made, and the defense produced no evidence to the contrary.

10. For the reasons above indicated, the Board is of opinion that the record is legally insufficient to support the findings and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., [illegible] 1939- To the Secretary of War.

1. I do not concur in the foregoing opinion by the Board of Review that the record of trial in the case of Private First Class Preston A. Edwards (6348482), Operations Section, Base Headquarters and 1st Air Base Squadron, GHQ, Air Force, is legally insufficient to support the findings of guilty and the sentence.

2. The unexecuted portion of the sentence to dishonorable discharge (suspended), total forfeitures and confinement was remitted August 26, 1939 (G.C.M.O. No. 131, Hq. 3rd C.A., 1939). Further action on the record is necessary for determination of the legality of that portion of the sentence involving forfeitures carried into execution prior to the remission. Because of the fact that the rights of accused would not seriously be affected by taking additional time to study the case, I have delayed action thereon in order to have the benefit of study by other officers in this office.

3. The evidence shows that accused, "first cook on duty" (R. 11) in the mess of his organization (R. 6), was "in charge" of the kitchen and stores therein during the absence of the mess sergeant (R. 11) and along with other cooks was "entrusted" with bacon issued to the mess and "had keys to everything" (R. 10). The mess sergeant having discovered an apparent shortage in bacon, a search was made whereupon a slab of the issued bacon was found in accused's personal locker. Accused later removed the bacon to a barracks bag (R. 13, 14). In response to a question as to why he had taken the bacon he stated that he "needed it for himself" (R. 14).

4. The Board of Review interprets the evidence as falling short of establishing that accused had <u>possession</u> of the property at the time of his appropriation of it, but as showing only that he had <u>access</u> to the property. Its opinion that the record of trial is legally insufficient to support the findings of guilty of embezzlement is based upon this interpretation of the facts and a legal premise that embezzlement as denounced by the Articles of War may be accomplished only if the offender at the time of the fraudulent appropriation has possession of the property. The board cites as precedents for its views an approved opinion in CM 211810, <u>Houston</u>, and an approved holding in CM 206567, <u>Sneeden</u>, <u>et al</u>.

In my opinion the evidence shows that accused not only had access to the property but that the property had been intrusted to him and had lawfully come into his hands. I believe that his fraudulent appropriation of the property under such circumstances amounted to a breach of trust and constituted embezzlement as that offense is defined by the Manual for Courts-Martial and by the Federal civil courts.

5. Paragraph 149 h of the Manual for Courts-Martial defines the offense of embezzlement denounced by Article of War 93, as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U. S. 268.)
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

It is enough that the property comes lawfully into the hands of the offender under circumstances which make his conversion a breach of trust. There is no requirement that control of the property by the offender shall be of any greater degree or that such control amount to possession within the meaning of that term as defined by the Manual in relation to larceny as "the present right and power absolutely to control a thing" (par. 149 g, Manual for Courts-Martial).

The definition quoted appears in substantially the same language in a decision by the Supreme Court of the United States in Moore v. United States (160 U.S. 268, 269). The language of the Moore case was quoted with approval by the same court in Grin v. Shine (187 U.S. 181, 196), and by a United States Circuit Court of Appeals in Schell v. United States (261 Fed. 593, 595). In Cooper v. United States (30 Fed. (2d) 567), and Weinhandler v. United States (20 Fed (2d) 359), the principle involved in the definition was applied. The Board of Review, with the approval of one of my predecessors, applying this definition and citing precedents of this office, has expressed the view that distinctions between possession and custody are immaterial in embezzlement cases.

6. The circumstance that larceny may be committed by a servant or other person with respect to property lawfully placed in his custody, the owner retaining legal possession (see par. 149 g, Manual for Courts-Martial; CM 206567, Sneeden, et al), does not mean that fraudulent appropriation of the property may not also amount to embezzlement if there be a breach of trust by the person to whom the property has been intrusted or into whose hands it has lawfully come. It is elementary that a particular act or omission may result in the commission of two or more distinct offenses if all the elements of two or more such offenses are present.

7. My views as herein expressed do not involve a conclusion that there is no legal distinction between embezzlement and larceny. Larceny involves a trespass against the owner's possession within the meaning of the term as laid down in paragraph 149 g, Manual for Courts-Martial; embezzlement involves some degree of lawful control and a breach of trust. In many cases the facts are such that the proper classification of the particular misdeed as larceny or embezzlement is manifest. There is a very considerable field in which classification is difficult and in which error in differentiation may be fatal. In view of this practical but highly technical difficulty, I recommended by memorandum to The Adjutant General, dated October 21, 1939, an amendment of Article of War 37 to provide, in effect, that misdescription of an offense as embezzlement when it is larceny, or vice versa, may be treated as harmless.

8. In its opinion the Board of Review relies primarily on CM 211810, Houston, a case in which the board, with my concurrence, expressed the view that the accused did not have rightful custody or possession of the property found to have been embezzled and that he was not intrusted with it. The board concluded that accused had access only to the property and that his offense was not embezzlement. My concurrence in that conclusion and my recommendation that the findings and sentence be vacated are not to be construed as involving the view that embezzlement may be committed only with respect to property of which the offender has possession as distinguished from lawful custody.

9. I recommend that the action of the reviewing authority approving the sentence be confirmed. A form of action to accomplish

such confirmation is inclosed herewith, marked form "A". A form of action to disapprove the findings and sentence in accord with the opinion of the Board of Review, marked form "B", is also inclosed for your use should you deem such action appropriate.

Allen W. Gullion,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Form "A".
Incl 3 - Form "B".

Sentence confirmed by Secretary of War.

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

(169)

Board of Review
CM 211931

AUG 10 1939

UNITED STATES	)	HAWAIIAN DEPARTMENT
v.	)	Trial by G.C.M., convened at Fort Shafter, T. H., June 5, 1939. Dismissal.
Major SENIUS J. RAYMOND (0-8031), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial in the case of the officer named above 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 61st Article of War.

Specification: In that Major Senius J. Raymond, Quartermaster Corps, being at the time Duty Officer of the Watchman System of guard in force at Fort Armstrong, Territory of Hawaii, and as such required during his tour of duty to be and remain in the Richards Street area or the Fort Armstrong area or in the area leading directly between such areas, did, without proper authority or leave, at Fort Armstrong, Territory of Hawaii, during the night of December 5-6, 1938, absent himself from his proper place of duty as such Duty Officer, by going to the American Legion Hall on Kapiolani Boulevard, to his quarters on Lewers Street, and to the Ramona Cafe on Ala Moana, all in the City of Honolulu and outside of said areas and his proper places of duty.

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

Specification: In that Major Senius J. Raymond, Quartermaster Corps, did, at Fort Armstrong, Territory of Hawaii, on or about December 7, 1938, with intent

to deceive his superior officer, Major Clarence H. Kells, (Inf) w/Quartermaster Corps, Commanding Officer, Provisional Battalion, QMC, Fort Armstrong, in reply to an official communication inquiring where he was between midnight December 5-6, 1938, and 1:45 A.M., December 6, 1938, write, sign and submit the following official statement:

"1st Ind.

Major S. J. Raymond, Q. M. C., Fort Armstrong, T. H., December 7, 1938: To: Commanding Officer, Provisional Battalion, Fort Armstrong, T. H.

"1. To the best of my knowledge and belief I was in in duty room from midnight to about 1:30 A.M. At 1:45 A.M., was at the Richard Street Area.

(Signed) S. J. Raymond
Major Q.M.C."

which said statement was false and untrue and then known by the said Major Raymond to be false and untrue, in that he then well knew that from about 12:15 A.M. to about 1:30 A.M., December 6, 1938, he was not in the Duty Room but was absent therefrom and from his proper place of duty, without proper leave or authority, in the city of Honolulu.

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

Specification 1: In that Major Senius J. Raymond, Quartermaster Corps, being at the time Duty Officer of the Watchman System of guard in force at Fort Armstrong, Territory of Hawaii, did, at Fort Armstrong and in the City of Honolulu, Territory of Hawaii, during his tour of duty as such Duty Officer on the night of December 5-6, 1938, wrongfully and to the prejudice of good order and military discipline drink intoxicating liquor and intoxicating beverages to such an extent as to incapacitate and render himself unfit for the proper performance of his duties as such Duty Officer.

Specification 2: In that Major Senius J. Raymond, Quartermaster Corps, did, at Honolulu, Territory of Hawaii, during the night of December 5-6, 1938, while in uniform and during his tour of duty as Duty Officer of the Watchman System

of guard in force at Fort Armstrong, Territory of Hawaii, wrongfully and to the prejudice of good order and military discipline drink intoxicating liquor with two enlisted men, namely, Sergeant Lawrence H. Ross, Company "A", and Corporal Walter Bebber, Company "B", 11th Quartermaster Regiment.

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 of trial for action under the 48th Article of War.

3. The Board of Review adopts in substance as a part of this opinion the summary of the evidence and discussion in the review of the record of trial in the case by the Department Judge Advocate, Hawaiian Department, which is substantially as follows:

The case was tried and evidence presented with reference to Charge I, Charge III and Charge II, in the order named, and the evidence will be discussed in the same order.

With reference to Charges I and III and their specifications, the following facts were established by competent and undisputed evidence, including proof of voluntary admissions prior to trial and testimony by the accused himself as a witness under oath at the trial.

From about 11 a.m., December 5th to about 11 a.m., December 6, 1938, accused was Duty Officer of the Watchman System of guard in force at Fort Armstrong (R. 8, 36, 38). Early in the evening of December 5th, he drank two bottles of beer with his supper and later about half a pint of whiskey in the Duty Officer's room at the post, where he then went to bed and to sleep. About 12:15 on the morning of December 6th, he awakened, left the Duty Officer's room, stopped at his company barracks where he took Sergeant Lawrence H. Ross and Corporal Walter Bebber in his car and with them left the post (R. 31, 36). These two soldiers and Major Raymond himself testified that they went directly to the American Legion Hall on the Ala Wai, then to Pier 15, back to Major Raymond's quarters in the city of Honolulu, where each of the three drank at least a part of one whiskey highball, after which they returned to Depot Headquarters in the Richards Street area where an inspection was made, then to the Ramona Cafe where they had sandwiches and hot coffee, and then returned to Fort Armstrong (R. 17, 31, 32, 54). All of these facts were specifically admitted by Major Raymond testifying under oath as a witness on his own behalf

at the trial. They constitute definite and specific proof of all of the allegations under Charge I except the allegations that accused as such Duty Officer was required during his tour of duty to be and remain in the Richards Street area or the Fort Armstrong area or in the area leading directly between such areas and that his absence therefrom was without proper authority or leave. The facts likewise constitute specific and definite proof of Specifications 1 and 2 under Charge III except proof that the intoxicating liquor and beverages had been drunk in sufficient quantity to incapacitate and render him unfit for the proper performance of his duties as Duty Officer.

In order to prove that accused was, as alleged, required during his tour of duty to remain in the places specified in the specification under Charge I, the prosecution offered Exhibits "A" and "B". Exhibit "A" is Memorandum No. 4, Headquarters Hawaiian Quartermaster Depot, Fort Armstrong, January 26, 1938, which specifically requires the Duty Officer to sleep in Duty Officer's room and to be in the Richards Street area or the Fort Armstrong area or the area leading directly between such areas during his entire tour of duty unless permission to leave such areas be given by the Commanding Officer, the Executive Officer or the Adjutant. Exhibit "B" is a document containing the guard orders for the Hawaiian Quartermaster Depot, paragraph one thereof being as follows:

> "The Watchman System of guard is prescribed for this station, effective October 1, 1938, and these orders supersede Guard Orders, Headquarters Fort Armstrong, T. H., dated July 1, 1938."

The defense originally contended that these guard orders necessarily revoked Memorandum No. 4 with the result that after October 1, 1938, there were no orders requiring the Duty Officer to remain in the Richards Street or Fort Armstrong areas. The new guard orders contained in Exhibit "B" in express terms superseded the guard orders previously issued, dated July 1, 1938, but they did not purport to revoke Memorandum No. 4. Major Kells, the Adjutant, stated definitely that Memorandum No. 4 was still in force on December 5-6, 1938. However, the two papers speak for themselves and their legal effect is determined not by what Major Kells, the Adjutant, or the accused himself thought but by the contents of the documents themselves. In the absence of other proof there might be some contention that accused had been misled into misinterpreting the guard orders of October 1, 1938;

and that, although he was actually absent without leave from his post of duty, he was not intentionally so. This inference, however, is entirely overcome by the testimony of the accused himself, who later admitted that he knew on December 5th and 6th that he was required to remain in the areas specified in the specification under Charge I and that he was in fact knowingly absent without leave (R. 79). It was also proved beyond dispute that he had not obtained permission to leave these areas from the Commanding Officer, the Executive Officer or the Adjutant (R. 55, 59, 60).

With reference to Specification 1 of Charge III, the evidence showed that during the night of December 5-6, 1938, accused drank two bottles of beer, about half a pint of whiskey and part of a whiskey highball (R. 76). These facts are sufficient to warrant some inference that the accused was incapacitated for the proper performance of his duties as such Duty Officer; but in addition thereto the accused himself specifically admitted that during the time alleged he was so much under the influence of intoxicating liquor that he was unable to remember when he left the post during the night and in effect that he lost control not only of his memory but of his conduct.

With reference to Charge II and the specification thereunder, the evidence may be summarized as follows:

The record shows that after considerable investigation of the events which had occurred on the night of December 5-6, 1938, Major Clarence H. Kells, the Adjutant of the Hawaiian Quartermaster Depot and Commander of the Provisional Battalion of which Companies "A" and "B" commanded by Major Raymond were a part (R. 8, 56, 75), addressed and caused to be delivered to the accused some time about 11 a.m., December 7, 1938, an official memorandum requesting the latter to reply by indorsement, "giving a detailed account of where you were, what you did, etc., between 12:00 Midnight, December 5-6, 1938, and 1:45 A.M., December 6, 1938". In reply, accused, as alleged in the specification of Charge II, wrote, signed and submitted the following official statement:

"1st Ind.

Major S. J. Raymond, Q.M.C., Fort Armstrong, T. H., December 7, 1938.

To: C. O., Prov. Bn., Fort Armstrong, T. H.

"1. To the best of my knowledge and belief I was in in duty room from midnight to about 1:30 A.M. At 1:45 A.M. was at the Richard St. Area.

(Signed) S. J. Raymond
Major Q.M.C." (R. 47, Ex. "E".)

It is shown beyond dispute and admitted by accused prior to and under oath at the trial (R. 73, Ex. "G", R. 74-79) that, instead of being in the Duty Room from midnight until about 1:30 a.m., he had left it and the post of Fort Armstrong about 12:15 a.m., and that between that time and 1:30 a.m., he was absent without leave from his place of duty, visiting the American Legion Hall and drinking with two enlisted men of his command in his home in the city of Honolulu (R. 58, 79-83). The only issue involved is, therefore, the question whether at the time the accused submitted the indorsement he knew where he had been during the time involved, or whether he then honestly believed that he had been in the Duty Room during the time mentioned. Accused testifying as a witness admitted that during the night he had "drawn a blank" (R. 80) with the result that he had no idea where he had been or any sense of time after he left Fort Armstrong in order to make an inspection. If he had no idea where he had been, then of course the only truthful statement he could make was that he did not know where he was during the period covered by his loss of memory, and he could not truthfully say that to the best of his knowledge and belief he was in the Duty Room. According to the sworn testimony of accused at the trial, the statement was false; but the prosecution did not rely upon the legal consequence of the predicament in which the accused placed himself, which in itself is legally sufficient to support the allegation, but showed that the accused knew at the time he submitted the statement that it was false and untrue. The facts show conclusively that accused was able to remember exactly what he was doing until he left the post at 12:15 a.m., on the morning of December 6th with two enlisted men, whom he had picked up from their barracks at that time. An hour and a half elapsed, during most of which time accused was absent without leave from his place of duty; and then he appeared in the Richards Street area, where he had under his orders a right to be (R. 77). Immediately he remembers that and was able so to state in his official indorsement. In other words, he remembers very accurately where he was when he was at his places of duty and the only thing he was unable to remember was where he was when he was away from his place of duty.

Accused is a mature, experienced officer with approximately twenty-five years' service. It is taken for granted that he knew the serious consequences which would follow if he told the full truth in his indorsement to his commanding officer, Major Kells. He would have to admit that as Duty Officer he left his place of duty without proper leave or authority. He also very probably knew that this would lead to a further investigation which might involve his conduct in drinking during his tour of duty in the Duty Officer's room and later in his own home with two enlisted men. He must have been conscious of the fact that during the time inquired about he had while intoxicated broken the windows in his commanding officer's office. All of these facts gave him a very strong motive for concealing his whereabouts during the time specified, and he attempted to do so by the guarded statement that to the best of his knowledge and belief he was in the Duty Room during the time when he was actually absent without leave from his proper place of duty.

The court very properly rejected his explanation that at the time he made the statement he was unable to remember where he was during that particular period but was able to remember in detail events both prior and subsequent to the period inquired about.

The evidence contained in the record is not analyzed in minute detail, as substantially every element of each of the specifications under each of the charges is supported by the sworn testimony of the accused before the court.

He admitted each and every one of the allegations of the specification under Charge I. He likewise admitted not only that he drank intoxicating liquor and intoxicating beverages, as alleged in Specification 1 of Charge III, to such an extent as to incapacitate and render himself unfit for the proper performance of his duty as Duty Officer, but also that he drank to such an extent that later he could not remember where he was or what he did. He likewise admitted drinking with two enlisted men of his own command while in uniform and during his tour of duty as Duty Officer, as alleged in Specification 2 of Charge III.

In substance accused admitted, and the competent, undisputed evidence shows, that he was not in the Duty Room at the time he said he believed he was there. In order to convince the court that the basic statement which he now admits was contrary to the actual facts was made in good faith, he comes before the court with the explanation that when

he wrote the statement he did not know where he was at the time inquired about, because at that time he was too drunk to know what he was doing or where he was; but, whenever questioned he was able to give a detailed, truthful account of his conduct at all times prior and subsequent to his unauthorized absence from the post. His claim that he had a lapse of memory just at the time when such a lapse of memory would protect him from his serious misconduct is entitled to no serious consideration. This claim is further weakened if not entirely destroyed by the fact that he persisted in and confirmed his original statement in the first indorsement until he was finally confronted with the knowledge that his commanding officer, Colonel Frink, knew the truth. Then and only then did he admit that he was absent without leave from his post. It is true that he persisted to the end in the contention that he believed the statement to be true, but he has admitted facts which entirely destroy any such contention. It is obvious that he attempted by an untrue and misleading statement to conceal his misconduct on the night in question until he at last realized that his effort to conceal was futile. His own attempted explanation convicts him and his sworn testimony before the court is sufficient to sustain the findings of the court.

Accused called only one witness besides himself, Colonel Edgar S. Miller, U. S. Army, Retired, who testified to accused's good character and superior qualifications. Colonel Miller has known accused for sixteen years and while at Camp Meade in command of the Tank Battalion accused served under him and lived next door (R. 83, 84).

4. The accused is 49 years of age. The Army Register shows his service as follows:

> "Sgt. and 1 sgt. Co. C 4 Inf. Md. N. G. 19 June 16 to 4 Sept. 16; 2 lt. Inf. Sec. O. R. C. 2 May 17; accepted 14 May 17; active duty 14 May 17; capt. Inf. Sec. O. R. C. 15 Aug. 17; accepted 15 Aug. 17; maj. of Inf. U. S. A. 28 Apr. 19. accepted 29 Apr. 19; vacated 12 Oct. 20. - - Pvt. 103 Co. C. A. C. 21 July 09 to 20 July 12; capt. of Inf. 1 July 20; accepted 12 Oct. 20; Q. M. C. 17 June 33 to 26 Aug. 33; Q. M. C. 29 Sept. 33; trfd. to Q. M. C. 17 Aug. 34; maj. 1 Aug. 35."

5. 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 upon conviction of violation of the 61st and 96th Articles of War and mandatory upon conviction of a violation of the 95th Article of War.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

George B. Campbell, Judge Advocate.

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

Board of Review
CM 211978

JUL 2 4 1939

UNITED STATES	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Fort Sill, Oklahoma, June 9, 1939. Dishonorable discharge and confinement for one (1) year and four (4) months. Disciplinary barracks.
	)	
Private ELBERT E. RIDDLE (6241660), Battery B, 77th Field Artillery.	)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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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 65th Article of War.

Specification 1: In that Private Elbert E. Riddle, Battery "B", 77th F.A., did, at Fort Sill, Oklahoma, on or about May 15, 1939, assault Corporal Leslie I. Gregory, Battery "B", 77th F.A., a Non-Commissioned Officer who was then in the execution of his office, by striking him on the face with his fist.

Specification 2: In that Private Elbert E. Riddle, Battery "B", 77th F.A., did, at Fort Sill, Oklahoma, on or about May 15, 1939, use the following threatening language toward Corporal Howard H. Goldsby, Battery "B", 77th F.A., a Non-Commissioned Officer who was then in the execution of his office "I just hit one God-damned Corporal and the same thing goes for you, Corporal Goldsby" or words to that effect.

Accused pleaded not guilty to and was convicted of both specifications and the charge. No evidence of previous convictions was submitted. The court sentenced accused to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year and four (4) months. The reviewing authority approved the sentence and transmitted the record for action under Article of War 50½.

3. The principal witness for the prosecution with respect to Specification 1 was Corporal Gregory, whose testimony on direct examination may be summarized as follows (p. 4):

On the morning of May 15, 1939, I was returning from the bathroom to the west squad room after taking a shave. I got within two or three paces of my wall locker and I had my toilet articles and a towel in my hand and accused rushed up towards me and said, "You son of a bitch; I will get you now when you don't have any stripes on"; and he hit me and the next thing I knew he was trying to get me up pulling on my underwear. I didn't have any outside shirt on and I got up and backed up from him and told him, "Let me alone; I don't want to have any trouble with you". About fifteen paces from this spot I turned around to get away from him and he kept following me and we went in a clinch and broke. I told him that would be enough; there wasn't any use of causing any more trouble. I didn't hit back at him.

4. Corporal Gregory was cross-examined at great length, and it was brought out that he and accused had been out drinking together Friday night as friends; that accused's sister, Modine Riddle, lived with Corporal Gregory and his wife as companion to Mrs. Gregory and nurse to the baby; and that about 1 a.m., Monday, the 15th (the same day as the assault), accused came to Corporal Gregory's house and wanted to take his sister away from there and beat hell out of her. Corporal Gregory told accused that he was not going to do anything like that, whereupon accused cursed Corporal Gregory and called him an indecent name. Corporal Gregory then went and got a stick and accused departed.

5. Private First Class Louis A. Bowdre (p. 13) testified to the occurrence of a fight between accused and Corporal Gregory on the morning of May 15th right after or before reveille. The witness did not see the first blow but first saw Corporal Gregory sitting on the floor apparently knocked out. Corporal Gregory was dressed in slacks and underwear. The witness heard accused say: "Corporal Gregory, you don't have your stripes on now".

6. Private Howard E. Ousnamer, Battery B, 77th Field Artillery (p. 16), testified that while the witness was still in bed on the morning of May 15th, Corporal Gregory came into the room; that accused said something to the effect that the corporal didn't have his stripes on and hit him with his fist and Corporal Gregory fell down and they struggled around on the floor. Corporal Gregory had his toilet articles in his hand and no weapon of any kind.

7. The principal witness with respect to Specification 2 was Corporal Howard H. Goldsby, Battery B, 77th Field Artillery, whose testimony for the prosecution may be summarized as follows (p. 18):

Before first call accused came up to the third floor. He sleeps there. He was muttering and using bad language, and I told him to stop the noise, and he said: "I just hit one God-damned Corporal and the same thing goes for you, too, Corporal Goldsby". I warned him about the noise and to stop throwing cigarette butts on the floor, and he ridiculed me in a snotty manner. On cross-examination the witness denied that he had ever cursed a soldier or called him a son of a bitch.

8. Private Virgil R. Knight, Battery B, 77th Field Artillery (p. 20), confirmed Corporal Goldsby's testimony, but stated on cross-examination that he had heard Corporal Goldsby call privates sons of bitches and bastards.

9. For the defense the only witness called was accused's sister, Miss Modine Riddle (p. 22). She had been present Friday evening when the two men were drinking together as good friends. On Sunday night Corporal Gregory and his wife went frog hunting, leaving Modine at their house to care for their baby. Accused came to the house to get his guitar, and his sister would not let him have it. He came back later after the return of Corporal and Mrs. Gregory and wanted his sister to go with him. Mrs. Gregory went to the door and was talking with accused and Corporal Gregory jumped out of bed and grabbed a club and ran accused away.

10. That accused without justification struck the blow and uttered the threatening words alleged is fully proved; but the case raises the question whether, when the blow was struck and when the words were uttered, each of the noncommissioned officers in question was, as alleged, "in the execution of his office". Those words are found in the 65th Article of War; and, unless it be proved that accused was "in the execution of his office", that article was not violated, and the offenses were, at most, violations of the 96th and 90th Articles, respectively.

11. a. In Dig. Ops. JAG 1912, page 539, paragraph XII A 8 a (2), it is said:

"Under a charge of a violation of article 21 in offering violence to a superior officer, it should be alleged and proved that the officer assaulted was at the time in

the execution of his office.' R. 1, 462, Dec., 1862; 9, 90, May, 1864."

b. In Dig. Ops. JAG 1912-30, section 1522, is digested JAG 250.46, April 3, 1929, from which the following quotations are made:

"The essence of the offense of using insulting language towards a noncommissioned officer, under the 65th Article of War, is of course the insult to the office, not the affront to the person. Where the person holding the office is not exercising any of the duties thereof, an insult to him is not an insult to the office. Where he is performing any of the duties of his office the insult is, in part, at least, to his official investiture.

* * *

"It would not be advisable to lay down a hard and fast rule that in the case of a transaction involving a private soldier and a noncommissioned officer where both are of a certain organization it may always be presumed that the noncommissioned officer is in the execution of his office. Each case should be determined in the light of the facts and circumstances surrounding it."

12. The Board next turns to decided cases, which, in solving this as other problems, are usually more helpful than general statements of principle. It finds in the files of trials by general court-martial the following:

a. CM 150434, Pace. Accused was convicted of two specifications in violation of the 65th Article of War, one alleging a battery upon a noncommissioned officer, and the other the use of insulting language toward him, in both instances while in the execution of his office. The record shows that Sergeant Hartman of accused's company, Private Caesar, and accused were eating in the company mess hall, that there was some jesting between Sergeant Hartman and Caesar, that accused called Hartman an opprobrious name and asked if Hartman was throwing that remark at him (accused). Sergeant Hartman answered in the negative, and accused said that Hartman had better not throw any remark at him. After dinner, in the hall of the barrack, accused grabbed Sergeant Hartman by the shoulder, dragged him into the band room, said, "You did throw them remarks at me", and hit the sergeant twice on the cheek. The Board said:

"* * * The evidence fails to show that Sergeant Hartman, at the time of the offense alleged, was performing any act or duty either pertaining to or incident to his office, or exerting any authority legal or appropriate to his rank. He was not, therefore, 'in the execution of his office'. * * *."

The Board therefore held accused guilty of lesser included offenses only in violation of the 96th Article of War.

b. CM 156431, McSwain. Accused struck a corporal who was sitting in the day room reading. There had been no trouble between the two previously. The Board said:

"As has been seen the evidence in this case shows merely that at the time (before retreat) of the assault, Corporal Loya was sitting in the day room, reading. It is not shown that in so doing he was in the performance of any military duty or that he was in charge of that room or in fact any other circumstance from which reasonably it may be inferred that when assaulted by accused Corporal Loya was in the execution of his office."

The Board held the offense to be a violation of the 96th Article of War only and reduced the sentence accordingly.

c. CM 183835, Garrison. The facts are thus stated in a letter from The Judge Advocate General to The Adjutant General:

"The evidence shows that on August 12, 1928, Corporal Henderson was on duty as the noncommissioned officer in charge of quarters of his troop. While the Corporal was in the troop mess hall eating an early meal accused entered the room in a drunken condition. He addressed a remark to the Corporal which the latter ignored, whereupon accused struck the Corporal with his fist and a fight ensued."

The Judge Advocate General continued:

"* * * The evidence fails to show that Corporal Henderson at the time of the assault alleged was performing any act or duty either pertaining to or incident to his office or ex-

ercising any authority legal or appropriate to his rank. He was not, therefore 'in the execution of his office' within the meaning of Article of War 65 and as found under Charge I and its specification (C. M. No. 150434, Pace). * * *."

The Judge Advocate General therefore advised The Adjutant General to reduce the sentence accordingly.

d. CM 196923, Frakes. Accused, a captain, was convicted, among other offenses, of offering violence to Major Schillerstrom, his superior officer, who was then in the execution of his office, by threatening to strike Major Schillerstrom with his fist, in violation of the 64th Article of War. The evidence showed that Mrs. Frakes, in a bloody and disheveled condition, ran out of her husband's quarters and to those of Major Schillerstrom, whither Captain Frakes followed her. Major Schillerstrom told accused to go home, saying that he did not want trash like accused around. At this, accused became much excited and advanced toward Major Schillerstrom with his fist clenched, saying, "You can't talk to me like that; I will give you a poke in the jaw." Mrs. Schillerstrom stepped between the two men, and no blow was actually delivered. The Board said:

"The facts established by the testimony recited above demonstrate that both the accused and Major Schillerstrom were engaged in a purely personal discussion from the moment the accused arrived at Major Schillerstrom's quarters until he departed therefrom. * * *

"* * * It is evident that at the time of the alleged offer of violence Major Schillerstrom was not in any sense 'in the execution of his office' within the meaning of Article of War 64. In fact the demonstrated cause of the offer of violence was Major Schillerstrom's angry and insulting remark to the accused. * * * The language used by the latter [Major Schillerstrom] was such as naturally to arouse resentment, particularly on the part of a person who had theretofore had friendly and almost intimate social relations with the speaker, and as the language was not used in an official capacity the natural reaction to that language could not have been directed to the speaker in his official capacity, that is, while he was 'in the execution of his office'. But while accused's offer of violence does not constitute an offense under Article of War 64, it does constitute an offense under Article of War 63. * * *."

e. CM 203718, Adams. Accused was convicted of two specifications in violation of the 64th Article of War, both alleging violence against his superior officer, Lieutenant Hagman, who was then in the execution of his office. One charged accused with striking Lieutenant Hagman with his fist, the other with throwing a pitcher and a waste basket at him. It was shown that Lieutenant Hagman was in command of a Civilian Conservation Corps camp, that accused had been his second-in-command up to a few days before the alleged offenses, that there had been friction between them, that accused had been transferred to a nearby camp but returned from time to time to attend to unfinished business, that he had left certain personal effects in the room which he formerly occupied in the officers' quarters, that Lieutenant Hagman had packed up those articles, moved them out of that room, and installed the camp contract physician in it, that accused arrived at the camp about 3 a.m., discovered the room and bed formerly his occupied by another, could not find his effects, angrily entered Lieutenant Hagman's room, found him in bed, reproached him for moving the effects out, called him vile names, struck him with his fist, and threw a pitcher and a waste basket at him. The Board of Review quoted paragraph 145, Manual for Courts-Martial, as follows:

> "The commanding officer of a post, or of a command, or detachment in the field in the actual exercise of command, is constantly on duty. * * *."

The Board also quoted other authorities and concluded that Lieutenant Hagman was in the execution of his office when the offenses against him were committed.

13. The Board is not required to and does not reach any definite conclusion with respect thereto, but it doubts if it would have made the same decision as was made in the Garrison case, discussed in paragraph 12 c, ante. It is inclined to believe that a noncommissioned officer in charge of quarters occupies a position like that of the officer of the day. Each goes on duty for a limited time, usually twenty-four hours. The officer of the day is the representative and agent of the post commander to maintain order in the post during his tour, and the noncommissioned officer in charge of quarters would seem to be the representative and agent of the company commander for the same purpose in the barrack and company area during his tour. The Board leans to the opinion that during his tour each is on duty at all times, as the commanding officer himself was held to be at all times in the Adams case, ante, paragraph 12 e.

14. Be that as it may, the principle to be deduced from the cases cited in paragraph 12 is that a noncommissioned officer is not always in the execution of his office, even when in the barrack of his company; but is so only when in the discharge of some duty directed or authorized by regulations, orders, or the custom of the service.

15. The Board feels it its duty to follow precedents so numerous and the principle laid down so clearly and positively by them.

16. Applying that principle to the facts disclosed by the evidence with respect to the altercation between accused and Corporal Gregory, involved in Specification 1, the Board observes that the controversy between the two men had its origin away from the post with respect to matters not involving military duty. Corporal Gregory was returning to his locker after shaving. He was not at the time engaged in any duty pertaining to his rank, but was in a position analogous to that of Sergeant Hartman (par. 12 a, ante) and Corporal Henderson (par. 12 c, ante), who were eating dinner in the mess hall, and to that of Corporal Loya, who was sitting in the day room reading (par. 12 b, ante). The Board therefore concludes that Corporal Gregory was not in the execution of his office when struck.

17. The Board next considers the same problem with respect to Specification 2. Was Corporal Goldsby "in the execution of his office" when the threatening words were addressed to him by accused, Accused, muttering and using bad language, came into the squad room where Corporal Goldsby was. Corporal Goldsby told him to stop, and accused then used the threatening language alleged. In telling accused to stop muttering and using bad language, Corporal Goldsby was performing one of the normal and proper duties of a noncommissioned officer, i.e., to keep order in the barrack. In so doing he was in the execution of his office. The threatening remark was provoked by Corporal Goldsby's performance of his duty, and the order given by Corporal Goldsby and the threatening language which it called forth must be considered as a single transaction. The Board concludes that Corporal Goldsby was in the execution of his office.

18. The Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Specification 1 as involves the lesser included offense of assaulting Corporal

Gregory, a noncommissioned officer, by striking him on the face with his (accused's) fist, at the time and place alleged, in violation of the 96th Article of War. The Board holds the record legally sufficient to support Specification 2 and the charge. It holds the record legally sufficient to support so much of the sentence only as adjudges dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten (10) months.

Archibald K., Judge Advocate.

George A. Frazer, Judge Advocate.

(On leave), Judge Advocate.

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

Board of Review
CM 211990

AUG 1 8 1939

U N I T E D S T A T E S	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, June 22, 1939. Dishonorable discharge and confinement for six (6) months. Fort George G. Meade, Maryland.
Sergeant THOMAS F. HAUGHEY (R-2338837), Company H, 34th Infantry.	)	

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. The accused was tried on a single charge and specification, as follows:

CHARGE: Violation of the 94th Article of War.

Specification: In that Sergeant Thomas F. Haughey, Company H, 34th Infantry, did, at Fort George G. Meade, Maryland, on or about June 2, 1939, feloniously take, steal, and carry away sixty five (65) pounds of ham of the value of about $11.70, the property of the United States, furnished and intended for the military service thereof.

3. The competent legal evidence of record shows that the accused was on June 2, 1939, the mess sergeant of Company H, 34th Infantry, Fort George G. Meade, Maryland, and pursuant to duties devolving upon him as such mess sergeant, drew for the company mess certain authorized provisions, including 65 pounds of ham of the total value of about $11.70. The provisions drawn were all properly

delivered to the company kitchen except the ham, which was taken off the post by the accused and sold to a civilian merchant. The proof in support of the finding of guilty is uncontradictory, clear and conclusive.

4. The sole question for consideration is whether the accused had possession of the ham in question and therefore did not commit a trespass, or had the bare custody thereof. This case appears to be a similar one to that of Private First Class Preston A. Edwards (CM 211900), recently considered by the Board of Review, except that in the Edwards case, the accused was an organization cook charged with the embezzlement of bacon issued for use at the mess and not the mess sergeant as in the case under consideration. See also the recent case of Private First Class William T. Houston, Jr., CM 211810. In view of the discussion of the question of embezzlement and larceny in the cases above referred to, a repetition thereof is not deemed necessary in the instant case. In accordance with the principle laid down in the Houston and Edwards cases, supra, and the holdings of the Board of Review that the offense there committed was larceny and not embezzlement, the Board, based on the evidence submitted in the instant case, holds that the offense committed is embezzlement and not larceny and therefore is of the opinion that the record is legally insufficient to support the findings and sentence.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

1st Ind.

War Department, J.A.G.O., [illegible] 1939 - To the Secretary of War.

1. I do not concur in the foregoing opinion by the Board of Review that the record of trial in the case of Sergeant Thomas F. Haughey (R-2338837), Company H, 34th Infantry, is legally insufficient to support the findings of guilty and the sentence.

2. The unexecuted portion of the sentence to dishonorable discharge (suspended), total forfeitures and confinement was remitted effective August 31, 1939 (G.C.M.O. No. 132, Hq. 3rd C.A., 1939). Further action on the record is necessary for determination of the legality of that portion of the sentence involving forfeitures carried into execution prior to the remission. Because of the fact that the rights of accused would not seriously be affected by taking additional time to study the case, I have delayed action thereon in order to have the benefit of study by other officers in this office.

3. Accused was found guilty of the larceny of 65 pounds of ham, property of the United States, furnished and intended for the military service, in violation of Article of War 94. The evidence shows that he was mess sergeant of his company. On June 2, 1939, as mess sergeant, he drew from the post commissary some bacon and frankfurters and 65 pounds of ham. He had been drinking (R. 5-8, 18). Very shortly he brought the meats to his company in his own car. There he caused the bacon and frankfurters to be taken into the kitchen but kept the ham in his car (R. 9-12). He then took the ham to a store near the post and sold it to the proprietor (R. 15). The hams were recovered by the company commander the same day (R. 14).

4. The opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty is based upon a conclusion that accused did not commit a trespass with respect to the ham but came into possession of it lawfully, and that his offense was therefore embezzlement rather than larceny. It is clear that trespass, a taking from the owner's possession without his consent, is an essential element of larceny. It is also clear that trespass within the law of larceny occurs when the wrongdoer gains custody or possession of the property by fraud, as when, at the time the property comes into his hands, he has the intention to convert it to his own use. In such a case, he does

not gain possession lawfully or by real consent of the owner (par. 149 g, M.C.M.; Wharton's Criminal Law, 11th ed., p. 1419; 36 Corpus Juris 751).

5. In my opinion the evidence is ample to justify an inference that at the time accused received the hams from the commissary he intended to sell them. The manner in which the other meats were disposed of and the promptness with which the hams were sold leave little room for doubt that his fraudulent purpose and intent permeated the entire transaction. I think the court was fully justified in concluding that accused unlawfully gained possession of the ham by fraud and that therefore a trespass occurred with resulting larceny.

6. I recommend that the action of the reviewing authority approving the sentence be confirmed. A form of action to accomplish such confirmation is inclosed herewith, marked form "A". A form of action to disapprove the findings and sentence in accord with the opinion of the Board of Review, marked form "B", is also inclosed for your use should you deem such action appropriate.

Allen W. Gullion,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Form "A".
Incl 3 - Form "B".

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

Board of Review
CM 211996

AUG 8 1939

UNITED STATES)	PANAMA CANAL DEPARTMENT
)	
v.)	Trial by G.C.M., convened at Fort William D. Davis, Canal Zone, June 9, 1939. Dishonorable discharge and confinement for six (6) months. Fort Davis, Canal Zone.
Private First Class TOMMIE M. GIDDENS (6924775), Company I, 14th Infantry.)	

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings in part and the sentence. The record has now 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 65th Article of War.

Specification 1: In that Private First Class Tommie M. Giddens, Company "I", 14th Inf., Fort William D. Davis, C.Z., did, at Fort William D. Davis, Canal Zone, on or about May 4, 1939, strike Sgt. Joseph E. Macinka, Company K, 14th Infantry, a noncommissioned officer who was then in the execution of his office, by hitting him in the face with his fist.

Specification 2: In that Private First Class Tommie M. Giddens, Company "I", 14th Inf., Fort William D. Davis, C.Z., did, at Fort William D. Davis, Canal Zone, on or about May 4, 1939, use the following disrespectful and insulting language

towards Sgt. Joseph E. Macinka, Company "K", 14th Infantry, a noncommissioned officer who was then in the execution of his office, "You Son of a Bitch", or words to that effect.

Accused pleaded not guilty to and was found guilty of the charge and specifications, and was sentenced to reduction to the grade of private, dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six (6) months. The reviewing authority approved the sentence and ordered it executed, subject to the suspension of the dishonorable discharge until the expiration of the period of confinement (G.C.M.O. No. 41, Panama Canal Dept., June 26, 1939).

3. The evidence for the prosecution shows that Sergeants Macinka and Groger, both of Company K, 14th Infantry, accused, and an unnamed soldier from the Coast Artillery rode back from Colon to Fort Davis in a "chiva", meaning apparently a public vehicle of some sort, between 1 and 2 a.m., May 4, 1939. Accused was boisterous and wanted to fight with the artilleryman; and Sergeant Macinka, who was in uniform, told him, "Damn it to hell, keep quiet!" Later accused started in again, and Sergeant Groger told him to "shut up, by God". When the two sergeants were crossing the parade ground after leaving the vehicle, accused accosted them and said to Sergeant Macinka, "You're the sergeant that wanted to fight last night". Sergeant Macinka had been bus guard the previous night. Then accused struck Sergeant Macinka and called him a son of a bitch. Sergeant Macinka fell to the ground, accused pounced on him, grabbed him by the hair, bounced his head up and down on the ground, and struck Sergeant Macinka on the head, neck, and shoulders.

