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

(1)

Military Justice
C.M. 192533

UNITED STATES)
))
) vs.)
))
Private RAY E. VOLLMER)
(6650669), Battery C, 3d)
Field Artillery.)

FIFTH CORPS AREA

Trial by G.C.M., convened at
Camp Knox, Kentucky, July 15,
1930. Dishonorable discharge
and one (1) year's confinement.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW,
GRAHAM, CLINE, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by BEER, Judge Advocate.

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

2. By the two specifications of the Charge it is alleged that accused while a sentry on post at the guard house described, through design, allowed Private Roy E. Woods, Battery C, 3d Field Artillery and General Prisoners Elmer N. Jones, Tom France, and Oscar M. Petty, all prisoners committed to his charge, to escape. The evidence, including the confession by accused, shows that Woods effected his escape at the time and place alleged, through the connivance of accused. There is in the record, however, no evidence that either Jones, France, or Petty escaped at any time. Witnesses testified that four prisoners, whose identity was not stated, escaped on the date alleged, and that Jones and Petty had previously made statements indicative of an intention on their part to escape; and the confession by accused contains admissions that on the night in question he permitted three unnamed prisoners other than Woods to escape. But this evidence fails entirely to show that either Jones, France, or Petty escaped. There being no proof that any prisoners named in the specification, except Woods, did in fact escape, it follows that the evidence is not legally sufficient to show that accused allowed Jones, France, and Petty to escape, as found by the court.

3. For the reasons hereinabove stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves find-

ings that accused, a sentry on post did at the time and place alleged, through design, allow Private Roy E. Woods, Battery C, 3d Field Artillery, a prisoner duly committed to his charge, to escape; legally insufficient to support the finding of guilty of Specification 2 of the Charge; and legally sufficient to support the finding of guilty of the Charge and the sentence.

Wahrohan, Judge Advocate. .

Walter P. Cline, Judge Advocate.

Salut Hoover, Judge Advocate.

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

Military Justice
C.M. 192573.

Sept. 18, 1930.

U N I T E D S T A T E S	)	FIRST CORPS AREA
)	
vs.	)	Trial by G.C.M. convened at
	)	Fort Ethan Allen, Vermont,
Private ABEL A. ROBINSON	)	August 7, 1930. Dishonorable
(6131557), Company L, 13th	)	discharge and confinement for
Infantry.	)	one (1) year. Disciplinary
	)	Barracks.

HOLDING by the BOARD OF REVIEW
MCNEIL, CLINE and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate.

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

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

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

Specification: In that Private Abel A. Robinson, Company L, 13th Infantry, did, without proper leave, absent himself from his organization at Fort Ethan Allen, Vermont, from about June 4, 1930 to about June 9, 1930.

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

Specification: In that Private Abel A. Robinson, Company L, 13th Infantry, being at the time firing on the pistol range, did, at Fort Ethan Allen, Vermont, on June 4, 1930, feloniously embezzle by fraudulently converting to his own use one (1) U.S. Automatic Pistol Cal. 45, No. 513088 of the value of Twenty Six dollars and thirty-eight cents (\$26.38), the property of the United States furnished for the military service thereof, intrusted to him the said Private Abel A. Robinson by Captain Harry W. Bolan, 13th Infantry.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that accused was absent from his organization at Fort Ethan Allen, Vermont, at reveille June 4, 1930, and that he remained absent until he reported at Walter Reed General Hospital at 7 p.m., June 9, 1930 (R 5, 6). (Charge I and its Specification).

With respect to Charge II and its Specification the evidence shows that on June 3, 1930, there was issued to accused, for use at target practice, a pistol, property of the United States, of a value of \$26.38 (R. 7-9). The supply sergeant who issued the pistol testified that although other pistols were turned into the supply room that day for cleaning after the firing, accused did not turn in the pistol issued to him, and that witness "looked for him but he had disappeared and could not be found at retreat" (R. 10). The pistol was not returned. The company commander, Captain Henry W. Boylan, 13th Infantry, testified that he saw accused firing with a pistol on the morning of June 3d, and that after the pistol was issued accused was instructed to "clean it up; it was not cleaned properly and was sent back for more cleaning. That was the last I saw of him or the pistol." (R. 7). The record shows the following to have occurred during the cross examination of this witness:

"Q. Was anyone else absent in your company that day?

* * * *

A. There were others who went absent without leave at that time, Private Robinson being one of them, stealing a car, and practically all of them were armed to the teeth to hold up people on the way down where they were going. I have a letter in my pocket, which is hearsay evidence, to the effect that this man stated Private Robinson had the pistol when he - - -

PROSECUTION: I object to that answer on the ground that it is hearsay evidence.

WITNESS: I withdraw the statement of that particular part." (R.7, 8).

4. The evidence sufficiently shows that accused absented himself without leave from his organization at Fort Ethan Allen, Vermont, between the dates alleged in the Specification, Charge I, the absence covering a period of six days. The maximum punishment authorized by Paragraph 104 g, M.C.M. for this offense is confinement at hard labor for eighteen days and forfeiture of twelve days pay.

With respect to the offense of embezzlement alleged by Charge II and its Specification, the competent evidence shows that on June 3, 1930, there was issued to accused a Government pistol for use in target practice, that at one time during the day of June 3d accused was in possession of a pistol and that after he absented himself without leave the issued pistol could not be found. There is testimony also to the effect that during this day instructions were given accused to clean the pistol issued to him but that he did not properly comply with the instructions and that it was thereupon returned to him. It also appears that accused did not turn the pistol in to the supply sergeant for cleaning at the time other pistols issued for target practice were turned in on June 3d. There is no direct competent evidence that accused was in possession of the pistol after he absented himself without leave or that he did anything which might be construed as amounting to a conversion of it. The only competent proof in the record of fraudulent conversion—the essence of the offense of embezzlement as charged—lies in whatever inference may be drawn from the fact that accused did not turn in his pistol to the supply sergeant for cleaning (the Captain testified that it was once turned in but returned to accused at some time during the day) when the others were turned in, and from the fact that it disappeared at about the time he absented himself without leave. In view of the nature of the property and all the other circumstances in the case, the Board of Review is not convinced that any reasonable inference of conversion may properly be drawn from these facts. The competent proof is quite consistent with an hypothesis of innocence, for it is as reasonable to suppose that the pistol was lost or stolen after accused absented himself without leave as it is to assume that he took it with him and thereby fraudulently converted it.

But whatever may be concluded as to the bare legal sufficiency of the competent evidence to support the findings of guilty of this offense it is clear that there was error in the introduction of testimony, and that this error is fatal to the conviction of embezzlement. Captain Boylan was permitted to testify, and the court apparently accepted the testimony as proper, that a number of soldiers

including accused stole an automobile at the time at which they absented themselves without leave and that "practically all of them were armed to the teeth to hold up people on the way down where they were going." As may be noted from the quotation of testimony in paragraph 3 above, a part of the answer embodying these statements was objected to as hearsay, but the court did not rule upon the objection, contenting itself with the witness' withdrawal of that particular part which he himself characterized as hearsay and to which objection had been made. The remaining testimony as to the theft of a car and as to accused's party being armed was also hearsay, for Captain Boylan had previously testified that he did not see accused or his pistol after the pistol had been returned to him on June 3d for recleaning. Not only was this remaining testimony incompetent as hearsay but part of it was objectionable upon the ground that it injected into the case proof of another wholly unrelated offense of larceny by accused of an automobile and of an intention to commit robbery. Accused not having raised any issue as to his own good character it was highly improper to show his bad character and specific misdeeds (Par. 112b, M.C.M.). The incompetent testimony that the members of accused's party were armed for purposes of robbery was the only real showing that accused, after he absented himself, had a pistol in his possession. Needless to say, such possession was, in itself, under the other circumstances of the case, evidence of fraudulent conversion. In view of the unconvincing and inconclusive nature of the competent evidence of conversion of the pistol by accused and the inherently damaging character of the incompetent evidence, the Board of Review has no reasonable alternative other than to conclude, after consideration of the entire record, that the erroneous introduction and consideration by the court of the incompetent evidence of bad character and of the possession by accused or his companions, after accused's absence, of property similar to that involved in the charges, materially influenced the findings of guilty of embezzlement and injuriously affected the substantial rights of accused within the meaning of the 37th Article of War. In the opinion of the Board of Review the record is legally insufficient to support the findings of guilty of Charge II and its Specification.

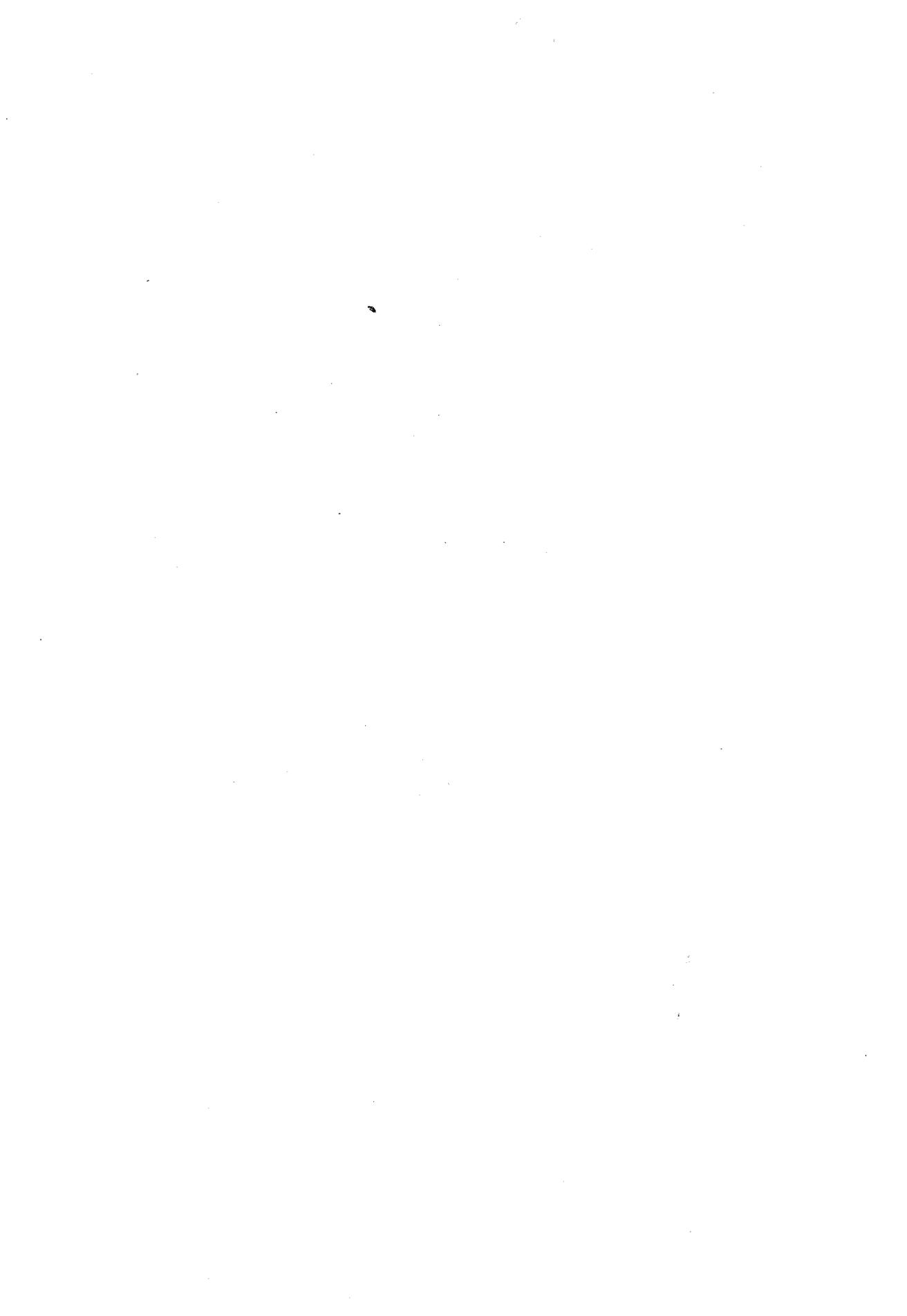
6. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence

as involves confinement at hard labor for eighteen days and forfeiture of twelve days pay.

E. C. McCreary Judge Advocate.

Walter D. Clune Judge Advocate.

Robert W. Hoover Judge Advocate.



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

OCT 20 1930

Military Justice
 C.M. 192609.

UNITED STATES

HAWAIIAN DIVISION

vs.

Private FREDERICK L. HULME
 (R-3368281), Headquarters
 Company, 21st Infantry.

Trial by G.C.M. convened at
 Schofield Barracks, T.H.,
 July 18, 1930. Dishonorable
 discharge and confinement for
 fifteen (15) years. Peniten-
 tiary.

HOLDING by the BOARD OF REVIEW
 McNEIL, CLINE and HOOVER, Judge Advocates

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

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

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

Specification 1: In that Private FREDERICK L. HULME, Headquarters Co., 21st Infantry, did, at Schofield Barracks, T.H., on or about May 20, 1930, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Arthur T. Ferguson, a human being.

Specification 2: In that Private FREDERICK L. HULME, Headquarters Co., 21st Infantry, did, at Schofield Barracks, T.H., on or about May 13, 1930, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Mark Longobardo, a human being.

Specification 3: In that Private FREDERICK L. HULME, Headquarters Co., 21st Infantry, did, at Haleiwa, T.H., on or about May 31, 1930, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Arthur T. Ferguson, a human being.

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

Specification: In that Private FREDERICK L. HULME, Headquarters Co., 21st Infantry, did, at Haleiwa, T.H., on or about May 31, 1930, willfully and unlawfully solicit and endeavor to procure Mark Longobardo, a human being, to commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with him, the said Frederick L. Hulme.

Accused pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced, three-fourths of the members of the court present concurring therein, to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years. The reviewing authority approved the sentence, reduced the period of confinement to 15 years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on the dates alleged, that is, May 13, May 20 and May 31, 1930, accused was a scout master at Schofield Barracks, T.H. (R. 8, 17, 46) and that Arthur T. Ferguson and Mark Longobardo, named in the specifications, boys of 10 and 9 years of age respectively (R. 8, 31), were members of the scouts there (R. 8, 17). Arthur Ferguson is the son of Staff Sergeant James R. Ferguson, Headquarters Company, 21st Infantry, stationed at Schofield Barracks (R. 58). Both boys appeared as witnesses and after each had stated in response to questions by the prosecution that they had attended church and Sunday school and that they knew that a failure to tell the truth after having been sworn to do so, would amount to a "lie to God", and had promised to tell the truth in his testimony, both were sworn as witnesses (R. 7, 16).

Arthur Ferguson testified that on the night of May 20, 1930 (R. 9, 33) he saw accused at a motion picture theater at Schofield Barracks and thereafter went with him and Mark Longobardo to Scout Headquarters on the post. At Scout Headquarters accused and Mark entered a room occupied by accused as sleeping quarters while witness remained in another part of the building (R. 9, 10). Presently accused called witness into his room. Witness at first protested but later consented to and did go into the sleeping room. Accused then asked witness "if he could have it", that is, if accused could suck witness' penis-the "thing I pea through", and told witness to sit down on the bed. Accused then "took it out" and

sucked witness' penis for a minute or two. Mark Longobardo was in the room at the time and saw what took place (R. 10). This boy testified substantially as did Arthur with respect to accused's acts in accompanying the two boys to his room, calling Arthur into the room and taking that boy's penis in his mouth (R. 18). (Specification 1, Charge I).

Mark Longobardo testified that, about one week before the events above described, accused called him into his room at Scout Headquarters and asked him "to let him have it." Witness consented and accused thereupon took witness' penis—the "thing I pee through," in his mouth and sucked it about a minute (R. 19, 20). (Specification 2, Charge I).

Arthur Ferguson further testified that on the night of May 31, 1930, which he remembered particularly because his father had given him an unusual sum of money on that day, he was at a scout camp with accused. While in some woods alone with accused the latter again asked witness "if he could suck it" and witness, after some persuasion, consented. Accused then took witness' penis in his mouth and sucked it for two or three minutes. Hearing some other children nearby the two concealed themselves and later returned to camp (R. 11). On cross-examination this boy testified that he willingly accompanied accused when the latter asked him to go with him, apparently on both occasions described, and knew what accused proposed to do (R. 15). At one time witness locked accused in a latrine at the scout building and then looked over a partition or door at accused and saw him "shake his thing" (R. 12). (Specification 3, Charge I).

Mark Longobardo further testified that while at a scout camp at Haleiwa, T.H., on May 31, 1930 he "slept with" accused (R. 20) and that after the two were in bed accused would not let witness sleep but "tried to put my hand on his thing and I wouldn't let him," and "asked me to put his thing in my mouth." Witness refused to do so. (R. 21). On one occasion Arthur Ferguson told witness that accused was "nasty," and related the incident in the course of which Arthur looked over the door of the latrine at accused (R. 28). Witness "told some of the kids" of his own relations with accused (R. 29). (Charge II and its Specification).

Second Lieutenant John S. Fisher, Infantry, testified that in the late afternoon of June 11, 1930 he was called to Military Police Headquarters at Schofield Barracks, T.H. and that upon his arrival there accused was brought before him. He administered an oath to accused, warned him that anything he might say would be used against him and that he was not required to make a statement, read to him a written statement which had been prepared, and asked accused if he

understood its contents. Witness noted nothing "out of the ordinary" about accused and did not observe that he was nervous or excited. No threats or force were used and accused was not handcuffed. Sergeant McLean and First Sergeant Ray came in with accused and McLean remained until the statement was signed (R. 65). Accused signed the statement in witness' presence, apparently voluntarily (R. 35, 36, 62, 64, 65)-"around 5:00 o'clock" (R. 65).

This statement, after the court had heard testimony bearing upon the circumstances under which it was made, was received in evidence over objection by the defense. The material part reads as follows:

"About 4 weeks ago I was at Boy Scout Headquarters and Arthur Ferguson, age 10 $\frac{1}{2}$ years, son of Staff Sergeant Ferguson, 21st Infantry, I went into the latrine and he came and locked the door from the outside. He then looked over the wall and I was playing with my private parts. I then came out and told him not to tell anyone. We then went and played cards. The next night I had Arthur Ferguson and Mark Longobardo at the Headquarters. I had Mark come to my room, I called Arthur in and asked him to let me suck it. He let me and I did this. About a week after I had Mark Longobardo come to my room and I sucked him and played with his private parts. One night about a week ago Arthur Ferguson was at Scout Headquarters and I went into my room to change my pants. I called Arthur in and asked him if he wanted to see how to make a baby. I then pulled my penis until I had spent my semen. I told him not to tell anyone. About 3 weeks ago we were at camp and Arthur Ferguson and Mark Longobardo were there. I asked Arthur to take a walk for some wood. I asked him three times to let me suck him and he finally did. That night Mark slept in my tent and I played with him and asked him if he wanted to take my penis in his mouth. He said no. At this time I do not wish to make any further statement." (Ex. 1).

Accused testified that he signed the statement above quoted only because the Military Police forced him to do so (R. 39). He stated that on the night of June 10, 1930 he was taken to Military Police Headquarters and kept there until about 2.30 A.M. on June 11th. On arrival he told the military police, apparently Sergeant McLean and Ray, that he was not guilty of the charges and that he did not choose to make any statement. After an argument of about half an hour "I was hand-cuffed, and stood against the wall, facing the wall. The hand-cuffs shut off the flow of blood in my hands. They had chains they put around my wrists. First the left wrist and then twisted

it. They said,--'You had better think it over.' That was Sergeant McLean. Then they took the chain off my left wrist and put it on my right wrist." (R. 40). Accused was thus kept standing with his face to the wall until taken to the "stockade" at about 2.30 A.M. At about 8.30 or 9.00 A.M. on June 11th, he was again taken to Military Police Headquarters and there kept in a hallway until about 1.30 P.M. while "being identified by the boys that were coming and going." At the end of that period he was taken to the room where he had been the night before, confronted with statements purporting to have been made by the two boys involved in the charges and asked what he intended to do (R. 40). Accused reiterated that he was not guilty, whereupon the military police "forced me against the wall again and kept me there until 3.30 or 4.00 o'clock until I could stand it no longer." While facing the wall the military police showed him a piece of chalk and said that they would put it between his fingers and press the fingers together (R. 49). The military police kept "torturing me until I finally gave in * * * and said I would sign the statement." (R. 46). The statement was written out by Sergeant McLean. Accused read it and said he would sign it (R. 45-46). When taken before Lieutenant Fisher soon after this Sergeant McLean was present (R. 41). Accused made no complaint to Lieutenant Fisher that he had been abused or had been under duress. He had had no sleep the night before, was tired out (R. 44, 47), and "did not know exactly what I was doing. I didn't know exactly what would happen if I told." (R. 49). At the time he talked with Lieutenant Fisher his wrists were not red from the chains used on him although he then still had a small mark on one wrist (R. 48). He testified that the statements contained in the confession were false, and that "I am not guilty of sodomy. General Winans put the Scout Master on Special Duty status and I have not violated his trust in me." (R. 46, 47, 68). The testimony of Arthur Ferguson and Mark Longobardo as to the occurrences at Scout Headquarters on the night of May 20th were true except that accused did not commit sodomy and except that he left the two boys in the "main room" while he looked for a flashlight (R. 70, 71). Mark Longobardo slept with accused once or twice at the scout camp about May 31, 1930, because other sleeping facilities were not provided (R. 69-72). In so far as accused knew neither of the boys had any reason to be unfriendly toward him (R. 69, 70).