4. The defense presented character evidence and called accused to the stand, whose testimony may be summarized as follows:

Some soldier from the Coast Artillery and I were arguing in the "chiva" over some whiskey that was busted and Sergeant Macinka stood over me and told me he would beat my damned ass if I didn't shut up. This guy started talking again, and me and him started arguing again, and the other sergeant got up and said the same words. I figured I was being double-teamed. I got off ahead of these two sergeants and there was a bunch drinking in front of I Company so I told them I was going to stop

them and felt they should make some apologies. I told Sergeant Macinka he could apologize or do something, and finally he said, "This is the last straw", and unbuttoned his shirt and started the attack, and we ran together and fell on the ground. There was only one or two licks passed. I was drunk.

5. If an accused charged with violations of the 63rd, 64th, or 65th Articles of War does not know that the officer or noncommissioned officer concerned is such, there is no violation of any of those articles. M.C.M., pars. 133, 134 b; Dig. Ops. JAG 1912-30, Supp. VII, sec. 1447 (1). It is therefore customary and proper for the trial judge advocate to ask the officer or noncommissioned officer in question whether at the time of the alleged offense he was in uniform with the insignia of his rank visible; or, if he was not, whether accused knew him to be an officer or a noncommissioned officer. The prosecution failed to ask such a question; but, in answer to a question by a member of the court, Sergeant Macinka testified that he was in uniform (p. 11), and accused in his own testimony frequently referred to Macinka as sergeant and spoke of "these two sergeants" (p. 24). The Board therefore concludes that there is evidence to show that accused knew Macinka to be a noncommissioned officer.

6. Article of War 65, which accused is alleged to have violated, reads as follows:

> "INSUBORDINATE CONDUCT TOWARD NONCOMMISSIONED OFFICER. - Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct."

7. The serious question in the case is whether Sergeant Macinka was "in the execution of his office" when accused struck him and used the disrespectful language towards him. The same question arose in the recent case of Riddle, CM 211978. In that case, after reviewing the precedents, the Board of Review said:

"* * * the principle to be deduced from the cases cited in paragraph 12 is that a noncommissioned officer is not always in the execution of his office, even when in the barrack of his company; but is so only when in the discharge of some duty directed or authorized by regulations, orders, or the custom of the service."

8. There were two specifications in the Riddle case, both charged as violations of the 65th Article of War. In the first, accused was charged with striking Corporal Gregory, who was in the execution of his office. The enmity between accused and Corporal Gregory was shown to have sprung from a quarrel between them the night before off the post, which arose out of a matter having no connection with official duty. Accused struck Corporal Gregory about the hour of reveille when Gregory was returning to his locker after shaving. Applying the principle above stated, the Board held that Corporal Gregory was not then in the execution of his office, and that accused's blow was a simple battery in violation of Article of War 96, but not of Article of War 65.

9. In Specification 2 of the Riddle case, accused was charged with using threatening language toward Corporal Goldsby, who was then in the execution of his office, in violation of Article of War 65. The Board said with respect thereto:

"* * * Was Corporal Goldsby 'in the execution of his office' when the threatening words were addressed to him by accused? Accused, muttering and using bad language, came into the squad room where Corporal Goldsby was. Corporal Goldsby told him to stop, and accused then used the threatening language alleged. In telling accused to stop muttering and using bad language, Corporal Goldsby was performing one of the normal and proper duties of a noncommissioned officer, i.e., to keep order in the barrack. In so doing he was in the execution of his office. The threatening remark was provoked by Corporal Goldsby's performance of his duty, and the order given by Corporal Goldsby and the threatening language which it called forth must be considered as a single transaction. The Board concludes that Corporal Goldsby was in the execution of his office."

10. The Board of Review thinks that the facts proved with respect to both specifications of the present case are more nearly analogous to Specification 2 than to Specification 1 of the Riddle case, and that what has just been quoted is applicable here. If Sergeant Macinka's testimony that accused accosted him on the parade ground with the remark, "You're the sergeant that wanted to fight last night" (p. 7), were all that there were in the case to show the origin of the accused's enmity toward Macinka, the problem would be more difficult; but accused's own testimony as to the origin of that enmity (p. 24) is the best evidence against him on that point, and it shows conclusively that his enmity arose from Sergeant Macinka's order to him to shut up given on the bus the same evening. In giving that order Sergeant Macinka was performing the proper duty of a noncommissioned officer in keeping order among soldiers on a public conveyance. It is true that Sergeant Macinka did wrong in accompanying his order with expletives, but that fact did not justify accused in waylaying him on the parade ground a few minutes later and picking a fight with him. The court apparently believed the testimony of the two sergeants that accused struck the first blow, which is not denied by accused. The Board may take judicial notice of geographical facts, including the location of Army posts (M.C.M., par. 125). The Army List and Directory for April 20, 1939, page 23, shows Fort William D. Davis, Canal Zone, to be six miles from Cristobal, Canal Zone, and Cristobal is well known to be immediately adjacent to Colon. The elapsed time between Sergeant Macinka's order to accused to shut up and the fight between them cannot therefore have been more than half an hour at the most.

11. In the passage last quoted from the Riddle case, ante, this opinion, paragraph 9, the Board said that the order to Riddle and the threatening language which it provoked must be considered as a single transaction. In the present case, the Board thinks that Sergeant Macinka's order to accused to shut up and the insulting language and blows which it provoked must also be considered as a single transaction. It is true that in the present case, the misconduct did not so immediately follow the order as in the Riddle case, but the causal connection is as direct and the interval of time was short. Just how long the interval would have to be to destroy the unity of the transaction the Board is not required to decide; but the Board thinks that it need not draw fine distinctions in such a case, and that the interval was not of sufficient length to have that effect in the present case.

12. The Board therefore concludes that ~~accused~~ Sgt. Masinka was in the execution of his office when the blow mentioned in Specification 1 was struck and the insulting language mentioned in Specification 2 uttered. The Board is therefore of opinion that the record of trial is legally sufficient to support the findings and sentence.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

George D. Campbell, Judge Advocate.

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

Board of Review
CM 212056

AUG 1 7 1939

UNITED STATES)	SEVENTH CORPS AREA
)	
v.)	Trial by G.C.M., convened at Fort Meade, South Dakota, July 1, 1939. Dishonorable discharge, total forfeitures, and confinement for two (2) years. Penitentiary.
)	
Corporal RAY W. SMITH)	
(6498261), Troop A, 4th)	
Cavalry.)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER, and CAMPBELL, Judge Advocates.

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 93rd Article of War.

Specification: In that Corporal Ray W. Smith, Troop A, 4th Cavalry, did at Fort Meade, South Dakota, on or about June 11, 1939, with intent to commit a felony, viz., sodomy, commit an assault upon Private Reuben B. Bundrock, Troop A, 4th Cavalry, by willfully and feloniously laying hands on him, seizing him, detaining him, and removing his clothes.

Accused pleaded not guilty to and was convicted of the specification and charge. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three (3) years. The reviewing authority approved the sentence but reduced the period of confinement to two (2) years and transmitted the record of trial under Article of War 50½.

3. The evidence for the prosecution may be summarized as follows:

a. Private Reuben B. Bundrock, Troop A, 4th Cavalry, Fort Meade, South Dakota (p.6): On Saturday night, June 10, Corporal Garrey, Privates Dudycha, and Kemper, and I went to Sturgis where we drank a half pint of

whiskey, thence to a dance at Boulder Canyon, where I drank two glasses of beer. About two o'clock we came home, and Corporal Garrey, Private Dudycha, and Private Kemper went to bed. I took off my coat and vest and went to the latrine in the basement. When I came out, Smith was standing in the doorway of the boiler room in the basement and motioned for me to come over by him. We walked around in the rear of the boiler room. I was wearing civilian clothes. Accused released my suspenders from my pants and unzipped the zipper on the front of my pants. He took my pants off, which I didn't object to. Accused had a jar in his hand which appeared to be either Vaseline or Vick's Vapo-Rub jar. I did not see the name on it. He took some of the Vaseline or Vick's which was in the jar and smeared it on his penis. He grabbed me underneath my arms and I jerked away from him. I had my back to him. During the time that he had hold of me, I was trying to get away. I got away and ran into the Machine Gun Platoon squad room and picked up a boot and went and looked for accused but did not find him. When I first saw accused he had on an OD shirt, necktie, and shorts, but no breeches, boots, or shoes. I met Private Norris and he helped me look for accused. We looked at his bed, but he was not there. We went back to the boiler room, but he was not there. I went upstairs and waked the charge of quarters, Corporal Burns, and he woke Sergeant Hutcherson. I told them what had happened. We went to accused's bed and this time he was there. Sergeant Hutcherson shook him and asked him how long he had been in bed. Accused mumbled something and said "What the hell are you talking about? I have been in bed two hours."

Cross Examination: I saw accused in Bruner's Cafe in Sturgis about 8:00 p.m. He was drinking, but I was not with him. I know that Private Norris and accused bought a quart of whiskey. I next saw him in the doorway of the boiler room in Troop A basement. In Bruner's Cafe accused was in uniform. There were no lights in the boiler room. I did not object to having my clothes taken off. I made no effort to resist his laying hands on me. He used force. I did not have much trouble getting free. He made no effort to seize me after I got free. He walked toward me, but I ran. He wasn't exactly sober nor exactly drunk.

Redirect Examination: Accused was drunk.

Examination by the Court: Accused and I have been in Troop A three years. I never had any trouble with him before. The person in the boiler room called me by my last name. It was light enough for him to see me.

b. Corporal Clifford M. Burns, Troop A, 4th Cavalry (p.10): I have known accused eight years. Saturday night June 10, about 3 in the morning I heard some one calling for the charge of quarters. It was Private Bundrock. I went and got Sergeant Hutcherson. He told Sergeant Hutcherson the same story he told me. We three went down stairs where accused sleeps and found him in bed. Sergeant Hutcherson asked him what the trouble was between him and Bundrock. Accused said, "What the hell are you talking about. I have been in bed for two hours."

Examination by the Court: Accused had been drinking but was not drunk. He answered too quick to be drunk. Bundrock had on a shirt, underwear, and shoes.

c. Sergeant Abner C. Hutcherson, Troop A, 4th Cavalry (p.12): I have known accused since 1930. Saturday night, June 10, along in the morning, I was wakened by a loud noise. Then Corporal Burns came to my room. Corporal Burns, Private Bundrock and I went to the squad room in the basement to look for accused. He was in bed. I shook him and asked what the trouble was between him and Bundrock. He asked me, "When?" I said, "A few minutes ago." He said, "Oh, hell, I have been in bed for two hours." Accused had been drinking but was not drunk. Bundrock had on a shirt and shorts and had his pants over his arm.

Examination by the Court: Bundrock had been drinking but was not drunk. Smith was not hard to awake. He turned over and answered me. I couldn't see if he was asleep or not, his back was toward me.

Private Gilbert Norris, Troop A, 4th Cavalry (p.14): I have known accused two years. Saturday night, June 10, I came home about 3 a.m., and saw Private Bundrock in the basement of Troop A barracks looking for accused, who was not in his bed. I took Bundrock into the latrine. Then I went to bed. Then the charge of quarters, Sergeant Hutcherson, and Private Bundrock came down and woke accused. Accused said he had been in bed two hours. Accused got into bed while I was in the latrine with Bundrock. I did not see accused get into his bed.

Cross Examination: Accused was in bed when I went to bed.

Captain Thomas Robinson, 4th Cavalry (p.15): I have known accused since I took command of the troop, July 1938. Sunday morning, June 11, 1939, in consequence of a report from Corporal Burns, charge of quarters, I called Lieutenant Culp to the orderly room. He and I went to the squad room where accused sleeps and between the end of his foot locker and the side of his bed I found one pair of breeches, wool, o.d., which accused later admitted to be his. The breeches had a white substance like kalsomine on them. In the pocket was a jar of Vick's Vapo-Rub without a top. In the jar was fifteen or twenty cents in change. Later Corporal Burns brought me a top for a jar of Vick's Vapo-Rub. The jar contained a small amount of Vick's Vapo-Rub. The only parts of my quarters that are painted with kalsomine are the boiler room and the kitchen. (Breeches and jar were introduced as Exhibits 1 and 2, respectively).

Corporal Clifford M. Burns, Troop A, 4th Cavalry, recalled (p.18): On June 11, behind the boiler in the boiler room, I found a lid from a Vick's salve jar. I gave it to Captain Robinson.

4. The evidence for the defense may be summarized as follows:

a. Private Alfred G. Miller, Troop A, 4th Cavalry (p.18): About 11 p.m. at the dance hall at Boulder Canyon I saw accused. He was drinking but not drunk. About the same time and place I saw Bundrock. He was sitting outside the hall and looked to be asleep. I came to the post and went to bed. Neither accused nor Bundrock was in the squad room when I came home.

b. Accused (p.20): On the afternoon of June 10, Private Bundrock, Private Miller, and I went to the post exchange and drank beer until 7 p.m. Then we went to Bruner's Cafe in Sturgis and had some whiskey. About 9 p.m. we went to Boulder Canyon to the dance. About 2 p.m. (probably an error for a.m.) we got a taxi, Corporal Garrey, Private Bundrock, and I and others whom I don't remember. As far as I know the taxi took us home, but I don't remember riding home. The next thing I remember was about 9 a.m. when Corporal Burns woke me up. One night a couple of months ago Bundrock was drunk in quarters and fighting. I was charge of quarters and tried to quiet him and told him I would call the guard house if he didn't quiet down. He didn't say any more so I didn't call the guard house. One other time Bundrock came down to our squad room and urinated on Private Palmer's bunk. I told him to get out but didn't turn him in. I don't recall seeing Bundrock the Saturday night after getting into the taxi. I don't recall going to bed or being awakened during the night.

5. The court recalled Private Bundrock, who testified further (p.23): I never before had any trouble with accused. When accused motioned to me I thought he wanted to give me a drink. I discovered that he didn't want to do so almost as soon as we got back of the boiler. Then he released my suspenders and zipper. I let him do so from curiosity. Then he used the Vaseline on himself and then he grabbed hold of me. I testified that he removed my trousers. I was ready to go to bed so I figured I would let him go ahead. I helped by lifting my feet. I was trying to convict the accused. Most any one would want to convict a man like that.

6. The testimony tending to show consent on the part of Private Bundrock to what accused in fact did, though not to what he intended, raises a serious question whether an assault was proved. The general principle is thus stated in 5 Corpus Juris, 742, under "Assault and Battery":-

> "Sec. 227. 5. Consent—a. In General. At common law the consent of the party toward whom the act is directed will prevent it from amounting to an assault and constitute a defense, and likewise a battery cannot be committed unless against the will of the injured party. * * *."

7. The principle is well illustrated by State v. Beck, 19 S.C. Law 363, 26 Am. Dec. 190. Defendant was convicted of assault and battery upon Anderson. Beck and others joined in a search for stolen leather and found it upon the premises of Anderson, whom they arrested. Anderson said that he would rather be whipped than go to jail, and requested Beck to whip him. After first declining, on Anderson's earnest entreaty Beck gave him a few blows with a switch and released him. Anderson was afterwards re-arrested and convicted of the same larceny. The court set aside the conviction of Beck of assault and battery, holding that as Anderson gave Beck license to beat him, there could be no assault and battery.

8. A class of cases coming nearer the present case is that involving indecent assaults upon women and children. In the paragraph following that from which a quotation has already been made, it is said (5 Corpus Juris 743):-

> Sed. 228. "b. Indecent Assault. The consent of an adult person assaulted may, under circumstances under which it may validly be given, constitute a defense to a charge of indecent assault. Hence, if a woman is over the age of consent, there can be no assault on account of liberties taken with her person, to which she has fully and freely consented. * * *."

6 Corpus Juris Secundum 941 uses substantially the same language.

9. A number of English cases, all involving the common law offense of assault with which we are concerned in the present case, illustrate the principle:-

a. Regina v. Martin, 9 Carrington & Payne, 213, 215, 2 Moody 123. Defendant was indicted upon three counts: -

> 1st count, carnal knowledge of Esther Ricketts, a girl between 10 and 12; 2d count, assault upon Esther Ricketts, with intent carnally to know her; an 3d count, common assault upon the same girl.

It was proved that the defendant and Esther lay down together in a field and that he applied his private parts to hers and hurt her much, and that he had an emission, but that there was no penetration. It was also shown that the two had done the same thing five times before, and that others had done it with Esther by her consent. The trial judge held that the first count was not proved, and took the opinion of the jury as to whether Esther consented to what was done. The jury found that she consented, and the trial judge directed a verdict of guilty of the second and third counts and reserved the case for consideration of the fifteen judges of the three ancient common

law courts. Their opinion was announced to the defendant at the next assizes (9 Car. & Payne, 215):-

> "Thomas Martin, at the last assizes for this county you were found guilty of an assault upon a child between ten and twelve years old, The learned Baron before whom you were tried did not pass any sentence on you, but reserved the point for the consideration of the Judges, whether it was proper that you should have been convicted of an assault. The case has since been considered by the Judges, and inasmuch as it appeared that the child consented, the Judges are of opinion that the charge was not properly laid, and that as the child consented it was not an assault. The Judges have directed that no judgment is to be pronounced against you upon the indictment upon which you have already been tried. You are still liable to be indicted for the attempt to commit a misdemeanor, and will be so indicted at these assizes, although your offense is not an assault."

b. Regina v. Beale, Law Reports, 1 Crown Cases 10. Defendant was indicted on three counts:-

1st count, unlawful attempt to have carnal knowledge of Mary Green, a child under the age of ten years;

2d count, assaulting Mary Green with intent carnally to know her; and

3d count, indecent assault.

The jury brought in a general verdict of guilty, with the further finding "for the child was too young to know what it was she was doing, and therefore consented to the act done by the prisoner." The trial judge reserved the questions whether defendant was rightly convicted of the first count and also whether he was guilty of an indecent assault. The Court for Crown Cases Reserved said (p.12):-

> "* * * Consent was altogether unimportant. The jury said the prisoner was guilty, but found that there had been a qualified consent on the part of the girl; and, if the nature of the consent had been material, it might have been necessary to analyze the facts of the case. Those facts, however, show an attempt to commit a crime, where consent was immaterial. Of course, if the indictment had been merely for an indecent assault, the question of consent would have become material.
>
> Conviction affirmed."

c. The English case nearest the present on the facts is Regina v. Wollaston, 12 Cox's Criminal Cases 180. The defendant was convicted of indecent assault upon two boys. The boys went willingly and in the expectation of reward to the place where the indecencies were committed and one of them had previously done the like with defendant. The Court of Criminal Appeal said (p.182):-

> "It is clear that, upon the circumstances of the case, there is nothing which constitutes an assault in law. If anything is done by one being upon the person of another, to make the act an assault, it must be done without the consent and against the will of the person upon whom it is done. * * *."

The court quashed the conviction.

d. Other English cases of the same sort holding that there can be no assault where there is consent are Regina v. Banks, 8 Carrington & Payne 574; Regina v. Meredith, 8 Carrington & Payne 589; Regina v. Read, 2 Carrington & Kirwan 957; Regina v. Cockburn, 3 Cox's Criminal Law 543; The King v. May, 1912, 3 K. B. 572.

10. The Board now turns to the American cases, and notes the following:

a. Smith v. State, 12 Ohio State 466, 80 American Decisions, 355. The defendant was convicted of assault upon a girl under 10 with intent to ravish and carnally to know her. There was no allegation of non-consent. The court said (80 American Decisions 357, 360):-

> "An assault implies force upon one side, and repulsion, or at least want of assent, upon the other. An assault, therefore, upon a consenting party would seem to be a legal absurdity.
>
> * * *
>
> "* * * an assault upon a consenting female, old or young, is a contradiction in terms—a legal impossibility."

b. State v. Pickett, 11 Nev. 255, 21 Am. Reports, 754. The defendant was indicted for statutory rape upon a female under 12, and the court instructed the jury that if there was no penetration they might find the defendant guilty of assault with intent to commit rape. The defense excepted to the charge on the ground that it would allow a conviction of assault even if there was full consent. The jury convicted the defendant of assault with intent to

commit rape. After reviewing the precedents, and relying particularly upon the English cases already mentioned in this holding, the court said (21 Am. Reports 756):-

> "* * * By virtue of the provisions of sections 2464 and 2037, this defendant might have been convicted of an 'attempt to commit rape,' even if the child consented to all he did; but it was error to instruct the jury that he could be convicted of 'assault with intent,' etc., in that case. There can be no assault upon a consenting female, although there may be what the statute designates a rape. It is quite possible, if this distinction had been drawn in the instructions to the jury, that the defendant would only have been convicted of the attempt, for which the extreme punishment is ten years' imprisonment. C.L. Sec. 2464. Whereas, the 'assault with intent,' etc., of which he was convicted, may be punished by fourteen years' imprisonment, and the defendant actually received that sentence. C.L. Sec. 2363)."

c. Stephens v. State, 107 Ind. 185, 8 N.E. 94. Assault with intent carnally to know a girl 11. She was begging on the street, and defendant told her that he would give her a nickel if she would go with him to a certain place, which, after first declining, she did. The report continues (8 N.E. 95):

> "* * * he then hugged and fondled the child, at the same time raised her clothes in front, and pressing his private parts against her body; that in this position he solicited her to permit him to have sexual intercourse with her, but she would not consent; that, dallying in this way for a few moments, he desisted from further liberties, gave the child a nickel, and went away; that everything that was done at the time was with the consent of the child, she objecting only to the proposed sexual intercourse, which the appellant did not urgently insist upon, and which he did not in any manner accomplish."

The court held that, though the defendant probably would have consummated his desire if circumstances had been favorable, he abandoned it before his act constituted the crime charged. An assault implies an unwillingness on the part of the party assaulted; and, as that party consented, no assault was committed. The court set the conviction aside.

d. Other authorities to the same effect are People v. Bransby, 32 N.Y. 325; State v. Archer, 22 S. Dak. 137, 115 N.W. 1075; Saye v. State, 54 Tex. Cr. 430, 114 S.W. 804; Bishop on Statutory Crimes, Sec. 496. There

are American cases to the contrary with respect to assaults on young children, on the ground that the child was incapable of giving valid consent; but those case have no application to the present, in which the party alleged to have been assailed was a man old enough to be a soldier.

11. The Board of Review proceeds to apply the above cases to the presnt. It notes that Private Bundrock according to his own testimony consented to everything that accused actually did to him (pp. 7, 23). He even cooperated to the extent of lifting his feet so that accused could take off his (Bundrock's) trousers (p.23). Nor can accused's final grabbing of Bundrock be considered an assault and battery. Accused might reasonably infer, and no doubt did in fact infer, from Bundrock's cooperation up to that moment, consent to accused's going further and completing the sodomy which he intended. Then, and then only, Bundrock resisted and broke away, and accused made no further effort to seize him (p.9), and apparently went away and hid, as Bundrock and Norris could find him neither in his bed nor in the boiler room (pp. 7, 14, 15).

12. Let it be supposed that Bundrock, instead of a man, was an adult woman, and that the effort of the man involved was to have carnal connection with her, not against the order of nature, but in the usual way. If the woman consented and cooperated, as Bundrock did, by allowing the man to remove part of her clothing, and made no objection when he exposed his penis and placed grease upon it, he would have been entitled to infer that she consented to the act for which he was obviously preparing. Let it further be supposed that the man involved then embraced this woman to perform that act, but that she broke away and ran, and he made no further effort to obtain the satisfaction which he desired. Neither his removal of her clothing nor his final embrace would constitute an assault and battery, even if the woman all along had resolved not to let him attain his object. The case supposed shows that it is not the secret operations of the mind of the person alleged to have been assailed that is determinative of the question of consent, but it is what that person said to the assailant or tacitly gave him to understand that counts. The Board feels sure that no court could properly convict a man so acting, — however wrong his conduct may have been from the moral standpoint,—of assault with intent to commit rape, or even simple assault.

13. The supposed case is substantially the same as the Stephens case, ante, this holding, par. 10 c. The Board can see no distinction between the case supposed and the Stephens case on the one hand, and the case before it on the other.

14. In writing the preceding paragraphs, the Board makes no imputation against the character of Private Bundrock. His motive, to convict and expel from the Army a man having such unnatural desires (p.23), was a praiseworthy one; and, so far as the Board can see, his conduct throughout the entire transaction was proper.

15. The Board invites particular attention to the Martin, Beale, and Pickett cases, ante, pars. 9 a, 9 b, and 10 b, respectively, all involving indecent actions with respect to girls under the age of consent, to which the girls in fact consented. In the Martin and Pickett cases, the court set aside convictions of assault with intent to have carnal knowledge, but stated expressly that the defendant might have been and should be indicted for and convicted of attempt to have carnal knowledge. In the Beale case, defendant was found guilty on two counts, one for attempt to have carnal knowledge of a girl under the age of consent, and the other for indecent assault upon her. The court upheld the conviction of attempt, but intimated that the conviction of assault was improper.

16. In sodomy, as in carnal knowledge of a child under the age of consent, consent is immaterial to the completed act; and the cases show that it is also immaterial to an attempt to commit that act; but they further show that consent is material when the charge is assault with intent to commit such an act, since, as said in the Smith case, ante, par. 10 a, there can be no assault upon a consenting party. Following the above authorities, the Board of Review is of opinion that the evidence shows that accused did not commit an assault upon Private Bundrock with intent to commit sodomy, but that he did attempt to commit sodomy upon Bundrock.

17. Is the latter offense, which accused committed, a lesser one included within the former, which he did not commit but of which he has been found guilty? That is the next question which the Board must answer. The Board has been unable to find any helpful precedents. Attempt is thus defined in the Manual for Courts-Martial, par. 152 c, page 190:

> "An attempt to commit a crime 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 (Clark)."

If that definition be applied to an attempt to commit sodomy, does it contain any element not in assault with intent to commit sodomy? If that question be answered in the affirmative, the former offense can not be included within the latter; but the Board thinks that the question must be answered in the negative and that the one offense is therefore included in the other. The Board has tried to imagine an attempt to commit sodomy containing an element of proof not found in an assault with intent to commit sodomy, but has been unable to do so. Let the problem be approached from the opposite direction. Is every assault with intent to commit sodomy also an attempt to commit sodomy? The Board thinks that it is. The Board believes that an assault with intent to commit sodomy is an attempt to commit sodomy plus another element, which is missing in the present case, namely, an offer or an unpermitted touching of the body of the person assaulted.

18. The next question is whether the approved sentence, dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for two (2) years is legally permissible for the less serious offense which is all that the Board holds the record sufficient to support.

19. Attempt to commit sodomy is not listed in the table of maximum punishments, MCM, par. 104 c. Assault with intent to commit any felony, except murder and rape, is listed; and the maximum punishment for it is fixed at dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for ten (10) years. Sodomy itself is listed and the maximum penalty for it is fixed at dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five (5) years. 6 District of Columbia Code 3 (formerly District of Columbia Code, Sec. 906), fixes one (1) year as the maximum period of confinement upon conviction of attempt to commit any crime, the punishment for which attempt is not otherwise fixed. It was held by the Board of Review and the Judge Advocate General for many years that a court-martial might not lawfully impose by way of punishment for an attempt to commit sodomy confinement for a longer period than that permitted in the District of Columbia Code, namely, one (1) year. CM 147074, Murphy; CM 145155, Gambrell; CM 145266, Baker; CM 153722, Owens; CM 159285, Millett. Later cases have allowed confinement for terms longer than one year. CM 192456, Ciambrone; CM 196922, Killalea; CM 209651, Palmer. In the case last cited the reason for the change in rulings is thus given:-

> "Paragraph 104 c, of the Manual for Courts-Martial, 1928, contains the following:
>
> '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 if not so listed, and for any offense closely related to either, if not so listed.' (Underscoring supplied).
>
> "The offense of sodomy is listed in the table referred to with a stated maximum limit of punishment by confinement of five years. The offense of attempting to commit sodomy is not listed in the table. Inasmuch as it is not listed and is included in the offense of sodomy, it is punishable as for sodomy. * * *."

20. The Board thinks that an additional and stronger argument against the application of the limits of punishment fixed by the District of Columbia Code to sentences imposed by courts-martial is furnished by the very title of that code, "The Code of the District of Columbia." Except for a few ancient British and Maryland statutes still in force in the District of Columbia, not material to the present discussion, the several acts of which that code is a compilation were enacted by Congress for the District of Columbia and made by

it in express terms applicable in that district only. The Board of Review has no authority to transfer statutes applicable in a small area of sixty square miles to a different and far wider field, and to say that limitations found therein must be applied to courts-martial sitting wherever the United States Army may go, thousands of miles distant from the district for which such limitations were enacted, and in courts of another sort created by another statute than that creating the courts of the District of Columbia. To do so is not to interpret or to construe legislation, but to legislate, and to assign to acts of Congress another and far wider scope than Congress itself gave them.

21. Paragraph 104 c, MCM, after referring to the table of maximum punishments therein, says:-

> "* * * Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service."

22. In CM 210762, Valeroso, after quoting the above sentence, the Board of Review said:-

> "* * * The word 'statute' in the above sentence clearly refers to a statute applicable to courts-martial ex proprio vigore or made applicable to such courts by some other statute (such as section 289) or competent order. The sentence quoted does not confer any validity in courts-martial upon a statute not otherwise applicable in such courts. The Board of Review therefore concludes that as a strict matter of law no statute of the Philippine Islands, whatever its provisions, may limit the punishment which a court-martial may impose in the present case."

23. The Board thinks the foregoing applicable to the District of Columbia Code. That code ex proprio vigore has no force in courts-martial, the Board knows of no other statute which gives it such force, and the Board itself is without authority to do so.

24. However, the Board thinks that a limitation fixed by the District of Columbia Code is relevant to this extent only, that it is an indication of what Congress thinks an appropriate punishment for the offense involved. As the Board said in the Valeroso case with respect to the statute of a state or insular possession fixing a limit of punishment, it is, to a court-martial or reviewing authority, "not controlling, but persuasive only, as to the limit of punishment."

25. The reviewing authority has designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement. Is that designation permissible if accused's offense is attempt to commit sodomy, and not assault with intent to commit sodomy? Article of War 42 provides:-

> "Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, * * *."

As has been stated, there is no statute of the United States of general application fixing the penalty for an attempt. 6 District of Columbia Code 3 fixes the period of confinement at one (1) year. It follows that penitentiary confinement is not authorized upon conviction by court-martial of attempt to commit sodomy, and it has been so held many times. Dig. Ops. JAG 1912-30, sec. 1613; CM 192456, Ciambrone; CM 196922, Killalea; CM 209651, Palmer.

26. For the reasons above indicated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings as involves findings that accused did, at the time and place alleged, attempt to commit the crime of sodomy by attempting feloniously and against the order of nature to have carnal connection with Private Reuben B. Bundrock, Troop A, 4th Cavalry, in violation of the 96th Article of War. The Board holds the record of trial legally sufficient to support the sentence as modified by the reviewing authority provided accused be confined at a place other than a penitentiary.

Archibald King, Judge Advocate.

George C. Frazier, Judge Advocate.

George B. Crumpton, Judge Advocate.

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

Board of Review
CM 212084

AUG 1 4 1939

UNITED STATES)	SECOND DIVISION
)	
v.)	Trial by G.C.M., convened at Fort Sam Houston, Texas, July 14, 1939. Dishonorable discharge and confinement for six (6) months. Fort Sam Houston, Texas.
)	
Private QUENTIN W. JOHNSON) (6288807), Battery B, 12th) Field Artillery.)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial 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 93rd Article of War.

Specification: In that Private Quentin W. Johnson, Battery B, 12th Field Artillery, did, in conjunction with Private Royce Stanley, Battery A, 12th Field Artillery, at San Antonio, Texas, on or about April 19, 1939, feloniously take, steal, and carry away one bicycle, value about $12.00, the property of Jack O'Brien, civilian.

3. Following the arraignment of the accused, defense counsel entered a plea in bar of trial on the ground that the court had no jurisdiction over the case for the reason that the accused had been discharged for the convenience of the Government and reenlisted for a term of three years on a date intervening between the date of the commission of the alleged offense and the date of trial. The plea of the defense was denied, whereupon the accused pleaded not guilty to the charge and the specif-

ication thereunder. The court found the accused guilty as charged and sentenced him to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. The reviewing authority approved the sentence, designated Fort Sam Houston, Texas, as the place of confinement, and transmitted the record for action under Article of War 50½.

4. With respect to the specification of the charge, there is competent legal evidence of record, including a voluntary confession properly admitted, that the accused, together with another soldier named in the specification, found the bicycle at the place and on the date alleged where it had been left by its owner, Jack O'Brien, while he was attending school; that the accused removed the name plate from the bicycle; rode it away and subsequently sold it to another. Approximately two months thereafter the bicycle in question was recovered by the military police with the name plate missing. The name plate was found in the locker trunk of accused. The corpus delicti and the value alleged were clearly established. It is the opinion of the Board that the proof in support of the findings and sentence is clear and conclusive.

5. The only question requiring consideration is the special plea filed by the defense before pleading to the general issue. While the plea entered was described as a plea in bar, the Board feels that it was in fact a plea to the jurisdiction. In this respect it appears from the evidence adduced at the trial that the accused, while serving a period of enlistment normally expiring in October, 1941, secured an honorable discharge from the service, dated April 28, 1939, for the convenience of the Government under the provisions of section X, AR 615-360, April 4, 1935, in order that he might attend the Cooks and Bakers School. Immediately following the accomplishment of the papers of discharge from the service, which was after the date of the alleged offense and before the date of trial, the accused reenlisted for a period of three years. The certificate of discharge was delivered to him after his reenlistment in accordance with the Army Regulations above referred to, which read in part as follows:

> "* * * When an enlisted man is discharged for the convenience of the Government for the purpose of reenlisting, the discharge certificate and final statements will not be delivered to him until reenlistment has been accomplished."

Defense counsel contends that his service having been terminated by discharge he was not thereafter amenable to general courts-martial for trial for any offense committed by him prior to such a discharge and therefore the court was without jurisdiction to proceed with the case.

6. With respect to the general rule relating to the termination of court-martial jurisdiction of persons subject to military law, paragraph 10 of the Manual for Courts-Martial, 1928, provides:

> "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."

Certain exceptions to the rule are thereafter set forth which are not applicable to the instant case.

In Dig. Ops. JAG 1912, pages 514-515, there appear under "Discipline", VIII I 1 and VIII I 1 a, two digested opinions which support the rule set forth in the Manual for Courts-Martial that an officer or soldier ceases to be amenable to the military jurisdiction for offenses committed by him while in the military service after he has been separated therefrom by discharge. In a case considered by The Judge Advocate General as recently as 1932, it was held:

> "* * * That it is well settled that a court martial is without jurisdiction to try an enlisted man for an offense, other than one denounced by A. W. 94, committed in a prior enlistment at the expiration of which he was discharged. * * * C. M. 199117 (1932)." (Sec. 1436, Ops. JAG 1912-30, Supp. VII.)

In Winthrop's Military Law and Precedents, page 93, discussing jurisdiction of courts-martial after a second appointment or enlistment of an officer or soldier once dismissed or discharged, the opinion is given that -

"* * * in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. * * *."

The learned author goes on to state that a subsequent reappointment or reenlistment into the Army does not revive the jurisdiction for past offenses.

It would appear from the above citations at first blush that in the instant case the accused, not having been brought to trial for an offense committed prior to his discharge from his first enlistment, the court-martial was without jurisdiction to try him at all, as the second enlistment would not operate to revive jurisdiction. However, a close examination of the digested opinions of The Judge Advocate General and other authorities hereinafter referred to indicates that the mere discharge from the service does not operate to sever jurisdiction provided there is no interruption in the service and that no moment exists during which the accused is not subject to military jurisdiction and control. Where the discharge operates to terminate the service of the soldier and remand him to civilian life, then and in that case only does the discharge from the service operate to terminate jurisdiction over accused. The criterion is not the mere fact of discharge but the termination of military service. In the cases referred to above digested in the opinions of The Judge Advocate General, 1912, the termination of jurisdiction by discharge exists, in the language of the opinion, where the soldier "has thus become a civilian" and has "left the Army". In Winthrop on Military Law and Precedents, page 89, in discussing the beginning and end of the personal amenability of military persons, the following appears:

"* * * In other words, the general rule is that <u>military persons</u> - officers and enlisted men - are subject to the military jurisdiction, so long only as they

> remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become civil persons, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community."

In a case where an emergency officer following the termination of the World War was discharged from his emergency commission and immediately thereafter accepted a commission in the Regular Army, following which he was tried by general court-martial for an offense committed prior to such discharge, The Judge Advocate General held that:

> "* * * Under the circumstances under which this discharge was executed, it can not be said that accused's military status terminated, and it follows that the rule that a person once discharged can not be tried by courts-martial for offenses committed prior to his discharge, except for violations of A. W. 94, does not apply. * * *." (Sec. 1435 (5), Dig. Ops. JAG 1912-30, p. 713.)

The Judge Advocate General also held in 1935 in the case of Second Lieutenant Henry A. Sebastian, 16th Infantry, that the court-martial had jurisdiction over him for an offense alleged to have been committed while a cadet, as his acceptance of a commission did not terminate his military service but merely changed his status from that of a cadet to that of a commissioned officer (CM 203457). To like effect is a holding by The Judge Advocate General with respect to trial of a commissioned officer for an offense committed by him when an enlisted man, reported in Opinions of The Judge Advocate General, 1918, pages 644-646.

In keeping with the principle above enunciated, the Comptroller General has held that a discharge and reenlistment, whether for the convenience of the soldier or of the Government, does not entitle the soldier to travel pay under the act of September 22, 1922, as such soldier is not "discharged from the Army" within the meaning of that act (Ryan, C.G., A-10856, Sept. 11, 1925; McCarl, C.G., A-16151, June 25, 1927).

7. In view of the foregoing, the Board of Review concludes that a discharge as such does not necessarily terminate jurisdiction over an accused for an offense committed by him prior thereto unless following such discharge there has been a complete release from the military service and return to the status of a civilian. In the instant case there was no such complete release from military jurisdiction as the certificate of discharge was not delivered to the accused until after his reenlistment for the convenience of the Government and, therefore, there being no hiatus in his military status, his military service was continuous and uninterrupted from the date of the commission of the offense alleged until the date of trial.

8. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

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

Board of Review
CM 212091

AUG 1 8 1939

UNITED STATES)	THIRD DIVISION
)	
v.)	Trial by G.C.M., convened at Fort Lewis, Washington, June 27, 1939. Dishonorable discharge and confinement for one (1) year. Fort Lewis, Washington.
Private WILLIE C. HOPKINS (6271808), Detachment Medical Department, Fort Lewis, Washington.)	

HOLDING by the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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

2. The accused was tried under a single charge and specification as follows:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Willie C. Hopkins, Detachment Medical Department, Fort Lewis, Washington, did, at the Station Hospital, Fort Lewis, Washington, on or about May 21, 1939, offer violence against 2d Lieut. Nola Forrest, Army Nurse Corps, his superior officer, who was then in the execution of her office, in that he, the said Private Hopkins, did draw back his closed fist and threaten to "blast" her (2d Lieut Forrest).

He pleaded not guilty to, and was found guilty of, the charge and specification thereunder.

3. Briefly summarized, the facts of the case, as established at the trial, are as follows:

On the night of May 21-22, 1939, Second Lieutenant Nola Forrest, Army Nurse Corps, while on duty as night nurse at the Station Hospital, Fort Lewis, Washington, made an unsuccessful ef-

fort to cause the accused to desist from creating a disturbance in the ward, which was then under her supervision. Lieutenant Forrest in her effort to enforce quiet in the ward and to restrain the accused, attempted to call over the telephone the Officer of the Day to report the matter to him and seek his aid in compelling the accused to remain quiet. The accused was a member of the Medical Detachment but not actually performing duty at the time. During the period of the effort on the part of the nurse to quiet the accused, he pounded on the desk in front of her, used abusive language, forcibly prevented her from telephoning the Officer of the Day, and finally raised his fist in a threatening manner, accompanying his action with the words, "I'll blast you". The accused had been indulging in intoxicating liquor to some extent, but was not drunk.

4. It is the opinion of the Board of Review that the offer of violence alleged in the specification was established by competent legal evidence beyond a reasonable doubt.

5. The questions requiring consideration are, first, was the offense properly laid under the 64th Article of War; and, second, was the language "his superior officer" employed in the specification appropriate to the facts. The determination of these questions necessarily raises the further question as to the maximum legal sentence imposable upon conviction.

6. That the 64th Article of War relates exclusively to commissioned officers is apparent not only from the wording of the article but also from the explanation concerning it contained on page 147 of the Manual for Courts-Martial, 1928. In this connection the 1st Article of War provides:

> "(a) The word 'officer' shall be construed to refer to a commissioned officer; * * *."

Also, Note 2, page 4, Manual for Courts-Martial, 1921, reads in part:

> "* * * The word 'officers' is used in this Manual in the same sense as in the first article of war, to designate commissioned officers only. * * *."

Moreover, the 68th Article of War specifically names members of the Army Nurse Corps in addition to officers, from which fact it may be

reasonably inferred that, since not specifically named therein, members of the Army Nurse Corps are not included in the term "superior officer", as used in the 64th Article of War. Members of the Army Nurse Corps do not receive commissions but are appointed in all grades except that of superintendant by The Surgeon General with the approval of the Secretary of War (par. 3, AR 40-20, Dec. 31, 1934). They hold relative rank.

7. In view of the foregoing the Board is impelled to the view that the words "superior officer", as used in Article of War 64, refer to a commissioned officer only and do not include a member of the Army Nurse Corps, and consequently the offense proved does not fall under that article. The Board is of the opinion, nevertheless, that the specification states an offense in violation of the 96th Article of War.

8. The next question which presents itself is, what is the maximum punishment authorized for the offense stated in violation of Article of War 96? If that offense be considered simple assault, the maximum sentence authorized by the Executive Order is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period. Manifestly, such a sentence falls far short of a punishment appropriate to the offense of which the accused was found guilty. Obviously, the offense is something more than a simple assault since it constitutes an attack upon an individual clothed with definite military authority and involves a wrongful interference with the execution of that authority.

In accordance with authority contained in the act of June 4, 1920 (41 Stat. 768), paragraph 2 b (1), AR 40-20, December 31, 1934, provides, with respect to the rights and privileges of members of the Army Nurse Corps, that:

> "They will be accorded the same obedience from enlisted men and patients in and about military hospitals as is accorded commissioned officers of grades corresponding to their relative rank."

The principle involved in the instant case appears to be the same as that followed in the case of Private First Class Stewart Oswald, Quartermaster Corps (CM 202117; sec. 1447 (2), Dig. Ops. JAG 1912-30, Supp. VIII), where it was held that the words "noncommissioned

officer", as used in Article of War 65, refer to a soldier legally appointed a noncommissioned officer and do not include an acting noncommissioned officer, but that assaulting an acting noncommissioned officer, while in the execution of his office, is an analogous offense, triable under the 96th Article of War, and carries with it the maximum punishment prescribed for a violation of the 65th Article of War.

9. In view of the foregoing, the Board of Review is of the opinion that offering violence to a member of the Army Nurse Corps by an enlisted man or patient in or about a military hospital, while in the execution of her office, is an offense in violation of the 96th Article of War, for which no maximum punishment is prescribed in paragraph 104 c, Manual for Courts-Martial, 1928. The most closely related offense is offering violence to a superior officer in violation of Article of War 64, for which offense also no maximum punishment is prescribed.

10. For the reasons stated the Board of Review holds that the record is legally sufficient to support only so much of the findings of guilty of the charge as involves a finding of guilty of a violation of the 96th Article of War in the manner alleged in the specification, except the words "his superior officer", and is legally sufficient to support the sentence.

Archibald King, Judge Advocate.

George H. Fraser, Judge Advocate.

George S. Crampton, Judge Advocate.

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

Board of Review
CM 212197

SEP 6 1939

UNITED STATES)	NINTH CORPS AREA
)	
v.)	Trial by G.C.M., convened at Fort Winfield Scott, California, July 28 and August 11, 1939. Dismissal and confinement for one (1) year and one (1) day.
)	
First Lieutenant HERBERT S. ROCKER (0-160842), Coast Artillery Reserve.)	

OPINION of the BOARD OF REVIEW
KING, FRAZER and CAMPBELL, Judge Advocates.

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1. The record of trial in the case of the officer named above 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 93rd Article of War.

Specification 1: In that First Lieut. Herbert S. Rocker, CA-Res., 502 CA (AA), while on active duty with the Civilian Conservation Corps, did at Camp Harrison Gulch F-32, California, from January to June, 1939, feloniously embezzle by fraudulently converting to his own use monies of the value of $335.80, the property of Company Fund, Company 210, CCC, entrusted to him for custody as commanding officer, Company 210, CCC.

Specification 2: In that First Lieut. Herbert S. Rocker, CA-Res., 502 CA (AA), while on active duty with the Civilian Conservation Corps, did at Camp Harrison Gulch F-32, California, from January to June, 1939, feloniously embezzle by fraudulently converting to his own use monies of the value of $316.67, the property of the Camp Exchange, Company 210, CCC, entrusted to him for custody as commanding officer, 210 Company, CCC.

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

Specification: In that 1st Lieut. Herbert S. Rocker, CA-Res., 502 CA (AA), did, at Camp Harrison Gulch F-32, California, on or about April 30, 1939, with intent to deceive the District Commander, Medford CCC District, officially report to the said District Commander, Medford CCC District, that Report of Accounts Payable by Company 210, CCC, Camp Harrison Gulch F-32, California, for the month ending April 30, 1939, did contain a complete list of all obligations against said Company 210, CCC, which report was known by the said 1st Lieut. Herbert S. Rocker, CA-Res., 502 CA (AA), to be untrue in that said report did not list the following obligations against said Company 210, CCC, to wit: Jackson Trunk Company, 775 De Koven Street, Chicago, Illinois, $216.00; Shwayder Brothers, Inc., 1050 South Broadway, Denver, Colorado, $90.35; and Montgomery Ward, Redding, California, $43.83; total obligations unreported $350.18.

Upon arraignment the accused pleaded guilty to Charge I and both specifications thereunder and not guilty to the specification of Charge II and to Charge II, and was found guilty of Charge I and its specifications and not guilty of Charge II and the specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed 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 may direct for a period of one year and one day. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The court having acquitted the accused of Charge II and the specification thereunder, no further reference thereto is deemed necessary.

4. With respect to Specifications 1 and 2 of Charge I, and Charge I, the accused having pleaded guilty thereto, and after having been fully advised concerning the effect of his pleas of guilty, having reiterated his desire that they stand, a detailed discussion and analysis of the evidence is not required. A plea

of guilty being a formal admission of guilt, evidence adduced during the trial can be considered only as indicative of the existence of extenuating or aggravating circumstances, as the case may be, surrounding the commission of the offenses to which the accused pleaded guilty and of which he was found guilty.

5. The legal competent evidence adduced at the trial discloses that at the time of the commission of the alleged offenses and at the time of accused's arrest and service of charges on him, he was, with his own consent, serving a tour of active duty and was, therefore, amenable to trial by general court-martial (Exs. 1, 2, 3). The prosecution introduced in evidence, without objection by the defense, certificates made by the accused for the month of May, 1939, of the Company Fund, 210th Company, Civilian Conservation Corps, and of the Camp Exchange Fund, showing cash on hand as $335.80 and $316.67, respectively (Exs. 4, 5).

First Lieutenant Ragnar Unden, Field Artillery Reserve, 32d Field Artillery, the only witness for the Government, testified that on or about June 6, 1939, he officially inspected the Company Fund, 210th Company, Civilian Conservation Corps, and Camp Exchange Fund, for the month of May, 1939, of which said funds the accused was custodian, and that the shortages alleged were reported by the accused as cash on hand but that he (accused) was unable to produce any part of either shortage and explained "that the money was used for his personal needs" (R. 13-17). The attitude of accused was "very cooperative" (R. 23).

The deposition of Captain Norman A. Donges, Infantry-Reserve, Headquarters Medford District, Civilian Conservation Corps, Medford, Oregon, was received in evidence without objection and shows that the deponent investigated the alleged financial shortages involved and after having fully advised the accused of his rights under Article of War 24, he (accused) freely admitted his conversion of the moneys, saying that:

> "* * * He guessed he had 'been a fool' for using Government funds for his personal use but that he thought he could make it up before he got in too deep * * *." (Ex. 10.)

6. The prosecution having rested, the accused, at his own request, and after having been fully advised of his rights in the premises, was sworn as a witness in his own behalf and testified that, prior to the investigation by Lieutenant Unden, he (accused) proceeded to Medford, Oregon, and there reported the entire alleged shortage to Colonel Fletcher because "I had it on my mind and wanted to clear it up" (R. 29). He further testified that he had embezzled the moneys alleged and "I will do my best to pay back all this money that is owed" (R. 30); that he owed "$150 to my family at home", $17.85 to the mess and other small outstanding obligations. He had received notice of the sale of furniture in storage, including the personal belongings of his family. His wife and children are wholly dependent upon him for their support. Also that he had served in the World War from about April, 1917, to about November, 1919, in the Coast Artillery, and had received an honorable discharge (R. 30, 31, 32).

The defense counsel and trial judge advocate stipulated the testimony of Dr. S. Dober, 2 Broadway, New York City, as follows:

> "'I have known Lieutenant Rocker continuously since 1924. His character has impressed me favorably, and his honesty, integrity and general reputation are all considered good.'"

The testimony of Colonel H. E. Scheer, 502d Coast Artillery, was stipulated as follows:

> "'I am commanding officer of the 502d Coast Artillery Regiment. Records at this headquarters show that Lieutenant Rocker enlisted in the regular Army May 2, 1916, and served until May 5, 1919. He was commissioned second lieutenant in the Officers Reserve Corps on June 11, 1921. His efficiency reports at a 1929 active duty camp classify him as satisfactory; at a 1937 C.M.T.C. Camp as excellent. Among the officers of his regiment, his general reputation and character are considered good.'" (R. 32, 33.)

The deposition of Lieutenant Colonel H. H. Fletcher, commanding Medford Civilian Conservation Corps District, Medford, Oregon, from which it appears that the accused, prior to the investiga-

tions by Captain Donges and Lieutenant Unden had "voluntarily confessed to a shortage of about twelve hundred dollars" (Ex. 11).

There is attached to the record of trial a letter of commendation of accused by Colonel L. B. Magruder, 7th Coast Artillery, Fort Hancock, New Jersey, reading as follows:

> "1. It gives me great pleasure to commend your excellent service as Assistant Mess Officer for the Fort Hancock C.M.T.C. and R.O.T.C. mess for the period July 19th to August 1st, 1937.
>
> "2. Your knowledge of mess management and constant attention to duty contributed materially to the successful operation of the mess during this period."

7. 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 of the sentence. Dismissal is authorized upon conviction of a violation of the 93d Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of embezzlement involved in the specifications of Charge I, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by section 851 b (sec. 76, title 6) of the Code of the District of Columbia.

(On leave), Judge Advocate.

George H. Fraser, Judge Advocate.

George S. Campbell, Judge Advocate.

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

Board of Review
CM 212272

SEP 19 1939

UNITED STATES	)	PANAMA CANAL DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at Fort Sherman, Canal Zone, August 19, 1939. Dishonorable discharge and confinement for two (2) years. Penitentiary.
	)	
Private WALTER H. DILL (6965634), Battery G, 1st Coast Artillery.	)	

HOLDING by the Board of Review
KING, FRAZER and CAMPBELL, Judge Advocates.

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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 96th Article of War.

Specification 1: In that Private Walter H. Dill, Battery G, 1st Coast Artillery, did, at Fort Sherman, Canal Zone, on or about August 3, 1939, unlawfully and feloniously commit certain lewd and lascivious acts upon and with the body of one Patricia Berg, a child under the age of thirteen (13) years, to wit, the age of six and eight twelfths (6 and 8/12) years, with the intent then and there to arouse, and appeal to, and gratify the lust, passions and sexual desires of the said Private Dill by then and there placing his hand upon and between the legs of the said Patricia Berg.

Specification 2: In that Private Walter H. Dill, Battery G, 1st Coast Artillery did, at Fort Sherman, Canal Zone, on or about August 3, 1939, unlawfully and feloniously commit certain lewd and lascivious acts upon and with the body of one Patricia Berg, a child under the age of thirteen (13) years, to wit, the age

of six and eight twelfths (6 and 8/12) years, with the intent then and there to arouse, and appeal to, and gratify the lust, passions and sexual desires of the said Private Dill by then and there forceably placing the hand of the said Patricia Berg upon his penis.

He pleaded not guilty to, and was found guilty of, the charge and specifications. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The reviewing authority approved the sentence, designated the Northeastern Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the evidence to be legally sufficient to support the findings and sentence with confinement at a place other than a penitentiary. The following are the reasons for the Board's holding:

Article of War 42 provides:

ART. 42. PLACES OF CONFINEMENT - WHEN LAWFUL - Except for -

a. desertion in time of war,

b. repeated desertion in time of peace, and

c. mutiny,

no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year -

d. by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or

e. by the law of the District of Columbia, or

f. by way of commutation of a death sentence,

and unless, also the period of confinement authorized and adjudged by such court-martial is more than one year; * * *. (Paragraphing supplied.)

4. It is obvious that the present offenses are not a, b, or c. Neither do they fall within d, as the Board can find no statute of the United States of general application within the continental limits of the United States covering them. Nor are they f.

5. The question remains: Do the present offenses fall within e? In other words, is there a law of the District of Columbia recognizing the acts which accused committed as offenses and authorizing punishment therefor by penitentiary confinement for more than one year? The only law of the District of Columbia which the Board of Review has been able to find which might possibly be so construed is section 37, title 6 (previously section 814) of the Code of the District of Columbia, as follows:

> "CRUELTY TO CHILDREN. - Any person who shall torture, cruelly beat, abuse, or otherwise willfully maltreat any child under the age of eighteen years; or any person, having the custody and possession of a child under the age of fourteen years, who shall expose, or aid and abet in exposing, such child in any highway, street, field, house, outhouse, or other place, with intent to abandon it; or any person, having in his custody or control a child under the age of fourteen years, who shall in any way dispose of it with a view to its being employed as an acrobat, or a gymnast, or a contortionist, or a circus rider, or a rope-walker, or in any exhibition of like dangerous character, or as a beggar, or mendicant, or pauper, or street singer, or street musician; or any person who shall take, receive, hire, employ, use, exhibit, or have in custody any child of the age last named for any of the purposes last enumerated, shall be deemed guilty of a misdemeanor, and, when convicted thereof, shall be subject to punishment by a fine of not more than two hundred and fifty dollars, or by imprisonment for a term not exceeding two years, or both. (Feb. 13, 1885, 23 Stat. 303, c. 58, sec. 3; Mar. 3, 1901, 31 Stat. 1322, c. 854, sec. 814.)"

6. In the recent case of Valeroso, CM 210762, in which the offenses were the same as those which the present accused committed; the Board, after quoting the above section of the Code of the District of Columbia, said:

"It is the view of the Board that the statute quoted does not embrace the offense of taking sexual liberties with female children or of committing upon them acts of a lascivious and indecent nature. It obviously contemplates physical harm to a child, abandoning one, or exploiting one for gain. The offense here involved is of a quite different nature."

7. The Board adheres to the view above expressed. It follows that the present case does not fall within any of the six classes enumerated in Article of War 42 as authorizing penitentiary confinement. In the Manual for Courts-Martial, 1928, paragraph 90 a, Article of War 42 is paraphrased and analyzed, and the classes above mentioned are enumerated, after which it is said:

"A penitentiary will not be designated as the place of confinement except as authorized above in this paragraph (90a). * * *."

8. Even if what is above quoted from the Manual for Courts-Martial were not found therein, it would be true, in view of the definite prohibition in Article of War 42, "no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless" the case falls within certain classes. As this case does not fall within one of those classes, penitentiary confinement is not authorized.

9. The penitentiary was perhaps designated as the place of confinement by the reviewing authority upon the view that such action was authorized by section 416, title 5, Canal Zone Code. The specifications in the present case closely follow the language of that section and the section itself was read to the court (R. p. 6). It punishes lewd and lascivious acts with children by penitentiary confinement up to ten years. It follows that if accused had been tried in a Canal Zone court for the present offenses and convicted, he might lawfully have been sentenced to the penitentiary. It may perhaps be regrettable that there is a difference between the power of a Canal Zone court and that of a court-martial in this respect; but the Canal Zone Code is neither a "statute of general application within the continental United States" nor a "law of the District of Columbia", and is therefore wholly irrelevant in determining whether penitentiary confinement may be imposed following a conviction by court-martial.

10. Attention is also invited to section 11 of title 5 of the Canal Zone Code, which says:

> "11. EFFECT OF TITLE UPON POWER OF COURTS MARTIAL AND OTHERS. - This title shall not affect any power which is conferred by law upon any court martial, military authority or other officer, or upon any public body, tribunal, or officer, to impose or inflict punishment upon offenders."

In view of what has already been said as to the inapplicability of section 416, title 5, Canal Zone Code, to the question of penitentiary confinement following conviction by court-martial, the Board finds it unnecessary to consider the effect of the section last quoted.

11. The Board of Review holds the record of trial legally sufficient to support the sentence, provided accused be confined at a place other than a penitentiary.

Archibald King, Judge Advocate.

George A. Frazer, Judge Advocate.

George B. Campbell, Judge Advocate.

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

Board of Review
CM 212412

OCT 20 1939

UNITED STATES)	HAWAIIAN DIVISION
)	
v.)	Trial by G.C.M., convened at
)	Schofield Barracks, T. H.,
Private JACK C. KING)	August 10, 1939. Dishonorable
(6376557), Company L,)	discharge and confinement for
19th Infantry.)	thirty (30) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
FRAZER, CAMPBELL and SCHLANT, Judge Advocates.

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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 stands convicted of (a) malicious conversion of an automobile at Schofield Barracks, T. H., on or about July 2, 1939, in violation of section 6070, Revised Laws of Hawaii, 1935; (b) unlawfully and maliciously, without her consent, on or about July 2, 1939, abducting, carrying away and detaining one Barbara Hodgeman, a female child about three and one-half years of age; and (c) unlawfully and maliciously, on or about July 2, 1939, assaulting Barbara Hodgeman, a female child, under the age of twelve years, with intent to ravish, carnally abuse and know the said child, in violation of section 6245, Revised Laws of Hawaii, 1935. The first of these offenses is punishable by confinement for five years under section 6070, Revised Laws of Hawaii, 1935. As paragraph 104 c of the Manual for Courts-Martial contains no maximum punishment for this offense, a period of five years confinement is considered legal. The second offense referred to, in effect, charges the offense of abduction, which is a violation of section 6230, Revised Laws of Hawaii, 1935, and under said section 6230, confinement for three years is authorized upon conviction of abduction. The Executive Order provides no maximum punishment for this offense, consequently three years confinement is considered the legal maximum punishment imposable. The third offense above set forth is punishable by confinement at hard labor for twenty years, as authorized by paragraph 104 c of the Manual for Courts-Martial, it being a conviction of an assault with intent to commit rape.

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 twenty-eight years.

Gazzett Frazer, Judge Advocate.

George S. Campbell, Judge Advocate.

Edward B. Libbin, Jr., Judge Advocate.

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

Board of Review
CM 212505

DEC 19 1939

UNITED STATES	)	HAWAIIAN DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at Schofield Barracks, T. H., September 18, 1939. Dishonorable discharge and confinement for thirty-five (35) years. Penitentiary.
	)	
Private ERNEST L. TIPTON (6944376), Service Company, 21st Infantry.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, CAMPBELL and SCHLANT, Judge Advocates.

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1. The record of trial 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.

Specification: In that Private Ernest L. Tipton, Service Company, 21st Infantry, did, at Schofield Barracks, Territory of Hawaii, on or about August 14, 1939, with intent to do her bodily harm, commit an assault upon Patricia Mae Springer by unlawfully and feloniously choking her and striking her on the head and face with his fists.

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

Specification: In that Private Ernest L. Tipton, Service Company, 21st Infantry, did, in violation of Section 6010, Revised Laws of Hawaii, 1935, at and in the vicinity of Schofield Barracks, Territory of Hawaii, on or about August 14, 1939, wrongfully and unlawfully kidnap Patricia Mae Springer, a child under the age of eleven years, by forcibly and without authority of law, seizing, imprisoning, detaining and carrying away the said Patricia Mae Springer with intent to cause her to be secreted within the Territory of Hawaii against her will.

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for thirty-five (35) years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The record of trial shows that at the place and time alleged in the specification, Charge I, accused assaulted Patricia Mae Springer, a female child ten years of age, by striking her about the head and face with his hands and choking her with such severity as to cause marked and prolonged swelling and discoloration about her face and throat and considerable nervous shock. Thereupon, as alleged in the specification, Charge II, accused forcibly seized and led or carried the child away against her will and detained or imprisoned her for about two hours during an afternoon within and in the vicinity of Schofield Barracks, T. H. The only questions requiring consideration here are whether the evidence is legally sufficient to show a specific intent by accused to do the child bodily harm as found under the specification, Charge I, and to show a specific intent to cause the child to be secreted within the Territory of Hawaii as found under the specification, Charge II, and whether the record of trial is legally sufficient to support the sentence.

4. It was announced by the trial judge advocate prior to the introduction of evidence that "no question of rape or similar offense has arisen" (R. 7). The record of trial contains nothing suggestive of a sexual motive. Neither is there in the record any suggestion of a purpose by accused to hold the child for ransom or reward or to transport her beyond the Territory of Hawaii.

5. The evidence may be summarized as follows:

From about 12 noon to about 3:30 p.m., August 14, 1939, accused attended a beer party in the 21st Infantry quadrangle at Schofield Barracks, T. H., and consumed a quantity of beer (R. 14, 15). He also drank beer in the 21st Infantry restaurant (R. 17, 90). At about 3:30 p.m., in the company of a Private Walters, he left the quadrangle en route to the Artillery section of the post and walked along Waianae Avenue to the vicinity of a depression known as Garden

Gulch, which was crossed by the Avenue (R. 15; Ex. 2). Before reaching Garden Gulch the two men "were wrestling around" (R. 15) and Walters picked accused up and carried him "across his shoulders like a bag of meal" (R. 15, 16, 87) for about "half a block" (R. 16). Reaching Garden Gulch the two walked down into it (R. 90). While Walters was carrying accused as described, an officer observed them, concluded they were drunk, and stopped to investigate. Accused disappeared but the officer accosted Walters and ordered him to report to his company. The officer also called to accused who was then in the gulch but he did not respond (R. 87, 88). Accused testified that at this time he was drunk, and that involuntarily he "rolled down in the bottom of the gulch" and laid there (R. 90, 91).

At about 3:30 p.m., the child Patricia was given permission to play tennis with a fifteen year old boy, Charles Morgan, at the 21st Infantry tennis courts. At about 3:45 p.m., Patricia's parents drove to Honolulu (R. 25, 54). From the vicinity of the tennis courts the two children rode their bicycles into Garden Gulch near a pistol range where they busied themselves picking up bits of lead. It started to rain and the two entered a nearby cabin (R. 37, 55) located approximately 1200 feet from the point at which accused had descended into the gulch (Ex. 2). Patricia went outside the cabin to pick up some tennis balls which had been dropped whereupon accused ran up to and attacked her (R. 38, 55). She cried and screamed. The boy Charles saw the attack, shouted to accused without effect, and went for help. Looking back he saw accused forcibly leading or dragging Patricia. Accused staggered as he walked, and Patricia stumbled or staggered. Charles thought accused was drunk (R. 55-62).

Patricia testified that accused (R. 50) struck her with his hands about her face, head and back about ten times and choked her. She was on the ground at one time during the attack. She did not think accused said anything at this time (R. 38). She tried to escape but he restrained her (R. 38, 39). She did not later try to run away because accused "said he had a gun, and I didn't want to get shot with that" (R. 48). She did not, however, believe she saw a gun in accused's pocket (R. 49). After the assault accused and witness went along the bottom of the gulch, then "across the highway (Kamehameha Avenue) and in some bushes" in a "sort of a valley" (R. 39). They stopped at a large concrete culvert, photographs of which witness identified (R. 40; Exs. 3, 4, 5). Accused lifted her up and sat her on a "ledge", apparently on the edge of the culvert. He went a few feet below and took off his undershirt. They

then made their way around the culvert across a small stream and into a pineapple field (R. 40, 41). It was raining, the ground was slippery and witness fell down several times (R. 47). Accused held her arm or hand most of the time (R. 46). She asked accused why he struck her and he said "he was sorry. He said the police would be coming after him, and he had to use me as a shield, and that he would bring me back in about three days" (R. 41). He also said the "policemen were going to get him, and he said he would be as good as dead because he couldn't get off the island" (R. 44). Witness asked accused "why he hit me so hard, and he said he tried to knock me out so I wouldn't scream" (R. 46). Accused asked witness her father's name but she refused to give it unless accused agreed to take her home (R. 44). He said he was going to take witness home and "might kill" her father "when he didn't mean to". In the pineapple field the two "just walked along" and accused took a few pineapples. Accused said he "knew a friend, and he said we would stay in his house; and I said: 'If he knew you had done something he might kill you', and he said the friend wouldn't". Having reached a small house the two sat down and rested (R. 42). Here accused again asked the name of witness' father and witness again refused to tell him unless accused agreed to take her home (R. 44). Leaving the small house they went further through the pineapple field and "into the woods, and there was a big pond (apparently north fork of Wahiawa Reservoir) and we sat near the edge of it in some bushes". Accused attempted or proposed to make a fire but his "matches were wet, and he said he might kill himself, and I told him not to" (R. 42). Witness asked accused where his knife was, and accused replied that he had "left his things back at the little shack" (R. 44). After reaching the pineapple field accused did not threaten witness (R. 42, 43). He said he would take witness "back home, but not too close because the police would get him" (R. 42), and said he might take her to the gulch where he found her (R. 43, 44). Accused then started back towards Schofield Barracks leading witness by the hand part of the time (R. 47). He told witness they would stay in the little house where they had rested "until it got darker and then go on further" (R. 44). While they were walking towards home the military police ran after and caught accused (R. 43).

Three or four days after the occurrences described Patricia went with her father, Captain Robert M. Springer, J.A.G.D., and others, over the route which, as she recalled, she and accused had traversed (R. 28-31, 51, 52). Captain Springer, testifying, marked on a map received in evidence as Exhibit 2, the approximate route thus retraced (R. 31). He also identified an undershirt found in the

vicinity of the culvert (R. 31, 32), and identified clothing worn by his daughter on August 14 (R. 26, 27).

An enlisted man, a member of a searching party, testified that at about 6:30 p.m., his party "caught" accused while he was walking with the child towards Schofield Barracks at a spot in a pineapple field about one hundred yards from a reservoir. Accused "acted dopey", but said he was going back to Schofield Barracks to give himself up, and that "he wasn't any good, and that they ought to kill him" (R. 78-80).

Private Walters, with whom, as related above, accused entered Garden Gulch after the beer party, testified that accused was drunk when witness last saw him (R. 8). This witness, prior to the trial, had stated that accused "was feeling good but wasn't drunk". "He was more sober than I was" and talked sensibly (R. 9; Ex. 1). Two medical officers testified that they examined accused at about 6:30 p.m. Both found him to be drunk (R. 63, 70). One of these officers testified that he did not believe that accused at the time of the examination or two or three hours previously, was so drunk as to be incapable of entertaining a criminal intent (R. 64). The other medical officer testified that he found alcohol present in the blood of accused in the amount of two milligrams of alcohol per hundred cubic centimeters of blood (R. 70), a "moderately high" content indicative of "acute alcoholism". This witness considered it "highly improbable to answer in detail the condition of any person three hours preceding" and could not say whether it was possible that three hours prior to the examination accused was so drunk that his ability to differentiate between right and wrong was impaired (R. 71).

An officer of a military police company testified that accused made a sworn statement and signed it in witness' presence at about 8 or 8:30 p.m., on August 14 (R. 75). Witness did not observe any odor of alcohol on the breath of accused at the time and paid no attention to his state of sobriety (R. 75, 76). In his statement (Ex. 10) after he had been warned that he was not required to say anything and that what he said might be used against him, accused stated in material part:

> "At about 12:00 Noon, August 14, 1939, I started drinking beer at Service Company, 21st Infantry, at a dinner and beer party given by the company for Organ-

> ization Day. After drinking beer there another soldier and I went to the 21st Infantry Restaurant and had some more beer there. The man I was with said he had a friend up at the Field Artillery. We walked as far as the Nurses Quarters and took a leak in the gulch. The next thing I remember is coming out of a pineapple field in back of Kemoo's. I noticed that there was a girl with me. She started talking that she wanted to go home. She said that she was sore because I had hit her. I do not remember hitting her. I told her that I would see that she got home and started walking towards Schofield. We soon saw some soldiers from the 35th Infantry and they took us to the main road where I was turned over to the Military Police and taken into the MP Headquarters."

Accused testified that when he went into Garden Gulch he "was the drunkest I have ever been since I have been in the army" (R. 90). After he rolled into the bottom of the gulch -

> "I don't know, sir, whether I went to sleep, or what happened, but I do remember that when I came to I was in the pineapple field with this girl, and it all seemed like a dream at first. I didn't know how she got there, nor anything. She told me I had hit her, and I remember telling her I was sorry I had hit her, but I said I would take her back home." (R. 91.)

Accused did not know where the child lived, but she asked him to take her to the vicinity of the 21st Infantry tennis court or playground. Accused did not remember that he intended to strike her or make her go any place with him (R. 91, 92). At the time of his arrest he did not see the soldiers as they approached him (R. 95).

6. The evidence unmistakably shows that accused was drunk at the time of the assault upon the child Patricia. His behavior and the alcoholic content of his blood were indicative of a considerable degree of drunkenness and his acts taken as a whole were so inexplicable as to suggest that he was mentally incapable of entertaining a specific intent to do the child bodily harm as charged. He was, on the other hand, manifestly capable of such physical self-control as to enable him effectively to commit the assault and his acts and subsequent remarks explanatory of the assault were not so

irrational as to be wholly inconsistent with the normal presumption that he was capable of intending what he unmistakably did do and what he coherently declared he was seeking to do, that is, inflict serious bodily injury. The evidence is legally sufficient to establish the specific intent charged and to support the findings of guilty of Charge I and its specification.

7. The Board of Review does not find in the evidence any adequate basis for an inference that in seizing, carrying away, imprisoning and detaining the child accused intended to cause her to be secreted within the Territory of Hawaii as found by the court under the specification, Charge II. The word "secrete" is defined by Webster's New International Dictionary as "to keep secret or hidden; to keep from general knowledge; esp., to deposit in a place of hiding; to hide; conceal; as, to secrete stolen goods; to secrete one's self". As compared to "hide", secrete means "to deposit in a place of close hiding" (see "hide", Webster's New International Dictionary). The word "secrete" thus connotes a positive act to prevent discovery. The requirement of the Hawaiian Statute defining kidnapping that there be a specific intent to cause the victim to be secreted would be without force if mere seizure, imprisonment, detention or asportation constituted the offense. Seizure, imprisonment, detention or asportation resulting in some slight element of concealment wholly incidental to another purpose inconsistent with concealment will not suffice to ground an inference of intent to cause the victim to be secreted.

There is proof that accused restrained, imprisoned and carried away the child in the sense that he forcibly and unlawfully compelled her to accompany him and thus deprived her of her liberty of movement. He did not attempt to hide or secrete the child in the sense of depositing her in a place of hiding. He did not at any time declare a purpose to hide or secrete her. The record is barren of any suggestion of a design by accused which would in reason lead him to hide or secrete the child. The acts and words of accused in their reasonable aspect most unfavorable to him show that he intended to detain or imprison the child to the end of using her as a "shield", a defense against his own apprehension by the police for drunkenness or some like or related offense, possibly in the home of a friend and possibly for as long as three days. This he could do, in his belief that he was sought by the police, without intending to hide or secrete her. He could not indeed carry out his declared purpose to use the child as a defensive "shield" - use

her, presumably, to stand between him and the police, if she were secreted or hidden away. Accused's drunken meanderings with the child in what may have been relatively unfrequented localities were consistent with his announced purpose to keep her with him as a "shield" but may not fairly be interpreted as a search for a hiding place for her. Such elements of concealment as might have resulted from these meanderings were slight and entirely incidental to the avowed purpose of accused to use the child as a "shield". As observed, these possible elements of concealment were inconsistent with that avowed purpose.

Whatever the inference of intent which might normally be drawn from the acts and words of accused, a true comprehension of the significance of those acts and words may not be had without considering them in relation to his abnormal state. Only when so considered does his conduct assume an understandable pattern. This pattern is that of a drunken venture of self-defense devoid of any real evidence of a positive intent to hide away or secrete the child.

The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 152797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206522, Young; CM 207591, Nash, et al.). The following has been quoted, with approval, by the Board of Review (CM 197408, McCrimon; CM 206522, Young; CM 207591, Nash, et al.):

> "We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen." (Buntain v. State, 15 Tex. Appeals, 490.)

The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of the specification, Charge II, as involves a finding that accused did at the place and time alleged forcibly and without authority of law, seize, imprison, detain and carry away Patricia Mae Springer, a child under the age of eleven years, against her will.

8. The maximum punishment by confinement authorized by paragraph 104 c, Manual for Courts-Martial, for the offense of assault with intent to do bodily harm, of which accused was found guilty under Charge I and its specification, is confinement at hard labor for one year. There remains for consideration the maximum punishment which may legally be imposed for the offense of which accused was properly found guilty under Charge II and its specification. This latter offense is the equivalent of the common law crime of false imprisonment which may be defined as "an unlawful physical restriction of corporal liberty". The place of imprisonment is not material. No element of specific intent is involved (sec. 777, Wharton's Criminal Law, 11th ed.; sec. 748, Bishop's New Criminal Law; sec. 486, McLain on Criminal Law; 25 Corpus Juris, 571).

9. Neither the offense of false imprisonment nor any closely related offense is listed in the table of maximum punishments contained in paragraph 104 c, Manual for Courts-Martial. Neither is this offense specifically denounced by the Criminal Code of the United States or by the Code of the District of Columbia. Section 7, title 6, of the Code of the District of Columbia, however, provides:

> "7. Punishment for offenses not covered by provisions of code. - Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than five years, or both."

Common law crimes are assimilated by and are punishable under this section (Palmer v. Lenovitz, 35 App. D.C. 303). It follows that the offense of false imprisonment, a crime at common law, falls under this section.

Paragraph 104 c of the Manual for Courts-Martial provides that offenses the punishment for which is not otherwise therein prescribed "remain punishable as authorized by statute or by the custom of the service". The "statute" thus mentioned has heretofore been construed to include "any Federal statute of general application or * * * the Code of the District of Columbia, * * * in the order named" (CM 210762, Valeroso; see also CM 145155, Gambril; CM 145266, Baker; CM 159983, MacCormack; CM 162435, Huston; CM 199369, Davis). In a recent holding (CM 212056, Smith), the Board of Review made observations to the effect that the Code of the District of Columbia is not controlling, but persuasive only as to limits of punishment. These observations were not, however, necessary to the holding.

Beyond the fact that the quoted clause of paragraph 104 c, Manual for Courts-Martial, has for many years been interpreted to include the Code of the District of Columbia, there are other cogent reasons for adherence to such view. A purpose of Article of War 45 authorizing the President to fix maximum limits of punishment was no doubt that of inducing "uniformity in the penalties adjudged by courts-martial in similar cases" (Winthrop's Military Law and Precedents, reprint, p. 395). The limitations by reference to statutes enacted by the Congress accomplish such a purpose. In view of the narrow scope of the Criminal Code, adoption of the Code of the District of Columbia materially widens the field of uniform limitation. It is but reasonable to assume, moreover, that in broadening and making uniform his limitations of punishments through reference to statutes, the President intended to include all statutes of the Congress, at least those applicable within the Continental United States, containing congressional expressions as to suitable punishments. The territorial scope of the Code of the District of Columbia is more limited than that of the Criminal Code but is of great if not equal value as a guide to what the Congress has deemed appropriate punishments. Persuasive, also, by analogy, is the fact that Article of War 42, in authorizing penitentiary confinement by reference to other statutes authorizing certain punishments, recognizes the law of the District of Columbia as of equal rank with statutes of the United States of general application within the Continental United States.

By the observations of the Board of Review in the Smith case (CM 212056), above referred to, it was suggested that the clause of paragraph 104 c of the Manual in question should not be interpreted to refer to the Code of the District of Columbia because that code is not applicable *ex proprio vigore* and is not made

applicable by some other statute or competent order to courts-martial. This view is hardly tenable for the reason that the Criminal Code, as well as the Code of the District of Columbia, does not have any force ex proprio vigore and is not made applicable by other statute or competent order (other than paragraph 104 c, M.C.M.) with respect to maximum authorized punishments to be adjudged by courts-martial, and if neither of these codes is applicable, the clause in question becomes substantially ineffective and meaningless.

Article of War 96 provides that:

> "* * * all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such Court."

Paragraph 152 c of the Manual for Courts-Martial interprets the crimes mentioned in this article as being those -

> "* * * committed in violation of public law as enforced by the civil power. The 'public law' here in contemplation includes that enacted by Congress or under the authority of Congress. For example, it includes (but only as to violations within their respective jurisdictions) the Code of the District of Columbia, and the laws of the several Territories and possessions of the United States."

This interpretation as to local application of the Code of the District of Columbia, relates only to offenses cognizable by the article and does not directly or by implication affect the provisions of law and of the Manual relating to maximum punishments.

It is to be observed that the above-quoted clause of paragraph 104 c of the Manual for Courts-Martial provides, in addition to the limitations by reference to "statute", that offenses the punishment of which is not otherwise prescribed remain punishable as authorized by the "custom of the service". The Board of Review, in holding that punishment adjudged by a court-martial (for an indecent assault upon a child in violation of Article of War 96) was limited to the maximum fixed by a statute of the Code of the District of Columbia for an analogous offense, has stated:

"* * * It is the custom of the service, where no limit of punishment for an offense is specifically prescribed in the Executive Order, to follow Congressional expression of what constitutes appropriate punishment. * * *." (CM 199369, Davis.)

The Board of Review holds that the maximum authorized punishment by confinement for the offense of which accused was properly convicted under the specification, Charge II, is confinement at hard labor for five years, the maximum punishment by confinement authorized by section 7, title 6, of the Code of the District of Columbia. Confinement in a penitentiary is authorized for this offense, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 7, title 6, of the Code of the District of Columbia.

10. 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, Charge II, as involves a finding that accused did at the place and at the time alleged forcibly and without authority of law seize, imprison, detain and carry away Patricia Mae Springer, a child under the age of eleven years, against her will; 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 years in a penitentiary.

Nyhart W. Hoover, Judge Advocate.

George B. Campbell, Judge Advocate.

Edward B. Schlant, Judge Advocate.

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

Board of Review
CM 212634

APR 5 1940

UNITED STATES	)	SECOND CORPS AREA
v.	)	Trial by G.C.M., convened at Governors Island, New York, September 18, 27, 28, October 4 and 5, 1939. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
General Prisoner GROVER C. BERGDOLL.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, CAMPBELL and SCHLANT, Judge Advocates.

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

2. Under Charge II and its specification accused was found guilty of desertion on or about May 21, 1920, terminated by apprehension on or about May 25, 1939, in violation of Article of War 58. The record of trial is legally sufficient to support the findings of guilty under this charge and specification and the sentence as approved and reduced by the reviewing authority is legally authorized, under the Executive Order of December 10, 1920 (par. 349, M.C.M., 1921), for the offense involved in these findings.

3. Under Charge I and its specification accused was found guilty of escape on or about May 21, 1920, in violation of Article of War 69. Upon arraignment on September 18, 1939, accused pleaded the statute of limitations (A.W. 39) in bar of trial (R. 27).

With respect to the plea in bar of trial, the prosecution contended, among other things, that accused was absent from the territorial limits of the United States from about May 22, 1920, to May 25, 1939, and that under the terms of Article of War 39, the period of such absence was to be excluded in computing the period of limitation prescribed by that article. To prove the absence asserted the prosecution introduced evidence of the departure of accused from the United States on the day following his escape, about May 22, 1920 (R. 30-33), of his subsequent presence in Germany shortly after his departure (R. 34, 38, 39) and again in 1934 (Pros. Ex. 1) and of his

return to the United States on May 25, 1939 (R. 44). Accused testified that he returned to the United States via Canada under the assumed names of Josef Amann and Bennet Nash, in June, 1929, and remained concealed in his mother's home in Philadelphia, Pennsylvania, until he departed for Germany about May, 1933; and that he again returned via Canada to his mother's home in Philadelphia, under the assumed names of Bennet Nash and John Sparks, about October, 1935, and remained there in concealment until about October, 1938 (R. 56-61, 74-79, 85-89). Witnesses for the defense, including the mother (R. 105, 106), wife (R. 123, 125), a sister-in-law (R. 138), a brother (R. 164), two children of accused (R. 173, 174, 180), a household servant (R. 145), and two persons not related to or residing with accused (R. 146, 147, 155, 156), testified in partial direct corroboration of the testimony by accused as to his presence in Philadelphia during the two periods described. Certain evidence, testimonial and documentary, tending to corroborate the testimony of accused as to his entries into the United States in 1929 and 1935 (Def. Exs. 6, 10, 11, 21-33), and departures therefrom in 1933 and 1938 (R. 64, 66, 222, 224; Def. Exs. 4, 5, 19, 20; Pros. Exs. 2, 3), were also introduced. A special agent of the Federal Bureau of Investigation testified for the prosecution that on many occasions between 1920 and 1939, he had watched the home of the mother of accused and had entered it at times but had not seen accused (R. 268-281). Evidence was also introduced that in 1934, in Stuttgart, Germany, accused declared in an application for a passport sworn to before a United States Consul that he last left the United States in May, 1920 (Pros. Ex. 1); and that ship manifests relating to the departures of the accused from the United States (Pros. Exs. 2, 3) contained recitals apparently based on information furnished by accused (R. 226), that he had arrived in the United States six days before his departure in 1933 (Pros. Ex. 2) and about fourteen months before his departure in 1938 (Pros. Ex. 3).

The law member, without objection by any member of the court, overruled the plea in bar of trial, stating in pertinent part:

> "The statute ran from the date the accused was removed from the Bremen, May 25, 1939, to the date of the arraignment of accused before this court, September 18, 1939, a period of a week less than four months.
>
> "Of the period from the date of escape, May 21, 1920, to the date accused was removed from the Bremen, May 25, 1939, the evidence shows that he was either (1) beyond the territorial jurisdiction of the United States, (2) was in

concealment in his house in Philadelphia, or (3) was en route between his home in Philadelphia, and the borders of the United States.

"The period of absence from the territorial jurisdiction of the United States is clearly excepted from the running of the two year period provided for in the statute, by the language of the second proviso of Article of War 39.

"As to the period during which the accused was shown to be within the territorial limits of the United States, prior to May 25, 1939, the testimony -- including that of accused himself -- clearly shows that he entered and departed from the United States under an assumed name and that during the entire period of his residence in his home in Philadelphia, he secreted himself in his home and avoided seeing any friends or acquaintances outside of his own family -- except the cleaning woman, and was in effect, and in fact, a fugitive from justice.