Sergeant Howard E. McLean, Headquarters and Military Police Company, Schofield Barracks, T.H., testified that at one time he had been employed by the William J. Burns Detective Agency for a period of four years (R. 57), and that it was his duty to conduct investigations at Schofield Barracks. When accused was brought to witness at Military Police Headquarters at about 8.45 on the evening of June 10, 1930, he was taken "to the office" and seated in a chair, whereupon witness and the First Sergeant of the military

police proceeded to question him. After the questioning had continued until about 11.15 P.M., accused still stated that he knew nothing of the offenses charged. Witness then caused him to be hand-cuffed and told him "to go over against the wall and think it over." Witness left the room about midnight and "accused was still there." (R. 51). On the following morning witness interviewed the boys concerned, after which he asked accused to make a statement and accused again declined to do so, whereupon "the first sergeant ordered him to get up against the wall and he did so. The first sergeant left the room to go to dinner. I told the accused to sit down. I removed the hand-cuffs." Witness then showed accused the statements that the boys had made and read them to him, whereupon accused said that they were true. Witness prepared a statement for accused's signature. The statement so prepared, after an alteration suggested by accused had been made, was satisfactory to accused. Witness did not strike accused or use any force or duress. In witness' presence chains were not placed on accused's wrists, nor was chalk placed between his fingers. When standing against the wall he was in a natural position. In witness' opinion accused, in making his statement, was very much influenced by the statements of the two boys (R. 54).

Staff Sergeant John S. Ferguson, 21st Infantry, father of Arthur Ferguson, testified that he was at Military Police Headquarters for from one to two and a half hours on the morning of June 11, 1930 and that in so far as he knew accused was not threatened or maltreated during this period. Accused did not have the appearance of being nervous or excited (R. 59, 60).

4. The evidence indicative of guilt consists of the testimony of the two boys plus the confession of accused which includes a circumstantial recital of his commission of the particular acts charged. In the opinion of the Board of Review this confession should not have been admitted in evidence.

The testimony of accused as to what was done at Military Police Headquarters on June 10 and 11, 1930, preceding the signing of the written confession, is corroborated in its salient features by Sergeant McLean, the military police investigator. It must be accepted as true that when accused was taken to Military Police Headquarters he made it clear that he did not wish to make a statement, that the non-commissioned officers of the military police thereupon questioned him at length, that in the course of the night of June 10th he was hand-cuffed and required to stand against a wall for a considerable period and "think it over", that on June 11th he was again questioned and confronted with statements by the child accusers, that on this second day he persisted in his desire to remain silent,

that he was again hand-cuffed and required to stand facing a wall, and that immediately following this last experience he expressed a willingness to sign the statement prepared for him. There is no evidence directly contradicting accused's testimony that the circulation of blood in his hands was stopped by the handcuffs, that a chain was placed about and twisted on one wrist and then on the other, and that a threat was made that his fingers would be squeezed against a piece of chalk placed between them. Sergeant McLean testified that the chain and the chalk were not used in his presence, but Sergeant Ray, the other inquisitor, who at times had accused alone in his charge, was not called as a witness. It is the view of the Board that from the uncontradicted evidence no reasonable conclusion may be drawn other than that accused's determination to remain silent, as he had a right to do, was overcome by the continued questioning and physical treatment to which he was unjustifiably subjected, and that his consent to sign the statement was the result of compulsion and fear and was not, therefore, his voluntary act.

The Manual for Courts-Martial, paragraph 114 a (page 116), provides that-

"It must appear that the confession was voluntary on the part of the accused. * * * A confession not voluntarily made must be rejected."

It also states that-

"The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior."

In *Bram vs. United States*, 168 U.S. 532, 549, the Supreme Court of the United States, after stating that in criminal trials, in the courts of the United States, the issue of the voluntary nature of a confession is controlled by that part of the Fifth Amendment to the Constitution providing that no person "shall be compelled in any criminal case to be a witness against himself" (compulsory self incrimination is prohibited in cases before courts-martial by the 24th Article of War), said-

"The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent".

In *Wan vs. United States*, 266 U.S. 1, 14, the same court said -

"A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise".

It was necessary for the court-martial in this case, acting through the law member, to ascertain and determine as a question of law and as a preliminary question of fact, whether the confession was voluntary, and its decision with respect to the facts is entitled to such weight that it should not be disturbed on appellate review unless there be no reasonable basis in the evidence for its action. The question of the voluntariness of the confession is one of law as well as of fact. It appearing in this case by uncontradicted evidence that there was in fact compulsion and fear and that the willingness of accused to make the confession was impelled by this compulsion and fear, the Board is of the opinion that the confession was not voluntary in fact or in law and that its admission by the court was error.

It is true that just before he signed the confession accused was taken into the presence of an officer and there warned that he need not make a statement and that whatever he said might be used against him. But accused had already, only a few minutes before

the warning was given, and as a culmination of what had gone before, consented to sign the statement. In going before the officer he was accompanied by the non-commissioned officer who had participated in breaking down his unwillingness to sign. It is only reasonable to infer that the effects of the compulsion still persisted and that the actual signature on the statement was but a closing incident of the assent previously given. There is nothing shown to justify a conclusion that the influence which impelled accused to sign the confession had ceased to operate on his mind. Only in the event that it had appeared that there had been such a cessation of influence could the confession properly have been deemed voluntary (*Mangum vs. United States*, 289 Fed. 213; C.M. 187615, Bruton).

It remains to be determined whether, within the contemplation of Articles of War 37 and 50 $\frac{1}{2}$, the erroneous admission of the confession injuriously affected the substantial rights of accused. A confession, in the language of the Manual (p. 114), "is indeed one of the strongest forms of proof known to the law." The particular confession here in question was so explicit and sweeping that, having been admitted, it must have foreclosed any possibility of acquittal on any of the charges. What would have been the result had it been excluded, as it ought to have been excluded? The remaining evidence of guilt consists of the testimony of the children, boys 9 and 10 years of age, each of whom, according to his own statement, had willingly and knowingly been a party to the commission of sodomy with accused. Assuming that these boys were legally capable of committing the offense of sodomy, and the evidence indicates that they acted with intelligence and understanding of the nature of their acts and were therefore legally responsible under the laws of the territory where the offenses of sodomy were committed (Sec. 3913, Revised Laws of Hawaii, 1925) and under the common law (Wharton's Criminal Law, page 119), each was an accomplice with accused in so far as the offenses of sodomy were concerned (C.M. 186545, Phillips; *People vs. Kangiesser*, 186 Pac. (Cal.) 388; *State vs. Wilkens*, 120 S.W. (Mo.) 22; *State vs. Bateman*, 186 Pac. (Ore.) 5; Sec. 440 Wharton's Criminal Evidence). The law declares that the testimony of an accomplice "is of doubtful integrity and is to be considered with great caution" (Par. 124 a, M.C.M.). But even though these witnesses were not, because of their tender years, of sufficient intelligence and understanding as to be legally capable of being particeps criminis, their testimony, on account of such lack of intelligence and understanding and the resulting absence of legal sanctions and mature moral sanctions, was subject to attack with respect to its intrinsic value and credibility, as it was attacked by the defense. Comparison of the testimony of the two boys shows such

similarity in substance and in language used that it must be conceded that an argument that they had before trial been rehearsed in what they were to say, and possibly unduly influenced, would have some substantial basis. To one of the alleged indecent acts both boys testified but to the other acts but one testified in each case. Accused positively denied, on his oath, any wrongful act. Thus it appears that the evidence of guilt exclusive of the confession, consisting of the testimony of one or more of the boys and conflicting, as it was, with other competent evidence, was certainly not of such quality or quantity as to be compelling, that is, was not of such a nature that it may now be said with reasonable certainty that it would have resulted in conviction had the confession been excluded. Such being the case it must be assumed that the confession substantially influenced the findings of the court. In view of the nature of the competent evidence as well as the nature of that erroneously admitted, the Board of Review can reach no conclusion other than that the error in question did injuriously affect the substantial rights of accused with respect to all of the findings of guilty.

5. For the reasons stated, the Board of Review holds that an error of law was committed which injuriously affected the substantial rights of accused.

J. C. McNeil Judge Advocate.

Walter D. Clark Judge Advocate.

Hubert D. Hoover Judge Advocate.

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

Specification: In that Private FREDERICK L. HULME, Headquarters Co., 21st Infantry, did, at Haleiwa, T.H., on or about May 31, 1930, willfully and unlawfully solicit and endeavor to procure Mark Longobardo, a human being, to commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with him, the said Frederick L. Hulme.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 20 years. The reviewing authority approved the sentence, reduced the period of confinement to 15 years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that between the dates May 13 and May 31, 1930, and prior thereto, accused was a Scout Master at Schofield Barracks, T.H. (R. 17, 20), of a Boy Scout troop of which Arthur Ferguson and Mark Longobardo, the boys named in the specifications of the Charges, were at the same time members (R. 17, 39).

Mark Longobardo, age 10 years (R. 16), the son of Technical Sergeant Longobardo (R. 17), was called as a witness for the prosecution. After a satisfactory examination on voir dire (R. 9, 10), he was sworn (R. 16) and testified that he was a member of the Scouts and became acquainted with accused while the latter was acting as Scout Master (R. 17). On the evening when a moving picture, entitled "Devil May Care", was shown at the theatre (R. 19), May 20, 1930 (date established by manager of theatre, R. 29), he, with his father's permission (R. 26), went to the show with accused and Arthur Ferguson. After the show, he and Arthur accompanied accused to the scout house (R. 18) where the latter had a living room. After entering this room accused asked Arthur if "he could have it", whereupon receiving his consent, accused took out Arthur's "thing", the thing he "pees" through, and in the presence of the witness "started to suck it". When accused finished he told Arthur to put in his "thing" (R. 19, Specification 1, Charge I).

This was not the first time that he saw accused do such a thing. "About two or three weeks before" the above event took place, the accused at the scout house "called me in and asked me to let him have it * * * I said 'alright'. He took my thing out, put it in his mouth and started to suck it". By "thing" the witness means "the thing I pee through". When the accused finished he said "not to tell my father".

Witness knew what was meant when accused "asked him to let him have it" (R. 20-22, Specification 2, Charge I).

The same witness, continuing his testimony, stated that he attended a scout camp on May 31, 1930, where accused was present. He remembers the date because "Daddy gave me a dollar." That night while sleeping with accused "he would not keep his hands off me. I pushed his hands off. I got up early. He woke me up. He asked me to put his 'thing' in my mouth" (R. 21, Charge II and its Specification). When asked, on cross-examination, whether he did it, he replied "Not that I can remember" (R. 28). Accused did not force him to do anything and witness does not understand that he is guilty of the same offense as accused. When accused first asked him he refused but consented after accused "begged me." He knew that he was not doing the right thing (R. 27). He further testified that he afterwards heard a lot of talk about accused. After discussing his bad traits with Pete Woods, who was about 18 years old, he was urged by the latter to tell his father. This was afterwards done: "I told him all about it. First thing I knew the M.P.'s. got him" (R. 24). The scout camps referred to were held at Haleiwa (R. 58).

Arthur T. Ferguson, ten years of age, the son of a Staff Sergeant formerly with the 21st Infantry, was not available as a witness at the rehearing, because he had departed from Hawaii with his father who had been transferred to Plattsburg Barracks, New York (R. 30-31). The prosecution therefore introduced in evidence the testimony of Arthur T. Ferguson, officially recorded in the record of accused's former trial by general court-martial, which was properly identified by the reporter thereof (R. 32). Upon proof that the proceedings of the former trial answered all the requirements of law, the complete testimony of Arthur T. Ferguson was received and read in evidence by the reporter who made the original transcript thereof (R. 36). This transcript showed that Arthur T. Ferguson, after a satisfactory examination on voir dire, was sworn and testified that he was ten years old and at the time resided at Schofield Barracks, T.H. (R. 38). He was a member of the Scouts and became acquainted with accused in the accused's capacity as Scout Master. On the evening when the moving picture "Devil May Care" was shown at the theatre, he went to the performance with accused and Mark Longobardo. After the show he went to Scout Headquarters where accused called him into his sleeping room. "First I said I would not come, then I said I would come. I came in there and Hulme asked if he could have it" "the thing I 'pee' through". He knew what accused meant because he had heard him say this before at "overnight camps." "He told me to sit down on the bed. He took it out and started to suck it." This continued for a minute or two and then accused told him "to put it in and button up my pants." Mark was present and saw all that happened (R. 40-41, Specification 1, Charge I).

On pay-day night, May 31, 1930, he was down at the Scout Camp and again saw accused. He remembered the date because his father had given him more money than he ever did before (R. 41). He accompanied accused into some woods to gather wood and while there accused "asked me if he could suck it". Witness at first refused but finally consented. Accused then "took my thing out" and sucked it two or three minutes. After he was through, "he told me to put it in and button up my pants". Upon the approach of other children, both hid and later returned to camp. Accused told him "not to tell anybody". (R. 42, Specification 3, Charge I). On cross-examination, witness testified in substance that about four weeks prior to the trial he went to the bathroom, in the scout building, and looked over the top at accused (R. 42) to see if he was ready to come out. He saw accused "shake his thing". When accused came out they played cards in the scout building. As he left for home, accused "told me not to tell anything." By that he meant not to tell "that he was in the bathroom doing that" (R. 43). Witness and Mark frequently play together but they never discussed accused (R. 44), "except when Hulme told me something about what they had done". By "they" he means accused and Mark. When accused asked witness to go anywhere with him he always went although he knew what accused was going to do (R. 45).

Mark Longobardo was recalled as a witness for the defense and in substance admitted that he had had a conversation with Arthur Ferguson two or three weeks before the moving picture show on May 20, 1930 "about Hulme being nasty" (R. 52). No one told him what to say in court. He admitted that Pete Woods questioned him about his relations with accused and persuaded him to tell his father (R. 54). Accused never did use force to accomplish his purpose and witness did not realize when testifying for the prosecution that anything could be done to him about it (R. 55). Before telling his father, he talked it over with Arthur, and both decided that Hulme was "nasty" (R. 54), "because he sucked our things." He would not have told his father if he had known that he might possibly be sent to a reform school for the part he took in the offense (R. 55) but he told his father because it was true (R. 56).

First Sergeant James V. Bay, Military Police Company, Hawaiian Division, a witness for the defense and the defense alone, testified in answer to questions propounded by the defense that, by authority of the Commanding Officer, Military Police Company, he conducted an investigation of a charge that accused had committed sodomy with two small boys. During the course of the investigation, which was conducted one evening, he "tried to get the accused to make a statement" (R. 58-59). Although he believed the testimony of two witnesses, he wanted a statement from accused because such statements are helpful and would serve to hasten the investigation. At one time during the evening accused was hand-cuffed and told "to go over and stand by the wall and think it

over". The sergeant does not know just how long he was kept handcuffed and standing against the wall as he was called back several times but he does know that he didn't stand there until 2:30 the next morning (R. 60). Sergeant McLean and Corporal Venham were present during the investigation on that evening and the following morning Sergeants Longobardo and Ferguson were also present (R. 60). The witness was not cross-examined by the prosecution or examined by the court.

Sergeant Howard E. McLean, Military Police Company, Hawaiian Division, a witness for the defense and the defense alone, testified in answer to questions propounded by the defense that he had conducted an investigation of charges that accused had committed sodomy with Mark Longobardo and Arthur Ferguson. The following proceedings were then had:

"Q. (by the defense) Tell the court the circumstances of that investigation.

"A. On or about June 9th, 1930, at about 8:30 P.M., we proceeded to the 21st Infantry guardhouse where Private Hulme was at that time held in confinement for this alleged sodomy. He was taken from the guardhouse to Military Police Headquarters where an investigation was held regarding the case. I questioned him regarding the alleged sodomy up to when I left about midnight. The next morning, June 10th, continued the investigation. On the afternoon of June 10th I obtained a confession from him--

"PRESIDENT AND LAW MEMBER:

The last sentence will be stricken from the record and the members of the court are cautioned to take no cognizance of it whatever in determining the guilt or innocence of the accused on the charges as preferred. The law member cautions the witness to be careful and not refer to that matter again.

"Questions by the Defense. (continued)

"Q. Did you believe the testimony of the two boys was sufficient for a court of law to convict the accused?

"A. I did.

"Q. Why, then, did you go to so much pains to get a statement from the accused?

"A. It is the usual procedure." (R. 61-62).

On cross-examination, witness testified only that the investigation conducted by him was not that prescribed by the 70th Article of War (R. 63). The witness was not examined by the court.

Wilbur r. Palmer, Superintendent, Post Office Schofield Barracks, T.H., testified that he had been Scout Master from June, 1928 to July, 1930. During part of that period accused acted as Assistant Scout Master. He handled his job in a competent manner and witness at that time "certainly" had no reason to believe he was a moral pervert (R. 64, 65).

Master Sergeant Roy P. Fisher, 19th Infantry, appeared for the defense, and testified that, about a year and a half before, he had engaged accused to stay with his children, of each sex and ranging from 3 to 13 years, during his absence. At that time he considered him a suitable person to leave in charge of children (R. 67).

The accused, advised by the law member of his rights in the matter, elected to take the stand as a witness in his own behalf and in substance admitted that Mark Longobardo and Arthur Ferguson told the truth in practically all details of their testimony except as to the charges of sodomy. He denied every alleged improper relation with them or with any one else. He knew of no reason why Mark Longobardo should have made a statement against him that was untrue, except that "He said he talked it over with Pete Woods" who was "practically kicked out of the Scouts and had it in for me" (R. 76). He had no idea why Mark told such a story "unless he was influenced by Pete Woods" (R. 78). He further maintained that every allegation of the specifications against him was untrue (R. 77-78).

3. Such evidence affords ample basis for findings that at the time and place alleged in Specifications 1 and 3, Charge I, accused, on two separate occasions, committed the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Arthur T. Ferguson, a ten year old boy; and that at the time and place alleged in Specification 2, Charge I, he committed the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Mark Longobardo, a ten year old boy, crimes denounced by the 93rd Article of War. It further affords ample basis for findings that at the time and place alleged in the Specification, Charge II, accused solicited Mark Longobardo to commit the crime of sodomy in violation of the 96th Article of War.

4. The Board of Review, upon a careful examination of the rehearing record in conformity with and for all the purposes of Article of War 50 $\frac{1}{2}$, finds that there is nothing in the record which justifies a reversal of the case and is of the opinion that the judgment therein, as modified and approved by the reviewing authority, should be affirmed. However, local counsel for accused, Mr. Samuel T. Ansell, who did not appear for him at the rehearing ordered by the convening authority

(accused being there represented in his defense before the court by military counsel of his own selection assisted by duly appointed defense counsel), has submitted a brief wherein reversible error is claimed of the rehearing proceedings and various grounds of reversal are urged upon our attention. The brief as a whole may be disposed of, for appellate review purposes, with the statement that in effect it ignores what this Board considers to be the plain rules of decision governing this case on the very questions which it raises. Nevertheless, such grounds of reversal pressed by counsel in his brief as seem to require comment by the Board will be herein expressly noticed.

(a) Counsel raises the seemingly important question of substantive law whether the act here involved (carnal copulation per os) constitutes sodomy within the meaning of Article of War 93. He says: "It is established that the penetration proved is not sodomy" (referring to copulation had per os and common-law sodomy). An editorial note to *Glover v. State* (1913), 101 N.E. 629, 45 L.R.A. (N.S.) 473, says: "Though there is a conflict of opinion on this question, weight of authority and the best-reasoned cases sustain *Glover v. State* in holding that one may be convicted of the crime of sodomy or the crime against nature where the act is committed by penetration of the mouth." The quoted statement of counsel represents a fact of law only in a geographically limited sense. As will appear from the learned opinion of the court in *Glover v. State*, *supra* (a case of sodomy committed by appellant, per os, on the pathetic, a boy of eleven years of age), his statement is applicable only to those jurisdictions dominated by the decision in *Rex v. Jacobs* (1817), which is the only English case cited by counsel and which, the above-cited opinion declares, "stands alone in England on the question and no other expression of the courts of that country can be found to limit the broader definitions of the offense given by the great writers on the common law." *Glover v. State* declares *Rex v. Jacobs* to be the source of the doctrine, accepted by some courts and textwriters, that carnal copulation had per os is not common-law sodomy. It cites a number of well-reasoned cases in other states in harmony with the conclusion there reached contra the doctrine just stated, and overthrows counsel's contention. Moreover, counsel ignores the content of paragraph 149 k, Manual for Courts-Martial, and the course of decision in court-martial cases whereof it is expository. The act here involved (carnal copulation per os, characterized in *Glover v. State*, *supra*, as "what might well be considered the vilest and most degenerate of all the acts within the inclusion of the broad definition") has so often been adjudged in court-martial cases to be sodomy within the intentment of Article of War 93 as no longer to be open to question of its precise criminal character in military law (C.M. Nos. 187221, Sumrall; 186139, Kelly; 178298, Furst; 149385, Kozilek; 149274, Schumpf; 149153, Whittle;

149069, Herberger; 149068, Knight; 147952, Macon; 147630, Milton; 147163, Mireci; 146997, Mitchell).