"It is clear, in my opinion, that during the periods of such residence in his home, there existed a 'manifest impediment' whereby the accused was not amenable to military justice, within the meaning of the second proviso of Article of War 39, and that the statute did not run in his favor during the two such periods of residence.

"If any doubt as to the application of the statute exists as to any period, it is to that period which is the sum of the five periods -- no one of which exceeded a week and all in the aggregate did not exceed one month -- while accused was en route between Philadelphia and the border of the United States. In each such case he entered or left the United States fraudently and under an assumed name. The evidence, in my opinion, does show the existence of a 'manifest impediment' within the meaning of the thirty-ninth Article of War, during those periods en route.

"In my opinion, the statute of limitations with respect to the charge of escape from confinement has run in favor of the accused only for an aggregate period of less than five months of the required two years." (R. 366-368.)

Neither the law member nor the court made any declaration during the trial which may be construed as an express determination or finding as to whether accused was in the United States for more than two years between the time of his escape and the time of his arraign-

ment, the period of limitation prescribed by Article of War 39. The ruling of the law member may conceivably be construed as a determination that accused was in the United States during the periods covered by his testimony, but the Board of Review finds nothing in this ruling or elsewhere in the record of trial to justify a conclusion that the law member or the court intended to determine that accused was not within the United States for more than two years between the time of his offense and the time of his arraignment. If the court had intended to determine that accused was not in the United States for more than two years between the time of his escape and the time of his arraignment, it is but reasonable to assume that it would have expressly stated such determination or would have stated merely that the plea was overruled, for either course would have been conclusive upon the plea and would have rendered unnecessary any consideration of other questions relating to the plea. Inasmuch as the ruling quoted purported fully to dispose of the plea in bar of trial upon the ground that during his presence in the United States accused was a fugitive from justice and that this circumstance constituted a manifest impediment to the running of the statute of limitations, the findings of guilty raise no inference of a finding by the court upon the issue of fact in question other than as indicated by the ruling. It follows that as the record of trial stands it does not contain any determination or finding by the court as to whether accused was present in the United States for more than two years between the time of his escape and the time of his arraignment, unless it be a determination that he was so present.

4. By letter from the Acting The Judge Advocate General, dated February 21, 1940, the record of trial was returned to the reviewing authority, the Commanding General, Second Corps Area, suggesting that a. the record be returned to the court for proceedings in revision for the purpose of correcting it to show the finding of the court with respect to the fact of the presence of accused within the United States subsequent to his escape and prior to his arraignment, if such finding was reached at the trial, or, if such finding was not reached at the trial, to make and record in the course of the proceedings in revision such a finding of fact; or b. that the findings of guilty of Charge I and its specification alleging escape be disapproved. By 1st Indorsement upon this letter, dated March 19, 1940, the reviewing authority returned the record of trial to the Acting The Judge Advocate General without adopting either of the suggestions. In his indorsement the reviewing authority stated, among other things, that he believed that the

evidence presented by the defense in support of the plea in bar of trial was unworthy of belief.

5. The ruling by the court that the alleged concealment of accused during his presence in the United States constituted a manifest impediment to the operation of the statute of limitations was erroneous. The Board of Review is in full accord with the views of the Acting The Judge Advocate General expressed in his letter to the reviewing authority, above referred to, as follows:

> "* * * Article of War 39 provides, in pertinent part -
>
> "'* * * That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitations: * * *.'
>
> The term 'manifest impediment' thus used in the article has been authoritatively interpreted to mean something other than mere -
>
> "' want of evidence, or ignorance as to the offender or offense by the military authorities, but it means something akin to absence, want of power, or a physical inability to bring the party charged to trial. A "manifest impediment" does not exist where the military authorities, by reasonable diligence could make such party amenable to justice; and any concealment of the evidence of his guilt, or other like fraud on his part by which the prosecution is delayed until the time of the bar has run does not in and of itself deprive him of the benefit of the statute (14 Op. Atty. Gen. 265).' (P. 211, M.C.M.)

See also In re Davison (4 Fed. 507; Winthrop, Military Law and Precedents (reprint), 257.) The above-quoted language of the Attorney General was used in a case in which a deserter had concealed himself by fraudulently enlisting under an alias in a regiment other than his own. The Attorney General held the statute had run. This office has never held that fraudulent concealment of the whereabouts of the offender amounted to a manifest impediment to operation of the statute. It has, however, held that a mere allegation that the where-

abouts of the offender was unknown to the military authorities is not a good averment of a manifest impediment (Dig. Ops. JAG 1912, p. 171). An example of a manifest impediment within the meaning of Article of War 39 may be found in an impediment to trial by court-martial arising through detention of the accused as a prisoner of war (p. 118, M.C.M., 1921) or through confinement of accused under a sentence legally imposed by a state court (CM 171710, Clark; CM 172791, Gross; p. 118, M.C.M., 1921).

"6. Article 88 of the Articles of War of 1806 and Article 103 of the Articles of War of 1874, predecessors of the present Article of War 39, barred trial of an accused after the lapse of more than two years between the commission of the offense and the order for trial 'unless, by reason of having absented himself, or of some other manifest impediment' (underscoring supplied) he had not been amenable to justice within that period. In support of its contention that concealment of accused in the United States amounted to a manifest impediment or by virtue of some other provision of Article of War 39 tolled the limitations of that statute, the prosecution invited attention to a series of opinions by this office that the absence referred to in the quoted clause of the old articles might include -

> "'* * * an absence by reason of a "fleeing from justice," analogous to that specified in section 1045, R. S., which has been held to mean leaving one's home, residence or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offense against the United States. (Dig. Ops. JAG 1912, p. 172.)

It may be noted that this office also held that under the old articles the limitation began to run in the case of desertion (which always involved a 'fleeing') only upon the return of the deserter to military control (Dig. Ops. JAG 1912, p. 172). It is to be observed also that by the act of April 11, 1890 (26 Stat. 54), the Congress amended Article of War 103 by adding a provision barring trial of an accused for peacetime desertion after the lapse of more than two years between the commission of the offense and arraignment 'unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation' (under-

scoring supplied), thus partially repealing the rule as to tolling absence recognized by the opinions on which the prosecution relied.

"7. In the present Article of War 39, enacted in 1916 and reenacted in 1920, the quoted clause of the old articles which had been construed by this office to include a 'fleeing from justice', was omitted. In lieu of that clause the present statute provides that the period of any '<u>absence of the accused from the jurisdiction of the United States</u>' (underscoring supplied), and any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the periods of limitation. The enactment of the present statute thus involved entire abandonment of the language on which was based the original rule as to tolling absence, already partially abandoned (with respect to desertion) by the act of April 11, 1890. The substituted language clearly and unequivocally limits the tolling absence to absence from the jurisdiction of the United States. An accused who is physically within the territorial boundaries of the United States cannot be absent from the jurisdiction of the United States. Jurisdiction imports legal authority to apply the law (Webster's New International Dictionary; <u>Wedding</u> v. <u>Meyler</u>, 192 U.S. 573; 14 Atty. Gen. 265), and the United States has legal authority to apply its laws to all persons within its territory although, as observed, there may be manifest impediments to the exercise of its jurisdiction with respect to such persons.

"Statutes of limitation in criminal matters must be interpreted to 'apply to all cases not expressly excepted from their operation'(14 Atty. Gen. 265, 268); that is, exceptions cannot be enlarged beyond the plain import of the language of the statute (<u>Ex parte Vice</u>, 89 Pac. (Calif.), 983). The United States Code of Criminal Procedure expressly excludes from the benefits of the statute of limitations of that code persons 'fleeing from justice' (18 U.S.C. 583), but this express exclusion is applicable only to prosecutions in the civil courts of the United States and is without force in court-martial procedure. Except as indicated in paragraph 7, above, equivalent language has never been used in our military statutes of limitations.

"8. During the trial the prosecution made reference to the report of a committee of the Senate (Rep. No. 130, 64th Cong., 1st sess., p. 19) pertaining to a proposed revision of the Articles of War in 1916, in which it was stated that Article of War 39 (in its present form) had been 'modified and simplified', that a change had been made in the period of limitation fixed by the original article with respect to certain offenses, that a change had been made excepting wartime desertion, mutiny and murder from the benefits of the statute, and that 'in no other respect has existing law been changed'. Particular emphasis was placed by the prosecution on this quoted remark. It is not clear from the entire report that the committee intended by the remark quoted to imply more than that changes had not been made in the periods of limitation or in the applicability of the statute to specific offenses other than as specially noted. Substantive changes not specially noted had in fact been made in that the end of the period of limitation had been changed from the time of issuing the order for trial (applicable under A.W. 103 to all offenses other than desertion) to the time of arraignment (see A.W. 39), and, as observed above, the language with respect to tolling absence had been radically modified. Whatever may have been the purport of the remark by the committee, it is entirely clear that a report of this character may not be accepted in contradiction of the unmistakeable language of the enactment itself (Wisconsin R.R. Comm. v. C. B. & Q. R.R. Co., 257 U.S. 563, 588)."

6. If the ruling of the law member is construed to show that the court intended to find that accused was present in the United States for more than two years between the time of his escape and the time of his arraignment, the bar of the statute of limitations must be held applicable to the offense of escape involved in Charge I and its specification. The determination as to the credibility and weight of the evidence submitted upon the issue of fact presented and as to whether the prosecution had successfully borne its burden of proving by a preponderance of evidence that the statute of limitations was inapplicable (par. 67, M.C.M.), was the exclusive function of the court. The opinion of the reviewing authority as to the question of fact raised by the plea in bar of trial, that is, his view that the evidence presented by the defense in support of the plea was unworthy of belief, might properly have been considered by the court had the record of trial been returned to it by the reviewing authority for reconsidera-

tion, under the authority of the Manual for Courts-Martial. There was substantial evidence that accused was present in the United States for more than two years between the time of his escape and the time of his arraignment, and the Board of Review cannot escape the conclusion that this evidence, if believed by the court, was legally sufficient to justify the court's finding that he was so present. There being this substantial evidence to support the finding, the view of the reviewing authority with respect to the credibility and weight of the evidence would not have been legally binding upon the court (par. 64 a, M.C.M.).

7. If the court did not intend to find that accused was in the United States as indicated, the only remaining legally tenable construction of the record of trial, as observed above, is that there was no determination or finding by the court as to whether accused was present in the United States for more than two years between the time of his escape and the time of his arraignment. In such case the record must likewise be held legally insufficient to support the findings of guilty of Charge I and its specification. The plea in bar of trial presented the specific issue of fact and accused had the unquestionable legal right to have it determined by the court in the manner provided by law. This legal right was a substantial one going to the very liability of accused to be tried for the offense alleged. The failure of the court to make the determination was error the injurious effect of which is manifest from its nature. As stated, there is substantial evidence reasonably sufficient to support the plea in bar of trial. This being so, neither the reviewing authority nor the Board of Review now has legal power to supply a determination as to the fact in issue or otherwise to avoid the necessity of such a determination by the court.

8. 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 specification; and legally sufficient to support the findings of guilty of Charge II and its specification and the sentence as approved and reduced by the reviewing authority.

Robert W. Goggs, Judge Advocate.

George D. Campbell, Judge Advocate.

Edward B. Schlant, Judge Advocate.

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

Board of Review
CM 212916

JAN 25 1940

UNITED STATES)	THIRD CORPS AREA
)	
v.)	Trial by G.C.M., convened at
)	Carlisle Barracks, Pennsylvania,
First Lieutenant PHILIP W.)	January 3, 1940. Dismissal and
HOCKERSMITH (0-18650), Med-)	confinement for one (1) year.
ical Administrative Corps.)	

OPINION of the BOARD OF REVIEW
HOOVER, CAMPBELL and SCHLANT, Judge Advocates.

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1. The record of trial in the case of the officer named above 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 93rd Article of War.

Specification 1: In that First Lieutenant Philip W. Hockersmith, Medical Administrative Corps, did, at Carlisle Barracks, Pa., between September 1, 1939, and November 27, 1939, feloniously embezzle by fraudulently converting to his own use funds in the amount of about one hundred four dollars and fifteen cents ($104.15), property of the Officers' Mess Fund, Carlisle Barracks, Pa., entrusted to him as custodian of said fund.

Specification 2: In that First Lieutenant Philip W. Hockersmith, Medical Administrative Corps, did, at Carlisle Barracks, Pa., between September 1, 1939 and November 27, 1939, feloniously embezzle by fraudulently converting to his own use funds in the amount of about one thousand one hundred fifty two dollars and twelve cents ($1,152.12), property of the Hospital Fund, Carlisle Barracks Pa., entrusted to him as custodian of said fund.

Specification 3: In that First Lieutenant Philip W. Hockersmith, Medical Administrative Corps, did,

> at Carlisle Barracks, Pa., between July 8, 1939 and November 27, 1939, feloniously embezzle by fraudulently converting to his own use funds in the amount of about two thousand three hundred sixty five dollars and twenty cents ($2,365.20), property of the Post Exchange, Carlisle Barracks, Pa., entrusted to him as Post Exchange Officer.

He pleaded guilty to the charge and specifications. He was found guilty of the charge and Specification 1, guilty of Specification 2, "except the words 'one thousand one hundred fifty-two dollars and twelve cents', substituting therefor the words 'one thousand one hundred fifty-two dollars and nineteen cents'; of the excepted words, not guilty; of the substituted words, guilty", and guilty of Specification 3, "except the words 'two thousand three hundred sixty-five dollars and twenty cents', substituting therefor the words 'two thousand three hundred thirty-eight dollars and ninety-three cents'; of the excepted words, not guilty; of the substituted words, guilty". No evidence of previous convictions was introduced. He was sentenced on January 3, 1940, to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the findings of guilty of the charge and of Specifications 1 and 3, approved only so much of the finding of guilty of Specification 2 "as finds the accused guilty of embezzlement in the sum of $1,152.12, as alleged", approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused was assigned to duty as Post Exchange Officer, Carlisle Barracks, Pennsylvania, July 7, 1939 (R. 4; Ex. A). He was assigned as Mess Officer of the Officers' Mess and Custodian of the Hospital Fund, Carlisle Barracks, on September 5, 1939 (R. 4; Ex. B). He continued on these duties until November 27, on which date he was relieved therefrom (R. 4; Ex. C), it having been reported that he was absent from the Post at a time at which he had been cautioned to have his "funds closed and ready for inspection" by an Inspector General (R. 4).

Following the report of the absence of accused, audits of the accounts and funds of the Officers' Mess and of the Hospital Fund were made by a board of officers and by a noncommissioned officer in charge of the records relating to the funds. It was discovered through

these audits that there was a cash shortage in the Officers' Mess amounting to $104.15 (Spec. 1), and a cash shortage in the Hospital Fund amounting to $1,152.19 (Spec. 2) (R. 7-9). Audits of the accounts and funds of the Post Exchange were made at about the same time by another board of officers and by a firm of accountants (R. 5, 6). These audits showed a cash shortage of $2,338.93 (Spec. 3) (R. 6; Ex. D).

On November 29, 1939, after having been "warned of his rights", accused was questioned by Colonel H. C. Gibner, Medical Corps, Commandant of the Medical Field Service School, Carlisle Barracks. Accused stated that -

> "* * * he had placed about $460.00 of Hospital Fund money in an envelope in the Post Exchange safe; that this money had been taken by someone * * * he may have left the envelope on top of the safe during a temporary absence or may have even forgotten to put it in when he closed the safe at the close of business; that he did not report this loss because he thought he would be subject to criticism for keeping Mess Fund money in the Post Exchange safe; that subsequently at the monthly audits following this he was able to show the proper amount of cash on hand in each of the funds by juggling the cash from one fund to another, the audits being made on different dates; that in November he became panic stricken and tried to recoup his losses by playing the races; that on one Saturday in November, whether it was Saturday the 11th or the following Saturday he does not remember, he lost approximately $400.00 playing the races and that on two subsequent occasions he lost amounts which he did not remember. He stated that the approximate shortage in the Hospital Fund was about $1100.00 and in the Officers' Mess Fund about $100.00. He stated that there was not a shortage of about $2300.00 in the Post Exchange Fund but that he believed it was considerably less than that." (R. 10.)

4. Evidence was introduced by the defense to the effect that from about September 1 to about September 13, 1939, accused, in addition to his other duties, was detailed from time to time for short periods as Medical Supply Officer in charge of the medical section of the New Cumberland General Depot and as Provost Marshal, Police Officer, Prison Officer, and Agent Finance Officer at Carlisle Barracks (R. 12, 13, 16, 17).

Accused testified that about September 5, 1939, a large amount of money belonging to the Hospital Fund came into his possession. At the end of the day, after making certain disbursements, he had about $460 in cash remaining. This money he placed in an envelope in the Post Exchange safe. Thereafter he opened the safe frequently and may have placed the envelope on top of the safe or dropped it to the floor. He looked for the envelope and money on September 6 or 7, but could not find it. Believing that he would be subject to criticism for placing Hospital Fund moneys in the Post Exchange safe, he did not report the loss (R. 17, 18) - "I knew it was my responsibility and I would have to make it good and I thought I could make it good without letting anyone know about it." (R. 18). He concealed the loss at the time of the next audit, late in September, by transferring funds from his Post Exchange account. A little later, upon audit of the Post Exchange account, he covered his shortage in the latter account by the use of moneys from the Hospital Fund. When his accounts were audited late in October, he again concealed his shortages. He tried unsuccessfully to borrow money to replace that lost (R. 18, 19). Thereafter, having heard that an Inspector General was due at the Post, he "decided to gamble on it. I played the races". He lost money at the races but could not at the time of the trial recall the amount of such loss (R. 19). Accused testified that he is married and has two children. He served in the Army as an enlisted man from about August, 1917, to June, 1919, and reenlisted in 1928. Commissioned in 1931, he served thereafter at Fitzsimons General Hospital and Tripler General Hospital and twice at Carlisle Barracks (R. 15, 16).

Statements of three commanding officers of accused, attesting to his satisfactory or excellent service at the stations mentioned in his testimony were introduced (R. 13, 14; Defense Ex. 1). One of the former commanding officers stated that the habits of accused "were exemplary and his accounts were always in perfect condition" (Defense Ex. 1).

5. The evidence, together with the pleas of guilty, fully supports the findings of guilty as approved by the reviewing authority. The testimony by accused that he lost $460 of the Hospital Fund moneys was to that extent inconsistent with his plea of guilty to Specification 2. Upon the proof, however, the finding of guilty of embezzlement of the entire amount covered by that specification was justified.

6. Seven of the ten members of the court joined in a recommendation that the confinement imposed by the sentence be "suspended in view of the previous good record and excellent service of accused".

7. Accused is thirty-eight years of age. The Army Register shows his service as follows:

"Pvt. Co. B. 3 Ark. Inf. 5 Aug. 17 to 15 Mar. 18; pvt. and pvt. 1 cl. Hq. Co. 154 Inf. and Hq. Co. and Co. E. 126 Inf. and 151 Dep. Brig. 16 Mar. 18 to 24 May 19; pvt. pvt. 1 cl. and sgt. Med. Dept. 20 Oct. 28 to 22 July 31; 2 lt. Med. Adm. C. 21 July 31; accepted 23 July 31; 1 lt. 21 July 36."

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed at 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 of the sentence. Dismissal is authorized for violation of Article of War 93.

Robert W. Hoover, Judge Advocate.

George B. Campbell, Judge Advocate.

Edward B. Schlant, Judge Advocate.

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

Board of Review
CM 212983

FEB 14 1940

UNITED STATES	)	FIRST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Bliss, Texas, December 4, 1939, and January 5, 1940. Dishonorable discharge and confinement for eleven (11) months. Fort Bliss, Texas.
	)	
Private RAYMOND L. DILSWORTH (6292754), Troop F, 8th Cavalry.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, CAMPBELL and SCHLANT, Judge Advocates.

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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. Accused was found guilty of one specification alleging a single larceny on November 6, 1939, of one pair of civilian trousers, one signet ring, two pairs of khaki breeches, and one pair of cowboy boots, of the values respectively of $8, $10, $3.96, and $13, total value, $34.96. There is competent evidence that the trousers were of market value of about $2 or $3 (R. 21), and that the ring was of market value of about $5 (R. 20). The breeches were of Government issue type, the price of which is listed in AR 30-3000, May 22, 1939, at $1.98 per pair. The only proof as to the value of the boots consisted of evidence that they were on one occasion worn by accused (R. 11), and the testimony of the owner, Private Tilley, that "They were valued at about ten dollars" (R. 28). Whether Tilley intended by his testimony to declare that the cost to him of the boots was $10 or that they were of that special value to him does not appear. It was not shown that he was qualified as an expert or was otherwise qualified to express an opinion as to market value or that he intended by his testimony to do so. The boots were not received in evidence or exhibited to the court. Neither the date of their original purchase nor the degree of their use or deterioration was shown. There is nothing in the record to indicate that the boots did not have a readily determinable market value.

It is well established that -

"Other than as to distinctive articles of government issue (par. 1533; Supp. V, Dig. Ops. JAG 1912-30) or other

> chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny thereof is the market value. CM 208002, Gilbert; CM 208481, Ragsdale; sec. 585, McClain on Criminal Law; People v. Gilbert, 128 N.W. (Mich.) 756. * * *." (CM 209131, Jacobs.)

The mere circumstance that the boots were used and the declaration by Tilley as to their value did not prove any definite market value. There is in the evidence sufficient basis for an inference that the boots were of some substantial value.

The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the finding as to the aggregate value of the trousers, ring, breeches and boots as involves a finding of aggregate value in excess of $10.96 but not in excess of $20. The maximum punishment by confinement authorized by paragraph 104 c, Manual for Courts-Martial, for larceny of property of value not more than $20 is confinement at hard labor for six months.

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 place and time alleged feloniously take, steal and carry away property of value in excess of $10.96 but not in excess of $20, to wit, one pair of brown civilian trousers of the value of $2 or more but not in excess of $3, one signet ring of the value of about $5, two pairs of khaki breeches of the value of about $3.96, and one pair of cowboy boots of some value, all of ownership as alleged; 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 months.

Herbert W. Hoover, Judge Advocate.

George B. Campbell, Judge Advocate.

Edward B. Schlant, Judge Advocate.

Form No. 34

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Board of Review

C. M. No. 213348

APR 19 1940

UNITED STATES vs. Sergeant JOSIAH S. McCLAIN (6316217), Infantry School Detachment, Fort Benning, Georgia.	FOURTH CORPS AREA Trial by G.C.M., convened at Fort Benning, Georgia, February 12, 1940. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HOOVER, CAMPBELL and SCHLANT, Judge Advocates.

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.

Walter H. Hoover, Judge Advocate.
George T. Campbell, Judge Advocate.
Edward B. Schlant, Judge Advocate.

1st Endorsement

War Department, J.A.G.O. JUN 6 1940 To the Commanding General, Fourth Corps Area, Atlanta, Georgia, through The Adjutant General.

1. In the case of Sergeant Josiah S. McClain (6316217), Infantry School Detachment, Fort Benning, Georgia, 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 endorsement. The file number of the record of this case in this office is 213348. 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. 213348).

3. The evidence in this case shows that about 5 p.m., January 5, 1940, while Staff Sergeant Lloyd H. Griffin, Headquarters Company, 67th Infantry, and the deceased, Corporal Isadore W. Gasser, 17th Ordnance Company (HM), were standing side by side, drinking beer, at and facing a bar in the Post gymnasium, Fort Benning, Georgia, accused approached, leaned over Griffin's shoulder, between Griffin and Gasser, and picked up Griffin's partly emptied beer mug. Accused suggested, apparently in a jocular manner, that Griffin get another glass of beer. Griffin did so. At about this time Gasser, who was quite drunk, addressed to accused the remark, "Here's a red-headed punk (sodomist) from the I.S.D." Accused did not reply. Gasser made further obscene remarks in similar vein and suggested in effect that soldiers of the Infantry School Detachment, of which accused was a member, could not gain promotion unless they were degenerates. He repeatedly nudged accused with his elbow. While Gasser talked, beer foam ran from his mouth. Griffin testified that Gasser's manner was that of an "obnoxious drunkard", insulting, overbearing and abusive. Gasser was a much larger man than accused. Accused was entirely sober. He left his position between Griffin and Gasser and stepped around Gasser and took a position at the bar on Gasser's right. Griffin testified that he believed that accused moved for the purpose of avoiding trouble. Gasser's abusive and obscene language continued and accused, with a glass beer mug held in his right hand, suddenly struck Gasser on the side of his head. Accused testified:

> "* * * And the number of times he kept calling me those names just kept pounding and pounding in my brain -- just like a drop of water falling on a man's head for any great length of time, they tell me will kill him, and I believe it will -- and got me right to the point where I hit him before I realised I was doing it."

The mug was broken by the blow and Gasser fell to the floor. Accused, apparently speaking to Gasser while he was on the floor, said: "When you come in a place straighten up and act like a man." A little later, in response to a question as to why he had struck Gasser, accused said: "There he is. You got him drunk. You can take care of him." Accused subsequently accompanied Gasser in an ambulance to the Post Hospital. Accused was placed in confinement on January 6, 1940. Gasser's skull was fractured by the blow and his death resulted.

Several witnesses, including officers and noncommissioned officers, testified to the excellent reputation of accused as an individual and as a peaceable, sober, industrious, honorable, and efficient soldier. Lieutenant Colonel Alvan C. Gillem, Jr., 68th Infantry, testified that he had known accused about four and one-half years and considered him "one of the best soldiers I have ever had, an able technician and fine man in every way". The record of trial shows that prior to his current enlistment in June 1937, accused had completed four prior enlistments having been discharged from each as a noncommissioned officer with character excellent.

4. All members of the court joined in a recommendation that the entire sentence be suspended or remitted, stating:

> "2. It is the concensus of opinion of the undersigned members of said court-martial that the accused, Sergeant McClain, was a victim of unfortunate circumstances, which he definitely tried to circumvent. Irrefutable evidence was produced, establishing the accused as a man of excellent character, sober habits and splendid military attainments. The slurring, insulting invectives hurled, without provocation, at the accused by Corporal Gasser, were of such a base nature that a self-respecting individual could not supinely accept them. The action taken by the accused was that commonly accepted among men as proper under such circumstances. The serious consequences, which developed from this single remonstrating act, were neither anticipated nor desired by the accused.
>
> "3. The court was governed by legal precepts and its oath in the findings and sentence, however, there was unanimity of opinion that, in fairness to the accused and in the interest of the Service, full clemency be recommended."

The defense counsel recommended remission of the dishonorable discharge adjudged and reduction of the term of confinement to six months. These recommendations were before the reviewing authority when he took action on the record of trial.

5. The unlawful homicide of which accused stands convicted was obviously committed by him on sudden impulse aroused by provocative action and insulting language of the deceased. The weapon used was not one which would ordinarily be considered a deadly one. A serious crime was committed, but in view of the circumstances surrounding the offense, the previous highly creditable service of accused, the apparent value of accused as a soldier, and the recommendations for clemency, I am convinced that the ends of justice and discipline do not require that the dishonorable discharge be carried into execution or that the entire sentence to confinement be served. The members of the Board of Review are in accord with this view.

6. It is recommended -

a. That the dishonorable discharge be suspended and that, effective July 1, 1940, the unexecuted portion of the entire sentence be remitted; and

b. That in the event the dishonorable discharge is not suspended and a general court-martial order directing execution of the dishonorable discharge is promulgated, administrative action carrying the dishonorable discharge into execution be withheld pending further action by the War Department.

Allen W. Gullion,
Major General,
The Judge Advocate General.

JUN 6 1940
Received

RECEIVED
JUN 6 1940
WASHINGTON, D. C.

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

Board of Review
CM 213442

MAY 20 1940

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
	)	
v.	)	Trial by G.C.M., convened at West Point, New York, April 4 and 5, 1940. Dismissal.
	)	
Cadet KENNETH O. DUE, First Class, United States Corps of Cadets.	)	

OPINION of the BOARD OF REVIEW
HOOVER, CAMPBELL and SCHLANT, Judge Advocates.

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 charges and specifications:

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

Specification: In that Cadet Kenneth O. Due, First Class, United States Corps of Cadets, was at New York City, New York, on or about February 18, 1940, in a public place, to wit, Hotel Astor, drunk and disorderly while in uniform, to the scandal and disgrace of the United States Corps of Cadets.

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

Specification: In that Cadet Kenneth O. Due, First Class, United States Corps of Cadets, did, at New York City, New York, on or about February 18, 1940, drink intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931.

He pleaded not guilty to Charge I and its specification and guilty to Charge II and its specification, and was found guilty of all 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 of trial for action under Article of War 48.

3. The evidence shows that accused, as a member of the Cadet Choir of the United States Military Academy, was a guest at the Hotel Astor in New York City during the afternoon of February 17, 1940, and the night of February 17-18 (R. 31-35). He and another cadet whose identity does not appear, were assigned to a room (R. 32) on the second floor (R. 6, 20). From about 2 p.m., to about 6 p.m. (R. 32, 36), accused "visited" in his room with a "woman" with whom he had previously made an engagement, and during this time, as he testified, consumed "four drinks of Scotch, ice and water". He left the room at about 6 p.m. (R. 32), and thereafter and prior to about 3:30 a.m., February 18, was observed by various cadets and other persons as hereinafter related.

At some time between 9 p.m., and 10 p.m., accused was observed on the second and third floors and on an elevator of the hotel, by Cadet Davis S. Woods, Second Class, United States Corps of Cadets. At this time accused was dressed in civilian clothes and was wearing an "Army trench coat". Woods testified that accused's breath smelled of alcohol, and that in his opinion accused was drunk (R. 6). At about 10 p.m., accused entered the room of Cadet William G. Gillis, Jr., Second Class, United States Corps of Cadets, while the latter was dressing. Accused was accompanied by two young ladies, apparently a Miss Rummel and a Miss McManus. He asked Gillis to join them. Gillis refused and accused became "belligerent" and angry. Accused stayed in the room about half an hour. Gillis testified that he received the impression that accused was at this time under the influence of intoxicating liquor (Ex. 11). At about 1 a.m., February 18, accused was observed while entering the hotel and while on an elevator, by Cadet Dean T. Vanderhoef, First Class, United States Corps of Cadets. He was dressed as above described, but at this time his trench coat was open at the collar and his shirt was unbuttoned and open "down to about the undershirt". He had neither hat nor necktie and his clothing appeared to be disarranged (R. 8). He was not "too well coordinated". He shouted "the length of the hotel hall" to a group of people and asked if they were cadets (R. 9). Vanderhoef testified that in his opinion accused was drunk (R. 8). Shortly thereafter, accused was observed in the hotel lobby in the company of the Miss Rummel mentioned above, by Cadet Lieutenant James L. Pitman, First Class, United States Corps

of Cadets (R. 11, 14). Accused was dressed as before but did not appear to be wearing a shirt (R. 11-13). Pitman testified that Miss Rummel asked him to "take care of" accused and that he asked accused to go to his room, but that accused refused (R. 12). Pitman also testified that there was an odor of alcohol on the breath of accused, that his eyes were "bleery", that his hair was "towsled", that his "physical faculties were sort of blurred", that he did not appear to be mentally alert, and that witness was of the opinion that accused was drunk (R. 13, 14).

At about 1:30 a.m., at the invitation of a Mr. John F. Byrne with whom accused had not previously been acquainted (R. 54), accused joined a "party" of fifteen to thirty civilians in rooms 151 and 152 of the hotel (on the same floor as the room assigned to accused) (R. 55, 57). The ladies and men in the rooms were dressed in evening clothes (R. 57). Accused was dressed substantially as described above with his trench coat collar open revealing what appeared to one witness to be a gray sweater (R. 56). While in these rooms accused was served a drink which a witness testified he thought was a "Scotch and soda" (R. 59) and from which accused drank at least a "sip" (R. 54). Accused remained in these rooms for some time (R. 53) and danced with one of the ladies (R. 59). After leaving these rooms accused, apparently at about 2:15 a.m., entered room 172 where a Mr. Kurzweil and a number of other civilians were present. Kurzweil and two of the other civilians testified that accused entered the room uninvited, that he was asked to leave and that they observed that he had been drinking (Exs. 7-9). Two of these witnesses testified that accused pretended to know at least one of the persons present, a young lady (Exs. 7, 9). He remained in the room about ten minutes (Ex. 7) and was then forcibly ejected (Exs. 7-9). It was reported to the hotel management that there was a disturbance or a "fight on the first floor" (Exs. 3-5).

At about 2:30 a.m., accused was observed in the hallway of the floor on which his room was located. He addressed a young lady who "appeared to be a stranger", told her she had "helped him", and that he would be glad to "help her". The young lady did not respond to his remarks and accused "called to her once or twice while she was going down the hall", but she did not give him her attention (R. 17). Shortly thereafter Cadets Howard L. Burris, John E. Craig, and Carl Helmstetter, Jr., all Third Class, United States Corps of Cadets, saw accused, dressed in full dress uniform but with his collar unhooked (R. 16, 22, 26) "pounding" on a door at the opposite

end of the hallway (apparently the door of room 172 or of a room nearby) (R. 15, 21, 25). Accused was heard to say "Yellow sons-of-bitches, come out and fight. You haven't got the guts to come out", or words to that effect (R. 16, 22). The cadets named withdrew from the scene (R. 15). A short time later Cadet Gillis saw accused in the latter's room. Gillis was accompanied by a young lady whose identity does not appear. Accused was still in full dress uniform (R. 29; Ex. 11). Gillis testified:

> "Cadet Due and I talked for 5 or 6 minutes. The house officer came to the door and I talked with him at that time. Cadet Due remained in the room. Then the house officer left and Cadet Due and I went into the hall. I instructed Cadet Due to go back to his bed. He was at this time telling me about the trouble he had had before about having been beat up by a bunch of men down in a room at the end of the hall. He said he wanted to find out what it was all about and all the time I was trying to get him to go back to bed and at this time a civilian in tails came down the hall with a card bearing number 421 written on it. The civilian hung around us making himself obnoxious, hanging on our shoulders, and wanting to know where to find Room 421. Cadet Due indicated that he thought this was one of the men he had trouble with previously and wanted to strike him. The man made himself obnoxious by pointing to Due's uniform and laughing and by just hanging around after I had told him to leave and Due all the time was wanting to fight this fellow. Finally I persuaded him that Due was mad and told him to go on before there was a fight. About this time, Due broke away from me and ran down the hall to tackle this civilian just as he was going up a landing. The civilian turned around and kicked Cadet Due in the face. Due was knocked up against the wall, he came back and swung at the fellow and missed him and by that time I had reached him and persuaded him to go back to his room and the civilian went down the hall. That was the last I saw of the civilian. The house detective came back around the corner at this time and pleaded with Due to go back to bed and told him that he was only getting himself in trouble and that he would never win if anything ever happened to him while in uni-

form. * * * The detective and I went down the hall together and got on the elevator and went downstairs and when we got to the elevator, Cadet Due was already there. * * *." (Ex. 11.)

While accused, the civilian with whom accused had had the altercation, Gillis, the young lady, and two men who appeared to be hotel detectives, were in the hallway, Cadets Burris, Craig, and Helmstetter returned to the scene. Accused was apparently being restrained by Gillis and one of the detectives who were leading him to his room (R. 15, 20-22, 24, 25, 27) against his protest (R. 19, 20). Accused "wobbled" (R. 24) or staggered as he walked (R. 28). He did not seem to recognize Burris, Craig or Helmstetter (R. 19, 23). At the time he was led into his room, or shortly thereafter, accused addressed the cadets last named with an inquiry as to whether they were "Jews" (R. 16, 22), "struck up a pugilistic attitude and said he could or would take on all the Jews in the hotel there" (R. 26). His face showed a "cut under the eye", apparently from the blow received when the civilian in evening clothes kicked him (Ex. 11). Gillis (Ex. 11), Burris (R. 16, 20), Craig (R. 22, 24), and Helmstetter (R. 26, 28) testified that they were of the opinion that accused was drunk.

4. Accused testified that at about 6 p.m., after his visit in his room with the "woman", he went to dinner and returned to his room at about 7 p.m. A young lady with whom he had made an engagement (he did not state her name) joined him at about 7:30 p.m. After talking with this young lady, his roommate, and another young lady for some time, he left the room to get some cigarettes. On his way through the hotel lobby he saw Miss Rummel whom he had met before and at her request attempted to find a cadet who she said had arranged to escort her. He also tried to find a cadet escort for her companion, Miss McManus. Accused introduced Miss Rummel and Miss McManus to Gillis. Miss Rummel left with Gillis and accused went in further search for an escort for Miss McManus (R. 32). Upon his return to his room he found that the young lady who had joined him at 7:30 p.m., had departed. Accused then went to the lobby of the hotel to intercept her. He did not find her and on his way back to his room met some civilians with whom he had talked previously and accepted their invitation to join them. He stayed with them (in rooms 151 and 152) for approximately an hour and a half. Upon his departure he "struck up a conversation" with a man whom he thought might have been a member of the party he had just

left. At the invitation of this man accused went with him into another room (room 172) where he saw a group of six or seven men who were talking loudly and were rather rude (R. 33). Some of the occupants of the room seemed to be "Jews" (R. 35). Accused decided to leave but a young couple spoke to him and he thereupon seated himself on a bed and talked to the couple for a few minutes (R. 33). While he was so engaged some of the men in the room seized him and said "we are throwing you out". They pushed and tripped accused and he "more or less plunged into the wall and fell" to the floor. His assailants struck him twice with their feet. Accused recalled little more of what occurred but did remember thereafter washing his face, standing by a door where he heard some people on the other side laugh, talking with Gillis, being kicked by "this civilian" and riding in an elevator. Upon reaching the elevator his memory became clearer. He went to a restaurant but suddenly lost his appetite, became nauseated and noticed that his stomach was sore (R. 34). The next morning he still suffered from lost of appetite. While returning to the Military Academy during the day he ate some sandwiches but later became nauseated and "threw them up". The nauseous condition returned "a couple of mornings during the next two weeks" (R. 35). Accused believed that he was dazed and "out of his head" following the attack upon him (R. 38). Prior to the assault, while in room 172, he had been "rather sober" (R. 40) and was not drunk at any time while in New York City (R. 38). He does not wear a hat with civilian clothes. He neglected to take a necktie on the trip to New York and as a result his shirt was left open at the neck (R. 41).

Five cadets, three First Classmen, one Third Classman and one Fourth Classman, testified for the defense that they saw accused and observed him to some extent on different occasions between about 5 p.m., and about 8 p.m., on February 17 and believed that he was sober (R. 43-46, 50). Three cadets, two Second Classmen and one Fourth Classman, testified that they saw accused and observed him to some extent on different occasions between 11 p.m., February 17, and 1 a.m., February 18, and believed that he was sober (R. 50-52, 61). A First Classman testified that he saw and spoke to accused as the latter left the Astor Hotel at about 3:30 a.m., February 18. Witness believed that accused was sober and saw no evidence that he was dazed (R. 80). One of the First Classmen who saw accused early in the evening noted the odor of liquor on his breath (R. 44). Seven of remaining eight cadets testified that they

did not detect any odor of liquor about him (R. 43, 46, 48, 50).

Miss Joan A. Rummel testified that she first met accused on the night of February 17. She was with and observed him from about 9 p.m., to about 10 p.m., February 17, and from about 12 p.m., February 17, to about 1:30 a.m., February 18. She believed that accused was "perfectly sober" at these times. She did not request Cadet Pitman to "take care" of accused (Ex. 2). Miss Elizabeth Virginia McManus testified that she was "intermittently associated" with accused for about one-half of the period between 9:30 p.m., February 17, and 1:30 a.m., February 18, and from her observation believed that he was "perfectly sober" (Ex. 1). Mr. John F. Byrne and two other occupants of rooms 151 and 152 of the hotel testified that while accused was in their company he appeared to be sober (R. 54, 56, 59). The general manager and assistant general manager of the Hotel Astor each testified that he did not receive any report of a disturbance involving a cadet on the night in question, although "an incident on the first floor" was reported (Exs. 3, 4). Two house officers of the hotel testified that upon receipt of a report of a disturbance or fight on the first floor, they made an investigation but that neither saw nor heard any disturbance and did not ask or advise any cadet to be quiet or to go to bed (Exs. 5, 6). One of these officers testified he saw a cadet in an elevator and observed an abraison on his forehead or cheek but that the cadet did not give any evidence of intoxication (Ex. 5). The tactical officer in charge of the Cadet Choir trip testified that he occupied a room on the fourth or fifth floor of the Hotel Astor after about 12:30 p.m., February 18, but that he did not hear or receive a report of a disturbance in the hotel (R. 42).

Three cadets, two Second Classmen and one Third Classman, testified that for about two weeks following the trip of the Cadet Choir to New York, they observed that accused ate lightly and heard him complain that he had been injured (R. 81-83). One of these cadets testified that accused complained of nausea (R. 81).

Lieutenant Colonel Paul M. Crawford, Medical Corps, and Major Oliver K. Niess, Medical Corps, testified that an individual who had consumed "four strong drinks" of whiskey during an afternoon, had eaten a normal dinner thereafter, had engaged in some physical activity after dinner, and had consumed a small quantity of liquor late in the evening, might be sober in the early hours of the following day. They also testified that a man who had re-

ceived an abdominal or head injury might be dazed and might suffer impairment of his faculties and memory, and to this extent might exhibit reactions similar to those of a drunken person. Symptoms following such injuries might continue for a considerable period (R. 71-79).