(b) Counsel, at pains to leave no possible ground of reversal unworked in his rehearing brief, contends on the one hand that the testimony as received of prosecution witnesses Ferguson and Longobardo was, by reason of their tender years, incompetent, and on the other that they were so besmirched with voluntary participation in the criminal act as to require, as a matter of law, corroboration of their testimony as accomplices for purposes of proof. (He refers to them as "two infant witnesses, willing pathics in the act charged", and asserts: "Both of them were accomplices".) Putting out of view the tendency of these two grounds to efface each other, we proceed to consider each on its merits, without regard to the other.

It is contended that the testimony of the Ferguson boy was doubly incompetent because of his age and because read in evidence as taken on a former hearing before another general court-martial on the same charges in the absence of the boy from the Territory of Hawaii at the time of the rehearing. But paragraph 117 b, Manual for Courts-Martial, provides that in such a case such testimony "may be received by the court if otherwise admissible", and its admissibility otherwise is here referable to the provisions of paragraph 120 b, Manual for Courts-Martial, reading: "The competency of children as witnesses is not dependent upon their age, but upon their apparent sense and their understanding of the moral importance of telling the truth. Such sense and understanding may appear upon such preliminary questioning of the children as the court deems necessary or from the child's appearance and testimony in the case." Ferguson's testimony as received contains substantial evidence of competency, disclosed by a preliminary examination of the child for the purpose, supplemented by that furnished by his testimony as an eye and ear witness to the component facts of the case for the prosecution with reference to Specifications 1 and 3 of Charge I; and upon careful examination of that testimony, we conclude that in its admission in evidence on the rehearing there was no abuse or transcending of the discretionary power lodged in the court by the above-cited provisions of the Manual for Courts-Martial, and that the evidence so introduced was competent as a means of proof. Touching the reasonableness and validity of the applicable provision of the Manual for Courts-Martial authorizing the admission in evidence on a court-martial trial of the testimony of an absent witness, we think it suffices to advert to a fundamental principle of military law embodied in the following excerpt from an authoritative opinion of Attorney-General Cushing rendered December 1, 1855 (7 Ops. Atty.-Gen. 604):

"Trials by court-martial are governed by the nature of the service which demands intelligible precision of language but regards the substance of things rather than their forms; which eschews looseness or confusion in all things, but reflects that military administration must be capable of working in peace, it is true, but more especially amid the privations and the dangers of war."
(Underscoring supplied.)

Under paragraph 120 b, cited above, we reach a similar conclusion in respect of the testimony of the Longobardo boy who in person testified before the court on the rehearing and was subjected to preliminary examination as to his competency as a witness. Blackstone, discussing rape (4 Bl. Com. 214), declares it settled law "that there is no determinate age at which the oath of a child ought either to be admitted or rejected". Further in support of our conclusion hereon and the cited paragraph of the Manual for Courts-Martial are the learned opinion of the Court of Appeals of the District of Columbia, speaking by Mr. Justice Morris in *Williams v. U.S.*, 3 App. D.C. 335, and that of the Federal Circuit Court of Appeals, Fourth Circuit, in *Oliver v. U.S.*, 267 F. 544.

(c) The ground of reversal for lack of corroboration of the testimony of these boys (which, if believed, substantiates all the accusatory averments in the charges) will be here stated in the language of counsel: "Even if the testimony of these boys or of either of them was competent, without corroboration it was insufficient to sustain a conviction. Both of them were accomplices. Their age does not affect their testimonial status as accomplices, however it affects their criminal liability or the question of assault upon them. Corroboration of the testimony of a participant in the offense is necessary."

If sodomy be committed on a boy under fourteen years of age, it is felony in the agent only at common law (1 Hale, 470; 3 Co. Inst. 59). That criminal liability is the sole criterion whereby to determine accomplice status for witness credit purposes in criminal cases would seem to be axiomatic. See *People v. Bunkers* (Cal.), 84 Pac. 364; 1 Bouvier Law Dict. 62. However, for the sake of the question and argument made by counsel on this ground of reversal, we shall here assume that each of the two boys is an accomplice as to every criminal act of accused testified to by him as a prosecution witness.

We concede and are not concerned with the contrariety of judicial opinion in the common law of England on the subject of the necessity for corroboration of accomplice testimony in order to convict thereon a person accused of crime (*Rex v. Rudd*, Camp. Rep. 336; *Rex v. Barnard*,

1 C. & P. 88; *Jordaine v. Lashbrook*, 7 T.R. 609; *Rex v. Jones*, 2 Camp. 132). We are concerned with the Federal criminal court rule in the matter (paragraph 111, Manual for Courts-Martial), thus clearly stated by the Federal Circuit Court of Appeals, Eighth Circuit, in *Harrington v. U.S.*, 267 F. 97, 103: "There is no rule of law in the courts of the United States that prevents convictions on the testimony of accomplices alone, if the jury believes them." To the same effect are the pronouncement of the Federal Supreme Court in the earlier case of *Caminetti v. U.S.* (1817), 242 U.S. 470, 495, and *U.S. v. Heitler*, 274 F. 401, 408, wherein the Federal Circuit Court of Appeals rejects a contention similar to that of counsel above quoted with the remark: "Since the decision in *Caminetti v. United States*, 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, Ann. Cas. 1917B, 1168, courts have generally recognized the rule therein announced that conviction may rest upon the uncorroborated testimony of an accomplice." Such rule has been embodied in paragraph 124, Manual for Courts-Martial, as a guide to the discretion of the court in weighing the uncorroborated testimony of accomplices.

Upon examination of the record of rehearing in the present case in the light of this paragraph, we are constrained to hold that no reversible error is involved in a conviction rested by the court and reviewing authority upon the unsupported testimony of the Ferguson and Longobardo boys - even assuming that in the eye of the law they are accomplices.

(d) Counsel finds grave fault with the testimony of Sergeants Ray and McLean of the Military Police Company, Hawaiian Division, relative to their examination, featured by maltreatment, of accused with a view to his self-crimination, and to the mention by witness McLean of "a confession" of accused thereby obtained, and on this testimony erects and urges a claim of reversible error, asserting: "The admission of such testimony reached the depths of prejudice in its effect." The record shows (R. 62) that while witness was uttering a statement containing the words, "On the afternoon of June 10th I obtained a confession from him", he was then and there interrupted by the following declaration of the law member:

"The last sentence will be stricken from the record and the members of the court are cautioned to take no cognizance of it whatsoever in determining the guilt or innocence of the accused on the charges as preferred. The law member cautions the witness to be careful and not refer to that matter again."

We see nothing in counsel's contention of prejudicial error in respect of such testimony. The witnesses who gave it were called for the purpose

by the defense, and not by the prosecution or the court, and the testimony in question was elicited by defense counsel - evidently with the view of engendering in the mind of the court the belief that the testimony of the child witnesses for the prosecution and the confession of accused under duress of military police sergeants were referable to one and the same sinister source and equally false. The record, in our opinion, does not reveal counsel conducting the defense as incompetent or neglectful of the interests of accused, and his questioning of defense witnesses Ray and McLean was clearly purposeful in accused's behalf. It would be a travesty on justice to hold that introduction of such evidence on the trial by defense counsel for any defense purpose automatically made the court thereafter competent to decide for accused but incompetent to decide against him. Whatever may have been the defense counsel's motive in the matter, the testimony does not now, in our opinion, avail as a means of relief from the conviction adjudged against accused. As was recently said by the Federal Supreme Court in *Ponzi v. Fessendon*, 258 U.S. 254, 260: "One accused of a crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that." To "be allowed in his defense to make any proof that he can produce by lawful witnesses" within the meaning of these words in R.S. 1034, would seem to be within the connotation of the dictum in the *Ponzi* case, as well as within the "reasonable protection" to which an accused on trial is said by the same high court to be entitled (*Beavers v. Henkel*, 194 U.S. 73, 83). Moreover, as the testimony here in question was potentially helpful and hurtful to both prosecution and defense and "was not offered by the Government, but by the accused, and was offered without qualification or restriction", it might have been in toto "received just as it was offered, no objection being interposed by the Government", and "rightly treated as admitted generally, as applicable to any issue which it tended to prove, and as equally available to the Government and the accused", within the language and principle of the opinion of the Supreme Court in the leading case of *Diaz v. U.S.*, 223 U.S. 442, 449-450. We conclude, therefore, that the ruling of the law member as shown above was not necessary to the avoidance of error in receiving in evidence the testimony in question and that the contention of counsel respecting such testimony is without merit.

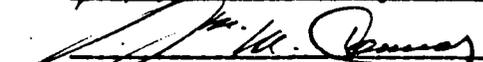
(e) Counsel concludes his attack on the judgment in the case as follows: "When the evidence is properly tested it is utterly insufficient as a matter of law to sustain a conviction of such an offense; there is no substantial evidence which can carry any reasonable conviction of the guilt of the accused not to mention conviction beyond a reasonable doubt." The conclusion stated above in paragraph 4(c) disposes of this contention. Blackstone, in discussing the evidence of children in criminal proceedings at common law, says (4 Bl. Com. 214):

"For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact." The Manual for Courts-Martial, paragraph 124, provides: "The court will draw its own conclusions as to the credibility of the witness and attach such weight to his evidence as his credibility may warrant." In the exercise of its judicial power of appellate review under Article of War 50¹/₂, the Board of Review treats the findings below as presumptively correct and attentively examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice. (Burton v. U.S. (1906), 202 U.S. 344, 373; Caminetti v. U.S. (1917), 242 U.S. 470, 495; Abrams v. U.S. (1919), 250 U.S. 616, 619, 624; Schaefer v. U.S. (1920), 251 U.S. 466, 471; Dierkes v. U.S. (1921), 274 F. 75, 85; C.M. No. 152797.) However, adopting the language of the Supreme Court in the Abrams Case, supra, we conclude, on the "question of law" here noticed, "which calls for an examination of the record not for the purpose of weighing conflicting testimony but only to determine whether there was some evidence, competent and substantial, before the" court "fairly tending to sustain the verdict", that "it is clear not only that some evidence, but that much persuasive evidence, was before the" court "tending to prove that the" accused was "guilty as charged".

5. The charge sheet shows accused enlisted February 6, 1928, for three years and had approximately three years and ten months prior service; and that he was 31 years and 2 months of age at the time of the commission of the offenses.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of sodomy involved in the Specifications, Charge I, recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by Section 910 of the Code of the District of Columbia.

 , Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.

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

Military Justice
 C.M. 192662.

Sept. 30, 1930

U N I T E D S T A T E S

vs.

Private SILAS W. ROWE
 (6365991), Battery B, 5th
 Field Artillery.

FOURTH CORPS AREA

Trial by G.C.M. convened at
 Fort Bragg, North Carolina,
 August 8, 1930. Dishonorable
 discharge and confinement for
 two (2) years. Disciplinary
 Barracks.

HOLDING by the BOARD OF REVIEW
 McNEIL, CLINE and HOOVER, Judge Advocates
 ORIGINAL EXAMINATION by HEFFERNAN, Judge Advocate

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Silas W. Rowe, Battery B, 5th Field Artillery, having taken an oath in a trial by the United States Court, Eastern District of North Carolina of Private Thomas Scott, before Mr. W.M. Bateman, District Deputy Clerk, a competent person, that he would testify truly, did at Fayetteville, North Carolina, on or about June 2, 1930, willfully, corruptly and contrary to such oath testify in substance that he, Private Silas W. Rowe, was on the last Sunday in October, 1929 with Private Scott at Fort Bragg, North Carolina at a place near the Station Hospital and saw the said Private Scott go with Janie Bell McArthur into the shrubbery between the Hospital and the Quartermaster corral, which testimony was a material matter and which he did not then believe to be true.

Accused pleaded not guilty to, and was found guilty of the charge and specification. Evidence of two previous convictions, one by summary court-martial and one by special court-martial, both for absence without leave in violation of the 61st Article of War, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, remitted three years of the confinement imposed, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that accused was duly sworn by W. M. Bateman, Deputy Clerk, as a witness in a case in which Private Thomas Scott was tried in the United States District Court at Fayetteville, North Carolina, on June 2, 1930; and that he testified that on the last Sunday in October (October 27, 1929) he saw Private Scott and a colored girl named Janie Bell McArthur go into the bushes in the vicinity of the Quartermaster corral at Fort Bragg, North Carolina (R 5, 7, 8, 14). By the deposition of Corporal Waid Atwood and duly authenticated extracts from the guard report and the morning report of the Casual Detachment at Fort Moultrie, South Carolina, it was shown that accused was on October 27, 1929 in confinement in the post guardhouse at Fort Moultrie, and did not leave Fort Moultrie to return to Camp Bragg until October 30, 1929 (Exs. 2, 3, 4).

Accused elected to remain silent.

4. In the opinion of the Board of Review the offense of perjury of which accused was found guilty is not proven for the reason that the record fails to show by any competent evidence that the false testimony was concerning a material matter. Mr. H.B. Crumpler, Assistant United States District Attorney, was permitted to testify that on his trial in the United States District Court, Private Scott was charged with rape committed upon the person of Janie Bell McArthur, on November 3, 1929, but neither the record of that trial nor the indictment was introduced or accounted for as being unavailable. Under the best evidence rule (Paragraph 116a, M.C.M.) oral testimony was not competent to prove the issues in the (trial of Scott), there having been nothing to show that the written evidence was unavailable by reason of its loss or destruction or from other cause (See C.M. 160345, Carter; C.M. 160327, Sutton; C.M. 160343, Young; C.M. 156858, Scarlett; C.M. 155728, Patterson; C.M. 152486, Bruton; C.M. 151969, Crow;

C.M. 148578, Eason et al).

The record of Scott's trial was not offered and when a copy of the indictment was produced in court by Mr. Crumpler, objection was made by the defense to its introduction in evidence (R. 7). Though specific objection was not made to Crumpler's oral testimony, when he was later recalled by the court (R. 19), as to the nature of the charges, it is only fair to assume, in view of the objection to the copy of the indictment, that it was the intention of counsel to insist on the application of the best evidence rule as he understood it with respect to the contents of this document. Paragraph 116 a of the Manual for Courts-Martial (page 120) provides, among other things, that failure to assert an objection to proffered evidence of the contents of a document under the best evidence rule may be regarded as a waiver of objection on the ground that the original document is unavailable, but since objection was herein made and since the defense indicated its intention to insist on the protection of the rule of exclusion, this provision of the Manual cannot be applied here. The Manual (Par. 126 c) also lays down the general principle with respect to the waiver of objections to the admissibility of evidence that

"If it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of such objection".

It also states, in the same paragraph, that a mere failure to object does not amount to a waiver except as otherwise stated or indicated in the Manual. There is nothing in the record of trial under consideration to indicate that counsel or accused knew of the right of the defense to object to the oral testimony, or to indicate that, knowing of the right, they intended to refrain from asserting it or intended to waive legal objection to the testimony. In view of this fact the mere failure to object to the oral testimony cannot be regarded as a waiver under the paragraph of the Manual last referred to. Not knowing by any competent evidence what Private Scott was tried for before the court, the Board of Review is unable to say that the materiality of the false testimony was established - an essential element of the crime of perjury. The evidence is, however, legally sufficient to support a conviction of the lesser included offense of false swearing in violation of the 96th Article of War (see cases cited).

5. The Board, in arriving at its conclusion, has considered an opinion expressed by the Board of Review in the case of Taylor (C.M. 168559) to the effect that evidence similar in scope and kind to that in this case was legally sufficient to support a conviction of perjury. It may be noted that this opinion did not receive the formal approval of The Judge Advocate General or any superior authority. The view was therein expressed that the admission of the oral testimony was not fatally injurious within the intent of the 37th Article of War. But the remedial provisions of the 37th Article of War may not, according to the plain import of its terms, be invoked to make competent the oral evidence in the instant case which is otherwise inadmissible or to supply missing proof of an essential element of the offense. Without this oral incompetent evidence there is no proof in the instant case of the materiality of the false testimony of accused.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involve findings of guilty of the lesser included offense of false swearing in violation of the 96th Article of War, and legally sufficient to support the sentence.

E. P. McNeil, Judge Advocate.
Walter D. Clark, Judge Advocate.
Robert W. Woods, Judge Advocate.

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

Military Justice
 C.M. 192731.

OCT 7 - 1930

U N I T E D S T A T E S	)	THIRD CORPS AREA
)	
vs.	)	Trial by G.C.M. convened at Fort
	)	Myer, Virginia, August 15, 1930.
Private First Class MORTON	)	Dishonorable discharge and con-
O. GUTH (6751688), Troop F,	)	finement for six (6) years.
3rd Cavalry.	)	Penitentiary.

REVIEW by the BOARD OF REVIEW
 McNEIL, CLINE AND HOOVER, Judge Advocates
 ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private First Class Morton O. Guth, Troop F, 3rd Cavalry, acting in conjunction with Private First Class Frederick Williams, Troop F, 3rd Cavalry, did, at Fort Myer, Virginia, on or about July 25, 1930, with intent to commit a felony, viz: robbery, commit an assault upon Thomas F. Crane, by willfully and feloniously striking the said Thomas F. Crane on the face with a weapon.

Specification 2: In that Private First Class Morton O. Guth, Troop F, 3rd Cavalry, acting in conjunction with Private First Class Frederick Williams, Troop F, 3rd Cavalry, did, at Fort Myer, Virginia, on or about July 25, 1930, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Thomas F. Crane, money to the value of Twenty Five (\$25.00) Dollars.

Accused pleaded not guilty to the Charge and specification and was found guilty of Specification 1, except the words "with a weapon", of the excepted words not guilty, guilty of Specification 2 and guilty of the Charge. Evidence of one previous conviction by summary court-martial for being drunk and disorderly in quarters in violation of the

96th Article of War, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

2. The evidence shows that on the evening of July 25, 1930 accused, Mr. Thomas F. Crane, and other persons including soldiers, were at a place termed "Sergeant Ward's speakeasy" located on Ninth Street, S.W. Washington, D.C. (R. 9, 10, 21, 26, 44). While paying for liquor served there, Crane took from his pocket money in the amount of twenty dollars or more (R. 17). Between ten and eleven o'clock Sergeant Ward requested Crane to take certain members of the party to Fort Myer, Virginia, in his automobile (R. 10). Crane complied with this request and at the time of leaving was accompanied in his car by accused and three other soldiers, including Privates Williams and Galloway (R. 10, 26, 27). Enroute to Fort Myer the party stopped at a second "speakeasy" at which time Galloway left and one Roslick joined the party (R. 26, 27). All entered the speakeasy where each was served with beer. While there Crane again displayed some of his money, including a ten dollar bill, at the time he paid for the beer (R. 14). Leaving this place Crane drove his companions in the direction of Fort Myer. Enroute they stopped twice, once at a gasoline filling station and shortly afterwards to urinate (R. 10, 11, 27). Proceeding thereafter they soon reached a lonely stretch of road and Crane was requested by accused to stop so that he might urinate. Crane stopped in an isolated place and accused and Williams got out and went to the right rear of the car (R. 11-12). Upon returning accused, approaching from Crane's right, spoke to Crane, who was in the car, and then struck him several blows in the face and about his head (R. 12), dazing him (R. 16). Some one made a remark about "getting the dough." (R. 13), and a hand was reached into Crane's trouser pocket nearest accused and twenty-five dollars in money was taken therefrom (R. 14). Crane testified that when struck, he attempted to get out of the left side of his car but was stopped by Williams (R. 13, 16, 22), and that he was in fear of his life during the attack. Finally escaping from his assailants, he ran in the direction of Fort Myer. A passing automobile took him to the guardhouse at Fort Myer, and he reported the events and received treatment by a medical officer of lacerations on his face caused by the assault (R. 13, 14, 23, 25).

Private First Class Frederick Williams testified for the defense that he saw accused "stiffen" and attempt to strike Crane (R. 49), and that witness, who was on the right side of the car "grabbed Guth by the shoulder and told him to cut it out." * * * I had been drinking and I could not handle him, so I walked away." Witness also testified that the "fight" stopped "as quickly as it started" and that he and accused went home together. Accused "didn't have any money" (R. 46, for the next morning he asked witness to get him some cigarettes (R. 50).

Accused after being warned of his rights as a witness in his own behalf elected to remain silent (R. 52).

3. The evidence sufficiently shows that at about the time and place alleged accused violently struck the civilian Crane about the face, perhaps with his fists, and that through this use of force and through the fear on Crane's part which the attack engendered, succeeded in stealing from Crane's person money in the amount of \$25.00 as alleged. The essential elements of the offenses of robbery and assault with intent to commit robbery as alleged were sufficiently proven.

Inasmuch as the two offenses were but different aspects of the same transaction, punishment should be imposed only with respect to the more serious offense, robbery (See Par. 80a, M.C.M.).

4. A brief submitted subsequent to the trial by defense counsel has been considered. It is addressed to the sufficiency of the evidence to show that money was actually taken by accused, that is to show that robbery was actually accomplished. The record of trial contains direct evidence that through force and violence and by putting Crane in fear, \$25.00 in money was taken from his pocket during the course of or immediately after the assault, and, in the opinion of the Board of Review, the circumstances under which it was taken fully justified the court in concluding that this money was stolen by accused.

5. The charge sheet shows accused enlisted January 11, 1928 with approximately three years prior service and that he was 27 years of age at the time of the commission of the offenses.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of robbery involved in Specification 2 of the Charge, recognized as an offense of a civil nature and so punishable by confinement for more than one year by Section 284 of the Federal Penal Code.

E. C. McNEIL

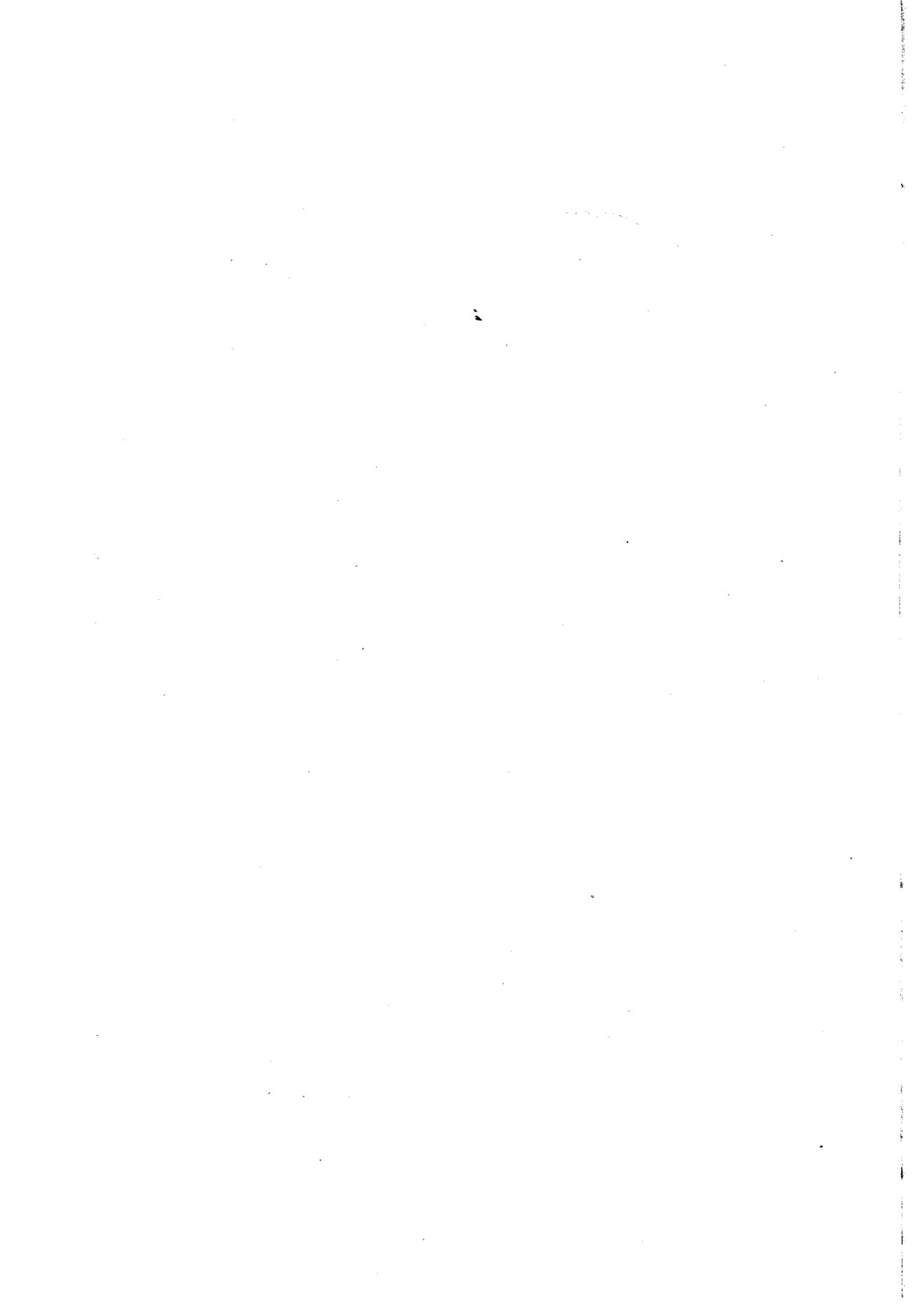
Judge Advocate.

Walter D. Clark

Judge Advocate.

HUBERT D. HOOVER

Judge Advocate.



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

Military Justice
C.M. 192877.

OCT 14 '930

U N I T E D S T A T E S

vs.

Private MELVEN E. BUTLER
(6220334), Company K, 25th
Infantry.

SEVENTH CORPS AREA

Trial by G.C.M. convened at
Fort Robinson, Nebraska,
August 26, 1930. Dishonor-
able discharge, suspended,
and confinement for three
(3) months. Fort Robinson,
Nebraska.

OPINION by the BOARD OF REVIEW
McNEILL, CLINE and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BEER, Judge Advocate

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Melven E. Butler, Company K, 25th Infantry, did, at Fort Huachuca, Arizona, on or about June 1st, 1929, desert the service of the United States and did remain absent in desertion until he was apprehended at Alliance, Nebraska, on or about June 30th, 1930.

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, but remitted nine months of the confinement imposed, directed its execution, suspended the dishonorable discharge and designated Fort Robinson, Nebraska, as the place of confinement. The sentence was published in General Court-Martial Order No. 327, Headquarters Seventh Corps Area, September 9, 1930.

3. The record of trial shows that the order appointing the court (Par. 3, S.O. 159, Headquarters 7th Corps Area, July 11, 1930) did not designate a law member and the Corps Area Judge Advocate in a letter to this office dated September 27, 1930, a copy of which is attached to the record of trial, confirms the fact that no law member for this court was detailed by the convening authority. Article of War 8 provides, inter alia, that

"The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service (selected by the appointing authority as specially) qualified to perform the duties of law member."

The foregoing provisions of the 8th Article of War have been repeatedly held to be mandatory (C.M. 159140, Du Temple; C.M. 159143, Davis; C.M. 159144, Anderson; C.M. 159146, Neenan; C.M. 159147, Reese; C.M. 159228, Willey; C.M. 163239, Cunningham; C.M. 163259, Adkins; C.M. 166057, Dunn; C.M. 187098, Henshaw; C.M. 187201, Bokoski). The record of trial contains nothing to indicate that an officer of the Judge Advocate General's Department or an officer of some other branch of the service specially qualified to perform the duties of law member was not available for such detail.

No law member having been detailed in this case in conformity with the mandatory provisions of the 8th Article of War above cited, it follows that the court which tried accused was not legally constituted, was without jurisdiction to try the accused and that the proceedings were null and void ab initio.

4. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support

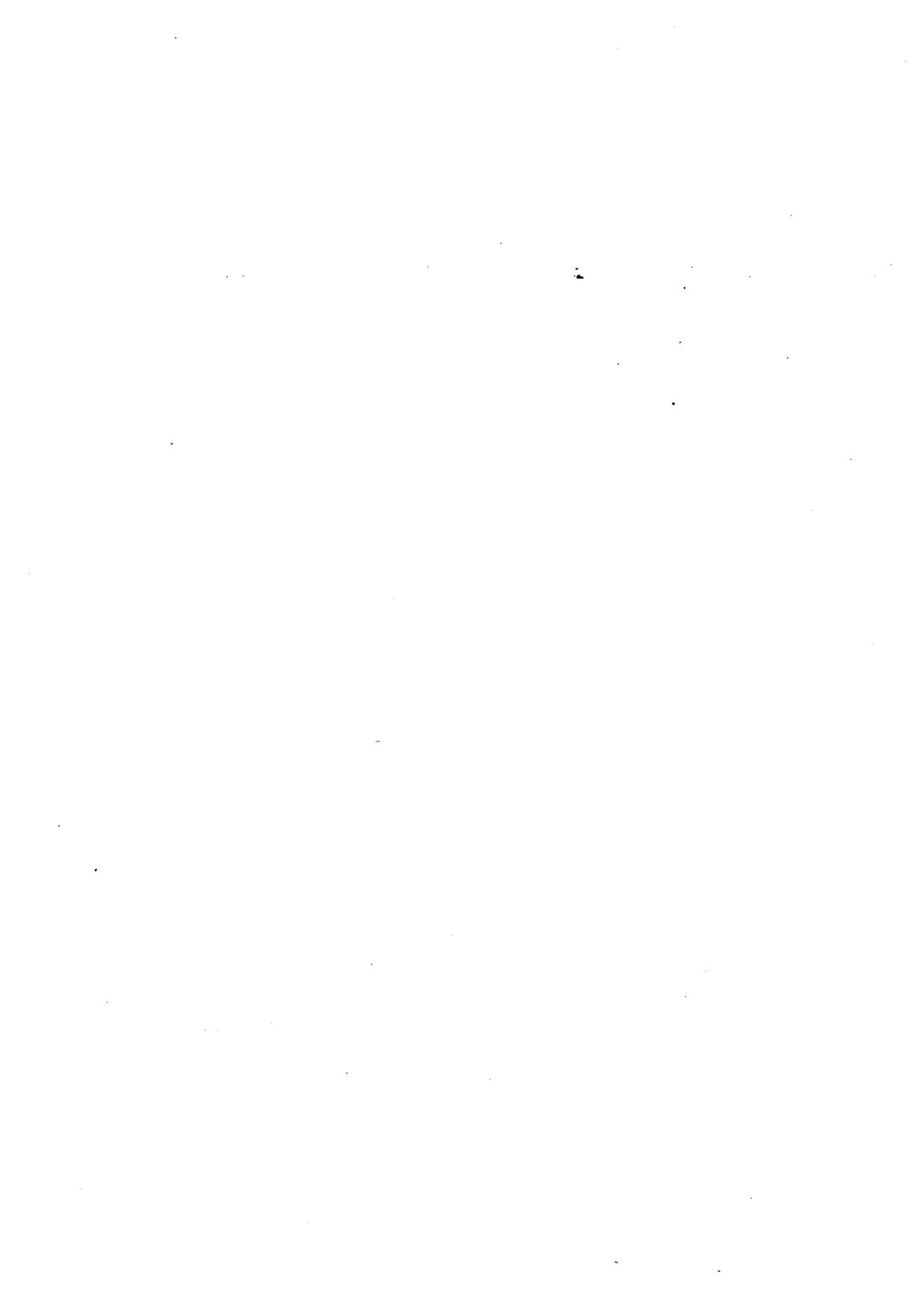
the findings and sentence.

E. P. McKey Judge Advocate.

Walter D. Cline Judge Advocate.

Richard W. Hoover Judge Advocate.

To The Judge Advocate General.



sig 1310 (43)

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

Military Justice
C.M. 192882.

OCT 10 1930

UNITED STATES }
 } vs. }
General Prisoners CHARLES }
L. HILBURN and LEO R. }
MORGAN. }
 }

FIRST CAVALRY DIVISION

Trial by G.C.M., convened at
Fort Bliss, Texas, August 14,
1930. Dishonorable discharge
(suspended) and confinement
for five (5) years as to
each accused.
Disciplinary Barracks.

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

1. The record of trial in the case of the general prisoners named above having been examined in the office of The Judge Advocate General and held 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 were tried on the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that General Prisoner Charles L. Hilburn and General Prisoner Leo R. Morgan, did, at Fort Bliss, Texas, on or about the 14th day of July, 1930, acting jointly, in pursuance of a common intent, and in the execution of a conspiracy to desert the service of the United States, previously entered into by them, desert the service of the United States and did remain absent in desertion until they were apprehended about nineteen (19) miles from Fort Bliss, Texas, on the Newman road on or about the 14th day of July, 1930.

Each accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to

become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority approved the sentence as to each accused and directed its execution, but suspended the dishonorable discharge, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentences were published in General Court-Martial Order No. 270, Headquarters First Cavalry Division, Fort Bliss, Texas, September 9, 1930.

3. The evidence shows: On or about July 14, 1930, the accused, both "paroled prisoners," at Fort Bliss, Texas, were sent by the provost sergeant to work without sentries at the remount station. Upon being informed by a member of the guard that accused had not returned from their work at 11:30 A.M., the provost sergeant went to the remount station and there was "told" that both prisoners had left "their team" in the corral and had disappeared. After searching the post for accused until 4:00 P.M., the provost sergeant returned to the guardhouse (R.10,11). While on his way back to the post on the afternoon of July 14, 1930, an officer saw the two accused on the Newman road. When he stopped his car about 150 yards from them, both accused ran and the officer continued on to the post (R.9). Upon his arrival at about 5:00 that afternoon he, together with the provost sergeant and the sergeant of the guard, in an automobile, started in pursuit of accused. At a point about fourteen miles from Fort Bliss, and within one and one-half miles of Newman, the two accused were seen about 600 yards from the road. As the officer and noncommissioned officers left the car the two prisoners began running towards Newman. After a short chase on foot accused Hilburn was captured, and at about the same time and place accused Morgan was discovered hiding behind a bush. The two were then returned to the post. Hilburn said his sister was ill and he was going home to see her (R.7-12).

4. It was thus shown by the evidence that accused, both Class A prisoners, were, on the morning of July 14, 1930, sent out without sentries to work on the post of Fort Bliss, Texas. Not having returned to the guardhouse at 11:30, an unsuccessful search of the post for them was instituted. About 5:00 P.M. the same day they were apprehended while together endeavoring to escape at a point about fourteen miles from Fort Bliss. Such evidence establishes breach of parole on the part of each accused and at the same time the offense of desertion. Their acts in leaving the post under the circumstances as shown by the record and their efforts to escape apprehension when overtaken about fourteen miles from the post by a searching party justify the inference that it was the intention of each accused permanently to absent himself from the service.

However, they are charged with, and convicted of, the offense of desertion while acting jointly, in the pursuance of a common intent, and in the execution of a conspiracy to desert. Desertion in the execution of a conspiracy is recognized as a more serious offense than simple desertion and is punishable under paragraph 104 c, Manual for Courts-Martial, by double the period of confinement awardable for simple desertion even in its most serious aspect. So, under a charge of desertion in the execution of a conspiracy, proof of the existence of a conspiracy is vital to a conviction. (Par. 130 a, M.C.M.)

"A conspiracy is an agreement by two or more persons to do an illegal act, or to do a legal act by illegal methods." A combination of minds in an unlawful purpose is the foundation of the offense of conspiracy. (U.S. v. Kissel, 173 Fed. 823; Hyde v. U.S., 225 U.S. 347; C.M. 187319, Line.) In the opinion of the Board of Review the proof in the instant case fails to meet this requirement of the law. The competent evidence of record tending to support the allegation of conspiracy shows only that the two accused were sent out to work on the morning of their alleged offense; that they left the post at sometime prior to 11:30; and that they were apprehended together. It does not appear that they were sent out together, worked together, or left the post together. For aught that appears of record they did not see or speak to one another during the day of their absence until a short time prior to their apprehension. The mere fact that they were together at that time is not sufficient evidence of the existence of a conspiracy. To establish a conspiracy even in those cases in which the offense which is the object of the conspiracy is capable of being committed jointly (such is not the case with desertion), the evidence must be such as to show that accused did something other than participate in the substantive offense which is the object of the conspiracy (United States v. Heitler, 274 Fed. 401). Federal civil courts have held in two comparatively recent cases that where the evidence showed only that two accused were riding in automobiles which, on being stopped, were found to contain liquor, there was insufficient to establish accused's guilt of the offense of conspiring to possess and transport intoxicating liquor (Stafford v. United States, 300 Fed. 537; Jianole v. United States, 299 Fed. 496). In C.M. 186947, Bopp and Aldrich, it was held by the Board of Review that the mere presence of a person at the scene of the commission of a robbery by another, in the absence of evidence of preconcert or of intent to participate if need be, is not sufficient basis for an inference of his participation as an accessory or principal therein.

The testimony that the provost sergeant was told that accused left "their team" at the corral and then disappeared was obviously based on hearsay and was therefore incompetent. This was the only evidence produced which really tended to show that accused were together prior to their desertion or that they left together, and probably influenced the court in its findings. Its introduction and consideration by the court was error.

The competent evidence in the case at hand shows nothing other than that each accused deserted, and there being a failure of proof as to prearrangement, agreement, or combination of minds in an unlawful purpose, it follows that neither accused can legally be convicted of the offense of desertion in the execution of a conspiracy. The evidence, however, does warrant their respective convictions of the lesser included offenses of separately deserting the service at Fort Bliss, Texas, on or about July 14, 1930, and remaining absent in desertion until apprehended on or about July 14, 1930, near Newman, Texas.

As to each accused the maximum punishment authorized by paragraph 104 g. of the Manual for Courts-Martial for the offense of which they are properly convicted is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years.

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 finding of guilty of the Specification as finds each accused separately deserted the service at Fort Bliss, Texas, July 14, 1930, and remained absent in desertion until he was apprehended near Newman, Texas, on or about July 14, 1930; and legally sufficient to support only so much of the sentence as to each accused as includes dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years.

E. M. Chey, Judge Advocate.

Walter D. Case, Judge Advocate.

Richard D. Hoover, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
C. M. No. 192911

Sept 27, 1930.

UNITED STATES)

v.)

Private JOSEPH WECKERLE)
(6680268), Service Company,)
18th Infantry.)

FIRST DIVISION

Trial by G.C.M., convened
at Camp Dix, New Jersey,
August 25, 1930. Dishonor-
able discharge and two (2)
years confinement. Dis-
ciplinary Barracks.

HOLDING by the BOARD OF REVIEW
MCNEIL, CLINE and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate.

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

2. By Specification 2 of the Charge it is alleged that accused did take, steal and carry away a polo shirt of the value of \$2.50 and a kodak of the value of \$18. The only testimony as to the value of these articles is that of Captain R. T. House, 18th Infantry, who stated that the shirt was worth approximately \$2.50 and the kodak approximately \$18 - "between fifteen and eighteen dollars" (R. 8,9). The articles were before the court. It does not appear that this witness was an expert or was otherwise qualified to express an opinion as to the value of the articles, and his testimony is not sufficient to support the finding of value in excess of \$20. In view of the nature of the articles their inspection by the court did not alone justify any finding of value other than that they were of some value (C.M. 144763, Parker). The evidence is legally sufficient to support only so much of the findings of guilty of this offense as involves a finding of guilty of larceny of the articles described, of some value, an offense for which the maximum punishment by confinement authorized by paragraph 104 c of the Manual for Courts-Martial is confinement at hard labor for six months.

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

legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder, legally sufficient to support only so much of the finding of guilty of Specification 2 as involves a finding of guilty of larceny of the articles described, of some value, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one (1) year and six (6) months.

E. M. Chees, Judge Advocate.
Walter D. Cline, Judge Advocate.
Robert W. Hoover, Judge Advocate.

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

Sept. 29, 1930

Military Justice
 C.M. 192940.

U N I T E D S T A T E S)

SECOND DIVISION

vs.)

Private SILAS M. FERGUSON
 (R-1492365), Headquarters
 Battery and Combat Train,
 2nd Battalion, 76th Field
 Artillery.)

Trial by G.C.M. convened at
 Fort Sam Houston, Texas, August
 21, 1930. Dishonorable discharge
 and confinement for six (6) months.
 Fort Sam Houston, Texas.)