5. The evidence, together with the pleas of guilty and the admissions of accused, fully supports the findings of guilty of Charge II and its specification alleging that on or about February 18, 1940, in New York City, accused drank intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, in violation of Article of War 96.

The specification, Charge I, alleges that accused was, in a public place, to wit, the Hotel Astor, New York City, drunk and disorderly while in uniform, to the scandal and disgrace of the United States Corps of Cadets. The evidence shows that at the time and place alleged, while in full dress cadet uniform, accused was disorderly in that he created a commotion in a hallway of the hotel at the door of one of the guest rooms, vulgarly and loudly cursed the occupants or those he obviously believed were in the room and challenged such occupants to fight. It also shows that thereafter, while still in uniform and in the presence of another cadet, a young lady, and employees of the hotel, he assaulted a civilian and engaged in a physical encounter with him in the hallway of the hotel. The disturbances were of sufficient gravity to prompt a report to the hotel management. Officials of the hotel denied that any report of a disturbance relating specifically to a cadet was received and hotel employees who investigated the report of the disturbances professed ignorance of any unseemly conduct by accused, but the testimony on the whole leaves no doubt that accused did in fact create the disturbances. The hallway in which the disturbances occurred was open to and was used in common by guests of the hotel, their friends, and hotel employees, and must be deemed to have been a public place within the commonly accepted meaning of that term (see CM 202846, Shirley; CM 207887, Lowry).

Certain witnesses who saw accused during the night of February 17-18 testified in his behalf that they believed that he was sober; and accused denied that he was drunk. In his testimony accused sought to explain his drunken appearance and behavior as attested by the prosecution witnesses, by a suggestion that they

were attributable to injuries received during the course of the evening. The proof of the nature and extent of such injuries as may have been suffered by accused upon his ejection from room 172 of the hotel and upon his encounter with the civilian in the hallway, lies in his own testimony with some slight corroboration through the testimony of other cadets as to apparent loss of appetite by accused and as to his complaints of other symptoms possibly attributable to injuries. In the final analysis the proof of injuries is reduced almost wholly to self-serving declarations by accused. These declarations, weighed with the convincing evidence of drunkenness both before and after the alleged infliction of injuries, which drunkenness might normally produce the symptoms exhibited by accused, fall short of satisfactory proof that accused did in fact suffer any material injuries. Medical officers testified in response to hypothetical questions based on assumed proof of the injuries asserted by accused, that his dazed condition and lack of coordination as observed by various prosecution witnesses might have been attributable to the injuries. In view of the absence of any medical or other convincing evidence of the injuries, these expert views can be given little weight upon the issue of drunkenness. It is to be noted in this connection that there is nothing in the record of trial which would give substantial support to a theory that the asserted injuries could by themselves have brought about the belligerency and violent actions of accused which so pointedly suggest the influence of alcohol. In the light of admissions by accused as to his drinking, his appearance and behavior during the course of the night indicative of further drinking and increasing influence of intoxicants, and the circumstance that he exhibited evidence of drunkenness prior to his asserted injuries, the court was amply justified in concluding in accord with the positive opinions of the cadet witnesses for the prosecution, that accused was in fact drunk and in concluding that his abnormal behavior was prompted by this condition.

The Board of Review is of the opinion that the evidence shows beyond reasonable doubt that accused was drunk and disorderly as charged, and that this conduct was clearly of a nature to bring discredit upon the military service.

6. There remains for consideration the question as to whether the drunkenness and disorderly conduct of accused were of such aggravated character as to amount to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. The Board

of Review has recently stated the principles applicable to determination of such an inquiry as follows:

> "7. The Manual for Courts-Martial, paragraph 151, lists, as an instance of violation of the 95th Article of War, 'being grossly drunk and conspicuously disorderly in a public place'. The Manual also, in the same paragraph, describes 'conduct unbecoming an officer and a gentleman' (A.W. 95) as including:
>
> "'action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms,'
>
> and states further:
>
> "'There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness.
>
> "The Article in question makes sentences of dismissal mandatory for courts-martial upon conviction of violation thereof. The test to be applied in each particular case would appear to rest in a determination as to whether the conduct involved proves moral unfitness to continue as an officer. Winthrop, reprint, p. 712; CM 202846, Shirley; CM 202290, Lowry; CM 197398, Mini; CM 197011, Kearney; CM 196426, Fleming; CM 195373, Beauchamp." (CM 207887, Lowry.)

Although the drunkenness and disorderly conduct of accused as proved were highly discreditable to a cadet wearing the uniform of the United States Corps of Cadets and to the military service generally, his drunkenness was hardly of such a degree that it may fairly be characterized as gross and his disorderly conduct was not especially conspicuous. The drunkenness and disorderly conduct charged were observed by only a limited number of persons and it does not appear that any public scandal resulted from his behavior. He committed a serious offense for which severe punishment may properly be imposed, but nothing is found in the record of trial which, to the Board of Review, justifies a conclusion that accused is morally unfit to continue as a cadet or to become an officer of the Army, or a conclusion that the drunkenness and disorders of which he was found guilty were so aggravated as to amount to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95.

It is the opinion of the Board of Review that the evidence is legally sufficient to support only so much of the findings of guilty of Charge I and its specification as involves findings that accused was, at the place and time alleged, in a public place, to wit, Hotel Astor, drunk and disorderly while in uniform, to the discredit of the military service, in violation of Article of War 96.

7. Attached to the record of trial is a letter by counsel for accused recommending that clemency be exercised to the extent of commuting the sentence of dismissal to suspension for one year without pay. Attached to this letter are certificates by four officers, including a brother of accused, and affidavits by 31 members of the First Class, United States Corps of Cadets, attesting to the previous good character and military qualifications of accused. There are also attached communications from eight other persons attesting to the previous good character of accused.

8. The Cadet Register shows that accused was admitted to the Military Academy from Colorado on July 1, 1936; that he was 24 years of age on October 16, 1939; and that his class standing for the last academic year was 444 in a class of 451 members.

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 only so much of the findings of guilty of Charge I and its specification as involves findings that accused was, at the place and time alleged, in a public place, to wit, Hotel Astor, drunk and disorderly while in uniform, to the discredit of the military service, in violation of Article of War 96; and legally sufficient to support the findings of guilty of Charge II and its specification and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized for violation of Article of War 96.

Robert W. Hoover, Judge Advocate.

George B. Crumpfelt, Judge Advocate.

Edward B. Schlant, Judge Advocate.

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

Board of Review
CM 213765

JUL 12 1940

UNITED STATES	)	EIGHTH CORPS AREA
v.	)	Trial by G.C.M., convened at Brooks Field, Texas, June 4, 1940. As to each: Dishonorable discharge and confinement for one (1) year and one (1) day. Penitentiary.
Privates JAMES L. KRUEGER (6289071); and ELBERT MAUM (6950529), both Quartermaster Detachment, Brooks Field, Texas.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, FRANKLIN and SCHLANT, Judge Advocates.

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

2. Accused were found guilty, under a single charge and specification, of the joint larceny, on April 22, 1940, of -

1 white tropical suit, heavy weight
1 Palm Beach suit
1 white tux coat
1 bathrobe
1 navy blue sweater
1 brown shirt, linen
1 Tuxedo shirt
2 white shirts
15 handkerchiefs
1 silk scarf
1 face towel
1 collar
6 pairs socks
1 riding crop
1 electric iron
shoe polish
1 tobacco pouch
1 swimming suit top and
1 wardrobe trunk,

of "total value over $50.00", the property of Second Lieutenant Robert C. Whipple, Air Corps. The several articles described, with the possible exception of the trunk, were introduced in evidence (Exs. A-R, Incl.). The trunk, which had contained the other articles when stolen, was described by the owner as a pressed composition wardrobe trunk with metal trimmings (R. 13, 16). The owner testified that he had purchased certain of the articles above described at the approximate prices and at about the times listed below.

Article	Price	Time of purchase prior to trial
white tropical suit	$17.50	2 years
Palm Beach suit	15.50	2 years
white Tuxedo coat	15.00	1 year
bathrobe	4.00	5 years
1 Tuxedo shirt	3.00	2 years
2 white shirts	6.60	1 year
6 pairs socks	2.40	6 months
riding crop	8.00	2½ years
electric iron	3.00	5 months

He testified that the sweater described had been given to him, that it was about one year old, and that its "known value" (apparently the purchase price) had been about $5 (R. 14-16). The trunk had been given to him and was about three years old (R. 16). He believed that he could not, to his satisfaction, replace all the stolen property for $90 (R. 17). A dealer in second-hand clothing testified that in his opinion the sale value in his store of the white tropical suit, the Palm Beach suit, and the tuxedo coat would be from $2.50 to $3.95 each (R. 33, 40, 41).

3. It is established that -

> "Other than as to distinctive articles of government issue (par. 1533; Supp. V, Dig. Ops. JAG 1912-30) or other chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny thereof is the market value. CM 208002, Gilbert; CM 208481, Ragsdale; sec. 585, McClain on Criminal Law; People v. Gilbert, 128 N.W. (Mich.) 756." (CM 209131, Jacobs; see also CM 212983, Dilsworth.)

None of the stolen articles were articles of government issue. There is nothing in the evidence to indicate that the articles did not have readily determinable market values. The only competent evidence as to market value was to the effect that the two suits of clothes and the tuxedo coat were of values aggregating about $7.50 or slightly more. The proof of the original purchase prices of certain of the stolen articles other than the suits of clothes and the tuxedo coat, was not, in view of the nature of the articles and the considerable periods intervening between their purchase and loss, sufficient basis for an inference of market value at the time the articles were stolen (CM 209131, Jacobs). Evidence of probable replacement cost of the articles was not, obviously, proof of the market value of the articles stolen. From its inspection of the property before it, the court could determine that it had some value, but to permit the court from its inspection alone to find definite market values of articles of the types here involved, "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208481, Ragsdale; see also CM 209131, Jacobs; CM 208002, Gilbert).

The evidence is legally sufficient to support only so much of the finding as to the aggregate value of the articles described in the Specification as involves a finding of aggregate value in excess of $7.50 but not in excess of $20. The maximum punishment by confinement authorized by paragraph 104 c, Manual for Courts-Martial, for larceny of property of value of not more than $20, is confinement at hard labor for six months. Confinement in a penitentiary is not authorized (A.W. 42, par. 90, M.C.M.).

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 involves a finding of guilty of the joint larceny by accused as alleged, at the place and time alleged, of the property described in the Specification, of value in excess of $7.50 but not in excess of $20, and of ownership as alleged; and legally sufficient to support only so much of the sentence in each case as involves dishonorable discharge, forfeiture

of all pay and allowances due or to become due, and confinement at hard labor for six months in a place other than a penitentiary.

Arthur H. Harris, Judge Advocate.

(On leave), Judge Advocate.

Edward B. Siblant, Judge Advocate.

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

Board of Review
CM 213817

JUL 16 1940

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Tried by G.C.M., convened at Fort Riley, Kansas, June 18, 1940. Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.
Private DELBERT B. FAIRCHILD (6932895), Detachment, Medical Department (M&DS), Fort Riley, Kansas.	)	

OPINION of the BOARD OF REVIEW
HOOVER, FRANKLIN and SCHLANT, Judge Advocates.

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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 in part, 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 Delbert B. Fairchild, Detachment Medical Department (M&DS), Fort Riley, Kansas, did, at Fort Riley, Kansas, on or about April 19, 1940 desert the service of the United States, and did remain absent in desertion until he was apprehended at Junction City, Kansas, on or about May 11, 1940.

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 and one-half years. The reviewing authority approved the

sentence and directed its execution but suspended the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Governors Islands, New York, as the place of confinement. The sentence was published in General Court-Martial Orders No. 167, Headquarters Seventh Corps Area, July 1, 1940.

3. The evidence shows that accused absented himself without leave from his detachment at Fort Riley, Kansas, on April 19, 1940 (R. 6, 7; Ex. A), and remained absent until apprehended by a civil police officer in Junction City (four miles from Fort Riley), Kansas, on May 11, 1940. At the time of his apprehension, in response to a question by the police officer as to why he had not returned to his organization, accused remarked, "if they want me they know where to find me" (R. 8). Two soldiers of accused's detachment testified that they had seen accused in Junction City during his absence and that accused had told them he intended shortly to return to his station (R. 18-20). One of these soldiers testified that accused was in uniform, without cap or tie, at the time witness saw him (R. 20). About May 4 or 5, the wife of accused telephoned to the commanding officer of accused's detachment and inquired whether the "matter would be dropped" if accused should return to his detachment. The officer replied that accused had been dropped as a deserter and that "the matter was out of my hands" (Ex. B). The wife of accused, a waitress employed in Junction City, testified that accused lived with her and remained in Junction City during the entire period of his absence. She also testified that he wore his uniform at all times and was in uniform at the time of his apprehension, that during his absence he did not have with him any baggage or civilian clothes (although he owned civilian clothes), and that he repeatedly announced his intention to return to his detachment (R. 15-17).

Accused was married about February 29, 1940. About March 20, in response to questioning, he advised his detachment commander of the marriage and stated that he had been married while drunk and intended to seek an annulment (Ex. B). The charge sheet shows that accused first enlisted November 15, 1939.

4. The evidence thus shows that accused, a recruit, remained absent without leave for a period of twenty-two days and until apprehended. He remained in uniform and in the company of his wife, in the immediate vicinity of his station, during the entire period of his absence. His whereabouts was known to members of his de-

tachment during at least a portion of his absence and a communication indicative of his whereabouts was received by his detachment commander. No dissatisfaction by accused with his station or with the service generally was shown. The Board of Review finds nothing in the absence or attendant circumstances to justify a reasonable inference that accused intended to desert, that is, intended to quit the service of the United States.

The failure of a soldier who is absent without leave to surrender while in the neighborhood of a military station may, under some circumstances, be indicative of an intent to desert (par. 130 a, M.C.M.). But the mere failure of a soldier to surrender while living openingly with his wife in a small community at the very gates of his post, as in this case, is merely an element of his continued absence and furnishes no substantial basis for an inference of intent to desert. The circumstances of this case suggest a contrary intent. 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. * * *." (Par. 130 a, M.C.M.)

Determination of the question as to whether an absence is "much prolonged" or satisfactorily explained, within the meaning of the quoted clause, must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be applied. The absence must be so prolonged that, considered in the light of proved causes and motives or in the light of a lack of rational explanation, it leads in sound reason to a conclusion that the soldier did not intend to return. The absence in the instant case, so considered, is not of such duration as to justify an inference of intent not to return.

It has been held repeatedly that mere absence without leave for a relatively short period does not establish desertion. See the following:

CM 120894, Allen -	Absence of 17 days
123404, Standlea-	Absence of 36 days
125904, Moore -	Absence of 11 days
189658, Hawkins -	Absence of 20 days

CM 195988, Parr	-	Absence of 14 days
196187, Roath	-	Absence of 18 days
196776, Maialoha	-	Absence of 19 days
196867, Swenson	-	Absence of 23 days
198750, Knouff	-	Absence of 21 days
200601, Rowland	-	Absence of 30 days
205916, Williams	-	Absence of 17 days.

The record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave, between the dates alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves the punishment authorized by paragraph 104 c, Manual for Courts-Martial, for that offense.

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 of guilty of absence without leave from April 19, 1940, to May 11, 1940, in violation of Article of War 61; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for sixty-six days and forfeiture of two-thirds pay per month for a like period.

_____, Judge Advocate.

(On leave), Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 213822

JUL 17 1940

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Jefferson Barracks, Missouri, June 18, 1940. Dishonorable discharge and confinement for nine (9) months. Disciplinary Barracks.
Private MILLARD G. PETTITT (7031268), Company D, 7th Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, FRANKLIN and SCHLANT, Judge Advocates.

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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 in part, 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 Millard G. Pettitt, Company D, Seventh Infantry, attached to Detachment, Seventh Infantry, did, at Vancouver Barracks, Washington, on or about April 22, 1940, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Jefferson Barracks, Missouri, on or about April 30, 1940.

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, reduced the period of confinement to nine months, directed the ex-

ecution of the sentence as thus modified, 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 Orders No. 169, Headquarters Seventh Corps Area, July 3, 1940.

3. The evidence shows that accused absented himself without leave from his organization at Vancouver Barracks, Washington, on or about April 22, 1940, and remained absent until he surrendered at the post guardhouse, Jefferson Barracks, Missouri, on or about April 30, 1940. Upon surrender he did not make any statement other than that he "wanted to turn in". He did not have any funds or baggage (Exs. 1, 2; R. 6, 7). Accused testified that he became homesick and went to Kewanee, Illinois, to the home of his parents, where he stayed two days. He surrendered in uniform. He did not intend to desert. He understood that he would not become a deserter unless he remained absent more than ten days but that he might be punished for his absence and might be charged with the cost of his return transportation. Accused first enlisted, at the age of eighteen years, on January 4, 1940 (R. 6-9).

4. Thus the evidence shows, in material part and in its aspect most unfavorable to him, that accused, a young recruit, left his station at Vancouver Barracks, Washington, without authority, proceeded to his home in Kewanee, Illinois, and, after a total absence of eight days, surrendered in uniform at a military post near his home. The following remarks by the Board of Review in CM 205916, Williams, a case in which the duration of the soldier's absence and the distance traveled prior to surrender were somewhat greater than in the case at hand, are pertinent:

> "In the absence of any other proof, it seems clear that, ***, the foregoing evidence, showing merely an absence of seventeen days terminated by surrender in uniform at the military post nearest the accused's home, where he must have known he was in danger of apprehension, is in itself insufficient to establish any intention to abandon entirely the military service. CM 196867, Swenson, and cases there cited. The result is that the sentence, if it is to be sustained at all, must be sustained on the theory that the foregoing evidence is sufficient to show that the accused sometime during his unauthorized absence entertained the intent never

to return to his proper station, which was Fort MacArthur, California, and probably had in mind a transfer to a station near his home.

"In the absence of any evidence tending to establish such an intent, the status of the accused was that of an enlisted man absent without leave, claiming to be without means to return to his proper station, who, under paragraph 10 AR 30-920, was authorized to report at another post, camp or station in order that he might be furnished with transportation necessary to enable him to return to his proper station, as provided in AR 615-290. In this case the accused found himself at Canton, Ohio, approximately 2400 miles from his proper station and he thereupon reported at Fort Hayes, the military post nearest Canton. There is no evidence tending to show that he was dissatisfied with the military service as a whole or with service at his proper station, and his conduct in reporting at Fort Hayes is not only entirely consistent with the reasonable theory of his innocence but is exactly what, under the circumstances so far as they are disclosed by this record, he was authorized, and in fact what he was required, to do. The burden of proof to the contrary was upon the prosecution throughout, and inasmuch as it has introduced no evidence inconsistent with the entire innocence of the accused of desertion, it is the opinion of the Board of Review that the evidence of record is legally insufficient to support the finding of guilty of that offense." (See also CM 208462, Meier.)

The evidence is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave, between the dates alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves the punishment authorized by paragraph 104 c, Manual for Courts-Martial, for that offense.

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 of guilty of absence without leave from April 22, 1940, to April 30,

1940, in violation of Article of War 61; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for twenty-four days and forfeiture of two-thirds pay for a like period.

Herbert H. Harris, Judge Advocate.

(On leave), Judge Advocate.

Edward B. Sibley, Judge Advocate.

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

Board of Review
CM 213952

AUG 3 1940

UNITED STATES)	FIRST CAVALRY DIVISION
)	
v.)	Trial by G.C.M., convened at
)	Fort Clark, Texas, July 5,
Private HARRISON B. MYERS,)	1940. Dishonorable discharge
Jr. (6284129), Headquarters)	and confinement for three (3)
Troop, 1st Cavalry Brigade.)	years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HOOVER, FRANKLIN and SCHLANT, Judge Advocates.

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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. Accused was found guilty of the larceny of a. one "Longine" wrist watch, value about $100, the property of Second Lieutenant Vincent L. Boylan (Spec. 1 of the Charge); and b. one Elgin pocket watch, value about $30, the property of Second Lieutenant John J. Carusone (Spec. 2 of the Charge). The watches were received in evidence (Exs. A, B). Lieutenant Boylan testified that the Longines watch was of the "value" of approximately $100, that it was yellow gold, that it had been given to witness by his parents on his twenty-first birthday (29 June, 1934), and that it was engraved on the back with witness' name and other lettering (R. 7, 9). After the theft the watch was turned over by accused to his brother to secure a loan of $1 (Ex. C). Lieutenant Carusone testified that the Elgin watch was white gold, that witness believed its intrinsic value to be about $30 or $35, and that it was engraved on the back with a recital of presentation to witness in July 1934 (R. 17, 18, 20). Prior to its recovery this watch was repaired at the instance of accused at a cost of about $1.50 (Ex. C). With respect to each watch the prosecution requested the court to take judicial notice of its value in the amount estimated by the owner as indicated above (R. 9, 20).

3. It is established that, except as to distinctive articles of government issue or other chattels which because of their character do not have readily determinable market values, the value of personal

property to be considered in determining the punishment authorized for larceny is market value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 212983, Dilsworth; CM 213765, Krueger, et al.). There is no competent testimony in this case as to the market values of the watches described. Neither of the officers who testified as to his estimate of value was shown to be qualified as an expert or shown to be otherwise qualified to express his opinion as to value. Each watch, at the time of its theft, had been in use for about six years. The watches were before the court but from mere inspection the court was not authorized to find more than that they were of some substantial value. It cannot legally be assumed that the members of the court-martial possessed such expert trade knowledge as to enable them to determine definite market values. The market value of a used gold Longines or Elgin watch is not a matter of such fixed and common knowledge as to justify a court in taking judicial notice of such value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 213765, Krueger, et al.).

The evidence is legally sufficient to support only so much of the finding as to value under each specification as involves a finding of some substantial value not in excess of $20. The maximum punishment by confinement authorized by paragraph 104 c, Manual for Courts-Martial, for larceny of property of value of not more than $20 is confinement at hard labor for six months.

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 each Specification as involves a finding of guilty of larceny by accused, at the place and time alleged, of the property described in the Specification, of some substantial value not in excess of $20, and of ownership as alleged; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for one year.

Robert W. Brown, Judge Advocate.

(Absent), Judge Advocate.

Edward B. Sibland, Judge Advocate.

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

Board of Review
CM 213993

NOV 1 1940

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort MacArthur, California,
Major JOHN B. CASSEDAY	)	June 27, 28, 29, and July 1,
(06837), U. S. Army,	)	1940. Dismissal and confine-
Retired.	)	ment for four (4) years.
		Penitentiary.

OPINION of the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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1. The record of trial in the case of the officer named above 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 95th Article of War.

Specification 1: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about October 4, 1938, become indebted to the Federal Services Finance Corporation, Washington, D.C., in the sum of $609.00 for money loaned to him, which sum became due and payable, as follows: $34.00, November 7, 1938; $25.00, December 7, 1938; and on the 7th day of each of the next 22 months; and having dishonorably failed without due cause to make the payments due on April 7, 1939, May 7, 1939, June 7, 1939, July 7, 1939, and August 7, 1939; and having agreed in writing on or about August 28, 1939, with said corporation that he would pay the balance then outstanding on said loan, $480.00, plus interest and other charges, total $526.00, as follows: $20.00 on September 5, 1939, and on the 5th day of each of the next 22 months, and $66.00 on the 5th of the next succeeding month, did at Riverside, California, from October 5, 1939, to the date of these

charges, inclusive, dishonorably fail without due cause to keep such agreement, notwithstanding the fact that he was repeatedly requested to do so by said corporation.

Specification 2: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, did at Riverside, California, on or about May 31, 1939, with the intent to deceive Colonel Rush B. Lincoln, Air Corps, Commanding Officer, Air Base Headquarters, March Field, California, his commanding officer, officially report in writing to the said Colonel Lincoln that he had adjusted with the Federal Services Finance Corporation, Washington, D.C., the dishonor of his check dated April 7, 1939, in the amount of $25.00, drawn on the Citizens National Trust and Savings Bank of Riverside, California, to the order of said corporation, which report was known by the said Major Casseday to be untrue, in that he well knew that he, the said Major Casseday, had not adjusted the matter of said dishonored check with said corporation.

Specification 3: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about July 7, 1938, become indebted to the Monroe Loan Society of New York, Inc., Brooklyn, N.Y., in the sum of $300.00 for money loaned to him, which sum became due and payable in monthly installments of $15.00 plus interest of $5.00, or a total of $20.00 on August 7, 1938, and on the 7th day of each of the next 19 months, did at March Field and Riverside, California, from November 7, 1938, to June 4, 1939, inclusive, and from July 5, 1939 to the date of these charges, inclusive, dishonorably fail and neglect to pay all of the installments due on said loan between said dates, notwithstanding the fact that he had been repeatedly requested by said society to pay the amounts due.

Specification 4: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, with intent to defraud, did at March Field, California, July 7, 1938, unlawfully pretend to the Monroe Loan Society of New York, Inc., Brooklyn, N.Y., that there was no indebtedness against his furniture and that his total indebtedness was $910.00, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from said society a loan of $300.00.

Specification 5: In that Major John B. Casseday, U.S. Army, Retired, having on or about September 22, 1939, become indebted to Globe Investment Company, Inc., Los Angeles, California, in the sum of $169.56 for money loaned to him, which sum became due and payable in monthly installments of $14.13 on November 5, 1939, and on the 5th day of each of the next 11 months, and knowing that said debt had been sold by said Globe Investment Company, Inc., to the Personal Loan Company, Riverside, California, did at Riverside, California, from March 5, 1940, to the date of these charges, inclusive, dishonorably fail and neglect to pay to said Personal Loan Company all installments due on said debt between said dates.

Specification 6: In that Major John B. Casseday, U.S. Army, Retired, with intent to defraud, did at Riverside, California, on or about September 22, 1939, unlawfully pretend to the Globe Investment Company, Inc., Los Angeles, California, in an apprisal record dated September 22, 1939, which supplemented and formed a part of a chattel mortgage covering the household goods of said Major Casseday, executed September 22, 1939, by said Major Casseday as mortgagor and said Globe Investment Company as mortgagee, that the following articles of personal property included in said apprisal record and said mortgage were free from all incumbrances:

1 Thor electric washing machine, aluminum lined, #16135,
1 Singer electric sewing machine, #AC 061709, cabinet,
1 set of tea and coffee service, solid silver, consisting of 3 pots, 3 trays, sugar, creamer and service bowl,

well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Globe Investment Company a loan of $169.56.

Specification 7: In that Major John B. Casseday, U.S. Army, Retired, having on or about July 5, 1939, become indebted to the Service Finance Corporation, San Antonio,

Texas, in the sum of $324.00 for a loan made to him, which sum became due and payable in monthly installments of $27.00 on August 10, 1939, and on the 10th day of each of the next 11 months, did at Riverside, California, from August 10, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay all installments due on said loan between said dates, notwithstanding the fact that he had been repeatedly requested by said Service Finance Corporation to pay the amounts due.

Specification 8: In that Major John B. Casseday, U.S.Army, Retired, with intent to defraud, did at Riverside, California, on or about July 7, 1939, unlawfully pretend to the Service Finance Corporation, San Antonio, Texas, that he was on the active list of the U.S. Army as a Major in the Quartermaster Corps, and that his total indebtedness was $725.00, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from said corporation a loan of $324.00.

Specification 9: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about November 4, 1938, become indebted to the Citizens Loan Association, Chicago, Illinois, now the Citizens Loan Corporation, in the sum of $300.00 for money loaned to him, which sum became due and payable in monthly installments of $23.85 on December 5, 1938, and on the 5th day of each of the next 15 months, did at Riverside, California, from July 5, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay all installments due on said loan between said dates, notwithstanding the fact that he had been repeatedly requested by said Citizens Loan Association and said Citizens Loan Corporation to pay the amounts due.

Specification 10: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, with intent to defraud, did at March Field, California, on or about October 22, 1938, unlawfully pretend to the Citizens Loan Association, Chicago, Illinois, now Citizens Loan Corporation, that his total indebtedness was $594.00, well knowing that said pretense was false, and by means thereof did fraudulently obtain from said association a loan of $300.00.

Specification 11: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about October 27, 1938, become indebted to the Armed Service Finance Company, Montgomery, Alabama, in the sum of $311.38 for money loaned to him, which sum became due and payable as follows: $3.24 on October 27, 1938; $17.30 on November 3, 1938, and on the 3rd of each of the next 15 months; $17.29 on March 3, 1940, and April 3, 1940, did at March Field and Riverside, California, from July 3, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay all of the installments due on said loan between said dates, notwithstanding the fact that he had been repeatedly requested by said company to pay the amounts due.

Specification 12: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, with intent to defraud, did at March Field, Riverside, California, on or about October 21, 1938, unlawfully pretend to the Armed Service Finance Company, Montgomery, Alabama, that his total indebtedness to banks and loan companies was $218.00, with monthly installments of $28.00, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from said company a loan of $311.38.

Specification 13: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about March 2, 1938, become indebted to the Public Loan Corporation of St. Joseph, Missouri, St. Joseph, Missouri, in the amount of $300.00, for money loaned to him, which sum became due and payable in monthly installments of $12.00 plus interest on April 5, 1938, and on the 5th day of each of the next 24 months, did at March Field and Riverside, California, from January 1, 1939, to April 30, 1939, inclusive, and from June 1, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay all installments due on said loan between said dates, notwithstanding the fact that he had been repeatedly requested by said corporation to pay the amounts due.

Specification 14: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about September 6, 1938, become indebted to the Mechanics Bank, Richmond, California, in the sum of $600.00 for money loaned to him, which sum

became due and payable in monthly installments of $37.35 on October 5, 1938, and on the 5th day of each of the next 17 months, and having from October 5, 1938, to May 21, 1939, inclusive, dishonorably failed without due cause to pay the amounts due, and having on or about May 22, 1939, promised in writing to said bank that he would liquidate the amount then due on said loan, $672.30, by a payment of $20.00 on June 5, 1939, and $20.00 on each and every 5th day of the month thereafter until said sum of $672.30 was paid in full, did without due cause, at Riverside, California, from June 5, 1939, to the date of these charges, inclusive, dishonorably fail to keep said promise.

Specification 15: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, with intent to defraud, did at Riverside, California, on or about September 3, 1938, unlawfully pretend to the Mechanics Bank, Richmond, California, that his total indebtedness was $948.34, well knowing that said pretense was false, and by means thereof did fraudulently obtain from said bank a loan of $600.00.

Specification 16: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about May 19, 1939, become indebted to the Citizens National Trust and Savings Bank, Riverside, California, in the sum of $1450.00 for money loaned to him, which sum became due and payable as follows: $100.00 on June 1, 1939 and $250.00 on the 1st day of each month thereafter until said debt was paid in full, did at Riverside, California, from August 1, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay all installments due on said loan between said dates, notwithstanding the fact that he had been repeatedly requested to pay the amounts due.

Specification 17: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about June 17, 1939, become indebted to the Citizens National Trust and Savings Bank, Riverside, California, in the sum of $75.00 for money loaned to him, which sum plus interest at 8 per cent per annum became due and payable fifteen days thereafter, did at Riverside, California, from July 1, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested to pay same.

Specification 18: In that Major John B. Casseday, U.S. Army, Retired, with intent to defraud, did at Riverside, California, on or about August 10, 1939, unlawfully pretend to the Citizens National Trust and Savings Bank, Riverside, California, that he had not received his Government pay for the month of July, 1939, and that said pay would be deposited with said bank when received, well knowing that said pretense was false, and by means thereof did fraudulently induce said bank to honor an overdraft in the amount of $125.00, dated July 10, 1939, drawn by said Major Casseday to the order of cash on said bank, thereby fraudulently obtaining $125.00 in cash.

Specification 19: In that Major John B. Casseday, U.S. Army, Retired, with the intent to deceive, did at Riverside, California, on or about August 10, 1939, falsely and dishonorably state to the Citizens National Trust and Savings Bank, Riverside, California, that he had not received his Government pay for the month of July, 1939, and that said pay and his Government pay for the month of August, 1939, when received would be deposited with said bank, he the said Major Casseday, well knowing that he had already received his pay for July, 1939, and had no intention of depositing said pay and his pay for August, 1939, when received, with said bank, and by means of said false statements did dishonorably induce said bank to honor an overdraft in the amount of $125.00, dated July 10, 1939, drawn by said Major Casseday to the order of cash, on said bank, thereby dishonorably obtaining $125.00 in cash.

Specification 20: In that Major John B. Casseday, U.S. Army, Retired, having on or about August 10, 1939, become indebted to the Citizens National Trust and Savings Bank, Riverside, California, in the sum of $132.18 for money advanced to him on an overdraft in the amount of $125.00, dated July 10, 1939, drawn by said Major Casseday to the order of cash, on said bank, and service charges relative thereto, which sum became due and payable on or about August 10, 1939, did at Riverside, California, from August 10, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay said debt, notwith-

standing the fact that he had been repeatedly requested by said bank to pay said debt.

Specification 21: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about August 4, 1938, become indebted to Mr. F.A. Braman, Riverside, California, in the sum of $450.00 for money loaned to him, which sum plus interest at the rate of 5 per cent per annum became due and payable on or about February 4, 1939, did at Riverside, California, from February 4, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested by said Mr. Braman and his agents to pay said debt.

Specification 22: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about August 16, 1938, become indebted to Mr. F.A. Braman, Riverside, California, in the sum of $525.00 for money loaned to him, which sum plus interest at the rate of 5 per cent per annum became due and payable on or about September 15, 1938, did at Riverside, California, from September 15, 1938, to the date of these charges, inclusive, dishonorably fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested by said Mr. Braman and his agents to pay said debt.

Specification 23: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about August 31, 1938, become indebted to Mr. Archer R. Norcross, Los Angeles, California, in the sum of $1000.00 for money loaned to him, which sum plus interest became due and payable 90 days thereafter, did on or about November 30, 1938, dishonorably fail to pay said debt.

Specification 24: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about August 31, 1938, become indebted to Mr. Archer R. Norcross, Los Angeles, California, in the sum of $1000.00 for money loaned to him, which sum plus interest, court cost and attorney fees became due and payable 90 days thereafter, did at Riverside, California, from on or about November 30,

1938, to the date of these charges, inclusive, dishonorably fail and neglect to pay $522.63 of said debt, notwithstanding the fact that he had been repeatedly requested by said Mr. Norcross and his agents to pay said debt in full.

Specification 25: In that Major John B. Casseday, U.S. Army, Retired, did at March Field, California, on or about November 8, 1939, with the intent to defraud, wrongfully and unlawfully make and utter to the Officers' Club, March Field, California, a personal check dated on or about November 8, 1939, in the amount of $7.50, drawn by the said Major Casseday to the order of Cash on the Citizens National Trust and Savings Bank, Riverside, California, and by means thereof did fraudulently obtain from said Officers' Club $7.50 in cash, he, the said Major Casseday, then well knowing that he did not have, and not intending that he should have, sufficient funds in the Citizens National Trust and Savings Bank, Riverside, California, for the payment of said check.

Specification 26: In that Major John B. Casseday, U.S. Army, Retired, did at March Field, California, on or about November 9, 1939, with the intent to defraud, wrongfully and unlawfully make and utter to the Officers' Club, March Field, California, a personal check dated on or about November 9, 1939, in the amount of $35.00, drawn by the said Major Casseday to the order of Cash on the Citizens National Trust and Savings Bank, Riverside, California, and by means thereof did fraudulently obtain from said Officers' Club $35.00 in cash, he, the said Major Casseday, then well knowing that he did not have, and not intending that he should have, sufficient funds in the Citizens National Trust and Savings Bank, Riverside, California, for the payment of said check.

Specification 27: In that Major John B. Casseday, U.S. Army, Retired, did at March Field, California, on or about November 18, 1939, with the intent to defraud, wrongfully and unlawfully make and utter to the Officers' Club, March Field, California, a personal check dated on or about November 18, 1939, in the amount of $50.00, drawn by the said Major Casseday to the order of Cash on the

Citizens National Trust and Savings Bank, Riverside, California, and by means thereof did fraudulently obtain from said Officers' Club a personal check dated on or about November 8, 1939, in the amount of $7.50, drawn by the said Major Casseday to the order of cash on the Citizens National Trust and Savings Bank, Riverside, California, and a personal check dated on or about November 8, 1939, in the amount of $42.50, drawn by the said Major Casseday to the order of Cash on the Citizens National Trust and Savings Bank, Riverside, California, he, the said Major Casseday, then well knowing that he did not have, and not intending that he should have, sufficient funds in the Citizens National Trust and Savings Bank, Riverside, California, for the payment of said check for $50.00.

Specification 28: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having at some time before May 2, 1939, become indebted to the Great Atlantic and Pacific Tea Company, Los Angeles, California, in the sum of $180.10, for groceries purchased at the Riverside, California, branch store of said company, which sum became due and payable on or before May 2, 1939, did at March Field and Riverside, California, from on or about May 2, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested to do so by said company.

Specification 29: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having during the winter of 1938-1939 become indebted to Mr. Karl W. Peters, Hemet, California, in the sum of $37.00, for dancing lessons given to three children of the said Major Casseday, which sum became due and payable on or before March 5, 1939, did at March Field and Riverside, California, from on or about March 5, 1939, to the date of these charges, inclusive, dishonorably fail and neglect to pay $31.00 of said debt, notwithstanding the fact that he had been repeatedly requested to pay said debt in full by said Mr. Peters.

Specification 30: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about February, 1938, become indebted to Sweets, Inc., Riverside, California,

in the sum of $247.59, for clothing and other wearing apparel, which sum became due and payable on or about March 1, 1938, did at Riverside, California, from on or about March 1, 1938, to the date of these charges, inclusive, dishonorably fail and neglect to pay $237.59 of said debt, notwithstanding the fact that he had been repeatedly requested to pay said debt in full by said corporation.

Specification 31: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having on or about October, 1938, become indebted to Union Oil Company, Los Angeles, California, in the sum of $88.08, for fuel, which sum became due and payable on or about November 1, 1938, did at March Field and Riverside, California, from on or about November 1, 1938, to the date of these charges, inclusive, dishonorably fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested to do so by said company.

Specification 32: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, did at March Field, California, on or about September 1, 1938, in his testimony before Lieut. Colonel Max W. Sullivan, I.G.D., an officer conducting an official investigation, testify as follows:

"33. Q. The answer to the following question is incriminating and you need not answer same, if you so desire. Since my arrival here yesterday have you had occasion to go out and borrow money to make this $959.00 available, or have you had it in your quarters all the time?

A. I have had it in my quarters all the time and I assure you I would be unable to raise $959.00 at one time.

"34. Q. You did not raise a loan in order to have $959.00 available for this payment?

A. No, sir."

which testimony by the said Major Casseday was known by him to be false and untrue in that he, the said Major Casseday, well knew that he did not have $959.00 available in his quarters before the arrival at March Field, California, of the said Lieut. Colonel Sullivan and that in order to make

it available he had borrowed on or about August 31, 1938, $1000.00 at one time from Mr. Archer R. Norcross, Los Angeles, California.

Specification 33: In that Major John B. Casseday, U.S. Army, Retired, did at Los Angeles, California, on or about February 20, 1940, in his testimony before Lieut. Colonel Richard W. Hocker, I.G.D., an officer conducting an official investigation, testify under oath as follows:

"402. Q. How do you reconcile that statement with the fact just called to your attention?
A. I have no obligations Colonel that have not been--not come to the attention--or that has not been brought to the attention of the War Department. I have reduced my obligations to about the information you have that is reported, based on my statement to the National Liquidation Bureau and those loans."

which testimony was known by the said Major Casseday to be false and untrue in that he, the said Major Casseday, well knew that his debt in the amount of $975.00 to Mr. F.A. Braman, Riverside, California, and his debt in the amount of approximately $600.00 to Mr. Archer R. Norcross, Los Angeles, California, had not been included in the list of debts submitted by the said Major Casseday to the National Liquidation Bureau, and having no reason to believe that said debts to said Mr. Braman and said Mr. Norcross had been theretofore brought to the attention of either the War Department or the said Lieut. Colonel Hocker.

Specification 34: In that Major John B. Casseday, U.S.Army, Retired, did at Los Angeles, California, on or about February 20, 1940, in his testimony before Lieut. Colonel Richard W. Hocker, I.G.D., an officer conducting an official investigation, testify under oath with respect to debts he had paid since his retirement on June 30, 1939, as follows:

"403. Q. Can you give any definite proof of having paid any debts?
A. Yes sir.

"404. Q. In what way?
A. Altogether commercial houses in Riverside contracted by my family.
405. Q. The names of the firms?
A. Rouse, Westbrooks.
406. Q. Any others?
A. Yes sir, there are.
407. Q. Are you speaking now of month to month living expenses or an actual reduction of your indebtedness as it existed at the time of your retirement?
A. Actual reduction of my indebtedness. - - Kaufman, Reynolds; I can't recall others right now Colonel."

which testimony was known by the said Major Casseday to be false and untrue in that he, the said Major Casseday, well knew that he had not paid since his retirement on June 30, 1939, any debts to any of the persons, companies and firms mentioned by him.

Specification 35: In that Major John B. Casseday, U.S. Army, Retired, did at Riverside, California, in official written communications addressed to the Commanding General, Ninth Corps Area, Presidio of San Francisco, California, dated October 1, 1939, and October 14, 1939, with the intent to deceive the said Commanding General, report that he, the said Major Casseday, was honestly and honorably endeavoring to liquidate his indebtedness to a large number of creditors through the agency of the National Liquidation Bureau, Los Angeles, California, which reports were known by the said Major Casseday to be untrue and misleading in that he well knew that he, the said Major Casseday, was not making any honorable or honest endeavor to liquidate his indebtedness through said National Liquidation Bureau.

Specification 36: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, did at Riverside, California, in an official communication addressed to the Commanding General, Presidio of San Francisco, California, dated May 19, 1939, but received at Headquarters Ninth Corps Area May 12, 1939, with the intent to deceive the Commanding General, Ninth Corps Area, report as follows:

"2. The undersigned has communicated with the Monroe Loan Society of New York with a view to making a satisfactory adjustment of this account."

which report was known by the said Major Casseday to be untrue and misleading in that the said Major Casseday's communication to said Monroe Loan Society of New York merely requested an extension of time and terms of payment.

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

Specification 1: In that Major John B. Casseday, U.S. Army, Retired, then Major, Q.M.C., and Base Quartermaster and Constructing Quartermaster, March Field, California, did at Riverside, California, on or about August 4, 1938, wrongfully solicit a loan in the approximate amount of $500.00 from Mr. Eric W. Emtman, Riverside, California, a general contractor, the said Major Casseday well knowing at the time he solicited said loan that the said Mr. Emtman was a general contractor who had performed and was performing Government contracts at March Field, California, under his, the said Major Casseday's, supervision as Base Quartermaster and Constructing Quartermaster thereat, and that it was probable that the said Mr. Emtman would in the future be a bidder for other such contracts.

Specification 2: In that Major John B. Casseday, U.S. Army, Retired, then Major, Q.M.C., and Base Quartermaster and Constructing Quartermaster, March Field, California, did at Riverside, California, on or about August 4, 1938, wrongfully solicit and obtain a loan in the amount of $450.00 from Mr. F. A. Braman, Riverside, California, owner and manager of the Service Gravel Company, Riverside, California, the said Major Casseday well knowing at the time he solicited and obtained said loan that the said Mr. Braman was owner and manager of said Service Gravel Company and that the said Service Gravel Company had performed and was performing Government contracts at March Field, California, under his, the said Major Casseday's, supervision as Base Quartermaster and Constructing Quartermaster thereat, and that it was probable that said Service Gravel Company would in the future be a bidder for other such contracts.

Specification 3: In that Major John B. Casseday, U.S. Army, Retired, then Major, Q.M.C., and Base Quartermaster and Constructing Quartermaster, March Field, California, did at Riverside, California, on or about August 16, 1938, wrongfully solicit and obtain a loan of $525.00 from Mr. F.A. Braman, Riverside, California, owner and manager of the Service Gravel Company, Riverside, California, well knowing at the time he solicited and obtained said loan that the said Mr. Braman was owner and manager of said Service Gravel Company and that the said Service Gravel Company had performed and was performing Government contracts at March Field, California, under his, the said Major Casseday's supervision as Base Quartermaster and Constructing Quartermaster thereat, and that it was probable that the said Service Gravel Company would, in the future, be a bidder for other such contracts.

Specification 4: In that Major John B. Casseday, U.S. Army, Retired, then Major, Q.M.C., and Base Quartermaster and Construction Quartermaster, March Field, California, did at Riverside, California, on or about August 31, 1938, wrongfully solicit and obtain a loan in the amount of $1000.00 from Mr. Archer R. Norcross, Los Angeles, California, District Manager of the American Bitumuls Company, Los Angeles, California, the said Major Casseday well knowing at the time he solicited and obtained said loan that the said Mr. Norcross was district manager of said American Bitumuls Company and that said company had performed and was performing Government contracts at March Field, California, under his, the said Major Casseday's supervision as Base Quartermaster and Construction Quartermaster, and that it was probable that the said American Bitumuls Company would, in the future, be a bidder for other such contracts.

Specification 5: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, did at March Field, California, and Riverside, California, during the period from about January 1, 1939, to November 30, 1939, inclusive, with intent to deceive and injure, wrongfully and unlawfully and to the discredit of the military service, make, utter and negotiate through various parties in the usual course of

business 56 checks bearing the approximate dates and the amounts as follows: January 16, 1939, $185; February 23, 1939, $48.33; February 23, 1939, $48.33; March 20, 1939, $22.50; March 13, 1939, $15.00; March 16, 1939, $17.50; March 15, 1939, $17.50; March 28, 1939, $15.00; March 1, 1939, $15.00; March 11, 1939, $7.50; March 31, 1939, $27.50; April 1, 1939, $12.50; April 1, 1939, $32.50; March 23, 1939, $17.50; March 30, 1939, $15.00; March 29, 1939, $17.50; April 3, 1939, $28.00; April 7, 1939, $25.00; March 5, 1939, $17.30; April 3, 1939, $28.00; March 5, 1939, $17.30; April 30, 1939, $35.93; April 30, 1939, $79.46; May 1, 1939, $40.00; April 30, 1939, $17.50; April 30, 1939, $8.50; April 30, 1939, $50.00; May 1, 1939, $12.50; May 7, 1939, $25.00; May 10, 1939, $30.00; April 3, 1939, $28.00; May 10, 1939, $30.00; June 1, 1939, $35.93; July 5, 1939, $23.85; July 5, 1939, $17.30; July 5, 1939, $20.00; July 7, 1939, $25.00; July 1, 1939, $20.00; July 7, 1939, $25.00; July 5, 1939, $17.30; July 31, 1939, $12.50; August 5, 1939, $17.30; August 1, 1939, $20.00; August 10, 1939, $27.00; August 5, 1939, $20.00; August 5, 1939, $17.30; August 10, 1939, $27.00; September 5, 1939, $17.30; September 5, 1939, $35.93; September 2, 1939, $20.00; September 10, 1939, $27.00; October 5, 1939, $17.30; October 10, 1939, $27.00; November 8, 1939, $7.50; November 9, 1939, $35.00; November 18, 1939, $50.00; all said checks being drawn upon the Citizens National Trust and Savings Bank, Riverside, California, the said Major Casseday neither making nor intending to make provision for the necessary funds and credit in said bank to meet the same, by reason whereof said checks were dishonored by said bank.

Specification 6: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having devised a scheme to defraud various and sundry loan companies, corporations and banks, which said scheme was to obtain loans of money by false pretenses, representations, and promises that he was an officer on the active list of the United States Army in the Quartermaster Corps and that his debts were within his financial ability to pay; and having at Riverside, California, on or about July 7, 1939, wrongfully and unlawfully made out a loan application dated July 7, 1939,

to the Service Finance Corporation, San Antonio, Texas, falsely pretending, representing, and promising in said application that he was on the active list of the United States Army as a major in the Quartermaster Corps and that his total indebtedness was $725.00; and thereafter, for the purpose of executing said scheme to defraud, did at Riverside, California, on or about July 7, 1939, wrongfully and unlawfully and in violation of 18 U.S.C. 338, place and cause to be placed in an authorized mail depositary said loan application in an envelope properly stamped and addressed to said Service Finance Corporation, San Antonio, Texas, to be sent and delivered to said Service Finance Corporation by the post office establishment of the United States, and by means thereof, did fraudulently obtain a loan of $324.00.

Specification 7: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having devised a scheme to defraud various and sundry loan companies, corporations and banks, which said scheme was to obtain loans of money by means of false pretenses, representations and promises that his debts were within his financial ability to pay; and having at March Field, California, on or about October 22, 1938, wrongfully and unlawfully made out a loan application dated October 22, 1938, to the Citizens Loan Association, Chicago, Illinois, now Citizens Loan Corporation, falsely pretending, representing and promising in said application that his total indebtedness was $594.00; and thereafter, for the purpose of executing said scheme to defraud, did at March Field, California, on or about October 22, 1938, wrongfully and unlawfully and in violation of 18 U.S.C. 338, place and cause to be placed in an authorized mail depositary said loan application in an envelope properly stamped and addressed to said Citizens Loan Association, at Chicago, Illinois, to be sent and delivered to said Citizens Loan Association by the post office establishment of the United States, and by means thereof, did fraudulently obtain a loan of $300.00.

Specification 8: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having devised a scheme to defraud various and sundry loan companies, corporations and banks,

which scheme was to obtain loans of money by means of false pretenses, representations and promises that his debts were within his financial ability to pay; and having at Riverside, California, on or about September 3, 1938, wrongfully and unlawfully made out a loan application dated September 3, 1938, to the Mechanics Bank, Richmond, California, falsely pretending, representing and promising in said application that his total indebtedness was $984.34; and thereafter, for the purpose of executing said scheme to defraud, did at Riverside, California, on or about September 3, 1938, wrongfully and unlawfully and in violation of 18 U.S.C. 338, place and cause to be placed in an authorized mail depositary said loan application in an envelope properly stamped and addressed to said Mechanics Bank, at Richmond, California, to be sent and delivered to said bank by the post office establishment of the United States, and by means thereof, did fraudulently obtain a loan of $600.00.

Specification 9: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having devised a scheme to defraud various and sundry loan companies, corporations and banks, which said scheme was to obtain loans of money by means of false pretenses, representations and promises that his debts were within his ability to pay; and having at March Field, California, on or about October 21, 1938, wrongfully and unlawfully made out a loan application dated October 21, 1938, to the Armed Service Finance Corporation, Montgomery, Alabama, falsely pretending, representing and promising in said application that his total indebtedness to banks and loan companies was $218.00, with monthly installments of $28.00; and thereafter, for the purpose of executing said scheme to defraud, did at March Field, California, on or about October 21, 1938, wrongfully and unlawfully and in violation of 18 U.S.C. 338, place and cause to be placed in an authorized mail depositary said loan application in an envelope properly stamped and addressed to said Armed Services Finance Corporation, at Montgomery, Alabama, to be sent and delivered to said corporation by the post office establishment of the United States, and by means thereof, did fraudulently obtain a loan of $311.38.

Specification 10: In that Major John B. Casseday, Q.M.C., retired June 30, 1939, having devised a scheme to defraud various and sundry loan companies, corporations and banks, which said scheme was to obtain loans of money by means of false pretenses, representations and promises that his debts were within his financial ability to pay; and having at March Field, California, on or about July 7, 1938, wrongfully and unlawfully made out a loan application dated July 7, 1938, to the Monroe Loan Society of New York, Inc., Brooklyn, New York, falsely pretending, representing and promising in said application that there was no indebtedness against his furniture and that his total indebtedness was $910.00; and thereafter, for the purpose of executing said scheme to defraud, did at March Field, California, on or about July 7, 1938, wrongfully and unlawfully and in violation of 18 U.S.C. 338, place and cause to be placed in an authorized mail depositary said loan application in an envelope properly stamped and addressed to said Monroe Loan Society of New York, Inc., at Brooklyn, New York, to be sent and delivered to said society by the post office establishment of the United States, and by means thereof, did fraudulently obtain a loan of $300.00.

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

Specification 1: In that Major John B. Casseday, U.S. Army, Retired, then Major, Q.M.C., and Base Quartermaster and Salvage Officer, March Field, California, did at March Field, California, during the period November 12, 1937, to September 1, 1938, inclusive, feloniously embezzle by fraudulently converting to his own use, $959.00, the property of the United States, intended for the military service thereof, which sum came into his possession by virtue of his office as Base Quartermaster and Salvage Officer, March Field, California.

Specification 2: In that Major John B. Casseday, U.S. Army, Retired, then Major, Q.M.C., and Base Quartermaster and Salvage Officer, March Field, California, did at March Field, California, during the period November 12, 1937, to September 1, 1938, inclusive, knowingly and wilfully apply to his own use and benefit, $959.00, the property of the United States, intended for the military service

thereof, which sum came into his possession by virtue of his office as Base Quartermaster and Salvage Officer, March Field, California.

Upon arraignment accused pleaded not guilty to all Charges and Specifications. In the course of the trial he entered a plea in bar of trial upon Charge III and its Specifications upon the ground that he had been punished under Article of War 104 for the offenses involved in those Specifications. The plea was overruled (R. 79-85). He was found guilty of all Charges and of all Specifications except Specifications 5, 6, 24, 30, 31 and 34, Charge I, and Specification 1, Charge II. He was found guilty of Specification 5, Charge I, except the words "the date of these charges", substituting therefor the words "March 23, 1940", of the excepted words, not guilty, of the substituted words and figures, guilty; guilty of Specification 6, Charge I, except the words and figures, "1 set of tea and coffee service, solid silver, consisting of 3 pots, 3 trays, sugar, creamer and service bowl", of the excepted words and figures, not guilty; guilty of Specification 24, Charge I, except the figures, "$522.63", substituting therefor the figures, "$526.63", of the excepted figures, not guilty, of the substituted figures, guilty; of Specification 30, Charge I, guilty, except the figures, "$237.59", substituting therefor the figures, "$192.31", of the excepted figures, not guilty, of the substituted figures, guilty; guilty of Specification 31, Charge I, except the word and figures, "November 1, 1938", substituting therefor the word and figures, "February 10, 1939", of the excepted word and figures, not guilty, of the substituted word and figures, guilty; guilty of Specification 34, Charge I, except the word, "Reynolds", of the excepted word, not guilty; and guilty of Specification 1, Charge II, except the words, "and was performing", of the excepted words, not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for four years. The sentence was not announced. The reviewing authority disapproved the finding of guilty of Specification 36, Charge I, approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The several transactions involved in the charges and the evidence relating thereto will be considered in general chronological order. Closely related transactions will be grouped for consideration.

4. With reference to Specifications 1 and 2, Charge III, alleging embezzlement and misapplication of Government moneys; Specification 32, Charge I, alleging false swearing concerning the source of funds used by accused to reimburse the Government for moneys received by him from salvage sales; and Specifications 1-4, inclusive, Charge II, alleging the soliciting and obtaining by accused of loans from Government contractors, the evidence is substantially as follows:

Accused was promoted to the grade of Major, Quartermaster Corps, August 1, 1935 (Army Register). He was assigned to duty as Quartermaster at March Field, California (Ex. 3), and on October 23, 1935, reported for duty under that assignment (Ex. 6). On January 4, 1936, he was assigned to duty as Constructing Quartermaster at March Field (Ex. 4). He also became Salvage Officer at that post (R. 226). In April 1937 he completed over thirty years' service for pay purposes and his monthly pay, including his subsistence allowance, thereafter was approximately $491.50. He had as dependents a wife and five children, and occupied Government quarters at March Field. At the time of the trial the oldest child was 22 years of age and the youngest 10 years (R. 295, 296; Ex. 59). Accused was retired, at his own request, after thirty years' service (sec. 1243, R.S.; 10 U.S.C. 943), on June 30, 1939, with retired pay of $328.12 per month (Ex. 59, p. 7; Army Register). At the time of the trial and for some months previous thereto, he was employed by the Douglas Aircraft Corporation at Long Beach, California, at a salary of about $150 per month (R. 295; Ex. 59, p. 7). He testified that in 1930, due to his wife's illness, he had borrowed money from a loan concern and thereafter had become involved financially, his debts increasing to about $3,000 in 1938 (R. 295, 302, 303). The evidence for the prosecution shows that prior to November 1937, he had borrowed money from and was indebted under monthly installment contracts to the Monroe Loan Society of Brooklyn, New York (Ex. 18); the Mechanics Bank, Richmond, California (Ex. 31); the Citizens Loan Association (subsequently the Citizens Loan Corporation), of Chicago, Illinois (Ex. 27); Public Loan Corporation of St. Joseph, Missouri (Ex. 29); the Service Finance Corporation, San Antonio, Texas (Ex. 26); and the Federal Services Finance Corporation, Washington, D. C. (Ex. 8). Accused was also indebted to the Bank of America, Riverside Branch, Riverside, California (R. 243; Ex. 75).

On October 15, 1937, accused, as Salvage Officer of March Field, sold a number of articles of Government property upon salvage

sale (Salvage Sale No. 34) and received payment, on that day, of sums aggregating $303.42 (R. 227, 228; Ex. 60). On November 12, 1937, at March Field, accused sold other Government property upon salvage sale (Salvage Sale No. 35) (Ex. 61), and received in payment, prior to the end of the month, sums in cash and checks aggregating $959 (R. 63, 228-240; Exs. 56, 57, 61, 68-74, 88). The proceeds of these sales were not turned over to the local finance officer on the dates of receipt, as required by paragraph 3 c, AR 30-2110, April 27, 1931. Corresponding amounts were, however, turned over subsequently as will hereinafter appear. On February 16, 1938, accused opened an account with the Bank of America, Riverside Branch, Riverside, California, under the designation "Salvage Sale Fund", depositing six of the checks he had received as payments under Salvage Sale No. 35 in sums aggregating $599.95, and another unidentified check for $51, making a total deposit of $650.95 (R. 248-252; Exs. 78, 79). On the same day accused withdrew $303.42 from this account, in the form of a cashier's check (R. 252; Ex. 80). On February 17 this cashier's check was turned over to the Agent Finance Officer, March Field, to cover Salvage Sale No. 34 (R. 257; Ex. 60). A representative of the Agent Finance Officer invited the attention of accused to the irregularity of the transaction in that the proceeds of the sale were not turned over in the form in which they were received but in the form of a single cashier's check drawn on the Bank of America (R. 257, 258). The balance of the Salvage Sale Fund account, $347.53, was withdrawn by accused on March 16, 1938 (R. 252, 253; Ex . 78).

On April 9, 1938, accused borrowed $600 on his promissory note from the Bank of America, Riverside Branch, $350 of the proceeds being applied in settlement of a previous loan to him by the bank (R. 243; Ex. 75). By July 7, 1938, his known personal indebtedness had reached the total of $3058.88 (Ex. 86). About August 4, 1938, accused solicited a loan of about $500 from Mr. Eric W. Entman, a member of a firm which had recently performed some small Government contracts at March Field under the supervision of accused as Constructing Quartermaster. Entman did not make the loan to accused but, on August 4, introduced him to Mr. F. A. Braman (R. 201-203; Ex. 68), manager of the Service Gravel Company of Riverside, California, a concern which had an uncompleted contract in the amount of $1444.95 for furnishing materials to the Government at March Field, and which had previously furnished similar materials to the Government under contracts and subcontracts (Exs. 58, 63). Accused told Braman that he had wrecked his automobile and needed money to purchase a new one and that money with which to meet his obligations would come to him shortly

from an estate. Accused asked for and obtained a loan from Braman in the amount of $450 and signed a note for that amount, due in six months (Ex. 58). On August 6, 1938, accused paid $400 to the Bank of America, Riverside Branch, on his note payable to that bank (R. 243; Ex. 75). On August 16, 1938, accused returned to Braman and asked for more money, stating that funds from the estate mentioned had been delayed and that he had "some obligations to meet". Braman loaned accused $525 and received from accused a thirty day note for that amount (Ex. 58).

At about 8:25 a.m., August 31, 1938, Lieutenant Colonel Max W. Sullivan, I.G.D., Assistant Inspector General, Headquarters Ninth Corps Area, who had just arrived at March Field, interviewed accused at Post Headquarters and told him that he was investigating the failure of accused to turn over to the Finance Officer the proceeds of salvage sales promptly and there was a salvage sale amounting to nearly $1,000 that was approximately six months overdue, the receipts from which had not yet been turned in to the Finance Department. At about 9 a.m., accused left the Inspector for the stated purpose of obtaining his salvage sales records from his office about one hundred yards distant. Accused returned to the Inspector after about two hours and fifteen minutes and presented some incomplete records. Accused, accompanied by a third officer detailed for that purpose, was sent back for further records. The further records were brought to the Inspector at about 1 p.m. The investigation continued until about 6 p.m. (Ex. 65). At about 9 a.m., or 10 a.m., August 31, accused entered the office of Mr. George H. Wilson, Jr., Superintendent of Construction at March Field, stated that he urgently needed some money at once and asked for a thirty day loan of about $900. Wilson stated that he did not have the money and suggested that accused apply for the loan to Mr. Archer R. Norcross, District Manager of the American Bitumuls Company (R. 205-207). About 10 a.m., or 11 a.m., accused telephoned Norcross and asked for an immediate loan of $950 in cash. Accused seemed to be "jittery" (R. 210, 211). Norcross testified that at about 6 p.m., August 31, he met accused at March Field, in the latter's office, and delivered to him as a loan $1,000 in the form of eight $100 bills and four $50 bills, the denominations and numbers of which were recorded by Norcross on the back of a ninety day note for $1,000, signed by accused (R. 211-214, 218). The note was received in evidence (Ex. 66). At the time of the transaction described Norcross' firm was performing a Government construction contract at March Field (R. 209), the contract price of which was $24,999.96. The concern had previously performed construction con-

tracts at March Field (Ex. 63). The note to Norcross increased the total personal indebtedness of accused to $5033.88 (Exs. 58, 75, 86).

At about 9 a.m., September 1, 1938, accused again appeared before the Inspector and at this time produced $959 in cash, mostly in the form of $20 bills but including considerable change, which he delivered to the local Agent Finance Officer to cover the proceeds of Salvage Sale No. 35 (R. 261; Ex. 65). In response to questions by the Inspector, accused testified under oath that during the previous evening he had found the money attached to a prepared War Department Form No. 325 (used in turning over the money to the Finance Officer) in his quarters where, apparently, about January 1938, he had unintentionally and through inadvertence left it. It had been his custom to carry home at nights some of his office work. He denied that he had devoted any of the money to his own use. In response to further questions by the Inspector, accused testified:

"33. Q. The answer to the following question is incriminating and you need not answer same, if you so desire. Since my arrival here yesterday have you had occasion to go out and borrow money to make this $959.00 available, or have you had it in your quarters all the time?

"33. A. I have had it in my quarters all the time and I assure you I would be unable to raise $959.00 at one time.

"34. Q. You did not raise a loan in order to have $959.00 available for this payment?

A. No sir." (Pp. 14, 15, Ex. 65.)

He also testified before the Inspector that he opened the Salvage Sale Fund account for the purpose of safeguarding the funds and for convenience in handling them. After being advised of the impropriety of depositing the funds in such an account, he "withdrew the balance, closing the account out. This balance began in Salvage Sale No. 35, * * *" (p. 12, Ex. 65). On March 21, 1940, in the course of an investigation by Lieutenant Colonel Richard W. Hocker, I.G.D., an Assistant Inspector General, Headquarters Ninth Corps Area, accused testified that during the investigation by Lieutenant Colonel Sullivan, prior to payment of the salvage account, he borrowed $1,000 from a source which he declined to reveal. He also testified before Colonel

Hocker that he borrowed this money in order that he might be in a position to state to the Inspector that he was prepared to liquidate his personal indebtedness should such indebtedness become a subject of inquiry. He testified:

> "It was borrowed after I had discovered that the funds under investigation were still in my possession; it had no connection whatever with those funds, except in the coincidence of time. I might add at this point, Colonel, at no time in my entire military career have I been tempted, regardless of my personal affairs situation, to use public funds. The fact that it was my concern with these funds, which the agent finance officer refused to receive until after the collection of the salvage sale involved, caused me to deposit them, not under my name, but under the official title of 'Salvage Fund.' Upon consultation with the Finance Officer at Fort MacArthur, I was advised that that procedure was unauthorized and I withdrew them -- kept them in my personal possession." (P. 28, Ex. 59.)

At the trial accused testified that at the time of the investigation by Lieutenant Colonel Sullivan, accused "had reached the point where my mind could no longer assimilate and evaluate the situation" (R. 304).

It is thus established that between November 30, 1937, and September 1, 1938, accused failed to account for or to deliver to the proper depository moneys in the amount of $959 belonging to the United States, the proceeds of Salvage Sale No. 35, which moneys were intended for the military service and had come into his possession by virtue of his office as Post Quartermaster and Salvage Officer at March Field, California. The extended period during which accused was in default with respect to these funds, the history of his rapidly growing personal indebtedness, his deposit in a bank of part of the proceeds of Salvage Sale No. 35, his diversion of part of this bank deposit to cover his obligations under Salvage Sale No. 34, his diversion to cash of the balance of the bank deposit, and the circumstances under which he finally produced funds to cover his obligations under Salvage Sale No. 35, leave no reasonable doubt that, as alleged in the Specifications, Charge III, accused fraudulently converted to his own use (Spec. 1) and knowingly and willfully misapplied (Spec. 2) the Government moneys in question. The two offenses of embezzlement and misapplication, violative of Article of War 94, were but different aspects of the same transaction.

The assertion by accused that the moneys he produced before the Inspector on September 1, 1938, represented the original proceeds of Salvage Sale No. 35 and that these moneys had, through inadvertence, laid for some time in his quarters, was not worthy of belief in view of the incriminating circumstances. It is true that the denominations of the currency delivered to accused by Norcross did not correspond to the denominations of the currency produced before the Inspector, but this discrepancy is most reasonably explicable in the light of accused's knowledge that Norcross had recorded the denominations and numbers of the bills he had delivered to accused and in the light of the obvious advantage to accused which might lie in concealing the source of the moneys produced. In connection with these transactions, the Board of Review cannot escape the conclusion, upon all the evidence, that accused's sworn testimony before Lieutenant Colonel Sullivan on September 1, 1938, that accused had had the salvage sale proceeds in his quarters and had not, through a loan, obtained the moneys turned over to the Agent Finance Officer, was false and was known by him to be false, as charged under Specification 32, Charge I. The evidence of falsity, as noted, is circumstantial, but the circumstances are mutually corroborative and compelling. The giving of the corrupt testimony was manifestly unbecoming an officer and gentleman within the meaning of Article of War 95.

The soliciting by accused of a personal loan from Emtman and his soliciting and procuring personal loans from Braman and Norcross, Government contractors, as charged in Specifications 1-4, inclusive, Charge II, were amply proved. Suggestions of business or financial favors to the contractors or threats of possible injury to them by accused in his official capacities, were implicit in the circumstances. His conduct in this connection was plainly of a nature to bring discredit upon the military service and was violative of Article of War 96, as charged.

5. With reference to Specifications 4, 6, 8, 10, 12 and 15, Charge I, alleging the obtaining of loans of money by false pretenses; and Specifications 6-10, inclusive, Charge II, alleging unlawful use of the United States mails in fraudulent ventures, the evidence is substantially as follows:

By signed, written (form) applications, made at March Field, California, at the times indicated below, accused applied to loan or banking concerns for personal loans (of cash or to absorb prior loans),

falsely representing in each case that his indebtedness at the time of the application was less than it was in fact. The dates of the applications, the names of the loaning concerns, the amount of the loans applied for, the total indebtedness as represented by accused, and the total debts actually owing by accused at the times of the applications were as follows:

Date of application.	Concern	Amt. of loan applied.	Total debts as represented.	Total debts owing.	Chg. I, Spec. as shown. References.
7/7/38	Monroe Loan Society of New York, Inc.	$300.00	$910.00	$3,058.88	4, Exs. 18, 19, 86.
9/3/38	Mechanics Bank, Richmond, Calif.	600.00	948.34	4,777.02	15, Exs. 31, 86.
10/21/38	Armed Service Finance Company, Montgomery, Ala.	311.18	218.00 (owing to banks or loan companies.)	2,704.03 (owing to banks or loan companies.)	12, Exs. 28, 86.
10/22/38	Citizens Loan Association, Chicago, Illinois.	300.00	594.00	6,035.06	10, Exs. 27, 86.
7/ 7/39	Service Finance Corporation, San Antonio, Texas.	324.00	725.00	6,289.58	8, Exs. 26, 86.

In the application submitted to the Monroe Loan Society (Spec. 4, Chg. I), accused failed to list any mortgage in a space provided in the form for listing such obligations, and stated "no indebtedness" in a space provided for listing debts with respect to "Furniture" (Ex. 19). Certain items of accused's household furniture were in fact mortgaged to the Federal Services Finance Corporation, Washington, D. C. This chattel mortgage had been made by accused

in 1936 to secure a loan by the mortgagee, which loan had been absorbed, in part, by a further loan made in November 1937. At the time of the application to the Monroe Loan Society, the chattel mortgage was held by the Federal Services Finance Corporation as security for the loan of November 1937 (Int. 20-29 and Ex. B of Ex. 8; p. 33, Ex. 59). In his application to the Service Finance Corporation (Spec. 8, Chg. I), dated July 7, 1939, accused (who had retired June 30, 1939) gave his "Rank" and "Organization" as "Major" "QMC", and stated "no" in response to a question as to whether he had received notice or knew that he was to "appear before a retiring board for physical disability". On the application, however, he stated correctly the rate of his retired pay (Ex. E of Ex. 26). On July 2, 1939, accused had signed a communication to this concern as "Major, Q.M. Corps" (Ex. C of Ex. 26). Accused testified before Lieutenant Colonel Richard W. Hocker, I.G.D., in the course of the investigation of March 21, 1940, to the effect that he believed that he had not misrepresented his status and that he had not entertained any intention to deceive or to conceal his retired status (p. 36, Ex. 59). In each case mentioned above, in reliance on the representations made by accused, the loan was granted. Each of the applications was transmitted to the loaning concern by accused through the United States mails (Exs. 18, 26-28, 31) (Spec. 6-10, Incl., Chg. II).

On September 22, 1939, at March Field, California, in connection with an application to the Globe Investment Company of Los Angeles, California, for a loan of $169.56, accused executed and delivered to the company a chattel mortgage upon articles of household furniture, together with a signed "appraisal record" in which he certified that a certain Thor electric washing machine, a Singer electric sewing machine, and other articles included in the chattel mortgage were "free from all encumbrances" (R. 55-59; Ex. 24). A washing machine and a sewing machine of similar description were included in the existing chattel mortgage to the Federal Services Finance Corporation above mentioned (R. 58; Exs. 12, 24). The loan was made by the Globe Investment Company in reliance on the representation made by accused (R. 59) (Spec. 6, Chg. I).

In the course of the investigation by Lieutenant Colonel Hocker on February 20 and March 21, 1940, accused testified that he was unable to account for his apparent omission of a complete statement of his debts in his loan application to the Mechanics Bank (p. 34, Ex. 59) (Spec. 15, Chg. I); that in his application to the Ser-

vice Finance Corporation he intended to report only his "current accounts", did not intend to report "indebtedness of a contractual nature", and had no purpose of evasion or fraud (pp. 11, 23, 35, Ex. 59) (Spec. 8, Chg. I); and that the washing and sewing machines were listed by error and "should not have been included" in the Globe Investment Company appraisal record and mortgage (p. 33, Ex. 59) (Spec. 6, Chg. I).

That accused obtained the several loans described in Specifications 4, 6, 8, 10, 12 and 15, Charge I, by means of material and false pretenses as to his debts and as to encumbrances on his household furnishings, as alleged, is fully proved. The circumstances leave no substantial doubt as to fraudulent intent in each case. The evidence also shows that in the application to the Service Finance Corporation (Spec. 8, Chg. I), accused failed to disclose the fact of his retirement, except by possible inference from his declaration as to his rate of pay. The court was justified, from all the evidence, in concluding that in fact accused intended to represent and did represent that he was still on the active list. The dishonest conduct involved in the various frauds was violative of Article of War 95. Unlawful use of the mails to promote frauds, in violation of section 215 of the Criminal Code of the United States (18 U.S.C. 338), and of Article of War 96, as charged in Specifications 6-10, inclusive, Charge II, is fully established by the proof of accused's transmission by mail of the fraudulent applications to the Monroe Loan Society, the Mechanics Bank, the Armed Service Finance Company, the Citizens Loan Association, and the Service Finance Corporation. The offenses involving the obtaining of loans on the last-mentioned applications and the unlawful use of the mails in transmitting the applications are but different aspects of the same transactions.

6. As to Specifications 18 and 19, Charge I, alleging the obtaining of money by false pretenses, the evidence shows that about August 10, 1939, accused orally requested a vice president and an assistant cashier of the Citizens National Trust and Savings Bank of Riverside, California, to permit an overdraft of $125 on accused's account with the bank. The officers of the bank testified that accused stated that, apparently due to his recent retirement, his pay check for the month of July 1939 had been delayed, that he had not received his pay for that month, and that as soon as the check arrived he would have it credited to his account with the bank (R. 122, 254). Accused was indebted to this bank (R. 117) and maintained with it a checking account in which his pay checks had for many months been deposited. The ac-

count was overdrawn on August 10 (Ex. 46). Accused had an arrangement with the bank whereby it was to debit his checking account to meet monthly payments on his indebtedness to the bank (R. 118, 123). The officers of the bank, relying on the statement by accused as to his July pay check, and with the understanding that the check was to be deposited with the bank when received, agreed to honor the overdraft. The bank then, on August 10, cashed accused's check drawn on this bank for $125, payable to cash, dated "July 10, 1939" (R. 124, 126; Ex. 47). Accused had in fact cashed his pay check for July 1939 at the Bank of America, Riverside Branch, prior to August 3, 1939 (R. 245, 246; Ex. 77). In the course of the investigation by Lieutenant Colonel Hocker on February 20, 1940, accused testified that he did not recall having definitely stated that his July pay check would be deposited to cover the overdraft, but that such an understanding might have been implied from the conversation. He did state to the representatives of the bank that he had not received the check in question. He further testified that he believed that he did not in fact receive the check until about August 11 or 12 (pp. 7, 8, Ex. 59).

The evidence fully supports the allegations of Specifications 18 and 19, Charge I, that accused fraudulently and dishonorably obtained the proceeds of the overdraft through falsely representing to the bank that he had not received his pay for July 1939, and that he proposed to deposit such pay with the bank when received. Violation of Article of War 95, as charged, is established. The fraudulent acts alleged by the two specifications are almost identical.

7. With reference to Specifications 1, 3, 5, 7, 9, 11, 13, 14, 16, 17, 20-24, inclusive, and 28-31, inclusive, Charge I, alleging dishonorable failure to pay debts, the evidence is substantially as follows:

Accused fell in arrears in payment of debts incurred by him through loans or through purchases of merchandise or for services rendered, as alleged in these specifications. The dates of arrearages, the names of the creditors, the amounts of original arrearages, the amounts payable monthly and the payments made from time to time prior to the date of the charges, are listed below.

In arrears from	Creditor	Original arrearage	Monthly payments due	Payments made prior to charges, amount and date	Chg. I, shown. Spec. as References.
3/ 1/38	Sweets, Inc.	$ 192.31	All due	None	30, R. 155, 156.
9/16/38	F. A. Braman	527.18	"	"	22, Ex. 58.
11/ 7/38	Monroe Loan Society	251.15	$20.00	$20.00, 6/5/39	3, Ex. 18.
11/30/38	Archer R. Norcross	1,015.00	All due	$100.00, 3/15/39 200.00, 7/10/39 100.00, 8/ 3/39 25.00,12/ 9/39 247.22, 2/19/40	23,24, R. 215-222.
1/19/39	Public Loan Corp.	181.93	$20.00	20.00, 5/ 1/39	13, Ex. 29.
2/ 4/39	F. A. Braman	461.25	All due	None	21, Ex. 58.
2/10/39	Union Oil Co.	88.08	"	"	31, R. 165-167.
3/ 5/39	Karl W. Peters	31.90	"	"	29, Ex. 33.
5/25/39	A. & P. Tea Co.	180.10	"	"	28, R. 71-75.
6/ 5/39	Mechanics Bank	672.30	$20.00	"	14, Ex. 31.
7/ 1/39	Citizens National Trust & Savings Bank	75.50	All due	"	17, R. 121.
7/ 3/39	Armed Service Finance Corporation	169.74	$17.30	"	11, Ex. 28.
7/ 5/39	Citizens Loan Corp.	164.51	23.85	"	9, Ex. 27.
8/ 1/39	Citizens Nat. Trust & Savings Bank	1,107.35	250.00	"	16, R. 118, 119.
8/10/39	Service Finance Corp.	324.00	27.00	"	7, Ex. 26.
8/10/39	Citizens National Trust & Savings Bank	132.18	All due	"	20, R. 123-127.
10/ 5/39	Federal Services Finance Corp.	506.00	$20.00	"	1, Ex. 8.
3/ 5/40	Globe Investment Company	127.17	14.13	$14.13, 3/23/40	5, R. 50-54.

After March 1, 1938, and prior to April 1, 1940, the date of the charges, accused made payments on his debts other than debts involving his current expenses, in amounts totaling about $4,000. During the same period he had, through loans, obtained cash totaling about $7,000 (R. 49, 50-54, 115, 116, 120, 126, 215-222; Exs. 8, 18, 26-29, 31, 42, 58, 75). Numerous requests for payment were made to accused by the several creditors during the periods of his delinquencies (R. 72, 73, 119, 156, 167, 215; Exs. 8, 18, 26-29, 31, 33, 58). Accused played slot machines in the Officers' Club at March Field to considerable extent during 1939 (R. 92-96, 107).

In the course of the investigation by Lieutenant Colonel Richard W. Hocker, I.G.D., on February 20 and March 21, 1940, accused testified that he was not heavily in debt when he went to March Field in 1935, but that his obligations thereafter increased. His duties at March Field were very arduous and he encountered difficulties with his superiors in the administration of affairs relating to W.P.A. and P.W.A. projects. He did not drink or gamble to excess and was not involved with any "other woman" (pp. 26, 29, Ex. 59). He further testified:

> "* * * the full situation built up through a chain of circumstances finally climaxed in a complete collapse of my whole financial structure. In the course of this time I became overwhelmed with indebtedness, which I attempted to meet by borrowing additional money. However, I had every reason to believe that funds from outside sources, amounts due me, would be sufficient to cover -- or rather to meet my obligations under the terms and conditions of the contracts. I had every reason to believe that I would receive employment with financial return sufficient to more than enable me to meet my obligations. I will admit poor judgment in the light of subsequent results; but at no time has it been my desire or intention to escape or evade my financial obligations. * * *." (Pp. 24, 25, Ex. 59.)

In response to a request by the Inspector for information as to the specific causes of his financial involvement, accused testified:

> "That puts me in a difficult position Colonel. I don't feel justified in involving people that are very close to me in relationship to whom I rendered assistance and support during the depression. I attempted to maintain,

> or rather support, more than one establishment. That statement, regardless of the outcome of this, will have to stand alone; I will not involve them." (P. 29, Ex. 59.)

At the trial accused testified that his debts increased suddenly in 1938 from about $3,000 to about double that amount (R. 303, 304). In answer to an inquiry as to the circumstances which increased his difficulties at this time, accused testified at the trial that the year 1938 -

> "* * * was a dividing line that split this thing in half. Up to that time my total indebtedness was around, roughly, $3000.00. I had expected to continue my military career. I had worked up to that point, serving under various commanding officers, three of whom offered their appraisal of the quality of my service up to that point. Colonel Wash, Air Corps, in command about the first day of May; my association with him was very distant. I had no official contact with him insofar as the discharge of my official duties were concerned. Covering that period of two months of May and June, at the end of the fiscal year, he submitted an efficiency report on me covering my professional qualifications. The efficiency report I would brand as the most viscious in the history of the Army. That completely knocked the props out from underneath me. I felt from then on that I had no alternative but to get out of the service and retire which I made plans to do and my career ended right there, while I actually retired on June 30th. * * *." (R. 303.)

Accused also testified at the trial that he attempted to liquidate his indebtedness through a concern known as the National Liquidation Bureau, of Los Angeles, California, but finally discovered that the services offered by it would not adequately protect him or his creditors. He also attempted liquidation through the Citizens National Trust and Savings Bank, Riverside, California, and sent a communication to the corps area commander proposing an allotment to that bank of $150 of his pay per month, effective March 1, 1940, for distribution among his creditors. No action was taken on the communication. Accused refused to go into bankruptcy but finally, in June 1940, made arrangements for distribution to his creditors, by a referee in bankruptcy, of funds which he might turn over for that purpose (R. 296-300; Ex. 90). In answer to a question by a member of the court-martial as to

what circumstances had caused the great increase in his obligations, accused testified:

> "I cannot extend into that question without disclosing the circumstances and issues under which I was laboring and the facts on which I based my judgment and motive." (R. 305-306.)

The evidence supports the findings of guilty of the specifications alleging dishonorable neglect to pay debts. Mere neglect by a person subject to military law promptly to pay his debts is not a military offense (CM 207212, Thompson). The neglect by accused in this case, however, was accompanied by circumstances which leave no reasonable doubt that he was, on the whole, indifferent to his obligations or that he positively intended fraudulently to avoid payment thereof. In addition to his pay which, prior to July 1, 1939, was the maximum for an officer of his grade, accused received substantial amounts from his borrowings. Manifestly, these resources were not adequately devoted to liquidation of his debts. He may have borrowed from "Peter to pay Paul", but he did not, in any case, use all of his borrowings to "pay Paul". He gave no convincing or adequate explanation of his delinquencies. Had he made honest and diligent efforts to do so, there is no apparent reason why he could not have made substantial partial payments on his debts, even after his retirement. Considered in connection with the many deceits and frauds practiced in his involved financial affairs, accused's long-continued failure to pay his debts or any reasonable proportion of them, must be deemed to have been prompted by dishonest motives and to have been unbecoming an officer and gentleman within the meaning of Article of War 95, as charged.

8. As to Specification 2, Charge I, alleging a false official report by accused regarding his adjustment of a transaction involving a dishonored check, the evidence shows that on May 31, 1939, by a written indorsement to the Commanding Officer, March Field, California (Colonel Rush B. Lincoln, Air Corps, who was also Commanding Officer of Air Base Headquarters at March Field), upon correspondence which had been referred to accused for report relating to the dishonor by the drawee bank, the Citizens National Trust and Savings Bank of Riverside, California, of a check for $25, dated April 7, 1939, drawn by accused in favor of the Federal Services Finance Corporation, accused stated:

"Subject matter of attached correspondence has been adjusted with the Federal Service Finance Corporation, Washington, D. C." (Ex. 2.)

On June 1, 1939, accused telegraphed to the Federal Services Finance Corporation as follows: "Adjustment of account mailed today" (Ex. P of Ex. 8). The dishonored check was not paid; no letter from accused was received by the finance company; and no adjustment of the indebtedness represented by the check was ever made. The only action taken by accused in connection with the dishonor of the check was the sending of the telegram noted (Ints. 52-63 of Ex. 8).