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence.
2. The evidence is not legally sufficient to support the findings of guilty of Charge II and its Specification by which is charged the embezzlement by accused of money in the amount of \$15.00, entrusted to him by one Michael Kamela. The evidence shows that accused, while on duty as a battery mess sergeant, absented himself without leave on September 4, 1929 (Ex. 1). Prior to this date he had from time to time received collections from boarders at his battery mess, of which Kamela was one. Collections amounting to \$31.00 made on August 10, 1929, were properly turned in to the organization commander, but no collections were received from accused in September, and no collection covering Kamela's board for August, 1929, was received by the organization (Ex. 2). Kamela testified that he paid board to accused in the summer of 1929, and that "the last month" accused was with the battery witness turned over \$15.00 to him, this being the last payment made and the only payment of exactly that amount. Kamela also testified that he did not know whether this

payment was made in August or September, or whether the payment covered board for July or August. He did not amplify his statement that the payment was made "the last month" of accused's duty with the battery and it is evident that these words might mean the last full month (August) during which accused was on duty. The testimony fails to show that accused received any money for which he did not properly account.

3. For the reasons stated, 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, but legally insufficient to support the findings of guilty of Charge II and its Specification.

J. C. M. M. M. Judge Advocate.

Walter B. Cline Judge Advocate.

Sheldon D. Hoover Judge Advocate.

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

Military Justice
C.M. 192952.

Oct. 4, 1930.

U N I T E D S T A T E S

SEVENTH CORPS AREA

vs.

Private HAROLD W. SCOLES
(6817363), Machine Gun
Troop, 4th Cavalry.

Trial by G.C.M. convened at
Fort Meade, South Dakota,
September 4, 1930. Dishonor-
able discharge and confinement
for one (1) year. Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
MCNEIL, CLINE and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by DINEMORE, Judge Advocate.

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

2. By the Specification, Charge I, accused is charged with the larceny of a pair of breeches, woolen, olive drab, the property of the United States, furnished and intended for the military service, in violation of the 94th Article of War. The evidence sufficiently shows that about the date alleged accused stole from Private Fred B. Gilson, a member of accused's company, a pair of breeches, one witness describing them as "Philadelphia breeches", which Gilson had previously obtained from another soldier (R. 6-8). The breeches were introduced in evidence (R. 11). They were marked HQ 7110 (R. 6).

There is no evidence that the breeches were the property of the United States, or had been issued and intended for the military service, as charged. The fact that they were "Philadelphia breeches" and, as may be inferred, were of the type used in the military service, does not justify an inference that they were government property, for it is a matter of common knowledge that uniform articles of this kind may be privately purchased and personally owned by soldiers. The breeches here described were obtained by Gilson from a soldier in Headquarters Troop and, so far as the evidence shows, were personally owned by him. The failure to prove the ownership of the breeches, as charged, was fatal to the conviction under this charge and specification (C. M. 164042,

Rodden; C.M. 191809, Price).

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

E. C. McNeil Judge Advocate.

Walter D. Clive Judge Advocate.

Richard W. Hoover Judge Advocate.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
CM 193001

NOV 5 1930

U N I T E D S T A T E S	)	FIFTH CORPS AREA
)	
v.	)	Trial by G.C.M., convened
	)	at Fort Thomas, Kentucky,
Captain RICHARD S. GESSFORD	)	August 7, 1930. Dismissal.
(O-8341), Infantry (DOL).)	

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

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

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

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

Specification: In that Capt. Richard S. Gessford, Inf., (DOL), did at Lexington, Ky., on or about the 10th day of Jan., 1930, feloniously embezzle by fraudulently converting to his own use the sum of two hundred fifty-five dollars and sixteen cents (\$255.16) the property of and belonging to Advanced Course ROTC students, University of Kentucky, and intrusted to the said Capt. Richard S. Gessford for the purpose of settling student indebtedness with the Reveille Legging Company, Leavenworth, Kansas.

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

Specification 1: In that Capt. Richard S. Gessford, Inf., (DOL), did, at Lexington, Ky., on or about Feb. 4, 1930, with intent to deceive, wrongfully

and unlawfully make and utter to the First National Bank and Trust Co., Lexington, Ky., a certain check in words and figures as follows, to wit: "The Fort Thomas Bank, Fort Thomas, Kentucky. Pay to the order of cash - \$200.00 Two hundred and no/100 - dollars Richard S. Gessford, Capt., Inf. (DOL)" and by means thereof, did fraudulently obtain credit to his account with the said First National Bank and Trust Company in the amount of \$200.00, he, the said Capt. Richard S. Gessford, then well knowing that he did not have and not intending that he should have sufficient funds in the said Fort Thomas Bank for the payment of said check.

Specification 2: In that Capt. Richard S. Gessford, Inf., (DOL), did, at Lexington, Ky., on or about Feb. 3, 1930, wrongfully and unlawfully make and utter to the City Hall Garage, Louisville, Kentucky, a check on the First National Bank and Trust Co., Lexington, Ky., for two hundred twenty five dollars and fifty cents (\$225.50), and by means thereof, did fraudulently cause said check to be paid by the said First National Bank and Trust Co., he, the said Capt. Richard S. Gessford, then well knowing that he did not have and not intending that he should have sufficient funds in the said bank for payment of said check.

Specification 3: In that Captain Richard S. Gessford, Inf. (DOL), did, at Lexington, Ky., on or about Feb. 10, 1930, with intent to deceive, wrongfully and unlawfully make and utter to the Fort Thomas Bank, Fort Thomas, Ky., a check for four hundred fifty dollars (\$450.00), on the First National Bank and Trust Co., Lexington, Ky., he, the said Capt. Richard S. Gessford, then well knowing that he did not have and not intending that he should have sufficient funds in the said First National Bank and Trust Co. for the payment of said check.

Specification 4: (Finding of Not Guilty.)

Specification 5: In that Capt. Richard S. Gessford, Inf., (DOL), did, at Lexington, Ky., on or about Feb. 10, 1930, with intent to deceive Major Owen R. Meredith, Inf., (DOL), P.M.S. & T., University of Ky., Lexington, Ky., officially state to the said Major Owen R. Meredith that he, the said Richard S. Gessford, believed he had sufficient funds in the First National Bank and Trust Co., Lexington, Ky, on or about January 10, 1930, for the payment of a two hundred fifty-five dollar and sixteen cent (\$255.16) check, which statement was known by the said Capt. Richard S. Gessford to be untrue.

Accused pleaded not guilty to the charges and specifications. He was found not guilty of Specification 4, Charge II, and guilty of the charges and remaining specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for the action of the President under Article of War 48.

3. Charge I and its Specification and Specification 5, Charge II.

The evidence shows that accused reported for duty as an instructor of the R.O.T.C. Unit, University of Kentucky, Lexington, Kentucky, about September, 1928, and remained on duty and as an assistant to the Professor of Military Science and Tactics there until about June, 1929 (R. 10). It had for sometime been a practice of the Military Department at the University to purchase Sam Browne belts from the Reveille Legging Company of Leavenworth, Kansas, for Advanced Course students, delivery being made in the fall and payment being made in January from collections from pay (commutation of subsistence) disbursed to the students at that time (R. 10-11). The individual students selected the types of belt desired, and the Adjutant consolidated the selections and measurements, submitted a single order covering them, and delivered the belts to the individuals when received from the seller (R. 19). Major Owen R. Meredith, Professor of Military Science and Tactics, testified that the purchases were made for the convenience of the students (R. 23), that he believed that responsibility for settlement of the accounts rested, "in the final analysis", on him or his department (R. 19,21), and that "until

that account had been finally settled I considered the money involved as belonging to the students" (R. 19). On October 8, 1929, as Adjutant, and upon the express or implied direction of Major Meredith, accused wrote the Reveille Legging Company, stating:

"We wish to place an order for fifty-three (53) Sam Browne belts, #209, as furnished our unit last year, for the men listed below, whose measurements are indicated * * *

This order is placed with the understanding that payment may be deferred until receipt of commutation of subsistence about January 1, 1930. If you wish to discontinue this policy, kindly advise us at once; otherwise, it is requested that this order be rushed, as the students' uniforms will soon be ready for issue. We assume also that prices for these belts will be the same as for those ordered last year. * * *"
(R. 21,62,71; Ex. F).

The belts were shipped by the Reveille Legging Company on October 24, 1929, to the Military Department and distributed shortly thereafter to the individual students (R. 11,59; Ex. F). Major Meredith directed accused to make the necessary collections from the students to pay for the belts (R. 12). On January 10 and 11, 1930, accused assisted in paying the students and collected from them, among other sums, an aggregate amount of about \$255.16 on account of the purchase of the belts (R. 26+29; Ex. A). On January 13th he showed Major Meredith a copy of the collection sheet showing the collections (R. 13). One of the students testified that he purchased a belt from accused and understood that the amount of the purchase price deducted by accused was "to be paid to the manufacturer" (R. 58-60). Payment for the belts was not received by the Reveille Legging Company (Ex. F), and about February 10, 1930, Major Meredith received a letter from that concern requesting payment (R. 14,15; Ex. C). Upon receiving the letter, Major Meredith asked accused about the account and the latter stated that he "had forwarded a check * * * in payment * * * on or about the 11th of January, 1930", and showed Major Meredith what purported to be a copy of a letter from accused to the Reveille Legging Company reciting inclosure of a check for \$255.16 in settlement of the account (R. 16).

During the conversation accused also stated to Major Meredith, in substance, that on or about January 10, 1930, he had, or believed that he had, sufficient funds in the First National Bank & Trust Company of Lexington, Kentucky, on which the check had been drawn, to pay it (R. 17,20). Such a check was never received by the Reveille Legging Company (Ex. F) and was never presented to the bank (R. 44). As a matter of fact accused's largest balance in this bank during January and until February 3d was \$16.79. The check would not have been paid had it been presented during this period (R. 43,45). On February 3d a deposit of \$263.42 was made, but on the same day there were withdrawals which reduced the balance to \$94.71 (R. 37,38). On February 4th, the balance was further reduced to \$63.31 (R. 39; Ex. G 1). On the same day a deposit of \$200 by check, drawn by accused on a Fort Thomas, Kentucky, bank (R. 34,44), was made by accused, but on February 5th the balance thus created was reduced to \$37.81. It did not again exceed this latter amount (Ex. G 1). The \$200 check was not honored by the drawee bank but was protested on February 7th and returned unpaid (R. 34,44; Ex. H). About February 21, 1930, the account with the Reveille Legging Company was paid in full from funds transmitted to Major Meredith by the father of accused (Ex. M).

On June 7, 1930, accused wrote and submitted to the Commanding General, Fifth Corps Area (Ex. M), a letter in which he stated, among other things, that

"The collections in January, 1930, from the R. O. T. C. students in the aggregate amount of \$255.16 referred to in the charges, were * * * to be paid by my personal check. Accordingly, I forwarded a letter to the Legging Company under date of January 11, 1930, enclosing therein my personal check for \$255.16 drawn on the First National Bank of Lexington, Kentucky. This purchase as well as former purchases can be considered as personal contracts between the Legging Company and myself for the benefit of the R. O. T. C. students. I would like to lay stress on the fact that all my transactions with the Legging Company had been on a personal business basis between that company and myself. I took the responsibility for the proper distribution of its particular equipment to the students and the collections therefor, and considered, and held, myself personally

liable for payments to the Legging Company for these accounts. * * * Further, with regard to the designation, in the charges, of the sum of \$255.16 as belonging to Advanced Course R. O. T. C. students, I would call attention to the fact that this sum represented full payment by the students for goods received by them and on payment to me became automatically a matter of personal accounting between myself and the Legging Company and cannot be stated as a fund belonging to the students themselves. The students had received value for value. The rest of the transaction was between myself and the Legging Company. This is in full accord with my aforesaid considered relationship to that company. When my check of January 11, 1930, was mailed for this equipment I was of the opinion that there were sufficient funds in the First National Bank & Trust Company to meet same. I regret that my check was not received by the Legging Company and sent through for collection as I am confident that had this occurred (even though, as it developed, insufficient funds were on hand) I would have been able to meet same on notice from my bank of the overdraft as I had on previous occasions of overdraft at this bank. My mistake as to the amount of my bank balance was not due to wilful error as I believed I had deposited my pay check or other funds in the First National Bank and Trust Company during the month of January, 1930. This mistake was no doubt due to a disturbed mental condition at the time. I had entirely lost track of where my deposits had been made. * * * I desire to emphasize the fact that there was absolutely no intent on my part to embezzle funds. It is admitted that the entire transaction may have been irregular and the proper discretion not used but it certainly cannot be held that I confiscated funds which did not belong to me. The records will also show that on numerous occasions I had charge of the distribution of company funds, equipment, etc., and there was never any irregularity for which I was responsible" (Ex. M).

He also stated in this letter:

"I did make the statement, that I believed at the time I wrote the check, January 11, 1930, there were

sufficient funds to my credit at the bank to pay said check. As stated in answer to Charge I, the error as to my bank balance was due to a disturbed mental condition, as well as to losing track as to just where my deposits were made, and how and when disbursed" (Ex. M).

Miss Mary Anne Dunne testified for the defense that in January, 1930, while employed as a secretary in the Military Department of the University of Kentucky, she wrote for accused a letter to The Reveille Legging Company, reciting the inclosure therewith of a check for \$255.16. She identified in court a copy of the letter, which was received in evidence (R. 57; Ex. 1).

Accused testified that he considered himself personally responsible for payment for the belts, that he had been billed for them, and that he had previously purchased goods from the same concern in a similar way (R. 62,63). It was, however, understood that he was not to pay for the belts until the students had paid him (R. 71,72).

Charge II and Specifications 1, 2, and 3 thereunder.

About February 3, 1930, accused gave to the City Hall Garage of Louisville, Kentucky, in payment of an indebtedness to that concern, his check for \$225.50, drawn on the First National Bank & Trust Company, Lexington, Kentucky (Exs. G 1,J) (Specification 2, Charge II). At the beginning of business on this day his balance with the bank was \$1.29. As noted above, his balance had not exceeded \$16.79 during the preceding days of February and the month of January (Ex. G 1). On February 3d, however, he made a deposit of \$263.42, but on the same day withdrew by his check made to "Cash" the sum of \$170 (R. 38; Ex. K), thus reducing his balance as of that day to \$94.71 (R. 38; Ex. G 1). On the following day, February 4th, his check for \$31.40 was also paid, thus reducing the balance, exclusive of a deposit to be next described below, to \$63.31 (R. 39; Ex. G 1).

On February 4th accused deposited with the First National Bank & Trust Company his check for \$200, drawn on The Fort Thomas Bank of Fort Thomas, Kentucky (R. 34,39; Exs. G 1,H,I). Upon the supposition that this check would be paid, the First National Bank & Trust Company credited him with the amount thereof (R. 34,40)

(Specification 1, Charge II). As a result of this deposit the apparent balance at the conclusion of business on February 4th was \$263.31 (R. 40; Ex. G 1). On February 5th the check for \$225.50, given by accused to the City Hall Garage, was presented to the First National Bank & Trust Company for payment, and paid (R. 40,41). From July 17, 1929, to February 10, 1930, accused's balance at The Fort Thomas Bank was \$5.34 only (Ex. L) and when the \$200 check, deposited with the First National Bank & Trust Company, was presented to The Fort Thomas Bank for payment on February 6th, it was returned unpaid on account of insufficient funds (R. 51).

An officer of the First National Bank & Trust Company testified that the check in favor of the City Hall Garage would not have been paid by his bank had that concern known that the \$200 Fort Thomas check deposited on February 4th would not be paid (R. 41,45). After the \$200 check was returned unpaid and protested, the First National Bank & Trust Company communicated with accused, told him that the check had been dishonored, and asked him to come to the bank and make an adjustment. Accused agreed to but did not do so. The officer of the bank thereupon communicated with Major Meredith, and accused came to the bank (R. 36) about February 8th (R. 48). The cashier of The Fort Thomas Bank testified that accused had had an account with that concern for five or six years (R. 49); that the account was inactive from July 17, 1929, to February 4, 1930, and that during this period accused's balance remained at \$5.34 (R. 50). He testified that the check for \$200 was not honored because

"the Banking Department is very strict on overdrafts and we always look for a call for a statement and we didn't like to show up any overdrafts in our statement. It is possible that at that time this check came in and I turned it down" (R. 55).

Witness testified, however, that overdrafts of accused, in amounts not indicated, had been permitted by the bank and had been made good by the accused (R. 55).

On February 10, 1930, The Fort Thomas Bank received for deposit to the credit of accused a check drawn by him on the First National Bank & Trust Company of Lexington for \$450 (Specification 3, Charge II). The Fort Thomas Bank gave accused credit

for the deposit and transmitted the check to Lexington for collection (R. 52). On the same date accused cashed against this account a check for \$50, the bank paying it because the cashier thought that the \$450 check "would be good" (R. 53). On February 10th, the day on which the \$450 check was drawn, accused's balance with the First National Bank & Trust Company was \$37.81, and no deposits were thereafter made (R. 42; Ex. G 1). The check reached the bank for collection on February 13th, at which time, because of insufficiency of funds, it was returned unpaid (R. 42,43,46). On the same day, after the check had been received and returned, this bank received from accused a notice dated February 11th requesting that payment on all checks except one for \$32.50 be stopped (R. 46).

In his letter of June 7th to the Corps Area Commander, above referred to, accused stated that at the times his checks for \$225.50, \$200, and \$450 were drawn, he expected to have sufficient funds in the respective drawee banks to pay them. In this connection, he further stated that he had written "early in January", 1930, to Captain Hunter McGuire in New York City for a loan of \$500, expecting that the loan would be made inasmuch as similar ones had been negotiated previously. "Early in February" not having received any reply to his letter, he telegraphed to Captain McGuire, whereupon the latter advised that he had written a letter to accused which accused must not have received, and stated that it would be impossible to make the loan. When accused found that he could not secure a loan sufficient to care for the \$450 check, he immediately notified the bank on which it was drawn to stop payment. On February 13, 1930, he delivered to a motor company in Lexington a Ford sedan automobile to be held as security for payment of the \$200 check and protest fee. Later he advised the motor company to sell the car in order that the debt might be satisfied (Ex. M).

Captain Hunter McGuire, Infantry, testified for the defense, by deposition, that accused applied to him in January, 1930, for a loan but that witness advised him, on a date which witness did not recall, that he regretted that he could not let him have the money. Witness testified that he had previously loaned accused \$500 which had been repaid as promised and that from past dealings he believed that accused might reasonably have expected him to make the loan requested (Def. Ex. 2).

Mr. R. W. Collins, a horsebreeder and racer and crude oil producer, testified for the defense, by deposition, that about February 10, 1930, accused verbally applied to him for a loan of \$300 but that witness verbally advised him that he could not make it at that time. Witness had previously loaned money to accused (Ex. 3).

Accused testified that at the time the various checks in question were written he believed that he would have sufficient funds in bank to meet them when presented (R. 65). With respect to the check for \$225.50 given to the City Hall Garage, he stated that he deposited about \$263 on the morning on which he drew the check and although he withdrew \$170 on the same day, "at the time it was drawn I had the money, money to be used for that purpose". At the time the \$200 check on The Fort Thomas Bank was drawn and deposited, accused believed that he would obtain money from Captain McGuire or Mr. Collins for the purpose of covering it and in the event that he did not, that the bank on which the check was drawn would possibly cash it although his balance was insufficient to cover (R. 70). To cover the \$450 check, he expected funds from Captain McGuire or Mr. Collins (R. 64,65). He testified that at the time of trial all his financial obligations were paid save debts in the amount of about \$1000 or \$1200, and that all of his remaining creditors were satisfied with the arrangements which he had made for payment (R. 63).

There were introduced in behalf of the defense letters of commendation from Colonels L. D. Gasser, Infantry, and Dana T. Merrill, I.G.D., and Lieutenant Colonel E. J. Moran, Infantry. Colonel Gasser stated that he considered accused "a normal average officer" (Ex. 8). Colonel Merrill stated that the services of accused had been satisfactory and that he had demonstrated his reliability as an officer (Ex. 9). Colonel Moran stated that he had found accused's performance of duty satisfactory and his conduct and habits exemplary (Ex. 12). Letters from four former officers referring to accused's creditable service in combat during the World War were also introduced (Exs. 10,11,13,14). It appears by copies of correspondence introduced by the defense that accused was seriously wounded in action in October, 1918 (Exs. 15-20).