The evidence shows beyond reasonable doubt that the official report contained in the indorsement of May 31, 1939, was essentially false and was known by accused to be false, as alleged. Intent by accused to deceive the officer to whom the communication was addressed and to mislead that officer to refrain from other official action with regard to the check transaction, must be implied from the circumstances. Violation of Article of War 95 is established.

9. With respect to Specification 35, Charge I, alleging an untrue and misleading official report by accused concerning liquidation of his debts, the evidence shows that on October 1, 1939, by 1st Indorsement to the Commanding General, Ninth Corps Area, upon an official letter to him, accused stated:

"1. Reply to communications referred to above have been delayed pending definite and specific advise from a National Financial Agency which is now negotiating with creditors with a view to consolidating and liquidating all my indebtedness. * * *

"2. I am directing all my efforts toward the satisfactory settlement of my accounts and the avoidance of appeals directed to the military authorities, however, I find the period of adjustment to a retired status and civil employment more difficult than planned or anticipated but am fully confident that if given time I can meet and will meet all my obligations." (Ex. B of Ex. 34.)

On October 14, 1939, by 1st Indorsement to the Commanding General, Ninth Corps Area, upon an official letter to accused directing him to submit a report of progress in liquidating his indebtedness through the agency mentioned in the indorsement of October 1, accused stated:

"I am in receipt of a communication from the National Liquidation Bureau dated October 14, 1939 in which they inform me that they have received replies from creditors in connection with my financial affairs and advise me to contact their Los Angeles office with a view to taking final action to liquidate my outstanding obligations through their agency. I shall visit their office Wednesday, October 18th for this purpose." (Ex. C of Ex. 34.)

About September 25, 1939, through a letter of reference from the Mechanics Bank, Richmond, California, accused had requested the National Liquidation Bureau of Los Angeles to undertake liquidation of his debts. On the following day, with the understanding that he was to submit a complete list of his debts, accused submitted to this concern a partial list thereof, proposing to turn over to the agency $100 per month to be prorated among the creditors (R. 269, 272; Ex. 81). The agency suggested that it communicate with the creditors to secure their cooperation (R. 270, 271), and addressed letters to them for that purpose (R. 273). Two of the creditors declined to participate in the plan, three others gave only qualified approval, and the remainder of those listed by accused agreed to participate. The liquidation concern continued with formulation of its plan and on October 13, 1939, addressed a letter to accused advising of the responses of creditors and requesting accused to call at the office of the agency and discuss a future course of action (R. 275-277). No reply from accused was received and the agency wrote again to accused on October 24, urging action (R. 277). Accused did not reply but telephoned to the concern about November 10, stating that he would call in person within a few days. He did not call and on November 15 a third letter was mailed to him (R. 279). Accused again telephoned but did not appear at the office of the agency. On November 27 the concern wrote accused that unless he should make definite arrangements by December 1 the plan for liquidation would be dropped. Accused replied to the last letter by a letter dated December 3, asking that further arrangements be completed by mail (R. 281). The agency addressed additional letters to accused on December 5 and 8 urging a personal interview. About December 10, following the filing in a State court of a complaint against accused based on his obligation to the Monroe Loan Society, accused called at the office of the agency (R. 282-284), and discussed an alternative plan, previously suggested, for applying to the Federal courts, for distribution of funds to his creditors through a Referee in Bankruptcy but without the usual

bankruptcy proceedings and discharge (R. 284, 285, 288). Accused stated that he did not wish to obtain a discharge from his debts through bankruptcy (R. 288), but agreed to apply to the Federal courts for the distribution service (R. 284, 285). The application to the courts was not made, however, and the efforts to liquidate the debts through either of the channels above indicated were abandoned for the time being (R. 285-287). On June 27, 1940, upon the application of accused, a Referee in Bankruptcy of a United States District Court appointed a distributing agent to receive and distribute to creditors such moneys as accused might deposit for that purpose (R. 296; Ex. 90). At the trial accused testified, as hereinbefore stated, that he finally reached the conclusion that the services offered by the National Liquidation Bureau did not give adequate protection to him or to his creditors (R. 298, 299).

The specification covering the official communications here involved charges, in substance, that the reports contained in the communications were dishonest and deceitful. The gist of the indorsements was that accused was extending his best efforts to liquidate his debts through the National Liquidation Bureau. The evidence shows that he had in fact initiated efforts in this direction and that, at the times at which the indorsements were submitted, he had cooperated with the agency to some extent. The entire course of conduct of accused with respect to his debts and his evasive action in dealing with the liquidation agency following the submission of the reports, however, leave no reasonable doubt that accused was using the agency only for the purposes of evasion and delay, and that his reports in the premises were in fact dishonest and deceitful. Violation of Article of War 95 is established.

10. As to Specification 5, Charge II, alleging the discreditable making and uttering of a series of checks without sufficient funds in bank to pay them; Specifications 25 and 26, Charge I, alleging the fraudulent obtaining of money through making and uttering checks without sufficient funds in bank to pay them; and Specification 27, Charge I, alleging the fraudulent obtaining by accused of two worthless checks previously made and uttered by him, through making and uttering a third check without sufficient funds in bank to pay it, the evidence is substantially as follows:

From January 16, 1939, to November 18, 1939, checks drawn by accused on the Citizens National Trust and Savings Bank, Riverside, California, were dishonored by that bank, upon presentation and in the regular course of business, because of insufficient funds on deposit to cover them, as follows:

Item No.	Date of Check		Amount	Date of Dishonor		Balance when Dishonored
(1)	January	16	$185.00	February	4	Overdrawn
(2)	February	23	48.33	"	24	"
				"	28	"
(3)	March	20	22.50	March	22	$1.91
(4)	"	13	15.00	"	22	1.91
(5)	"	16	17.50	"	22	1.91
(6)	"	15	17.50	"	22	1.91
(7)	"	28	15.00	"	22	1.91
(8)	"	1	15.00	"	22	1.91
(9)	"	11	7.50	"	22	1.91
(10)	"	31	27.50	April	4	7.49
(11)	April	1	12.50	"	4	7.49
(12)	"	1	32.50	"	4	7.49
(13)	March	23	17.50	"	4	7.49
(14)	"	30	15.00	"	4	7.49
(15)	"	29	17.50	"	4	7.49
(16)	April	3	28.00	"	5	27.49
				"	17	1.89
				May	17	3.38
(17)	"	7	25.00	April	12	2.14
(18)	March	5	17.30	"	12	2.14
				"	26	.64
(19)	April	30	35.93	May	1	.64
(20)	"	30	79.46	"	1	.64
(21)	May	1	40.00	"	1	.64
(22)	April	30	17.50	"	1	.64
(23)	"	30	8.50	"	1	.64
(24)	"	30	50.00	"	2	.64
(25)	May	1	12.50	"	2	.64
(26)	"	7	25.00	"	13	28.38
(27)	"	10	30.00	"	13	28.38
				"	18	2.88
(28)	June	1	35.93	July	1	9.03
(29)	July	5	23.85	"	11	12.32
(30)	"	5	17.30	"	12	12.32
				"	26	Overdrawn

(31)	July	5	$20.00	July	12	$12.32
(32)	"	7	25.00	"	13	11.82
				"	17	11.82
(33)	"	1	20.00	"	13	11.82
(34)	"	31	12.50	"	31	Overdrawn
(35)	August	5	17.30	August	8	"
				"	19	"
(36)	"	1	20.00	"	11	"
(37)	"	10	27.00	"	12	"
				"	23	"
(38)	"	5	20.00	"	14	"
(39)	September	5	17.30	September	6	"
(40)	"	5	35.93	"	7	"
(41)	"	2	20.00	"	8	"
(42)	"	10	27.00	"	13	"
(43)	October	5	17.30	October	6	"
(44)	"	10	27.00	"	16	"
(45)	November	8	7.50	November	16	"
(46)	"	9	35.00	"	16	"
(47)	"	18	50.00	"	22	"

(R. 110, 111; Exs. 14, 41.)

As appears from the foregoing, eight of the checks (items 2, 16, 18, 27, 30, 32, 35 and 37) were presented for payment and dishonored two or more times (Ex. 41). At least six of the checks (items 17, 26, 32, 37, 42 and 44) were postdated ones given by accused in advance to cover monthly payments on loan accounts (Exs. 8, 26). The check for $25, dated April 7, 1939 (item 17), was that concerning which accused's false official report of May 31, 1939 (Spec. 2, Chg. I), was made. The reason for the dishonor on May 13 of the check for $25 (item 26) does not appear, for the bank balance on that date exceeded the amount of the check. Following the dishonor on July 1 of the check for $35.93 (item 28), a deposit of $547.58 was made on the same day. By July 5 the balance had been reduced to $27.32. Accused's pay checks were regularly deposited in the account up to July 1. Other substantial deposits were also made from time to time prior to this date. The account was continuously overdrawn from January 13 to March 21. On March 30 it was overdrawn. On April 30 the balance was $.64. On May 31 the balance was $4.78. On June 30 the balance was $9.03. After July 25 the account was continuously overdrawn (Ex. 46). The check dated January 16, 1939 (item 1), and twelve of the remaining checks (items 3-6, 8-15, incl.) were cashed for accused by the Officers' Club at March Field. The money turned over to accused was usually in the form of

nickles, dimes, and quarters (R. 86-91) suitable for playing slot machines in the club (R. 93) (Spec. 5, Chg. II).

On November 8, 1939, the Officers' Club, March Field, California, cashed for accused his check for $7.50 drawn on the Citizens National Trust and Savings Bank of Riverside, California (listed above as item 45) (R. 101, 102) (Spec. 25, Chg. I). At about this time the club also cashed a check for accused in the amount of $42.50, accused stating that he would "redeem" it the following day (R. 98, 99). On November 18 accused presented to the club his check for $50, drawn on the same bank (listed above as item 47), and in return for it obtained the checks for $7.50 and $42.50, which had previously been cashed by the club (R. 103-105) (Spec. 27, Chg. I). On November 9 the club cashed for accused his check for $35 drawn on the same bank (R. 102) (Spec. 26, Chg. I). The checks for $7.50, $50 and $35 were deposited for collection but were returned unpaid by the drawee bank (R. 102, 103, 106; Ex. 41). As noted, the account of accused with the bank was overdrawn during the month of November. No deposit was made in the account after July 1, 1939 (Ex. 46) (Spec. 25, 26, 27, Chg. I).

Thus the evidence shows that between the dates alleged in Specification 5, Charge II, accused made and uttered 47 of the checks described in the Specification without making necessary arrangements with the bank for funds with which to pay them. As noted, certain of these checks had been made some time prior to their dishonor and some were presented for payment and were dishonored two or more times. The evidence fails to show that there were not on deposit with the drawee bank sufficient funds to pay the check for $25, dated May 7, 1939, (item 26). Accused knew or ought to have known the balance in his account available for the payment of the various checks. In view of the generally depleted state of his account and of his many financial difficulties, the Board of Review is convinced that the making and negotiation of the dishonored checks (except item 26) were the result of gross carelessness or indifference, were deliberately designed to gain time and temporary relief from creditors or were deliberately fraudulent. The bank had allowed accused to overdraw his account and might thus have aroused in him a hope that some of the worthless checks in question would be honored when presented for payment. But the checks were in fact dishonored and any expectations

by accused that further overdrafts would be allowed were not, manifestly, justified. The acts of accused were wrongful and unlawful, as alleged. Intent by accused finally to defraud through the use of the checks is not alleged by this Specification, but the wrongful and unlawful making, uttering and negotiation of the checks was nevertheless discreditable within the meaning of Article of War 96 (CM 208870, Moore). The failure of proof with respect to the check dated May 7 (item 26), and the failure to prove that more than 47 checks were unlawfully made and uttered, are relatively unimportant and no part of the finding of guilty of this Specification need be disapproved.

There can be no serious doubt that at the time the checks described in Specifications 25, 26 and 27, Charge I, were made and uttered, accused knew that he did not have sufficient funds in bank to pay them. In view of his previous involvement with the bank he had no reasonable basis for any expectation that the checks would be paid when presented. The circumstances under which the three checks were presented are indicative of fraud in each case. The proof amply supports the findings under Specifications 25 and 26 that, with intent to defraud, accused obtained the proceeds of the checks for $7.50 and $35, and the finding under Specification 27 that, with like intent, he obtained the checks for $7.50 and $42.50.

11. With respect to Specifications 33 and 34, Charge I, alleging false swearing by accused concerning his debts, the evidence shows that on February 20, 1940, in his sworn testimony in the investigation by Lieutenant Colonel Richard W. Hocker, I.G.D., accused testified under oath, in the language set forth in these Specifications, that he had no financial obligations that had not been brought to the attention of the War Department and had not been included in a statement furnished by him to the National Liquidation Bureau of Los Angeles, California (p. 21, Ex. 59) with whom, in September 1939, he had initiated arrangements for adjustment of his debts (R. 268) (Spec. 33); and that since his retirement on August 30, 1939, he had paid debts owing to commercial concerns in Riverside, California, which he described as "Rouse", "Westbrooks" and "Kaufman" (p. 22, Ex. 59) (Spec. 34). In fact the debts owing by accused to F. A. Braman in the original amount of $975 (Ex. 58) and the balance of the debt owing to Archer R. Norcross in the amount of about $526.63 (R. 223), described above, had not been included in the statement to the National Liquidation Bureau (R. 272; Ex. 81) and were not mentioned by accused in his testimony before

Lieutenant Colonel Hocker (Ex. 59). Accused had not made any payment to "Rouse's", a department store in Riverside (R. 171-174), to the "J. R. Westbrook Company", a hardware store in Riverside (R. 174-176), or to "A. R. Coffin", a shoe merchant of Riverside (R. 177), since June 30, 1939, the date of accused's retirement. During the continuation of his testimony on March 21, 1940, accused testified in reference to the omission of the Norcross debt from his statement of debts that his previous testimony was incorrect and that he did in fact owe amounts not theretofore brought to the attention of the War Department (p. 32, Ex. 59); and testified with respect to the asserted payments to the Riverside merchants that he had not intended to convey the meaning that the accounts had been paid following his retirement (pp. 30, 31, Ex. 59).

The circumstances in evidence plainly show that the omission from accused's testimony before Lieutenant Colonel Hocker of any statement of the Braman and Norcross debts was intentional. Not only were the debts owing but they were large ones and the creditors had pressed accused for payment. The circumstances under which these debts were incurred leave no serious doubt that accused conceived it to be to his interest to conceal them and thus conceal the source of the moneys used by him on September 1, 1938, to settle the Salvage Sale account. The evidence also shows that the testimony by accused that he had, since his retirement, paid accounts of concerns which he described as "Rouse" and "Westbrooks", was false. Under the circumstances there can be no reasonable doubt that accused was aware of the falsity of this testimony. Although the evidence shows that accused had not paid an account with a merchant named "Coffin", there is no other evidence with respect to any payment he may have made to a concern known as "Kaufman", a concern mentioned in his testimony before Lieutenant Colonel Hocker. Falsity of the testimony with respect to Kaufman is not, therefore, established. The failure of proof is relatively unimportant and the finding in this connection need not be disturbed. The elements of false swearing alleged by Specifications 33 and 34, Charge I, as violative of Article of War 95, are established in their essential particulars beyond reasonable doubt.

12. The court properly overruled the plea in bar of trial upon Charge III and its Specifications. It appears that accused was reprimanded under the 104th Article of War for negligence in the handling of the moneys involved in these Specifications, and for failing to deposit the funds with a finance officer (R. 80-85).

It is not shown that any attempt was made to impose disciplinary punishment under Article of War 104 for the offenses of embezzlement and misapplication here charged. These offenses are not, indeed, "minor offenses" for which Article of War 104 authorizes disciplinary punishment.

13. After accused had testified at the trial, on direct examination, in certain particulars with respect to his debts and related matters, as set forth above, the court, following suggestions by the trial judge advocate, stated that the cross-examination would be limited to matters covered on direct examination (R. 302). Subsequently an answer by accused to a question by a member of the court as to what circumstances had caused the great increase in his obligations, was interrupted and objected to by the trial judge advocate upon the ground that the answer was not responsive. The answer was not continued and the court did not rule upon the objection (R. 303-304). Thereafter a similar question by a member of the court was objected to by the trial judge advocate upon the ground, in substance, that the subject matter had not been covered on direct examination (R. 304-305). The court ruled with respect to the latter objection that the "question must be answered by a direct answer and then it may be followed by further explanation" (R. 305). Accused then testified:

> "I cannot extend into that question without disclosing the circumstances and issues under which I was laboring and the facts on which I based my judgment and motive." (R. 305-306.)

Following this response accused was advised by the court as to his right to testify or make an unsworn statement (R. 306). He declared -

> "I desire at this time to expose myself to examination and cross examination on any subject matter that has been brought before this court for their consideration." (R. 307.)

He was then further advised of his rights as a witness and stated that he understood them (R. 308-309). He was not questioned further and did not testify further.

In a letter to the president of the court-martial, dated July 2, 1940, attached to the record of the trial (vol. 4, just before record of trial proper), accused contends, in substance, that his substantial rights were injuriously affected in that he was not permitted as a witness to continue with his explanation of the increase in his debts and that his right to testify in his own behalf was improperly curtailed. The Board of Review finds no substantial error in the rulings of the court, and finds no reasonable basis in the record of trial for the contention by accused that his right to testify in his own behalf was improperly curtailed.

In the letter referred to, accused also stated:

> "1. The apparant and indifferent manner in which my defense was being conducted gave me grave concern during the course of the trial but the full significance and weight was not fully realized until I was led from the court-room in custody of an armed guard. I refer particularly to permitting all manner of testimony to be presented and documents read by the prosecution without interruption or challenge, this procedure was followed throughout the trial upon advise of Counsel and that it would be met at the proper time."

The record shows that substantially all of the testimony and documentary evidence was presented at the trial without objection by the defense. No substantial error in the admission of evidence has been discovered.

14. The accused is 52 years of age. The Army Register shows his service as follows:

> 2 lt. of Cav. (temp.) 30 June 17; accepted 11 Aug. 17; 1 lt. of Cav., N. A. 15 Jan. 18; accepted 7 Feb. 18; capt. 22 Oct. 18; accepted 15 Dec. 18; hon. dis. 25 Oct. 19. — Pvt. corp. and sgt. Btry. A, 5 F. A., Tr. D, 1 Cav. and Q. M. C. 7 Jan. 07 to 10 Aug. 17; sgt. Q. M. C. 23 Jan. 20 to 17 Sept. 20; 1 lt. of Cav. 1 July 20; accepted 18 Sept 20; capt. 1 July 20; Q. M. C. 1 Aug. 28; trfd. to Q. M. C. 26 Dec. 28; maj. 1 Aug. 35; retired 30 June 39.

15. 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 of guilty and ~~of~~ the sentence, and to warrant confirmation of the sentence. Confinement in a penitentiary is authorized under Article of War 42 for the offenses involved in Specification 1, Charge III, and in Specifications 6-10, inclusive, Charge II, said offenses under Charges II and III being recognized as offenses of a civil nature and so punishable by confinement in a penitentiary by section 36 of the Criminal Code of the United States (18 U.S.C. 87), and section 215 of the Criminal Code of the United States (18 U.S.C. 338), respectively.

_____, Judge Advocate.

Edward B. Sehlau, Judge Advocate.

Albert W. Johnson, Judge Advocate.

1st Ind.

War Department, J.A.G.O. Nov. 6, 1940 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major John B. Casseday (06837), U. S. Army, Retired.

2. Major Casseday was convicted under forty-seven specifications, as itemized in the draft of your letter to the President. He was sentenced to be dismissed the service, and to be confined at hard labor for four years. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement.

3. The records of the War Department show that accused was born in Minnesota, May 1, 1888. He attended high school for one year. He served as an enlisted man from January 7, 1907, to August 10, 1917, as a temporary second lieutenant, and as a first lieutenant and captain, National Army, from August 11, 1917, to October 25, 1919. He reenlisted January 23, 1920, and served as an enlisted man until September 17, 1920. He was appointed a first lieutenant, Cavalry, Regular Army, effective July 1, 1920, and was promoted to captain as of the same date. He was promoted to major August 1, 1935. He was transferred to the Quartermaster Corps, December 26, 1928, and served in that branch until he retired, at his own request, after more than thirty years' service, on June 30, 1939. He was graduated from the Quartermaster Subsistence School in 1930.

During his commissioned service, a total of forty-four efficiency reports were rendered upon him. In two of these reports covering about ten months, his general rating was superior; in thirty-two of the reports, covering about eighteen years and eleven months, his general rating was excellent or above average; in nine of the reports, covering about two years and six months, his general ratings were satisfactory; and in one report, covering about two and one-half months, his general rating was unsatisfactory. Correspondence relating to debt delinquencies, mostly pertaining to the debts involved in the charges, appears in his 201 file. His efficiency file contains two commendations for efficient performance of duties and his efficiency reports contain numerous commendatory remarks with respect to his general value to the service. On December 28, 1938, he was awarded the Soldier's Medal in recognition of heroism displayed in rescuing civilians from drowning during a flood at Riverside, California.

4. The most serious offense of which accused stands convicted is that of embezzlement, in 1938, of $959, property of the United States, the proceeds of salvage sales. Restitution of the moneys was made. Accused has a family consisting of a wife and five children, the youngest of whom is about ten years of age.

5. I concur in the opinion of the Board of Review and recommend that the sentence be confirmed. In view of the circumstances surrounding the various offenses, the prior excellent service of accused, and the severity of the punishment involved in the sentence to dismissal, I believe that the ends of justice will be satisfied by a term of confinement substantially less than that adjudged. I accordingly recommend that the term of confinement be reduced to one year and one day, to be served in a penitentiary. I also recommend that the sentence as thus modified, be ordered executed.

6. Inclosed herewith are a draft of letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence, reducing the term of confinement to one year and one day, and directing execution of the sentence as thus modified.

Allen W. Gullion,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Drft. of let. for sig. Sec. of War.
Incl 3 - Form of Executive action.

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

Board of Review
CM 214103

SEP 13 1940

UNITED STATES)	THIRD CORPS AREA
)	
v.)	Trial by G.C.M., convened at
)	Bolling Field, D. C., July 9,
Private GEORGE W. SEYMOUR)	1940. Dishonorable discharge
(6850507), Second Staff)	and confinement for three (3)
Squadron, Air Corps.)	years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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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. Accused was found guilty of the larceny, under a single Charge and Specification, of a man's gabardine suit, value about $20, a man's white suit, value about $25, a man's brown suit, value about $25, a lady's white suit, value about $5, a Hamilton watch, value about $25, and a belt and silver buckle, value about $5, total value $115, the property of Harry S. Cobb. The total value alleged should be $105 and not $115. The brown suit and the belt and buckle were not before the court, but the watch and other suits were (R. 10, 11; Exs. 1, 2, 3, 4). The owner of the watch stated that it was invaluable to him as it was one of two articles left by his father who died on January 3. He also stated that "I believe the police department of Washington has placed a value of $25.00 on the watch" (R. 9). This evidence as to value is hearsay and, were it admissible, it does not appear that the evidence is from a competent source. It also appears that the accused gave the watch to another soldier as security for a loan of $4 (R. 18). The owner of the four suits stated that the value of the three men's suits and the one woman's suit is not less than $85. It does not appear that the owner was qualified to express an opinion as to the market value of these suits. Isadore L. Firestone, operator of a pawn shop and clothing store, a prosecution witness, valued the four suits at $6 (Ex. 5). No evidence was introduced as to the value of the belt and buckle. As to the suits, there is no evidence showing the dates of their purchase, the prices paid

for them, and the degree of their use. The record discloses nothing to indicate that all of the articles referred to did not have a readily determinable market value.

3. It is established that -

> "Other than as to distinctive articles of government issue (par. 1533; Supp. V, Dig. Ops. JAG 1912-30) or other chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny thereof is the market value. CM 208002, Gilbert; CM 208481, Ragsdale; sec. 585, McClain on Criminal Law; People v. Gilbert, 128 N.W. (Mich.) 756." (CM 209131, Jacobs; see also CM 212983, Dilsworth; CM 213765, Krueger, et al.; CM 213952, Myers.)

The only competent evidence as to the market value was the statement by Isadore L. Firestone that the four suits have an aggregate value of $6. Mere inspection of the property before it did not authorize the court to find more than that it was of some substantial value. To permit the court to determine market value from this inspection alone "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 213765, Krueger, et al.; CM 213952, Myers).

The evidence is legally sufficient to support only so much of the finding as to the aggregate value of the articles described in the Specification as involves a finding of aggregate value in excess of $6 but not in excess of $20. The maximum punishment by confinement authorized by paragraph 104 c, Manual for Courts-Martial, for larceny of property of value of not more than $20 is confinement at hard labor for six months.

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 involves a finding of guilty of larceny by the accused as alleged, at the place and time alleged, of the property described in the Specification, of value in excess of

$6 but not in excess of $20, and of ownership as alleged; 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 months.

Lester S. Hill Jr., Judge Advocate.

Edward B. Schlant, Judge Advocate.

Albert W. Johnson, Judge Advocate.

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

Board of Review
CM 214273

OCT 9 1940

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, August 30 and 31, 1940. As to each: Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
	)	
Private LEWIS P. REYNOLDS (6986108), Company H, 1st Infantry; and Private First Class PHILLIP RICHARDSON (6291478), Company D, 1st Infantry.	)	

HOLDING by the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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

2. The accused were arraigned upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Lewis P. Reynolds, Company H, 1st Infantry, and Private 1st class Phillip Richardson, Company D, 1st Infantry, acting jointly and in pursuance of a common intent, did, at Fort Francis E. Warren, Wyoming, on or about August 10, 1940, by force and violence, and by putting him in fear, feloniously take, steal, and carry away from the person of Thomas G. Hudnall, cash, the property of the said Thomas G. Hudnall, value about $25.00.

Specification 2: (Finding of not guilty).

Specification 3: In that private Lewis P. Reynolds, Company H, 1st Infantry, and Private 1st class

> Phillip Richardson, Company D, 1st Infantry, acting jointly and in pursuance of a common intent, did, at Fort Francis E. Warren, Wyoming, on or about August 10, 1940, with intent to do him bodily harm, commit an assault upon Thomas G. Hudnall, Taxi Driver, by striking him on the head with a dangerous weapon, to wit, a pistol.

Each accused pleaded not guilty to the Charge and Specifications and were each found guilty of Specifications 1 and 3, not guilty of Specification 2, and guilty of the Charge. No evidence of previous convictions was introduced as to accused Reynolds. As to accused Richardson, evidence of a previous conviction was introduced relating to an offense committed during his current enlistment but prior to the one year next preceding the commission of the offense charged. This evidence of previous conviction was, therefore, incompetent and should not have been received in evidence. Accused Richardson was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. Accused Reynolds 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 the sentences as to each of the accused, but reduced the period of the confinement imposed against Private Richardson to three years, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The accused were found guilty of joint robbery and assault with intent to do bodily harm with a dangerous weapon, to wit, a pistol. The evidence is compelling that the two accused were in a taxicab at the time of the alleged occurrence, and that the taxi driver was hit on the head by one of them with a pistol and robbed of $24.80. The contention of the defense was that both accused were so drunk that they knew nothing of the occurrence. Accused Reynolds also contended that he did not partake in the assault or robbery. The question of the degree of drunkenness was, therefore, important because of the intent involved in the findings.

4. The record discloses many erroneous rulings by the court on objections to questions by defense counsel. Two of these rulings are especially prejudicial. The effect of these rulings is important because they affected the question of the degree of drunkenness.

5. A prosecution witness who arrested accused Richardson after the alleged offense was committed stated (R. 24) that when he arrested Richardson he was obviously intoxicated, did not walk straight, and smelled of liquor. Second Lieutenant William G. White, Jr., who investigated the matter after the arrest, stated that accused Richardson staggered a little (R. 36). A defense witness, Private Howard F. Speake, stated (R. 46, 47) that accused Richardson was pretty drunk around 7:30 p.m., on August 10, 1940. Private Vernon M. Davids, a defense witness, stated that he saw accused Richardson on August 10, 1940, and drank with him from six o'clock until a quarter of nine (R. 51), and that accused was drunk. Private Donald H. Bonham, a defense witness, stated (R. 56) that on August 10, 1940, he was with accused Reynolds around nine o'clock and Reynolds was drunk. Both accused testified that they were drinking on August 10, 1940 and late in the evening were drunk (R. 58, 62). These various references disclose that the degree of drunkenness of the accused was very important on the question of intent.

6. The first of the two serious errors occurred when prosecution witness, Private Victor L. Williams, who arrested accused Richardson was being questioned by counsel for accused Reynolds. The question was (R. 23):

> "Q. What was the general condition of Private Richardson at that time?"

The prosecution stated:

> "I object, this is the special counsel for Private Reynolds. He was named special counsel for Private Reynolds only and not for Private Richardson."

This objection was sustained by the court. It was then brought out by the members of the court (R. 24) that at the time of his arrest Richardson was intoxicated. As the offense was joint robbery, it was perfectly proper to cross-examine all the accused as both were bound by the acts of each accused. The real danger of this ruling is that the defense counsel may have disclosed that Richardson was more drunk than disclosed by the questions asked by the members of the court. Also, it is possible that the defense counsel was foreclosed from asking questions other than as to Richardson's general condition.

7. The second serious error occurred when a defense witness, Private Howard F. Speake, was testifying as to the condition of ac-

cused Richardson on August 10, 1940. In reply to questions by the defense counsel, he stated that Richardson was drunk on this day. The prosecution stated (R. 48):

> "May it please the court, if the defense counsel now asks any questions of Private Speake with relation to Private Richardson, I object to the counsel for Private Reynolds conferring with the defense counsel of Private Richardson, unless the question absolutely pertains to Private Reynolds."

The court ruled: "The defense has heard the objection of the prosecution and will please conform to that." Counsel for Richardson asked no further questions with relation to Private Richardson and counsel for Reynolds than examined the witness. This ruling was highly improper as the accused were charged jointly and jointly responsible for the acts of each other. The detailed defense counsel was acting for both the accused and to hold that he could not confer with an associate counsel is to deprive the accused of the full aid of his counsel. This error was prejudicial to the substantial rights of the accused.

8. As the evidence on the question of the degree of drunkenness of the accused is not compelling, resort may not be had to Article of War 37 to hold the record legally sufficient on the ground that no substantial right of the accused was injuriously affected by the erroneous rulings (CM 190127, Hammond; CM 200328, Boutiller; CM 200942, Cole).

9. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings and sentences.

Walter S. Hilt, Jr., Judge Advocate.

Edward B. Schlant, Judge Advocate.

Albert W. Johnson, Judge Advocate.

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

Board of Review
CM 214336

OCT 24 1940

UNITED STATES)	THIRD DIVISION
)	
v.)	Trial by G.C.M., convened at
)	Fort Lewis, Washington, August
Private LUCIUS C. BELLAMY)	9, 1940. Dishonorable discharge
(6916598), Company G, 47th)	and confinement for nine (9)
Quartermaster Regiment.)	months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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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 Charges and Specifications:

CHARGE I: Violation of the 65th Article of War.

Specification: In that Private Lucius C. Bellamy, Company G, 47th QM Regiment, did, at Tacoma, Washington, on or about July 2, 1940, strike Corporal Lonnett H. Cypert, a noncommissioned officer who was then in the execution of his office, in the face with his fist.

CHARGE II: Violation of the 68th Article of War.

Specification: In that Private Lucius C. Bellamy, Company G, 47th QM Regiment, being engaged in a fray among persons subject to military law, and having been ordered to his organization by Corporal Lonnett H. Cypert, Company E, 47th QM Regiment, did, at Tacoma, Washington, on or about July 2, 1940, refuse to do the same.

Accused pleaded not guilty to Charge I and its Specification. He pleaded to the Specification, Charge II, not guilty, but guilty of a Specification, as follows:

"In that Private Lucius C. Bellamy, Company G, 47th QM Regiment, did, at Tacoma, Washington, on or about July 2, 1940, engage in a fray, to the prejudice of good order and military discipline."

To Charge II, he pleaded not guilty, but guilty of violation of Article of War 96. He was found guilty of Charge I and its Specification and guilty of substituted Charge II and its substituted 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 to be confined at hard labor for one year. The reviewing authority approved only so much of the sentence as pertains to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for nine months, and transmitted the record under Article of War 50½.

3. When the accused pleaded guilty to a substituted specification and charge in place of Charge II and its Specification, the prosecution stated (R. 5):

"In view of the pleading of guilty to a lesser included offense as to Charge 2, by direction of the Commanding General the prosecution withdraws charge 2 and its specification and will not pursue that charge further at the present trial."

This action was a full and complete withdrawal of Charge II and its Specification and there is no basis in fact or law upon which to sustain the findings of guilty as to this so-called substituted charge and specification. The approved sentence, however, is amply sustained by the findings as to Charge I and its Specification.

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

The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence, as approved and reduced by the reviewing authority.

Victor S. Hill Jr., Judge Advocate.

Edward B. Schlant, Judge Advocate.

Albert W. Johnson, Judge Advocate.

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

Board of Review
CM 214342

OCT 28 1940

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
	)	
v.	)	Trial by G.C.M., convened at West Point, New York, September 18, 1940. Dismissal.
	)	
Cadet RILEY S. KING, First Class, United States Corps of Cadets.	)	

OPINION of the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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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 96th Article of War.

Specification: In that Cadet Riley S. King, First Class, United States Corps of Cadets, did, at or near Highland Mills, New York, on or about August 22, 1940, drink intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931.

Accused pleaded guilty to and was found guilty of the Specification and the Charge. 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 action under Article of War 48.

3. The prosecution did not introduce any evidence, but did read paragraph 135, Regulations for the United States Military Academy, 1931, which regulation is as follows:

"135. Intoxicating liquors. - 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."

4. The defense introduced three character witnesses and made an unsworn statement.

Cadet John Norton, First Class, United States Corps of Cadets, testified that he has known the accused for two years, has had closer association with him than with any other cadet, and found him above the average in the performance of his duties as a cadet. He is very level-headed and well liked in the Corps. After graduation, he would be willing to serve with or under the accused. The accused could always be trusted and has gone far with his teachers (R. 8, 9).

Captain Harry W. Johnson, 10th Cavalry, West Point, New York, testified that he has known the accused all four years he has been at the Academy and has instructed him. He was in command of the Cavalry in Cadet maneuvers and the accused was one of eight cadets who performed their duties in an outstanding manner. He believes the accused will make a very fine officer (R. 10-12).

Captain James R. Davidson, Infantry, testified that he has known and observed the accused continuously since September 1939. The accused has performed his duties in an excellent manner as a cadet and has excellent capabilities and possibilities as an officer, above the average cadet. He would be very happy to have the accused serve under him at any time. Witness discussed the accused with Cadet Company Commander Mr. Lee, and he esteemed him very highly (R. 13, 14).

The accused made the following unsworn statement (R. 6):

"I did do a very foolish thing. I realize that now. During the last three weeks I have suffered a great deal of anguish because I jeopardized my entire career and my whole future life for the sake of a few bottles of beer. I can honestly say now I have learned my lesson. Although my previous thoughtlessness is no defense now, I do say if this court will give me another chance, I will do every-

thing in my power to make myself worthy of the opportunity they have offered me. That is all I have to say."

Four of the six members of the court joined in a plea for clemency which is attached to the record. In this plea it is recommended that the sentence of dismissal be commuted to suspension for one year. The reasons given are the accused's excellent reputation with both officers and cadets with whom he has come in contact, and his probable worth as an officer in the Army of the United States.

The Superintendent of the Military Academy made a recommendation for clemency, which appears below his action on this case, wherein he recommends that the sentence be confirmed and commuted to the usual restriction to limits and performance of punishment tours prescribed for cadets undergoing special punishment for a period of six months beginning with the date of action by the President. He further states that such modification of the sentence will meet the requirements of justice and discipline.

5. That the accused drank intoxicating liquor, as alleged, is established by his pleas of guilty.

6. Accused was admitted to the Military Academy from Florida on July 1, 1937, and was 25 years of age on August 15, 1940.

7. The court was legally constituted. The record of trial discloses no errors or irregularities injuriously affecting the substantial rights of accused. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence. The Board of Review, however, concurs in the recommendation of the Superintendent, United States Military Academy, that the sentence be confirmed and commuted to the usual restriction to limits and punishment tours prescribed for cadets undergoing special punishment for a period of six months beginning with the date of action by the President.

Victor S. Hill Jr., Judge Advocate.

Edward B. Schlank, Judge Advocate.

Albert W. Johnson, Judge Advocate.

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

Board of Review
CM 214367

OCT 25 1940

UNITED STATES	)	FOURTH DIVISION
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, September 25, 1940. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private LEO E. KASALAJTIS (6917797), Battery I, 83d Field Artillery.	)	

HOLDING by the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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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. Accused was found guilty of the larceny of one Hi-Standard automatic pistol, one heavy leather brown holster with extra clip on holster, 500 rounds of 22 caliber ammunition, one Argus candid camera, with leather carrying case, and four lens, of a total value of about $40. It was stipulated between the prosecution and the defense that were Second Lieutenant Joseph F. Keithly, 29th Field Artillery, present in court, he would testify as follows (R. 7, 8):

> "That on or about August 5, 1940, he was stationed with Battery I, 83rd Field Artillery, at Fort Benning, Georgia; that at that time he owned one 22 calibre Hi-Standard Automatic Pistol with heavy brown leather holster with extra clip pocket, valued at about $20.00; 500 rounds of 22 calibre ammunition valued at about $3.50; one Argus Model 'A' Candid camera valued at about $10.00; one leather carrying case with purple velvet lining for said camera, valued at about $2.50; 1 kit of lenses and accessories containing four lenses for the camera above described, valued at about $3.50; one roll of films in the camera described, valued at about 85¢; that he kept all of these articles in a suitcase in his tent in the 83rd Field Artillery area; that about August 5, 1940, he missed all of the articles named, having a total value of about $40.00 or more, from the place where kept; * * *."

The articles referred to were received in evidence. The only evidence as to the value of these articles is the stipulated testimony of the

owner, Lieutenant Keithly, but it does not appear that he was qualified to express an opinion as to their market value, nor is there any showing as to the purchase price, date of purchase, and degree of use of these articles except that Second Lieutenant Herman R. Smith, Jr., stated that the leather camera case was "somewhat worn" (R. 15).

3. Except as to distinctive articles of government issue or other chattels, which, because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 212983, Dilsworth; CM 213765, Krueger, et al.). The record discloses no competent evidence as to market value. While the articles referred to were before the court, the court was not authorized, from a mere inspection of same, to find that they were more than of some substantial value. To hold that the court could determine the definite market values of these articles "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208481, Ragsdale; CM 208002, Gilbert; CM 209131, Jacobs).

The evidence is legally sufficient to support only so much of the finding as to value under the specification as involves a finding of some substantial value not in excess of $20. The maximum punishment by confinement authorized by paragraph 104 c, Manual for Courts-Martial, for larceny of property of value of not more than $20 is confinement at hard labor for six months.

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 involves a finding of guilty of larceny by the accused as alleged, at the place and time alleged, of the property described in the Specification, of some substantial value not in excess of $20, and of ownership as alleged; 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 months.

Lester S. Hill Judge Advocate.

Edward B. Schlenk Judge Advocate.

Albert W. Johnson Judge Advocate.

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

Board of Review
CM 214421

OCT 29 1940

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, August 30, 1940. Dismissal.
Cadet THEODORE K. WHITE, First Class, United States Corps of Cadets.	)	

OPINION of the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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 Charges and Specifications:

CHARGE I: Violation of the 85th Article of War.

Specification: In that Cadet Theodore K. White, First Class, United States Corps of Cadets, was at West Point, New York, on or about July 19, 1940, found drunk while on duty as Intermediate Officer of the Guard, Cadet Camp.

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

Specification: In that Cadet Theodore K. White, First Class, United States Corps of Cadets, did, at West Point, New York, on or about July 19, 1940, drink intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous conviction was introduced.

He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused was detailed as Intermediate Officer of the Guard at Cadet Camp for Thursday, July 18, 1940 (Ex. 1), and was mounted at 5 p.m., July 18 and not relieved prior to 5 p.m., July 19, 1940 (R. 9-11). Accused was sober and not under the influence of liquor at supper July 18 (R. 17). Cadet R. P. Pierpont, First Class, Senior Officer of the Guard, arranged the hours dividing up the night July 18-19, and assigned the period from about 10:30 p.m., to 1:30 a.m., to accused, the period 1:30 a.m., to 3:30 a.m., to Cadet Foster, Junior Officer of the Guard, and 3:30 a.m., to reveille, to himself (R. 120, 121, 124). At about 11 p.m., when Cadet Pierpont went to bed (R. 120) and the last time he saw accused before sick call next morning, the condition of accused was quite normal (R. 79). He did not see accused and purposely avoided him from 11 p.m., until sick call July 19, because he had "a hunch" that accused might be doing something wrong because he saw accused during the evening in front of or inside the guard tent with an empty barrack bag (R. 83, 84).

Cadet H. G. Foster, First Class, was Junior Officer of the Guard, July 18-19, 1940 (R. 127; Ex. 1), had the shift from 1 a.m., until 3:30 a.m., was present in the guard tent or visitors' tent from 1 a.m., until he went to bed at 3 a.m., and saw accused practically the whole time during that period (R. 127, 128, 132, 133, 134). Cadet Foster stated that there was nothing extraordinary in the manner or behavior of accused during that period; that he did not smell liquor on accused; did not know that accused was drinking during that period; that accused had the next prior shift but just stayed on during his shift without giving any reason therefor; that after 2:45 a.m., he did not see accused until 9 a.m., July 19, 1940 (R. 128, 129); when he left at 2:45 or 3 a.m., and went to bed he told accused to wake Cadet Pierpont and fully thought that accused took over the guard then (R. 130); accused was then in the visitors' tent with Cadet Hollis where sandwiches and coffee were kept (R. 133, 134); and he did not see accused take a drink that evening and saw no liquor in guard or visitors' tent nor in the vicinity that night (R. 135).

Cadet J. B. Hollis, Third Class, was Sergeant of the Guard night of July 18-19, 1940, was on duty around the guard tent from

1:30 a.m., to 5 a.m., and saw accused during those hours. He did not notice anything peculiar about, nor detect any odor of liquor on accused during those hours (R. 99, 103). He was pretty sure accused did not go to tent to sleep before 5:30 a.m. (R. 106).

When at 4:30 a.m., Cadet Pierpont woke himself an hour late as Cadet Foster had failed to wake him, and went to the guard tent, he saw Cadet Hollis in front of the tent, but did not see accused or Cadet Foster there (R. 121, 122, 125). Cadet Hollis told him that Cadet Foster had gone to bed and that accused was on duty and would keep going until reveille (R. 125, 126). Cadet Pierpont heard a noise in the visitors' tent but did not check to see what the noise was (R. 126), and then went back to bed until reveille (R. 124). Accused ate one or two sandwiches. Cheese and ham sandwiches were provided that night in the visitors' tent (R. 98, 99, 138).

The testimony that the accused was drunk is confined to the period from reveille, about 6:10 a.m., to the formation of the sick squad following breakfast July 19, 1940. The pertinent testimony for the prosecution and defense may be summarized as follows:

a. For the prosecution four cadets, First Class, testified that accused was drunk, two Barrack Policemen that he was under the influence of liquor, and a third policeman that he was sick from being drunk. Cadet Price testified that accused had a hangover (R. 13); was drunk within the definition of drunkenness under Article of War 85, Manual for Courts-Martial, 1928, page 160, "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (R. 14); that after reveille and three or four minutes after accused lay down on bed, he dashed a dipper of cold water in face of accused and put finger down throat of accused to fully awaken accused (R. 12, 13); that he smelled the odor of liquor on the breath of accused (R. 13); that accused was slightly dazed and not fully awakened, and a little unsteady on his feet (R. 14). Cadet Atkinson testified that accused was drunk (R. 18), hard to awaken and not in complete control of himself; had a little trouble getting out to reveille; was unsteady on his feet; that he got accused up for reveille, held accused's left arm at reveille; accused then lay down on bed; and that in his opinion the full exercise of the mental and physical faculties of accused was sensibly impaired through the consumption of alcoholic beverages (R. 18, 19, 22). Cadet Neumeister believed

accused was drunk at time accused went to showers, was acting giddy in the shower, and had odor of liquor after he came back from shower (R. 35-37); and that a combination of incidents led him to reach opinion that accused was drunk (R. 39). Cadet Millikin smelled liquor on breath of accused while in tent (R. 25, 27); had impression that accused had too much to drink (R. 26) and was suffering from after effects of liquor (R. 32); and was of opinion that the full exercise of mental and physical faculties of accused was sensibly impaired through consumption of alcoholic beverages to the extent that he had the smell of liquor on his breath, was slow in walking, and slouched along to sinks, but not otherwise (R. 26, 27); that he saw in the locker of accused a brown quart bottle in a horizontal position with no cork, which was the same size and color as a liquor bottle (R. 25, 28, 30); and that accused acted naturally in the shower, adjusted it rapidly, dried himself off and walked slowly back to the main level (R. 31). Policeman Vineyard testified that after Corps went to breakfast, accused was walking to sinks slightly bent forward, his knees sagging and looked like he was going to fall down (R. 41); half an hour later in tent breath of accused had odor of intoxicating liquor; yellowish spots on trousers of accused looked like vomit; he buttoned up the front of trousers of accused (R. 42); was of opinion that full exercise of his mental and physical faculties was sensibly impaired through consumption of alcoholic beverages (R. 43); and that he first thought accused was sick but later observation of his bleary eyes, facial expression, and walk of accused were basis of opinion that he was under the influence of intoxicating liquor (R. 46-49). Policeman Halvorsen testified that while Corps was at breakfast, accused was sick from being drunk, was sleepy looking, his eyes were red, bleary and foggy looking, and he had odor of liquor on his breath (R. 51-56); and that he handed pair of trousers to accused, and helped put on right sash as accused had on silk sash (R. 52) while one of the men held accused up by the arms (R. 62). Policeman Swim testified that while the Corps was at breakfast, accused was under the influence of liquor; he based that opinion on actions and general appearance of accused, that he staggered, could walk after a fashion but not normally, and had puked on his pants (R. 56-61); and that one of the men held accused up by the arms while they fixed the sash (R. 62).

b. For the defense four cadets and two Barrack Policemen testified that they noticed nothing abnormal or unusual about the appearance of accused during the period from about 6:10 a.m., to the formation of sick squad following breakfast. Cadet J. R.

Sykes, First Class, testified that ten minutes after reveille when he found accused asleep on bunk he tapped accused on head, and accused immediately awoke and got up; that he did not believe that he smelled liquor on breath of accused but did smell an unusual odor for a tent; that accused seemed quite normal except for being a little pale, and that he figured accused "was under his own powers" (R. 64-66). Cadet C. H. Burr, Third Class, testified that accused appeared normal, did not look as if drunk and was able to stand alone (R. 66-68). Cadet R. P. Pierpont, First Class, testified that he started to form the sick squad - which accused was supposed to form - after breakfast and that he noticed nothing abnormal or peculiar about accused who walked rapidly up to mess hall, took command, and in the usual manner marched sick squad off (R. 78, 79). Cadet J. B. Hollis, Third Class, testified that at reveille he yelled and shook accused to wake him up because the Officer of the Day left a note to make sure everybody was up, but left when another cadet said he would get accused up; that he was in the tent while accused changed trousers because of a stain, which looked like vomit, on leg; did not assist in dressing accused except to help hold him up "like this" and to adjust sash; and hurried out at brisk walk with accused, who was navigating by himself to take charge of sick call (R. 99-104). Policeman Zwanziger testified that he did not smell any liquor on accused, who was not drunk; the double timing of accused toward the mess hall was perfectly normal; and that he brushed off the shoes of accused because he had the idea that accused was late and not because accused was unable to take care of himself (R. 71, 72). Policeman Baggett testified that there was nothing abnormal in the way the accused ran at double time toward the mess hall (R. 75, 76).

Two cadets, Third Class, members of the sick squad, testified that accused marched the squad to the Cadet Hospital and performed his duties as efficiently as others had done on other days, and that there was nothing unusual in the manner in which accused performed his duty (R. 87-90). One of them, Cadet Starnes, did not smell any liquor on breath of accused as he sat next to accused in the hospital (R. 88).

Captain E. M. Saeger, Medical Corps, who took sick call at Cadet Hospital from July 5 to August 1, 1940, did not notice anything peculiar or abnormal as to coordination, speech, actions or manner of performing duty of Officer of the Guard who reported the sick squad on July 19. A man who had been so drunk at about 7:10 in the morning that he required aid in dressing and required a man to button his trousers, would at sick call be lacking in co-

ordination, would act so out of the ordinary and his speech would be affected, so that you would notice it (R. 110-112). A man who had vomited from eating food might have same appearance as a man who was drunk and had vomited (R. 112). Captain Saeger, at request of defense, had made food allergy skin tests of accused and found that mustard, pork, milk and cheese at that time showed positive, a skin sensitivity to those foods (R. 113, 114). There is much more possibility of a man allergic to certain foods to become sick from eating them than one not allergic (R. 114). Captain Saeger could not recall that the Officer of the Guard reporting the sick squad on July 19, 1940, wanted to be examined (R. 116).

The accused elected to remain silent (R. 119).

4. The evidence fully supports the findings of guilty of Charge I and its Specification alleging that on or about July 19, 1940, at West Point, New York, accused was found drunk while on duty as Intermediate Officer of the Guard, Cadet Camp, in violation of Article of War 85, and of Charge II and its Specification alleging that on or about July 19, 1940, at West Point, New York, accused drank intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, in violation of Article of War 96.

With respect to Charge I the evidence shows that in the period following reveille the rational and full exercise by the accused of his mental and physical faculties was sensibly impaired within the definition of drunkenness on duty under Article of War 85 (p. 160, M.C.M., 1928). He was hard to awaken, had trouble getting out to reveille and was not in complete control of himself, was slightly dazed, unsteady on his feet, his left arm was held at reveille by another cadet, he acted giddy in the shower, he had an odor of liquor on his breath before and after his shower, was suffering from after effects of liquor, his eyes were bleary and foggy looking, and he walked to sinks with sagging knees and looked like he was going to fall down.

With respect to Charge II, there is no direct proof that accused drank intoxicating liquor on or about June 19, 1940. The testimony, however, that he was drunk in the period following reveille on that date, and that a brown bottle the same size and color as a liquor bottle with no cork was seen lying in a horizontal position in the trunk locker of accused shortly after reveille on that day, furnish satisfactory circumstantial proof that accused did on that day drink

intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931, in violation of Article of War 96.

The Board of Review is of the opinion that the evidence shows beyond reasonable doubt that accused was drunk while on duty as Intermediate Officer of the Guard, and drank intoxicating liquor in violation of the stated regulations, as charged.

While the evidence shows that accused was drunk, his drunkenness cannot be characterized as gross. It appears that when accused took charge of the sick squad following breakfast, he marched the squad to the Cadet Hospital and performed his duties in connection with the squad in a normal manner. There is nothing in the record of trial which, in the opinion of the Board of Review, justifies a conclusion that accused is morally unfitted to continue as a cadet or to become an officer of the Army.

5. The Superintendent of the Military Academy, following his formal action approving the sentence, recommended that the sentence be confirmed and commuted to the usual restriction to limits and performance of punishment tours prescribed for cadets undergoing special punishment for a period of five months beginning with the date of action by the President and to postponement of the graduation of accused until the day after the graduation of his class when he shall be graduated and commissioned, if otherwise qualified. He stated that the modification of the sentence as recommended will meet the requirements of justice and discipline.

6. The Cadet Register for the year ending June 30, 1939, the last issue available, shows that the accused was admitted to the Military Academy from New Jersey, that he was twenty-two years of age on April 22, 1940, and that his class standing for the academic year ending June 30, 1939, was 317 in a class of 441 members.

7. 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. Dismissal is authorized for violation of Articles of War 85 or 96. The Board of Review, however, concurs in the recommendation of the Superintendent,

United States Military Academy, that the sentence be confirmed and commuted to the usual restriction to limits and performance of punishment tours prescribed for cadets undergoing special punishment for a period of five months beginning with the date of action by the President and to postponement of the graduation of accused until the day after the graduation of his class, when he shall be graduated and commissioned, if otherwise qualified.

Lester F. Hill Jr., Judge Advocate.

Edward B. Schlant, Judge Advocate.

Albert W. Johnson, Judge Advocate.

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

Board of Review
CM 214442

OCT 31 1940

UNITED STATES	FIRST ARMORED DIVISION
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, September 16, 1940. Dishonorable discharge and confinement for one (1) year. Fort Knox, Kentucky.
Private BERNARD C. MATTINGLY (6665632), Headquarters Company, 1st Armored Division.	

HOLDING by the BOARD OF REVIEW
HILL, HARMELING and SCHLANT, Judge Advocates.

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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 Specification, Charge II, of the three charges upon which accused was tried, alleges that accused did, on or about August 24, 1940, through neglect suffer a Chevrolet sedan, U.S. W-12082, military property of the United States, value about $603.07, to be damaged by overturning it upon highway No. 52, near Dant, Kentucky, in violation of Article of War 83. The accused pleaded not guilty to and was found guilty, among others, of Charge II and its Specification. He was sentenced to dishonorable discharge, total forfeitures, and confinement for one year. The reviewing authority approved the sentence, designated the guard house, Fort Knox, Kentucky, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

With respect to Charge II and its Specification, the record contains no proof of neglect by which the accused suffered the sedan to be damaged by overturning it, as alleged. The evidence shows that a farmer sitting on a porch noticed a car go by and heard the wreck about 75 yards from him. Upon going to the scene, he found the car overturned and three men, of whom accused was one, out of the car. A deputy sheriff who drove by a few minutes later identified the car - which was "tore all to pieces" - by the United States license and the accused whom he had previously known. The record is not only bare of any proof of neglect on the part of this accused but fails to show who was driving the car at the time it overturned.

3. For the reasons above indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its Specification.

The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge III and its Specification, and legally sufficient to support the sentence.

_____, Judge Advocate.

(On leave), Judge Advocate.

Edward B. Fihlan, Judge Advocate.

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

Board of Review
CM 214637

NOV 30 1949

UNITED STATES	FOURTH DIVISION
v.	Trial by G.C.M., convened at Fort Benning, Georgia, October 17, 1940. As to each: Dishonorable discharge and confinement for nine (9) months. Fort Benning, Georgia.
Privates RICHARD T. BULLINGTON (7084113); JOSEPH R. MARSCHALL (6931396); and BEN H. YATES (6387907), all Headquarters Battery, 83rd Field Artillery.	

HOLDING by the BOARD OF REVIEW
HILL, HARMELING and SCHLANT, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review with respect to the findings of guilty and the sentence of accused Marschall only.

2. The accused were arraigned upon the following Charge and Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Richard T. Bullington, Private Joseph R. Marschall, and Private Ben H. Yates, all Headquarters Battery, 83rd Field Artillery, acting jointly, and in pursuance of a common intent, did, at Fort Benning, Georgia, on or about September 15, 1940, feloniously take, steal, and carry away one ham, value about $2.04, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private Richard T. Bullington, Private Joseph R. Marschall, and Private Ben H. Yates, all Headquarters Battery, 83rd Field Artillery, acting jointly, and in pursuance of a common intent, did, at Fort Benning, Georgia, on or about September 15, 1940, wrongfully and knowingly sell one ham, value about $2.04, property of the United States, furnished and intended for the military service thereof.

Accused Bullington and Yates each pleaded guilty to the Charge and

Specifications, and accused Marschall pleaded not guilty to the Charge and Specifications. All of the accused were found guilty of the Charge and Specifications and were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for nine months. No evidence of previous convictions was introduced as to any accused. The reviewing authority approved the sentences as to each accused, designated Fort Benning, Georgia, as the place of confinement of each accused, and as to accused Bullington and Yates ordered the sentences duly executed. As to accused Marschall, the reviewing authority forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about September 15, 1940, a Wilson ham, weighing about twelve pounds and costing about $2.05, which had been bought from the commissary around September 12th by Headquarters Battery, 83rd Field Artillery, was missing from the battery kitchen (R. 6-8). Accused Yates testified that he stole this ham from the Headquarters Battery mess (R. 31, 33) on September 15th about 5:30 p.m., and then pursuant to an arrangement made with accused Bullington, the ham was placed in Bullington's footlocker. About 7:30 p.m., on September 15th, Yates, Bullington and Marschall walked to the Quartermaster Utilities where the ham was sold for $2.50 to a Mr. Reid. Accused Bullington stated that he retained the ham stolen by Yates and later went with him with the understanding that they were to sell the ham (R. 36). It appears that on the night of September 15, 1940, around 7:30 p.m., Sergeant Theodore R. Martin, Headquarters Battery, 83rd Field Artillery, saw accused Bullington come out of his tent carrying a package wrapped in white paper and at the same time he saw accused Yates and Marschall walking towards accused Bullington's tent. The three accused met in the company street and walked off together from the battery area. Sergeant Martin followed them as far as the bathhouse. The three accused then went on over the hill toward the Second Battalion corrals (R. 12, 18, 19). Sergeant Martin later saw the three accused near Cusseta with a civilian and at that time they did not have the package (R. 14). Later Sergeant Martin was present when accused Bullington told Lieutenant Bergman that -

> "* * * Yates got the ham and that he got the sausage. And he said they had sold this ham and sausage to this civilian down here at the utilities yard and had gotten two dollars and a half for it. He said, of course Marschall was along with them but didn't mention him as helping in the stealing of the ham or the sausage." (R. 16.)

The prosecution introduced evidence as to a confession made by each accused. The confession of Yates and of Bullington implicated Marschall. So much of the confession of Yates and of Bullington as referred to Marschall was clearly inadmissible and should not have been received. After the testimony as to these confessions was completed the law member remarked:

> "Just a moment. In repeating the admissions of these men to you it is best that you confine your testimony to only those admissions against themselves, and not as to the acts of the other alleged co-conspirators." (R. 26.)

This statement is not sufficiently clear to warrant a conclusion that the references to Marschall by Yates and Bullington in their confessions were not considered by the court.

Accused Yates stated to Captain Orlando C. Troxel, Jr., that he had, with Privates Marschall and Bullington, taken the ham on the night of September 15th and then took it to a Mr. Reid across the Cusseta Highway from the 83rd Field Artillery Camp and that they sold the ham and sausage to Mr. Reid, receiving $2.50 therefor. He also stated that on other occasions he had stolen things in the battery with Marschall, although he always took the things and Marschall had just been with him on some of these previous times. He further stated that he had given Marschall 75¢ for being with them at the time this ham and sausage was taken (R. 24, 25).

Accused Bullington stated to Captain Troxel that he went to the battery mess at about 6 p.m., with Yates on the night of September 15th and took a ham and a five-pound box of sausage from the mess hall ice box. He put the articles in his footlocker and later about 7:30 p.m., he, Yates and Marschall left the battery and went down to the utilities yard by the Cusseta Highway and turned over the goods to a Mr. Reid. He stated that Yates sold the ham for $2.50 and gave Marschall 75¢ (R. 25, 26).

Accused Marschall stated to Captain Troxel -

> "* * * that he and Yates and <u>Marschall</u> went to meet an elderly gentleman whose name he did not know, at the Utilities Yard on the Cusseta Highway, a civilian, and that they took with them a ham and some sausage which Yates had taken from the mess hall, and that the civilian gave Yates two dollars and a half for these goods, and that Yates had given him, that is Marschall, seventy-five cents for coming along. * * *." (R. 26, 27.)

First Sergeant Idwo W. Stevens, Headquarters Battery, 83rd Field Artillery, testified that he was present when each of the accused was interviewed by the battery commander and each of their statements was an admission of guilt. This statement is a conclusion, indefinite, and highly objectionable.

4. Testifying for the defense, accused Yates and Bullington both stated that accused Marschall had nothing to do with the larceny or sale. Accused Yates stated that Marschall was not present when the ham was taken and did not know about it until after the sale and they had returned to the 83rd Field Artillery and at which time -

> " * * * He told me I shouldn't have done that and all that and that I had better get it back and return it, but I had done spent some of the money then, and then I loaned him seventy-five cents to go to town on, and Bullington went on up to the battery to go to bed and me and Marschall went on to town." (R. 33.)

Accused Yates said that at the time of the sale to the civilian, accused Marschall was standing across the road from the place where the sale was made (R. 34). Accused Bullington stated that accused Marschall knew nothing beforehand about the sale of the ham by him and accused Yates to Mr. Reid, and that Marschall was across the road from the utilities when he and Yates went across the road and delivered the ham and took the money from Mr. Reid. He also stated that he was present later on that night when Yates told Marschall that he, Yates, had stolen the ham and Marschall "told him he shouldn't have done that" (R. 36, 37).

5. As to the charge of larceny, the competent evidence does not connect accused Marschall with the larceny of this ham or with the accused Yates and Bullington until more than an hour after the larceny, when all three were seen walking out of camp together. Any part taken by accused Marschall in the asportation of the ham, after it had been removed from Bullington's footlocker, was for the purpose of selling the ham and not concerned with the larceny.

As to the charge of joint wrongful sale of the ham, the competent evidence shows that accused Marschall and Yates met accused Bullington near Bullington's tent about 7:30 p.m., on September 15, 1940, and walked away from the area together, Bullington carrying a package wrapped in white paper. The testimony of both Yates and

Bullington show that Marschall was across the street from where the sale was made and that Marschall received part of the proceeds of the sale. In his confession to Captain Troxel, Marschall, after being warned of his rights, admitted that he had gone with Yates and Bullington to meet an elderly gentleman; that they took with them a ham and some sausage which Yates had taken from the mess hall; that the civilian gave Yates $2.50 for these goods, and that Yates had given him 75¢ for coming along (R. 27).

6. The evidence as to the participation of accused, Marschall, in the joint and wrongful sale is not compelling as to his guilt. The erroneous reception of so much of the confessions of Yates and Bullington as implicated Marschall in this and other offenses, and of the statement by Stevens of his indefinite conclusion that Marschall admitted his guilt are errors which must be deemed to have injuriously affected the substantial rights of the accused, Marschall, within the meaning of Article of War 37.

7. For the reasons above stated, the Board of Review holds that the record of trial as to accused, Marschall, is legally insufficient to support the findings of guilty made by the court with respect to Private Marschall and the sentence imposed by it upon him.

Arthur S. Hill Jr., Judge Advocate.

Henry Harmeling, Judge Advocate.

Edward B. Schlant, Judge Advocate.

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

Board of Review
CM 215241

JAN 31 1941
37th DIVISION

UNITED STATES)	
)	
v.)	Trial by G.C.M., convened at Camp Shelby, Mississippi, December 10, 1940. Forfeiture of $20 of pay and restriction to regimental area for thirty (30) days.
Private GEORGE SCOTT (20507686), Company B, 147th Infantry.)	

OPINION of the BOARD OF REVIEW
HILL, CORRIDON and WALSH, Judge Advocates.

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

2. The accused was convicted on December 10, 1940, upon a single Charge and Specification as follows:

CHARGE: Violation of the 84th Article of War.

Specification #1. In that Private George Scott, 20507686, did, at a place just outside the limits of Camp Shelby, Miss., on or about November 3, 1940, wrongfully dispose of by trading or exchanging for whiskey, (1) one shirt, worsted, wool, O.D., of the value of $3.81, issued for use in the military service of the United States.

He was sentenced to forfeit $20 of his pay and to be restricted to the limits of his regimental area for a period of thirty days except for training purposes. The reviewing authority published a general court-martial order approving the sentence and ordering its execution. The signed action of the reviewing authority does not appear at the end of the record.

3. Two witnesses only - Captain M. F. Ratterman, 147th Infantry, and First Lieutenant R. B. Wiley, 37th Division, Headquarters Military Police Company - testified in this case, and for the prosecution. Their testimony shows that after the 24th Article of War had been read to accused and after it had been stated to accused that the trade of a wool worsted shirt was made at Slim's place, and upon being questioned about it, the accused at first denied but finally said that he traded with Slim for whiskey a shirt taken from one of his tent mates. Lieutenant Wiley further testified that the shirt had not been returned, that he had no idea where it was, that Slim's place on a road connecting two sentry posts had been raided, that Slim was out on bail, and that the sheriff had been unable to locate him.

4. The only testimony in the case, aside from the confession, even remotely connected with proof of the corpus delicti is that of Captain Ratterman that another party told him that the trade was supposed to have taken place at Slim's place, which testimony is clearly hearsay, incompetent, and inadmissible. There is no competent proof either direct or circumstantial outside of the confession, that the shirt referred to had ever been issued for use in the military service, that accused ever had possession of it, or that a shirt was missing, or had been traded by anyone to Slim for whiskey.

5. a. The rules with respect to proof of the corpus delicti as a prerequisite to the admission of a confession was stated many years ago in the charge to the jury in the trial court in United States v. Williams (1 Clifford 5, Fed. Case No. 16707):

> "'It is true that in our jurisprudence the accused cannot be convicted on their own confessions, without some corroborating proof of the corpus delicti. There must be some proof that the crime has been committed independent of the confessions, but it is not necessary that it should be plenary proof. There must be evidence tending or conducing to prove the fact; and if it has that tendency, it is proper to be submitted to a jury and if not, it ought to be excluded as irrelevant.'"

b. In its opinion in the Mallon case, CM 202213 (Dig. Ops. JAG 1912-30, Supp. VIII, sec. 1292 a (2), the board thus stated the rule:

> "The general rule * * * is that the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of evidence or at all, but that some evidence corroborative of the confession must be produced and such evidence must touch the corpus delicti."

c. In a case in which the accused was found guilty of the wrongful sale of a blanket, property of the United States, it was not proven otherwise than by accused's confession that he sold the blanket. As the corpus delicti had not been shown, accused's confession as to his disposition of the property was inadmissible and the record held not legally sufficient to support the findings of guilty (CM 159283, Nelson, Dig. Ops. JAG 1912-30, sec. 1594 (1)).

Again in the Greene case (CM 187168, Dig. Ops. JAG 1912-30, sec. 1594 (2)) of wrongful sale of Government property, in violation of Article of War 84, the board held that the corpus delicti was not established by evidence of the fact that the property was missing and that it was a fatal error to admit a confession of the sale where there had been no other evidence of the corpus delicti.

6. In the absence in this case of any competent proof of the probable commission of the offense alleged, consideration of the confession was improper and the evidence is not legally sufficient to support the findings of guilty.

7. The Board of Review is, therefore, of the opinion that the record is not legally sufficient to support the findings and sentence.

Peter S. Hill Jr., Judge Advocate.

John H. Corridan, Judge Advocate.

E. T. Walsh, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 215347

FEB 4 1941

UNITED STATES	)	SEVENTH DIVISION
v.	)	Trial by G.C.M., convened at Fort Ord, California, December 5, 1940. Dishonorable discharge and confinement for two (2) years. Penitentiary.
Private First Class MYREL E. HOPKINS (19012194), Company I, 53rd Infantry.	)	

HOLDING by the BOARD OF REVIEW
HILL, CORRIDON and WALSH, Judge Advocates.

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

2. The accused was tried under a Charge and on two Specifications alleging (a) drunk and disorderly in camp, and (b) attempt to commit sodomy, in violation of Article of War 96. The accused pleaded not guilty to, and was found guilty of, the Charge and each Specification. No evidence of previous conviction 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 reduced the period of confinement to two years, approved the sentence as thus modified, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record for action under Article of War 50½. The only question requiring consideration is the designation of a penitentiary as the place of confinement.

3. The Board of Review held in the case of Palmer and Morrell (CM 209651) that -

> "Confinement in a penitentiary is not authorized by Article of War 42 upon conviction of an attempt to commit sodomy, that offense not being punishable by confinement for more than one year by any statute of the United States. CM 196922, Killalea; CM 192456, Ciambrone; Dig. Ops. JAG 1912-30, sec. 1613."

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty, and to support the sentence, provided accused be confined at a place other than a penitentiary.

Peter S. Hill Jr., Judge Advocate.

John H. Corridon, Judge Advocate.

E. J. Walsh, Judge Advocate.

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

Board of Review
CM 215351

FEB 24 1941

UNITED STATES	)	SIXTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sheridan, Illinois, No-
Private JOHN I. NADROWSKI	)	vember 14, 1940. Dishonorable
(6832924), Company E, 2nd	)	discharge and confinement for
Infantry.	)	three (3) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
HILL, CORRIDON and WALSH, Judge Advocates.

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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 Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private JOHN I. NADROWSKI, Company E, 2d Infantry, did, at Fort Wayne, Detroit, Michigan, on or about August 17, 1940, feloniously take, steal, and carry away four pairs of field glasses, type EE, of the value of about $33.60 each, of a total value of about $134.40, 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. Evidence of previous conviction for larceny 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 the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. It is shown by competent evidence that upon the return of Company E, 2nd Infantry, from maneuvers to Fort Wayne, Michigan, about September 3, 1940, a locked box in the supply room had been opened and four pairs of type EE field glasses, numbers 258589, 261846, 10318, and 301744, property of the United States issued

for the military service, were missing; that on August 24, 1940, some person representing himself as Jack Steiner, 2036 Trowbridge, Hamtramck, Michigan, sold to a pawnbroker, Louis Arnkoff, Detroit, Michigan, two pairs, numbers EE 258589 and 261846, and on August 28, 1940, attempted to sell Arnkoff two pairs, numbers EE 10318 and 301744; and that on August 31, 1940, Lieutenant Searl went to police headquarters, Detroit, Michigan, received a soldier and placed him in confinement at Fort Wayne, Michigan.

4. The accused elected to remain silent.

5. The only testimony in any way tending to connect the accused with the field glasses is found in the depositions of Louis Arnkoff and of Lieutenant Searl.

a. The Arnkoff deposition taken in Detroit, Michigan, to be read before the court appointed to meet at Fort Sheridan, Illinois, reads as follows:

> "First interrogatory: Are you in the military service of the United States? If so, what is your full name, grade, organization, and station? If not, what is your full name, occupation, and residence?
>
> "Answer: No. Louis Arnkoff, 2311 Leslie, Detroit, Michigan. Occupation: Pawnbroker.
>
> "Second interrogatory: Do you know the accused? If so, how long have you known him?
>
> "Answer: No.
>
> "Third interrogatory: When did you first see the accused and what did he state his name and address was?
>
> "Answer: August 24, 1940. Jack Steiner, 2036 Trowbridge, Hamtramck, Michigan.
>
> "Fourth interrogatory: In what way did the accused come to your attention August 24, 1940?
>
> "Answer: When he sold me two pairs of binoculars, serial numbers EE 258589 and EE 261846.
>
> "Fifth interrogatory: Did the accused come to your attention again on August 28, 1940? If so, in what way?
>
> "Answer: Yes, on August 28, 1940 he again came to me and attempted to sell me two more pairs of binoculars, serial numbers EE 10318 and EE 301744."

It is to be noted that Mr. Arnkoff answers "No" to the

question if he knew accused. In answer to the further interrogatory when he first saw accused and what he stated as his name, Mr. Arnkoff states the date and "Jack Steiner, 2036 Trowbridge, Hamtramck, Michigan". It does not appear that the accused was present at the taking of the deposition or that any photograph or other means of identification was presented to Mr. Arnkoff by means of which he could testify that he identified the accused on trial as the man who sold to him two certain pairs of binoculars on August 24th and who attempted to sell two more pairs on August 28, 1940.

This deposition wholly fails to connect this accused with the sale of the field glasses.

b. The deposition of Second Lieutenant Howard A. Searl, Infantry, taken at Fort Custer, Battle Creek, Michigan, to be read before the court appointed to meet at Fort Sheridan, Illinois, reads in pertinent part as follows:

> "Third interrogatory: Did the accused come to your attention about August 31, 1940? If so, in what way?
> "Answer: Yes. I was instructed by the Commanding Officer, Fort Wayne, Michigan, Lt. Col. Swanton, to go to Detroit Police Headquarters, to take Private Nadrowski into custody and place him in confinement at Fort Wayne or to aid local police.
> "Fourth interrogatory: Did you hear the accused make a statement? If so, was it entirely voluntary, and what did he say?
> "Answer: Yes. Private Nadrowski made a voluntary written statement in the presence of a representative of the F.B.I. The statement he made was that he was guilty and proceeded to give details of the theft. I believe the statement is in the hands of the F.B.I.
> "Fifth interrogatory: Were four field glasses type EE the subject of investigation?
> "Answer: Yes.
> "Sixth interrogatory: Did you place the accused in confinement? If so, when and where?
> "Answer: Yes. I placed him in confinement August 31, 1940, in the guardhouse at Fort Wayne, Michigan.
> "Seventh interrogatory: Will you repeat the statement as nearly verbatim as possible that Private Nadrowski made in your presence?
> "Answer: The voluntary written statement (as I remember it) made to Inspector Davis and myself:

"'While on guard at Ft. Wayne, Mich., about three (3) weeks ago, I noted the unlocked door to Company 'E' storeroom. I investigated and saw the field glasses. I took four (4) pairs without cases and laid them in the tall brush along the Detroit River, and continued on my tour of guard.

"'About a week later, on a Wednesday afternoon in my free time, I took two pairs and went to the Sunshine Loan Company, 529 Michigan Avenue, Detroit and sold two pairs, receiving, thirteen dollars ($13.00) for them. I told the man at the pawn shop they were my own property and I had a right to sell them.

"'On the next Wednesday, August 28, 1940, I took the remaining pairs to the same store and while attempting to sell them was apprehended. Taken to Detroit Police Headquarters I first told the police I was a civilian then a member of the National Guard and finally a Regular Army man from Fort Wayne.'"

When the deposition of Lieutenant Searl (Ex. 3) was offered in evidence, the defense objected to the fourth interrogatory and to the seventh interrogatory "on the ground of hearsay evidence" (R. 15). The defense again objected to the reading of the fourth interrogatory "on the ground of hearsay evidence" (R. 15). The objection to the fourth interrogatory was overruled (R. 16).

The defense then objected to any further reading of the deposition for the following reasons: "First, hearsay evidence; second, the accused was not warned of any rights; third, the statement in that deposition that it was voluntary is erroneous as it was not voluntarily made". The objection was overruled (R. 17).

When prosecution then read the question in the seventh interrogatory, the defense counsel again objected to the reading of the seventh interrogatory "on the grounds of hearsay evidence" (R. 17). The defense counsel then again objected, generally without stating any specific ground of objection, to the answer to the seventh interrogatory as well as the answer previously given to the fourth interrogatory (R. 18). The objection was overruled (R. 19).

In his final argument, the defense counsel stated (R. 33):

"I would also like to call attention to one very important element in this 4th interrogatory, and I will read:

"'Answer: Yes. Private Nadrowski made a voluntary written statement.'

"The Defense Counsel would like to know where that written statement is and why that was not produced in court. I am quite sure that if such a statement was made, and recorded, and written, and signed, presumably as it states here, that not only it should be introduced, but it would have been introduced in court.

"As to the 7th interrogatory in the same deposition, there again it states:

"'The voluntary written statement (as I remember it) made to Inspector Davis and myself:'

"Here again there is no evidence showing that this written statement was made voluntary, and I believe that such written statement, if any, should have been introduced by the Prosecution."

It will be seen that defense counsel, prior to his final argument, specifically objected at least three times to the admission of the fourth and seventh interrogatories. In his closing argument defense counsel inquired why the written statement was not produced in court, and in effect reinforced his former objections to the admission of the fourth and seventh interrogatories with this objection that prior testimony as to the contents of the written confession was not admissible in the absence of proof that the writing had been lost or destroyed or otherwise a satisfactory showing that the writing could not be produced (par. 116 a, p. 119, M.C.M., 1928; Wigmore on Evidence (2d Ed.), par. 1178). The only proof as to the whereabouts of the written statement is contained in the answer to the fourth interrogatory where Lieutenant Searl states that he believed it to be in the hands of the "F.B.I.". That statement affords no basis for a conclusion that the written confession was lost, destroyed, or could not be produced.

4. It is stated in the Manual for Courts-Martial, 1928, at page 120 (par. 116 a) -

"An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable; * * *."

In this case, the defense objected vigorously and repeatedly at the time of the proffer to the admission of the answers to the fourth and seventh interrogatories. While it is true that the early objections were not based upon the proper grounds, the last objection prior to the argument (R. 18) was a general objection, and the objection urged in the argument was upon the correct ground that no proper basis had been laid for the introduction of oral testimony of the written confession.

It is the opinion of the board that the objection made by defense counsel in his closing argument to the admission of oral testimony as to the contents of the written confession, coupled with his repeated objections upon other grounds at the time the deposition was introduced, barred the application of the rule quoted above from paragraph 116 a, Manual for Courts-Martial, 1928.

5. It follows that the admission of the answers to the fourth and seventh interrogatories in Lieutenant Searl's deposition was a fatal error in view of the fact that with the exclusion of those interrogatories from the record, there is no competent proof connecting this accused with the larceny of the field glasses.

In reaching that conclusion, the board has not overlooked the holding in the case of Bonner, et al., (CM 210985) that the admission without objection of oral testimony as to a confession which was reduced to writing did not constitute a fatal error. In the instant case objection was so made as to exclude the application of the rule stated in paragraph 116 a, Manual for Courts-Martial, 1928, which was relied upon in the Bonner case.

6. For the reasons above indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Lester S. Hill, Judge Advocate.

John H. Corridon, Judge Advocate.

E. J. Walsh, Judge Advocate.

1st Ind.

FEB 27 1941

War Department, J.A.G.O., - To the Commanding General,
Sixth Corps Area, Chicago, Illinois.

1. In the case of Private John I. Nadrowski (6832924), Company E, 2nd Infantry, I concur in the foregoing holding by the Board of Review and, for the reasons therein stated, recommend that the findings of guilty and the sentence be vacated.

In view of the fact that it appears that competent evidence is available, the possibility of a rehearing under the provisions of Article of War 50½ is suggested.

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. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 215351).

Allen W. Gullion,
Major General,
The Judge Advocate General.

1 Incl -
Record of trial.

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

Board of Review
CM 215536

U N I T E D S T A T E S v. Private First Class RODNEY V. LOCKARD (6667416); Corporal ROY W. COBB (6663183), both Battery C, 14th Field Artillery (Armd); Private First Class JOHN BLACKABY (6669808), Ammunition Train, 14th Field Artillery (Armd); and Corporal CLIFTON YORK (6663046), Armored Force School Detachment, Fort Knox, Kentucky.	)	1st ARMORED DIVISION Trial by G.C.M., convened at Fort Knox, Kentucky, January 15, 1941. As to each: Dishonorable discharge and confinement for six (6) months. Fort Knox, Kentucky.

OPINION of the BOARD OF REVIEW
HILL, CORRIDON and TAPPY, Judge Advocates.

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

2. The accused were arraigned on a single Charge and Specification, as follows:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Corporal Roy W. Cobb, Battery C, 14th Field Artillery (Armd), Fort Benning, Georgia; Corporal Clifton York, Armored Force School Detachment, Fort Knox, Kentucky; Private First Class John Blackaby, Ammunition Train, 14th Field Artillery, Fort Benning, Georgia; Private First Class Rodney V. Lockard, Battery C, 14th Field Artillery (Armd) Fort Benning, Georgia; Private William White, Company A, 41st Infantry (Armd) Fort Benning, Georgia; Private George A. Cogan, Headquarters Company, Second Battalion, 69th Armored Regiment (M), Fort Knox, Kentucky;

> acting jointly, and in pursuance of a common intent, did, at Fort Knox, Kentucky, on or about 11:00 P.M. November 17, 1940, feloniously take, steal, and carry away parts of an automobile, to wit, two (2) wheels complete with tire and tube, value about Twenty Five dollars ($25.00), the property of Mr. Leon Feitelson, 2824 West Chestnut, Louisville, Kentucky.

Each accused pleaded not guilty to the Charge and Specification thereunder, each was found guilty with exceptions and substitutions, and sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. The reviewing authority approved the sentence but suspended the dishonorable discharge until the soldiers' release from confinement (G.C.M.O. 20, Headquarters 1st Armored Division, Fort Knox, Kentucky, January 30, 1941).

A motion to sever, on the ground that the defense of the other accused would be antagonistic to their defense was granted Private William White and Private George A. Cogan. The Specification was formally amended to conform with that action and the court proceeded to the trial upon the charges as amended.

3. The competent evidence shows that two members of the Fort Knox military police detachment drove, pursuant to instructions, to an outlying part of the reservation to pull an automobile out of a ditch. This car was a 1938 Chevrolet coupe. After inspecting the car and its contents, they went back to the guardhouse, procured a tow chain, returned to the ditched car, and proceeded to pull it out. The chain broke, whereupon one of the men checked on the towed car and found that one of the wheels had been removed since their first visit to the place. While they were examining the area a man jumped from the nearby weeds and ran across country. They gave chase in their car but failed to catch the man. Returning to the ditched car, they saw another Chevrolet coupe (1931 model) parked in the road about thirty yards from it. Six soldiers were standing around this car and, upon the approach of the military policemen, the soldiers drove off in their car. The military police chased them about a mile, stopped the car and searched it and the occupants. In the car they found two letters which they had previously seen in the ditched car. These letters were addressed respectively to Mr. Leon Feitelson, 2824 West Chestnut Street, Louisville, Kentucky, and to Mr. Lee Feitelson, same address. Upon examination of the soldiers'

car, a disc wheel and tire similar to that with which the 1938 Chevrolet was equipped, was found mounted on it. One of the accused, on behalf of all, made an unsworn statement to the effect that while returning to the post after a turkey shoot, they had found a wheel and tire lying on the side of the road, which they mounted on their car to replace a flat tire.

4. The sole question for consideration is whether the ownership of the property has been proven as alleged. To establish the offense charged, it was necessary to prove by direct or circumstantial evidence that the automobile wheel and tire shown to have been in the possession of the accused were the property of Mr. Leon Feitelson of Louisville, Kentucky. To establish such ownership the prosecution relied solely upon the proof that two letters addressed to a Mr. Feitelson were found in the car occupied by the accused, and upon the following testimony (R. 22, 23):

"Q - The letters you found in the accused's car were addressed to whom?
"A - Feitelson.
"Q - He is the owner of the car?
"A - Yes, sir; the Louisville police said he was the owner."

Excluding the incompetent hearsay statement attributed to the police of ownership of the car by Feitelson, the sole evidence in the record tending to connect him with the car is the fact that two letters found in the car were addressed to him. Such evidence entirely fails to establish his ownership of the car. In the absence of proof that the wheel and tire were the property of Mr. Feitelson as alleged, the record fails to establish an essential element of the offense charged (par. 149 g, M.C.M., 1928).

5. For the reasons above indicated, the Board of Review is of the opinion that the record is, with respect to each accused, legally insufficient to support the findings and the sentence.

Arthur S. Hill Jr., Judge Advocate.

John H. Corridan, Judge Advocate.

Thomas N. Taffy, Judge Advocate.

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