4. The evidence shows that at the time and place alleged in the Specification, Charge I, accused received from individual students of the Advanced Course of the R.O.T.C. of the University

of Kentucky the sum of \$255.16, collected by him from monies paid on account of commutation of subsistence and intended to settle the indebtedness of the various students arising from the purchase by them of belts, the belts having been ordered and delivered, through accused, in October, 1929. The amount in question was owing to the Reveille Legging Company which had sold the belts and it was the duty of accused to transmit it to that concern at once, as he contends he did attempt to do. The money was not, however, paid to the Reveille Legging Company until after complaint had been made, and in view of this and the other facts in evidence the court was justified in finding that the money intrusted to him was in fact fraudulently converted by accused to his own use, and that the offense of embezzlement was thereby committed. It was shown that on January 11, 1930, there was prepared for accused's signature a letter reciting the transmittal to the seller of a check to cover, and accused stated that he mailed with this letter a check on the First National Bank & Trust Company for the amount owing. Neither the letter nor the check was ever received by the Reveille Legging Company and the check was never presented to the bank for payment. On the evidence, a conclusion that it was never sent by accused would be justified. In any event, had it been presented to the bank it would not, on account of insufficiency of funds, have been paid. Accused stated that he considered the transaction involving the purchase of the belts a personal one, that he believed that the obligation to pay for the belts was his own, and that his failure to make the payment did not involve a breach of trust. But the evidence as a whole, including the letter by which the belts were ordered, leaves no real doubt that a fiduciary relation did exist in that accused acted throughout the transaction as an agent for the individual students and the seller, and that being an agent for the students, it was his legal duty to transmit to the Reveille Legging Company, in behalf of the students, the money received from them.

The evidence also shows that on February 3, 1930, accused made and uttered to the City Hall Garage his check on the First National Bank & Trust Company of Lexington for \$225.50, as alleged in Specification 2, Charge II. He made a deposit on the same day sufficient to cover this check but promptly withdrew most of it, leaving, as he must have known, an insufficient balance to care for the check when presented in normal course. On the following day, as alleged in Specification 1, Charge II, he deposited his worthless check on The Fort Thomas Bank for \$200 and by means of this

deposit created an apparent balance with the First National Bank & Trust Company sufficient to cover the check given to the garage, and thus caused its payment. It appears that at the time he deposited the \$200 check he knew he had insufficient funds in The Fort Thomas Bank to pay it, and since his balance at that bank was and had been for many months only \$5.34 and since the check was in fact dishonored, it must be concluded that he had no reasonable grounds for expecting that the check would be paid. He testified with respect to this latter check, as well as the others, that he believed that he could borrow money from friends sufficient to pay them, but it is clear that this belief was not reasonably justified. His application to Collins was made orally and was denied at the time it was made. He had not at the time of the check transactions received from Captain McGuire a response to his request for a loan, though more than sufficient time for transmittal of the response had elapsed. Had accused genuinely relied on a loan from Captain McGuire, it would have been but rational for him to await the funds from this source instead of uttering checks known to be worthless in fact when uttered. On all the evidence, the Board of Review can reach no conclusion other than that the transactions with respect to these two checks were fraudulent in that they were conceived and carried out by accused with the deliberate purpose of obtaining by deceitful means funds and credit to which he was not entitled and which he had not been able to obtain by honest methods. His present assertion of good faith is not consistent with what he did. Because of its fraudulent character, the manipulation by accused of the checks must be deemed conduct unbecoming an officer and a gentleman and violative of the 95th Article of War.

The evidence also shows that on February 10, 1930, accused made and deposited with The Fort Thomas Bank his check on the First National Bank & Trust Company for \$450, as alleged in Specification 3, Charge II. It is shown that he knew at the time of depositing this check that he did not have sufficient funds in the drawee bank to pay it. For the reasons indicated above, the Board of Review is convinced that he did not have any reasonable grounds for believing that he would have sufficient funds on deposit for its payment when presented. Although he knew he had insufficient funds in The Fort Thomas Bank to meet the check, he withdrew \$50 from that bank on the day of the deposit, the payment being made with the expectation by the bank that the check deposited would be paid. It is true that accused stopped payment on the \$450 check after payment had been refused by the drawee bank, but his

fraud in obtaining credit with The Fort Thomas Bank and in using that credit had already been accomplished. In the opinion of the Board of Review, accused's conduct with respect to this check was also unbecoming an officer and a gentleman within the meaning of the 95th Article of War.

The evidence further shows that at about the time alleged in Specification 5, Charge II, accused officially stated to Major Meredith that he believed that he had sufficient funds in the First National Bank & Trust Company on January 10, 1930, to pay the check which he asserted he had sent to the Reveille Logging Company. Accused stated in his letter to the Corps Area Commander that at the time the check was made he believed that he had sufficient balance to care for it, this because of a deposit which he believed he had made in that bank. In view of all the circumstances in the case, including the fact that at no time during January, 1930, did accused's balance at either bank mentioned in the evidence exceed \$17, the court was fully justified in concluding that accused's statement was made with knowledge of its falsity. His conduct in the premises was a violation of the 95th Article of War.

5. Five of the eleven members of the court joined in a recommendation for clemency as follows:

"The following members of a General Court Martial which on this date tried Captain Richard S. Gessford, Infantry, D.O.L., recommend that clemency be exercised in his case, in view of his war record and his record since the war".

6. The Army Register shows that accused was born July 5, 1894, and has had military service as follows: "2 lt. Inf. Sec. O. R. C. 15 Aug. 17; active duty 15 Aug. 17; 1 lt. N. G. 28 Apr. 18; hon. dis, 23 Apr. 19--2 lt. of Inf. 1 July 20; capt. 1 July 20; 1 lt. (Nov. 18, 22); capt. 2 Sept. 25".

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 is legally sufficient to support the findings and sentence and

warrants confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War, and is authorized for violation of the 93d Article of War.

J. M. Chief, Judge Advocate.
Walter D. Quie, Judge Advocate.
Robert O. Hoover, Judge Advocate.

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

Military Justice
 C. M. 193003.

Oct. 31, 1930.

U N I T E D S T A T E S	)	FIRST CAVALRY DIVISION
)	
v.	)	Trial by G. C. M., convened at
	)	Fort D. A. Russell, Texas,
Private ELMER SIMPKINS	)	August 8, 1930. Dishonorable
(6373749), Troop A, 1st	)	discharge and confinement for
Cavalry.	)	fourteen years and nine months.
	)	Disciplinary Barracks.

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

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

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

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

Specification: In that Private Elmer Simpkins, Troop "A", 1st Cavalry, did, at Fort D. A. Russell, Texas on or about May 19, 1930, in the execution of a conspiracy to desert the service of the United States previously entered into with General Prisoner Marion Champ and Private Charles Howell, Detachment Medical Department, Fort D. A. Russell, Texas, desert the service of the United States, and did remain absent in desertion until he was apprehended at Fort Stockton, Texas, on or about May 20, 1930.

CHARGE II: Violation of the 73rd Article of War.

Specification: In that Private Elmer Simpkins, Troop A, 1st Cavalry, did, at Fort D. A. Russell, Texas on or about May 19, 1930,

through design suffer General Prisoner Marion Champ and Private Charles Howell, Detachment Medical Department, Fort D. A. Russell, Texas, prisoners duly committed to his charge to escape.

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

Specification: In that Private Elmer Simpkins, Troop A, 1st Cavalry, did, at Fort D. A. Russell, Texas on or about May 19, 1930, feloniously take, steal, and carry away one (1) Belt, Cart., Cal. 30, mtd., M/14, of the value of about Two Dollars and Eighty-nine cents (\$2.89); one Blanket, saddle, of the value of about Seven Dollars and Fifty cents (\$7.50); one (1) Bridle, Cav., M/09, of the value of about Eleven Dollars and Fifty cents (\$11.50); one (1) case, oiler and thong, complete with brush and thong, of the value of about Fifty-nine cents (\$.59); one (1) cover, front, sight, of the value of about Five cents (\$.05); one (1) gun sling M/07, of the value of about One Dollar and Thirty-one cents (\$1.31); one horse, riding, of the value of about One Hundred Sixty Dollars and Eighty cents (\$160.80); two sets harness, escort wagon, wheel, single set, complete with collars, of the value of about Seventy Dollars (\$70.00); two (2) Mules, draft, of the value of about Three Hundred Twenty Six Dollars and Fifty-two cents (\$326.52); one (1) pistol, automatic, Cal. 45, M/11, of the value of about Twenty Six Dollars and Thirty-eight cents (\$26.38); one (1) Rifle, US, Cal. 30, M/03, of the value of about Thirty Two Dollars and Seventy-five cents (\$32.75); one (1) rifle scabbard, M/04, of the value of about Six Dollars and Thirty-eight cents (\$6.38); one (1) saddle, McClellan Cav., M/04, of the value of about Thirty Eight Dollars (\$38.00); one (1) pair suspenders, Cart. Belt, of the value of about Ninety-eight cents (\$.98); one (1) Wagon, escort, of the value of about One Hundred Seventy Two Dollars (\$172.00), Total value of about Eight Hundred Fifty Seven Dollars and Twenty-two cents (\$857.65), property of the United States furnished and intended for the military service thereof.

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

Specification: In that Private Elmer Simpkins, Troop "A", 1st Cavalry, in conjunction with Private Charles Howell, Detachment, Medical Department, Fort D.A. Russell, Texas, and General Prisoner Marion Champ, did, at about seven miles south of Fort Davis, Texas, on the Marfa, Fort Davis Road, on or about May 19, 1930, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Mr. Henry Sowell, one Ford automobile, the property of the Texas Highway Department, value about \$300.00.

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 fifteen years. The reviewing authority disapproved so much of the finding of guilty of the Specification, Charge III, as involved detailed alleged descriptions of the articles mentioned, and as involved the finding of aggregate value of the various articles, approved the sentence but remitted three months of the confinement imposed, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. The evidence shows that on the morning of May 19, 1930 (R. 10), while on duty as a mounted sentry of the prison guard at Fort D.A. Russell, Texas (R. 7, 10), accused was given charge of Prisoner Charles Howell and General Prisoner Champ and instructed to obtain a team of mules equipped with harness, and an escort wagon, and was sent out to deliver fuel (R. 11, 12, 25). Accused was equipped with a cartridge belt, saddle, blanket, bridle, oiler and thong complete, front sight cover, gun sling, horse, pistol, rifle, rifle boot and suspenders, cartridge belt, all of which had been issued to him (R. 11, 15). Later in the morning he was seen with the prisoners using the pair of mules with harness, and the escort wagon (R. 12) all of which had been obtained from the quartermaster (R. 25). The list prices

of the various articles are substantially as alleged in the Specification, Charge III (R. 32). Neither accused nor the prisoners returned to the guardhouse "at the proper time" (R. 10, 12, 14), and the three were apprehended by a sheriff at Fort Stockton, Texas, while driving in a stolen car, about 1 A.M., May 20, 1930 (R. 23, 30). Accused had in his possession a "holster and belt" (R. 23). After the apprehension a government pistol was found 30 or 40 feet from the scene of the arrest (R. 23). The horse, saddle, bridle and rifle boot were returned to the troop supply sergeant by members of a searching party (R. 16).

Private Charles Howell, Medical Department, who stated that he had been told that he probably would not be tried if he told the truth (R. 26), testified that during the morning of May 19, 1930, while witness was a guardhouse prisoner under the charge of accused, the latter and Prisoner Champ "talked it over among themselves about leaving", said "that was the best chance, and they were going to take off no backing out", and that the three then "walked" away "towards Fort Davis", witness going along because accused had a gun (R. 27, 28). The horse and mules were tied to the wagon and left about three miles from "town", - "down over a bank, kinder." The rifle was left in the wagon, and the men "kept on walking until dark" (R. 28). Accused took the pistol with him, but threw it away after the apprehending officer had fired upon them and just before the arrest was consummated (R. 31).

About 9.00 P.M., on May 19, 1930, while Mr. Henry Sowell and his wife were riding in a Ford automobile, the property of the State (Texas) Highway Department, value about \$300.00 (R. 17, 20), on the Davis-Marfa road about seven or eight miles south of Fort Davis, accused fired two shots from his pistol from a point approximately 100 feet ahead of the car (R. 17, 29). Sowell stopped and was immediately confronted by accused, in company with the two prisoners (R. 17, 18). Accused pointed the pistol from his hip at Sowell and, after asking why Sowell had not stopped "at the first shot" and after some other conversation, told him to get out of the car and go down the road. Both Sowell and his wife got out of the car and accused and his companions got in (R. 18, 29), "pushed it off in high gear and drove away with it" (R. 19). Sowell testified that he was in fear of accused and "did not take any chances" but did what accused told him to do. Howell testified that he, accused and

Champ "kept on driving" the car until they were apprehended (R. 29, 30). The car was returned to the Highway Department on the following day (R. 20).

Accused remained silent at the trial.

4. The evidence shows that accused absented himself without leave at the time and place alleged in the Specification, Charge I, and remained absent until apprehended as alleged. Not only did he deliberately plan his unauthorized departure in connivance with one of the prisoners, but, as alleged in the Specification, Charge II, permitted both prisoners committed to his charge to escape. In view of the testimony of Howell and all the circumstances in the case, the court was justified in finding that accused intended to desert, that his desertion was committed in the execution of a conspiracy, and that it was through design that he suffered the prisoners to escape.

The evidence also shows that at the time and place alleged in the Specification, Additional Charge, accused, through force and fear engendered by the use of the pistol, took and carried away from the presence of Sowell the Ford automobile described, the property of the Texas Highway Department, of the approximate value alleged. Intent to steal is to be inferred from the circumstances. The elements of the offense of robbery, as charged, are sufficiently proven.

As to the Specification, Charge III, the evidence sufficiently shows the larceny of the pistol described, as charged. The evidence further shows that the other articles described in this specification were taken by accused and his companions and carried away for a short distance, but, in the opinion of the Board of Review, the evidence does not show that accused intended to deprive the United States of its property therein. The proof shows, on the other hand, that the horse, mules, wagon, etc. were abandoned three miles from the point of departure and under circumstances conducive to their prompt recovery by the proper officers of the Government, and that they were so recovered. They were obviously used only to further the immediate secrecy of the desertion and escape. There is nothing to indicate any purpose on the part of accused or his companions to dispose of them to another, or in any way permanently to deprive the United States of its use or ownership thereof. There being no substantial proof, direct or circumstantial, of an intent to steal, the of-

fense of larceny, as to these articles, is not established. The proof does, however, as indicated, show that accused committed the lesser included offense of willfully and knowingly misapplying these articles, in that by using them to further his escape he devoted them to an unauthorized purpose (Par. 150 1, M.C.M.; C.M. 147022, Murphy). There is no direct proof as to the value of any of the articles described in this specification. None of the articles was before the court for its inspection. Since they were issued for use it may, however, properly be inferred that they were serviceable and were of some value (C.M. 189745, Millerich; C.M. 185034, Pitt; C.M. 183954, Jackson; C.M. 153955, Lane). In view of the nature of the property misapplied, which included a horse, two mules and a wagon, it may properly be inferred that it was, in the aggregate, worth more than \$50 (C.M. 115242, Grissom).

5. Accused enlisted on September 12, 1929, with no prior service, and was 22 years and 8 months of age at the time of the commission of the offenses.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges I and II and the Additional Charge and their specifications; legally sufficient to support the finding of guilty of Charge III but legally sufficient to support only so much of the finding of guilty of the Specification, Charge III, as involves the larceny, as charged, of one pistol, of some value, property of the United States, furnished and intended for the military service, and as involves the offense of knowingly and willfully misapplying the remaining property described in the specification, of aggregate value in excess of \$50, property of the United States, furnished and intended for the military service; and legally sufficient to support the sentence.

J. P. Miller, Judge Advocate.

Walter D. Clark, Judge Advocate.

Robert W. Hoover, Judge Advocate.

2. The evidence shows that accused, Sergeants Thomas J. Sorrell, Company L, 26th Infantry, and Charles L. Bailey, Company I, 26th Infantry, Privates Justino C. Soto and Eduardo San Quirico, both of Company B, 26th Infantry, and others were in the Annex Restaurant, Plattsburg, New York, about midnight of June 30-July 1, 1930 (R. 11,15,23,35). Soto and San Quirico, apparently Porto Ricans, while conversing in Spanish, were interrupted by Sergeant Sorrell who touched Soto on the shoulder and inquired if he could speak English. Soto replied in the affirmative and was told by Sorrell, "Well, speak it. You are in America now". Soto retorted, "You make me speak it". Sorrell then struck Soto and a fight ensued, Sorrell, Bailey, Soto and San Quirico participating (R. 11,23,24). No serious injuries resulted to the participants, and they separated in a few minutes (R. 24). During the fight San Quirico had a pair of "brass knuckles" (R. 31,66). Accused was present in the restaurant during the fight but did not participate (R. 59). Soto was "thrown out" of the restaurant and San Quirico joined him shortly (R. 12). They ran toward their quarters, in Plattsburg Barracks, which was approximately a hundred yards from the restaurant, and were pursued by accused (R. 13,16,46,47). Accused, as well as San Quirico and Soto, had been drinking (R. 52,58,59,81,84). Soto testified that during the pursuit accused struck at him with what appeared to be a knife, but that the blow was avoided (R. 13, 14). San Quirico testified that he was overtaken by accused in front of B Company Barracks and that there accused struck him four or more times with a knife or razor, wounding him twice (R. 17). The more serious wound was a cut about seven inches long on the face and neck, completely severing the lobe of the left ear, the superficial temporal artery, and the transverse facial artery and associated veins. The other wound was a small superficial cut on the left arm (R. 55). After escaping from his assailant, San Quirico went to the station hospital where he was treated by Captain Harold W. Kohl, Medical Corps (R. 21,55). Captain Kohl testified that in his opinion the wound inflicted upon San Quirico's face and neck was made by a very sharp instrument, a knife or razor, and might have been fatal had not medical attention been rendered (R. 55,56).

Very soon after the assault, accused encountered a Private Walsh, and remarked, "I got them" (R. 45). Accused entered the restaurant within a few minutes, at which time there was blood on his right hand (R. 27,46,52). He remarked, "I fixed one of them", and displayed a knife with the statement that "This is what I fixed

him with* (R. 52,71).

Accused, after being advised of his rights as a witness in his own behalf, elected to remain silent (R. 87).

3. The commission by accused of the assault with a dangerous weapon, at the time and place and in the manner alleged, is sufficiently shown. The identity of the assailant was questioned by the defense, but the fact that accused struck the blows is clearly shown by the direct testimony of the victim of the assault, the circumstances of the pursuit, and accused's statements following the assault. Intent to do bodily harm is to be inferred from the nature of the weapon used, the character of the wounds inflicted and the other circumstances in the case.

4. The charge sheet shows that accused enlisted April 20, 1930, with prior service in Company M, 26th Infantry, from March 10, 1924, to March 9, 1927, and from March 10, 1927, to April 19, 1930, and that he was 36 years and 11 months of age at the time of the commission of the offense.

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

E. P. McCall, Judge Advocate.
Walter D. Clue, Judge Advocate.
Walter D. Clue, Judge Advocate.



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

Military Justice
 C.M. 195135.

Oct. 17, 1930.

UNITED STATES

THIRD CORPS AREA

vs.

Private THOMAS F. CAVANAUGH
 (6778538), 1st Provisional
 Platoon, Troop A, 2nd Armored
 Car Squadron.

Trial by G.C.M. convened at
 Holabird Quartermaster Depot,
 Baltimore, Maryland, September
 16, 1930. Dishonorable dis-
 charge and confinement for two
 years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
 McNEIL, CLINE and HOOVER, Judge Advocates
 ORIGINAL EXAMINATION by DINSMORE, Judge Advocate

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II and Specifications 2 and 3 thereunder, and the sentence.

2. With respect to Specification 4, Charge II, alleging the larceny by accused on or about August 1, 1930 of a base ball glove, value about \$5.00, property of Company D, 1st Motor Repair Battalion, the evidence shows that on or about June 15, 1930 at Holabird Quartermaster Depot, Baltimore, Maryland, a base ball glove, of the approximate value alleged, the property of Company D, 1st Motor Repair Battalion, was loaned to accused without "any definite date set for its return", and was not returned to the organization thereafter (R. 18). Accused absented himself without leave from the Holabird Quartermaster Depot on August 1, 1930 (R. 10) and remained absent until apprehended by civil authorities in an apartment at 933 North Calvert Street, Baltimore, Maryland on August 11, 1930 (R. 5). He was employed during his absence and at the time of apprehension was living with a woman registered as his wife. When placed in arrest a suit of clothes and a suit case which had been taken from the depot at the time accused absented himself without leave were found in the apartment (R. 5, 6). The base ball glove was subsequently found in a room on Calvert Street (R. 17), apparently the one which had been occupied by accused (R. 17, 19). Accused testified that he intended to return the glove "after the base ball season" (R. 19).

The evidence is insufficient to support the finding of guilty of larceny under this specification for the reason that it does not show that the glove was taken and carried away by trespass. It might be inferred from the evidence that after accused had borrowed the glove he decided to and did convert it to his own use but such conversion of the borrowed property did not amount to larceny inasmuch as it did not involve the element of trespass (M.C.M., page 172). Larceny may be committed by a borrower if at the time the article is borrowed he has the intention to convert it (M.C.M., idem), but there is nothing in this record of trial to indicate that such an intention existed at the time the glove was borrowed or that any fraudulent intent whatever existed prior to the conversion which took place, if at all, at about the time accused absented himself without leave, that is, about 45 days after he secured lawful possession of the property.

3. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II and Specifications 2 and 3 thereunder and the sentence, but legally insufficient to support the finding of guilty of Specification 4, Charge II.

E. J. McCreary

Judge Advocate.

Walter Deane

Judge Advocate.

Hubert P. Hoover

Judge Advocate.

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

(77)

Board of Review
CM 193191

Nov. 26, 1930.

U N I T E D S T A T E S)

SECOND DIVISION

v.)

Private JOHN T. HOSMER, Jr.)
(6247100), Headquarters)
Troop, 5th Cavalry.)

Trial by G.C.M., convened at
Fort Sam Houston, Texas,
September 22, 1930. Dishonor-
able discharge and confinement
for two (2) years and four (4)
months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and HOOVER, Judge Advocates.

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

2. By the Specification, Charge III, it was alleged that accused did take, steal and carry away an automobile, the "property of H. Rankin". After the conclusion of the presentation of evidence and after the trial judge advocate had stated that it had been proved that the automobile was the property of Mrs. G. A. Opem, and had invited attention to paragraph 73 of the Manual for Courts-Martial, the president and law member announced that the "court directs that the specification under Charge III be changed to read 'property of Mrs. G. A. Opem' instead of 'property of H. Rankin'". After oral arguments the court then closed and found accused guilty of this Charge and Specification. The action of the court in thus directing the amendment of the Specification upon which accused was arraigned and tried, was tantamount to reaching findings by exceptions and substitutions whereby the allegation of identity of the owner of the stolen property might be changed. It has been held that such a variance between the allegations and findings is fatal to a conviction of larceny (C. M. 110910, Brooks; C. M. 157982, Acosta; C. M. 164042, Rodden). It follows that the record of trial is not legally sufficient to support the findings of guilty of Charge III and its Specification.

3. Under Charge IV and its Specification, accused was found

guilty of suffering, through neglect, a pistol, value about \$26.38, military property of the United States, to be lost. There was no proof of the value of the pistol; it was not physically before the court. Though the court might properly take judicial notice of the official price list showing the price of pistols issued for use in the military service, as was this one, such listed price was not alone sufficient to show actual value at the time of the larceny, equivalent to the list price. Since the pistol had been issued for use it may be inferred that it was of some value (C. M. 183954, Jackson; C. M. 185034, Pitt; C. M. 188766, Ramsey; C. M. 189745, Millerick) The maximum punishment by confinement authorized by paragraph 104 c of the Manual for Courts-Martial for this offense, that is, for losing through neglect property not shown to be of a value in excess of \$20, issued for use in the military service, is confinement at hard labor for three months.

4. The maximum authorized punishment for the remaining offense of which accused stands properly convicted, that is, desertion terminated by apprehension, accused having been in the military service for not more than six months at the time of desertion, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification; legally insufficient to support the findings of guilty of Charge III and its Specification; legally sufficient to support so much only of the findings of guilty of Charge IV and its Specification as involves findings of guilty of losing through neglect, at the time and place alleged, the pistol described, of some value not in excess of \$20; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and nine months.

E. Oschrey, Judge Advocate.
J. M. Cannon, Judge Advocate.
Robert D. Hoover, Judge Advocate.

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

Military Justice
GM 193292

NOV 14 1930

U N I T E D S T A T E S)

EIGHTH CORPS AREA

vs.)

Trial by G.C.M., convened at
Fort Francis E. Warren, Wyoming,
August 26, 1930. Confinement
for eight (8) years.
Disciplinary Barracks.

General Prisoner JOHN)
OLLES.)

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

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

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

Specification: In that General Prisoner John Olles, having been duly placed in confinement at Fort Francis E. Warren, Wyoming, on or about December 7, 1929, did at Fort Francis E. Warren, Wyoming, on or about July 11, 1930, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner John Olles, did, at Fort Francis E. Warren, Wyoming, on or about July 11, 1930, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private Dallas A. Windham, Company "F" 1st Infantry, one (1) Automatic Pistol, Caliber 45, Model 1911, the property of the United States, and issued for the military use thereof, the value about \$26.38, Twenty six dollars and thirty eight cents.

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

Specification: In that General Prisoner John Olles did, at Fort Francis E. Warren, Wyoming, on or about July 11, 1930, assault Private Dallas A. Windham, Company F, 1st Infantry, a sentinel in the execution of his duty, by striking him with his fists.

Accused pleaded to Charge I and its Specification guilty, to Charge II and its Specification not guilty, to the Specification, Charge III, "as written, not guilty. To the specification as amended by changing the last six words thereof to read 'by grabbing with his hands', guilty", and guilty to Charge III. He was found guilty of Charges I and II and the specifications thereunder and guilty of the Specification, Charge III, "as pleaded" and guilty of Charge III "as pleaded". No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for eight years. The reviewing authority approved the sentence, directed its execution, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement.

2. The evidence shows that on July 11, 1930, while accused was a general prisoner in lawful confinement in the Post Guardhouse, Fort Francis E. Warren, Wyoming (R. 10,11; Ex. 1), he was sent out to work under a sentry, Private Dallas Windham, Company F, 1st Infantry (R. 6). The sentry was armed with an automatic pistol, Caliber .45, (R. 7), which had been issued to him (R. 20), and was detailed to take accused, with three other prisoners, Winter, Latulippe, and Stimmell, to cut the lawns in front of the 1st Infantry officers' quarters. Sometime thereafter the sentry returned, unarmed, without the prisoners, "scratched up and bruised quite a bit and a bit bloody" (R. 8). Winter voluntarily returned (R. 9). Accused was subsequently returned to military control at Fort Crook, Nebraska (R. 12). The pistol was not recovered (R. 14).

Private Windham testified that he received the prisoners at about 1 p.m. and put them to work on the lawns in front of the officers' quarters (R. 17). At about 4 p.m. he took them near a dump where accused "caught me around the head, like this (illustrating), and just squeezed me around the head and the mouth, and all the time he had me by the head and the mouth, and then he made a pass for my gun. Prisoner Stimmell, he had me around the waist -- they all three had me -- they just got me down, so I didn't have a chance to get my gun.

Then they tied me up and put me in that little old shack over there" (R. 18,19). One of the assailants took witness' pistol and accused "covered" witness with it while the other prisoners tied him up with wire. After he was tied accused, Stimmell and Latulippe ran way, with the pistol, going towards the "Happy Jack Road". Witness worked himself loose and reported back to the guardhouse (R. 20,21). Winter testified in substantial corroboration of Windham (R. 25-28).

Accused chose to remain silent (R. 28).

3. The evidence, together with the pleas of guilty, establishes the escape from confinement as alleged in the Specification, Charge I. The evidence as to the Specification, Charge II, establishes the theft of the pistol as alleged, by force and violence. The essential elements of the offense of robbery were shown. The evidence, together with the pleas of guilty, also establishes the assault upon the sentinel, as found under Charge III and its Specification. Accused was charged with assaulting the sentinel "by striking him with his fists", and was found guilty, in accordance with the pleas and evidence, of assaulting him "by grabbing with his hands". This change did not alter the substantive nature or the identity of the offense, and was not improper.

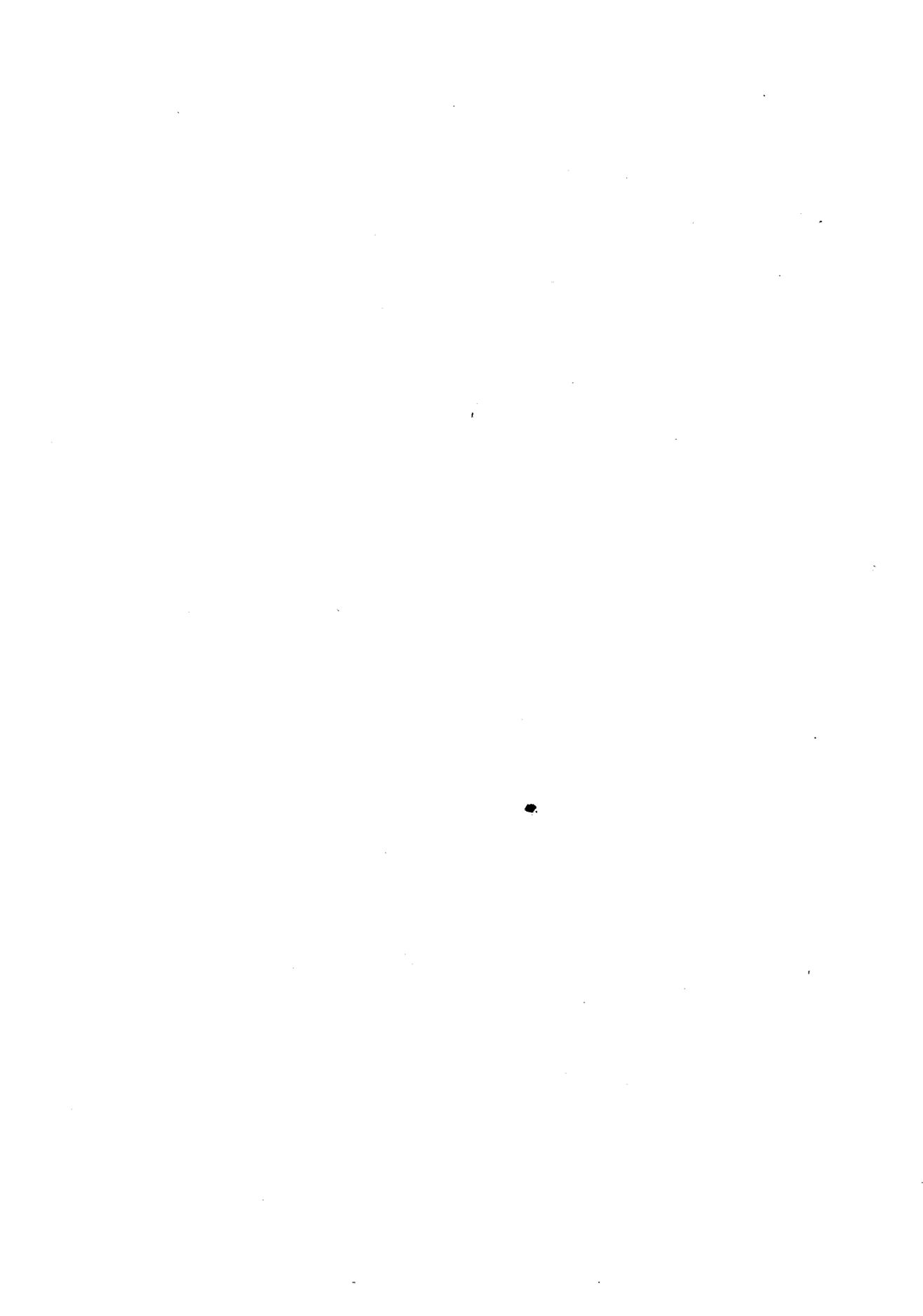
4. The charge sheet shows no prior service, and shows that accused was 30 years and 10 months of age at the time of the commission of the offense.

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

E. M. Sheef, Judge Advocate.

John P. ... Judge Advocate.

Hubert D. Hoover, Judge Advocate.



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

Military Justice
C.M. 193315

Nov. 14, 1930

U N I T E D S T A T E S	)	FOURTH CORPS AREA
)	
vs.	)	Trial by G.C.M., convened at
	)	Fort Moultrie, South Caro-
Private GEORGE A. ROSBOROUGH	)	lina, October 3, 1930. Dis-
(6357596), Headquarters Com-	)	honorable discharge and con-
pany, 8th Infantry.	)	finement for one (1) year.
	)	Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and HOOVER, Judge Advocates.

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

2. By the evidence for the prosecution it sufficiently appears that the owner was deprived of possession of the automobile described in the specification for a period of not exceeding three hours on the night of August 14, 1930 (R. 5); that the accused, without authority or consent of the owner, entered that automobile then parked in a well-lighted place (R. 4,12) on Sullivan's Island (which lies a few miles off Charleston, S. C., and is an island approximately four miles long and one-half mile wide, whereon is located the Fort Moultrie military reservation), and, accompanied by another soldier, drove the car (R. 9,13) while in an intoxicated condition (R. 9,10,17)

from the pleasure resort (R. 8) where it was parked to the mounted orderly station, Fort Moultrie (R. 9), then to Headquarters Company, 8th Infantry, then to Mt. Pleasant (a nearby town on the adjacent mainland whence escape into the Carolina interior was easy), then to the Isle of Palms (lying further seaward and wherefrom land egress is impossible except by connecting bridge through Sullivan's Island and Fort Moultrie military reservation), then back to Sullivan's Island where a stop was made to visit a girl friend of the accused (R. 9). While driving in the direction of the military post, near the place from which the car was taken (R. 7,9), the accused and his companion were pursued by a Sullivan's Island policeman in a motor car and apprehended, and the car was immediately restored to the owner's possession by the apprehending officer (R. 5,7,9). The restricted area in which the evidence for the prosecution shows the accused operated the car after its wrongful taking reveals a purpose to make wrongful use thereof for a pleasure drive of short duration. There is nothing in the evidence from which may reasonably be inferred an intent on his part permanently to deprive the owner thereof, a necessary element of the offense of larceny. The evidence does show a wrongful taking and carrying away of the car by the accused, without the consent of the owner, a lesser included offense in violation of the 96th Article of War.

3. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings of guilty of wrongfully taking and carrying away the automobile described, at the time and place alleged, without the consent of the owner, in violation of the 96th Article of War, and legally sufficient to support the sentence.

J. L. U. Chief, Judge Advocate.

J. W. Conrad, Judge Advocate.

Robert D. Hoover, Judge Advocate.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
CM 193543

DEC 22 1930

U N I T E D S T A T E S)	FIRST DIVISION
)	
vs.)	Trial by G.C.M., convened
)	at Plattsburg Barracks,
Private DAVID A. KAZMAIER)	New York, August 4 and
(6325435), Company H, 26th)	October 16, 1930. Dishonor-
Infantry.)	able discharge and confine-
)	ment for twenty (20) years.
)	Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW,
MONEIL, CONNOR, and MOFFETT, Judge Advocates.
ORIGINAL EXAMINATION by CONNOR, Judge Advocate.

1. The accused was tried on the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private David A. Kazmaier, Company H, 26th Infantry, did, at Plattsburg Barracks, New York, on or about June 10, 1930, with intent to commit a felony, viz., murder, commit an assault upon Sergeant John Donley, Company H, 26th Infantry, by willfully and feloniously shooting the said Sergeant John Donley, Company H, 26th Infantry, in the head with an Automatic pistol, Cal. 45.

Although accused pleaded guilty to the Charge and Specification, trial was in all respects had as upon a plea of not guilty, upon the conclusion of which he was found guilty as charged. 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 twenty (20) years. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

2. The evidence shows that about 7.30 o'clock of the morning of June 10, 1930, in the squad room of the building occupied by Company H, 26th Infantry, as barracks, situated at Plattsburg Barracks, New York, the accused's unwillingness to obey a certain order then and there given him by Sergeant John Donley, Company H, 26th Infantry, in regard to the proper placing of the latter's bunk led to an altercation between the two, of a nature only partly disclosed by the evidence, in the course of which accused fell on the bunk of another soldier, and was caught by the leg by Donley (R. 11, 37, 38). During the difficulty there was a heated exchange of words between Donley and accused; the latter threatening to strike Sergeant Donley on the head with a baseball bat or a cuspidor (R. 8, 9, 11). The threat was not carried out, and Sergeant Donley had no further trouble with accused that morning (R. 9).

At about 9.30 o'clock of the same morning, Private Herbert C. Daniell, of Company H, in order to mount guard at 1.30 P.M., had drawn from the Supply Sergeant pistol No. 1442, which, at about 11.00 o'clock he laid on his bunk while changing his clothes (R. 15, 16, 18). At that time accused appeared and started to clean this pistol, which was then unloaded. He laid it down when told that it had already been cleaned, and this caused Daniell to pay no further attention to him (R. 16, 18). Accused also had access to a supply of 45 calibre pistol ammunition between 8:00 and 11:25 o'clock that morning while at work with other members of the company cleaning machine guns in the basement used as the organization supply room (R. 9, 26, 28).

Within a few minutes after Daniell turned his attention away from accused, and while Sergeant Donley was sitting in the day room between Sergeant Williams and Corporal Roche engaged in listening to the radio and reading a newspaper, a report of a pistol shot was heard and simultaneously Sergeant Donley received a gunshot wound in the head, between the eyes, which resulted in the loss of his right eye (R. 9, 12, 16, 28). Immediately after this shot was fired, accused was seen near the entrance to the day (recreation) room of Company H with a calibre 45 pistol in his hand (R. 22, 24, 25). A few minutes later when accused was in the hallway with the pistol in his hand, and after Corporal Davis had failed in his effort to take it away from him, Private Albert J. Schriver induced accused to deliver the same to him (R. 14, 16, 20, 37). The pistol was cocked and warm but Schriver did not examine it to see whether it was loaded, as accused had told him "that he only had one round" and Schriver "took his statement for it" (R. 20, 37). Accused also then and there told Schriver "that he lost his head or something to that effect"; that "he was sorry he done it"; and "made the sign of the cross" (R. 21, 37). At this time accused was excited and "I guess he was more scared than anything" (R. 37). The pistol which Schriver obtained from the accused was the one issued that morning to Private Daniell for guard mount and which the latter had not

missed prior to the shooting of Sergeant Donley (R. 16) at about 11:30 o'clock (R. 9, 10, 28). The seven rounds of ammunition in the custody of Private Daniell at the time were concealed by him under his pillow and no part thereof was missing (R. 18).

On the day of the shooting of Sergeant Donley, after accused had been placed in confinement in the guard house, he was there interviewed by First Lieutenant James C. Fry, to whom, after being "properly warned", he made the voluntary statement "that Sergeant Donley had struck him that morning and that he had found a pistol of a man going on guard and shot Sergeant Donley" (Deposition of First Lieutenant James C. Fry, Ex. A, R. 10).

The accused, on the trial, elected to be sworn and testified as a witness in his own behalf. Concerning the shooting of Sergeant Donley he declared, in substance, that he did not know who shot him; that he did not remember shooting him, getting a pistol or having one taken away from him on the day of the shooting; that he remembered being taken to the guard house before noon of the day of the shooting; that since the time of his confinement he has been cognizant of events, and while he recalled talking with Lieutenant Fry he did not remember telling that officer that Sergeant Donley had struck him and he had shot Donley (R. 30, 32, 33, 35). That he remembered working in the supply room in the basement on the morning of his confinement - cleaning machine guns - but did not get any calibre 45 cartridge there; and did not remember talking with Private Daniell, when the latter was about to go on guard (R. 33, 34). Accused further testified in substance that on the morning of the shooting he received an order from Sergeant Donley to place his (accused's) bed in a certain position in the squad room and that he immediately turned it around several times but failed to satisfy the Sergeant, whereupon he requested of him an explanation of the order, which brought forth further unintelligible mumbling of the Sergeant, followed by further unsuccessful efforts on his part to move the bed to the required position. Sergeant Donley then flew into a rage, cursing and striking accused and throwing him on three or four of the beds, and several men in the squad room tried to "cool both of us down" (R. 30, 31). Accused also denied making any statement on this occasion to the effect that he would do any bodily injury to Sergeant Donley (R. 31). Accused also testified, on direct examination, respecting two previous assaults committed upon his person by Donley within a period of approximately two years prior to the difficulty in the squad room on the day the latter was shot (R. 29).

Sergeant Donley, for the prosecution, testified that during the three years of his acquaintance with the accused no trouble had arisen between them prior to the day of the shooting and that he had never struck or assaulted accused (R. 10).

Corporal Roche, for the prosecution, testified that in the squad room on the morning of the shooting Sergeant Donley "grabbed hold of his leg" when accused fell while running away from the Sergeant, but that he did not see the latter strike the former, and has never seen the Sergeant strike or offend the accused in any way during the four years witness has served in Company B (R. 11, 12, 13). That he was the only person who intervened in the difficulty between the two in the squad room, and his action consisted in speaking to both and asking Sergeant Donley to leave the accused alone when the former held the latter by the foot (R. 35, 36).

3. The evidence in the case, therefore, affords sufficient basis for a positive finding that the accused did, at Plattsburg Barracks, New York, about 11:30 A.M., June 10, 1930, shoot in the head, with a calibre 45 service pistol, Sergeant John Donley, of Company H, 26th Infantry, while the latter was reading and listening to the radio in the recreation room of the organization; and that such shooting was premeditated and done with deliberate intent to kill Sergeant Donley, an intent formed by the accused as a result of a difficulty between the two which occurred about four hours prior to the shooting. The period which elapsed between the difficulty and the subsequent assault eliminates the possibility of the act having been done in sudden heat of passion. Under the provisions of Par. 112, Manual for Courts-Martial, malice is presumed from the use of a deadly weapon and a sane person is presumed to have intended the natural and probable consequences of acts which he is shown to have committed. If the principle holds that "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce", as affirmed by the Supreme Court of the United States in *Abrams v. United States*, 250 U. S. 616, 621, then it follows necessarily that a finding that accused committed assault at the time and place alleged upon the person of Sergeant Donley with intent to commit murder, in violation of the 93rd Article of War, is warranted by the evidence in this case. Accused stands so convicted.

4. Although accused pleaded guilty as charged and after the prosecution had rested made certain statements under oath as a witness in his own behalf in derogation of such plea and amounting to a denial of guilt or knowledge of the perpetrator of the specific criminal act charged, and although the court took no action by way of compliance with paragraph 70, M.C.M., to remove the variance between such statements and plea, nevertheless the Board of Review is of the opinion that the trial proceedings are not invalidated by the failure of the court to make such explanation and statement to the accused as the occasion required, since the record of trial discloses that the trial was conducted throughout as on a plea of not guilty and the evidence as a whole is conclusive of guilt of the accused as found by the court and approved by the reviewing authority.

The record of trial contains no substantial evidence of insanity of accused either at the time of commission of the act charged or at the time of trial. The presumption of sanity contemplated in paragraphs 63 and 112, M.C.M., was therefore operative for every purpose of the trial. Prior to plea of accused, at the first session of the court in the case, defense counsel requested of the court "that a board of inquiry consisting of medical officers, be appointed to determine the sanity of the accused" on the ground that "the accused does not intelligently cooperate in his defense", thereby presenting to the court the question of existing mental condition of the accused, in consequence whereof the court directed the trial judge advocate "to request of the convening authority that a board of medical officers be convened to determine the mental condition of the accused", and continued the case (R. 5). On this question, the record of trial shows (certificate addendum to page 7) that on October 16, 1930, "The Trial Judge Advocate submitted to the court the approved proceedings of a board of Medical Officers finding the accused to be sane", and that "The court directed that the trial proceed", whereupon the accused pleaded to the Specification and Charge. Although this medical board report is to be considered as not introduced in evidence, it was not necessary under paragraph 63, Manual for Courts-Martial, that it should have been so introduced in order to enable the court to summarily dispose of the question then before the court of existing mental condition of accused; as under the cited paragraph, the court, by reason of the presumption of sanity therein stated, was empowered to constitute itself the judge of the extent to which the burden of inquiring into the mental condition of accused had been imposed upon it by the representation of defense counsel. See State v. Nordstrom, 58 Pac. 248; 53 L.R. A. 584.

5. The record and related papers show that accused had completed approximately eight years and eight months of service at the time of the commission of the offense, including two three-year enlistments wherefrom he was discharged with character "Excellent." He last enlisted on October 19, 1927, and was twenty-six years and seven months of age when the offense of which he was convicted was committed.

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


 _____ Judge Advocate.


 _____ Judge Advocate.


 _____ Judge Advocate.

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

Military Justice
C.M. 193739.

DEC. 15, 1930

UNITED STATES

EIGHTH CORPS AREA

vs.

Privates BRICE J. JOHNSTONE
(6222685) and EUGENE M. BOYCE
(6234990), both of Company D,
3rd Motor Repair Battalion,
Quartermaster Corps, and General
Prisoner WALTER WELLS.

Trial by G.C.M. convened at Fort
Sam Houston, Texas, November 10,
1930. Dishonorable discharge
and confinement for five (5) years
in case of each accused. Disci-
plinary Barracks.

REVIEW by the BOARD OF REVIEW
McNEIL, CONNOR and MOFFETT, Judge Advocates
ORIGINAL EXAMINATION by JACKSON, Judge Advocate.

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Brice J. Johnstone, Company D, 3rd Motor Repair Battalion, Private Eugene M. Boyce, Company D, 3rd Motor Repair Battalion, and general prisoner Walter J. Wells, then Private, Company D, 3rd Motor Repair Battalion, Quartermaster Corps, at Normoyle Quartermaster Depot, San Antonio, Texas, between July 1, and July 9, 1930, both dates inclusive, acting jointly and in pursuance of a common intent did, take, steal, and carry away from Warehouse No. 117, the following articles, to-wit:

2-4 ACA 51 Mack radiators, Lynete type,	@ \$280.00 each,	\$560.00
35-F.W.D. Glass Bowl Carburetors	@ 17.88 each,	643.68
21-1½-ton White Carburetors	@ 7.79 each,	163.59
30-1-ton White Carburetors	@ 7.87 each,	236.10
45-G.M.C. Marvel Carburetors	@ 7.30 each,	328.50
15-29-30 Standard B. Carburetors	@ 9.60 each,	144.00

of a total value of \$2,075.87, property of the United States, furnished and intended for use in the military service thereof.

Specification 2: In that Private Brice J. Johnstone, Company D, 3rd Motor Repair Battalion, Private Eugene M. Boyce, Company D, 3rd Motor Repair Battalion, and general prisoner Walter J. Wells, then Private, Company D, 3rd Motor Repair Battalion, Quartermaster Corps, did, at Normoyle Quartermaster Depot, San Antonio, Texas, between the dates of July 12, and July 21, 1930, acting jointly and in pursuance of a common intent, take, steal and carry away from Warehouse No. 117, two (2) crankcases, total value \$500.00, property of the United States furnished and intended for use in the military service thereof.

Each accused pleaded guilty to, and was found guilty of, the Charge and specifications thereunder. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentences, directed the execution thereof and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentences were published in General Court-Martial Order No. 672, Headquarters Eighth Corps Area, November 24, 1930.

2. The prosecution placed no evidence before the court but the defense called to the witness stand Mr. C.R. Davis, Special Agent, Bureau of Investigation, Department of Justice, San Antonio, Texas, who testified in substance that when he investigated the matter of the loss of the property involved in the specifications and charge each of the accused freely admitted his guilt and assisted the Government in recovering other material that had also been reported missing but which was not involved in the case then before the court (R. 8-10).

The accused Boyce made an unsworn statement as follows:

"When Private Johnstone asked me to go into the thing with him, I didn't have any idea of going into it with him. He asked me, but I didn't do it intentionally. He was buying a car and he couldn't make the payments on it. I didn't have but two months to do at the time. I didn't want to do it, but he kept on after me. I didn't do it intentionally, I didn't think what I was doing at the time. I was supposed to have been discharged before this, but he kept on after me". (R. 11-12).

Accused Johnstone made an unsworn statement as follows:

"Private Boyce should have thought of that alibi before he told the truth in the written statement.

I am guilty, as the written statement says, and after having suffered a loss of \$200.00 for the car and four months confinement waiting for trial, this certainly has made a Christian out of me, and I pray that I get off light". (R. 12).

Accused Wells remained silent.

3. Accused Boyce statement as to the effect that he did not intentionally commit the offenses to which he pleaded guilty is not deemed to be inconsistent with his plea nor does it show that the plea was improvidently made within the meaning of the 21st Article of War. Taking his testimony as a whole and at its full value there is nothing contained therein that amounts to more than a mere statement of mitigating circumstances.

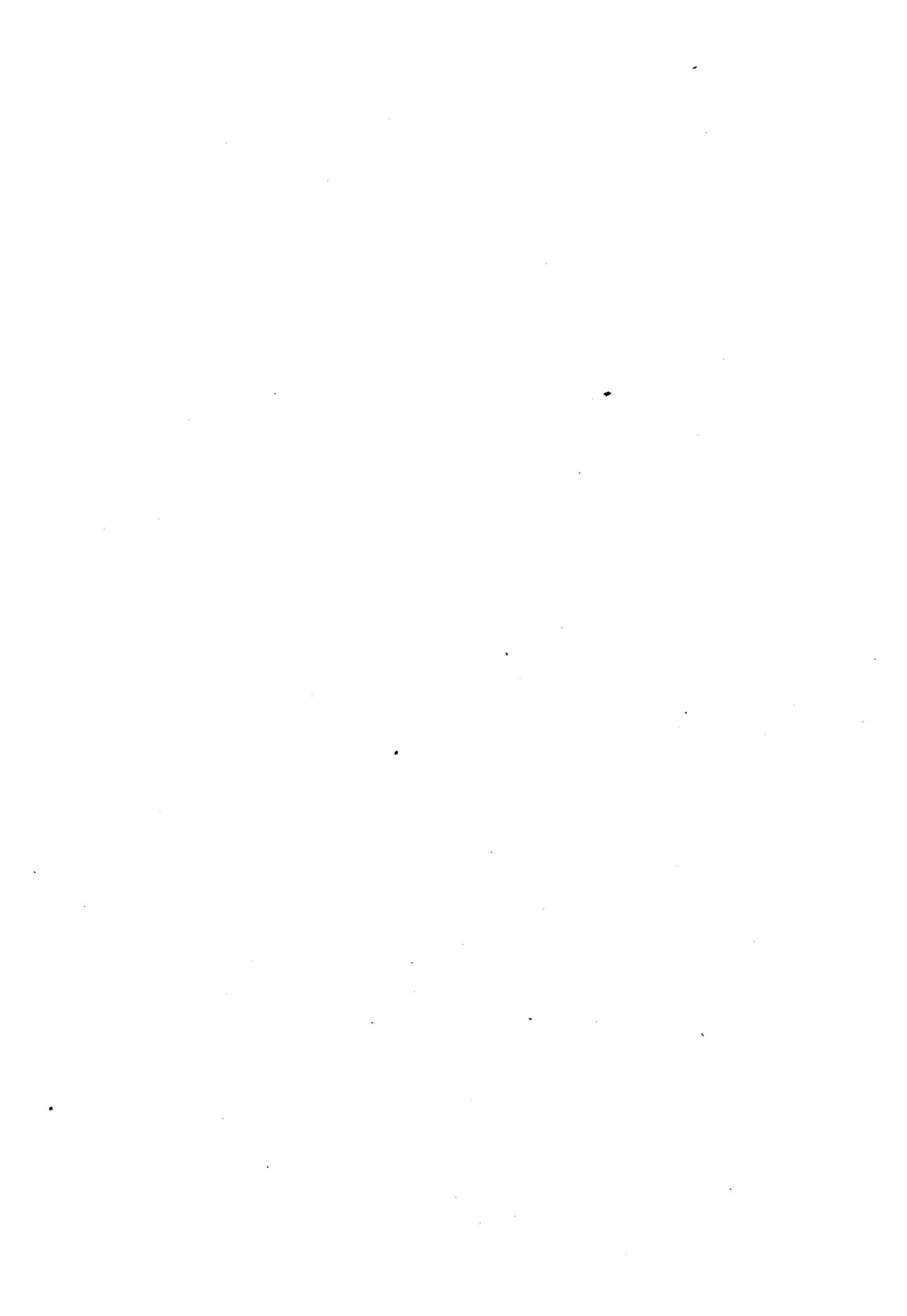
4. The charge sheet shows accused Johnstone enlisted October 13, 1927 with two years and three months prior service and that he was 25 years and 10 months of age at the time of the commission of the offenses; Accused Boyce enlisted January 27, 1927 with no prior service and was 24 years and 7 months of age at the time of commission of the offenses; Accused Wells enlisted October 25, 1929 with no prior service and was 26 years and 7 months of age at the time of the commission of the offenses.

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

E. M. Boyce Judge Advocate.

J. W. Cannon Judge Advocate.

C. M. Coffell Judge Advocate.



WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
CM 193828

JAN 14 1931

U N I T E D S T A T E S)

FIRST DIVISION

vs.)

Privates EDWARD J. MORANDE)
(6703421) and ALTON E. MINGO)
(6706247), both of Company H,)
26th Infantry.)

Trial by G.C.M., convened at
Plattsburg Barracks, New York,
November 20, 1930. Dishonor-
able discharge, suspended, and
confinement for six (6) months
in each case. Disciplinary Bar-
racks.

OPINION of the BOARD OF REVIEW,
McNEIL, CONNOR, and MOFFETT, Judge Advocates.
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate.

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

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

CHARGE: Violation of the 84th Article of War.

Specification: In that Private Alton E. Mingo and Private Edward J. Morande, both of Company H, 26th Infantry, acting jointly and in pursuance of a common intent did at Plattsburg Barracks, N.Y., on or about September 26, 1930, unlawfully sell six (6) blankets of the value of about \$28.80, issued for use in the military service of the United States.

Each accused pleaded not guilty to the Specification and Charge, and each was found guilty of the Specification, except the figures \$28.80, substituting therefor the figures \$15.00, of the excepted figures not

guilty, of the substituted figures guilty, and guilty of the Charge. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence and directed its execution, but suspended the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement. The sentence was published in General Court-Martial Order No. 438, Headquarters First Division, December 1, 1930.

3. The evidence shows that a check of Government owned blankets in the squadroom of Company H, 26th Infantry, Plattsburg Barracks, New York, on September 26, 1930, disclosed a shortage of six such blankets. Three of these blankets had been issued to a Private Burrows, two to accused Morande, and one to accused Mingo, all of whom were quartered in the squadroom. While on the way to the guardhouse to be confined, accused Mingo voluntarily stated to a corporal that he had sold the missing blankets for \$3.00 (R.6-10,17). Later, while in confinement and after having been warned by Major Richard T. Taylor that anything they might say could be used against them, each accused stated that they had sold the blankets in question at a restaurant for \$.50 apiece, or a total of \$3.00 (R.12-15). The prosecution requested the court to take judicial notice of Army Regulations governing the cost of blankets (R.12).

4. Without considering other questions involved, the Board of Review is of the opinion that the record of trial is not legally sufficient to sustain the findings of guilty of the Charge and Specification for the reason that the requisite corroboration of accused's confessions that they sold the blankets in question is wanting in the evidence of record.

An accused cannot be convicted legally upon his unsupported confession, and it was not proper for the court to consider the confessions with respect to the sale of the property in question without other evidence tending to show that the precise offense charged had probably been committed, that is, without some other evidence of the corpus delicti. Paragraph 114, Manual for Courts-Martial, lays down the rule as follows:

"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."

This is not to be construed as requiring proof of the corpus delicti independent of the confession, for the confession itself may be used in connection with other evidence to establish the corpus delicti (Flowers v. United States, 116 Fed. 241; Rosenfeld v. United States, 202 Fed. 469; Goff v. United States, 257 Fed. 294). It means nothing more than that "there should be corroborative evidence tending to prove the facts embraced in the confession; and, where such evidence is introduced it belongs to the jury, under the instruction of the court, to determine upon its sufficiency" (United States v. Williams, 1 Cliff. 5, 28 Fed. Cas. No. 16, 707; Boland v. United States, 238 Fed. 529). In applying this rule the Circuit Court of Appeals, Second Circuit, in the leading case of Daecher v. United States, 250 Fed. 566, lays down the following requirement in respect of the corroborating evidence:

"Any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof."

The court, further in the opinion, elucidated the matter thus:

"The rule can in any event be no more than that a confession wholly uncorroborated will not serve; any quantitative measure of corroboration we mean to repudiate. * * * Again, if the question were of the measure of corroboration we should of course not assume to determine how much weight the jury might give it; but, as we have said, the question is whether there was any, not how much."

The quoted language of the court in this case was, however, expressly qualified by the preliminary statement that "The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel." (CM 186681, Jackson; Wynkoop v. United States, 22 Fed. (2d) 799; Forlina v. United States, 12 Fed. (2d) 631; Pearlman v. United States, 10 Fed. (2d) 460; Litkofsky et al v. United States, 9 Fed. (2d) 877; Mangun v. United States, 289 Fed. 213; People v. Jones, 55 Pac. 698; Ryan v. State, 100 Ala. 94; People v. Jachne, 103 N.Y. 182; People v. Badgley, 16 Wend. (N.Y.) 53).

Applying this liberal but well established rule to the case in hand it is clear, in the opinion of the Board, that the corroborative evidence relied upon to support the confessions fails to meet the prescribed test. Such evidence, in the last analysis, consists of nothing more than testimony showing that the property was missing and that accused had access to it. The Manual for Courts-Martial, Paragraph 114, thus exemplifies the rule requiring proof of the corpus delicti.

"In a case * * * of alleged unlawful sale evidence that the property in question was missing under circumstances indicating * * * that it was probably unlawfully sold, would be a compliance with the rule."

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 Daeché case, supra, are, in the opinion of the Board of Review, insufficient as corroborative of the confessions in this case. There being no evidence, other than the uncorroborated confessions, of the probable commission of the offense charged, consideration of the confessions was improper and the remaining evidence is not legally sufficient to support the findings of guilty (CM 159283, Nelson; CM 168834, Hazard, CM 187168, Greene; CM 188211, Hornsby).

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

E. M. Lewis, Judge Advocate.

J. W. Cannon, Judge Advocate.

C. M. Giff, Judge Advocate.

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WAR DEPARTMENT

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

Military Justice
CM 193913

FEB 16 1931

UNITED STATES)
) THIRD CORPS AREA
))
) v.) Trial by G.C.M., convened at
)) Fort George G. Meade, Maryland,
Private ALBERT S. DAWSON)) November 24, 1930. Dishonorable
(6812686), Medical)) discharge, suspended, and con-
Department.)) finement for six (6) months.
)) Disciplinary Barracks.

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

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

2. The substantial question actually presented in this case is whether the court duly sworn to try the same and before which trial was had was a legally constituted tribunal.

The law member of the trial court created by paragraph 14 of Special Orders No. 165, Headquarters Third Corps Area, July 7, 1930, namely, Captain Thomas J. Jackson (Infantry), Judge Advocate General's Department, did not sit at the hearing or take any part in the adjudication of the instant case at Fort George G. Meade, Maryland, on November 24, 1930, by eight members of the duly appointed court, in all other respects duly assembled, and was accounted for in the record of trial as "absent" and "Excused by Commander Third Corps Area". There was no specific direction of the appointing authority that the law member sit in

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this case. It will be here assumed that prior to above mentioned date of trial both Third Corps Area Headquarters and Captain Jackson had received official notice of paragraph 15, Special Orders No. 270, War Department, November 18, 1930, reading as follows:

"15. Captain Thomas J. Jackson, Judge Advocate General's Department, is relieved from assignment and duty at headquarters Third Corps Area, Baltimore, Maryland, will proceed to Washington, D.C., and report to the Judge Advocate General for duty in his office. The travel directed is necessary in the military service. FD 28 P 5040 A 2-1."

On such a state of facts the immediate question of law arises: Was the above quoted paragraph 15 of War Department Special Orders effective of itself to remove Captain Jackson as a member of the general court-martial appointed by paragraph 14 of Special Orders No. 165, Headquarters Third Corps Area, or to terminate his member status on such court, thereby leaving that court without the law member required by Article of War 8 to be detailed as one of its members? The precise point does not appear to have been heretofore decided.

If such a legal effect was produced by the War Department special order under consideration, then that effect was accomplished, of course, at the very time the special order itself became effective, and not at any later time by virtue of any subsequent physical act or change of whereabouts of Captain Jackson in the course of compliance on his part with the special order. Hence it is of vital importance to the consideration of this question to note that as a settled matter of military law the special order of the War Department concerning Captain Jackson became effective upon delivery thereof to him through the usual military channels (Op. J.A.G. 300.4, June 23, 1924; Davis, Military Law, p. 382). This might have been upon the conclusion of the hearing of an important general court-martial case extending over days or weeks and before judgment therein or after the making of findings and before deliberation upon the sentence, or pending the reconvening of the court composed of the members sitting at the trial for revision proceedings in a case of invalid, uncertain or erroneous findings or sentence (such, for example, as C.M. 191799-Druzd, C.M. 192068-Wilson-Furlough, and C.M. 193728-Koten, recently arising in the court-martial jurisdiction of the case in hand, or the recent C.M. 191831-Shoop). It is thus apparent that if the taking effect of change-of-station special orders issued by superior authority, of itself and without any administrative order in complement thereof issued by the jurisdiction concerned, avails as a matter of law in military administration to extinguish member status on a court-martial, then the whole process of orderly

adjudication of a court-martial case is liable to sudden vitiation or abatement, in consequence of the exigencies and operations requirements of our military service. The mischief-making possibilities of such a rule of military law and its subversive effect on the discipline and efficiency of a general court-martial command would be multiplied in time of war, and this consideration makes for its inherent unsoundness on the fundamental principle of military law embodied in the following excerpt from an authoritative opinion of Attorney-General Cushing, rendered December 1, 1855 (7 Ops. Atty. Gen. 604):

"Trials by court-martial are governed by the nature of the service, which demands intelligible precision of language but regards the substance of things rather than their forms; which eschews looseness or confusion in all things, but reflects that military administration must be capable of working in peace, it is true, but more especially amid the privations and the dangers of war."

No such extinguishment of member status on a court-martial is expressly ordained by the above quoted special order relating to Captain Jackson, that is to say, no such end or objective is specifically included in its component words. And, in the opinion of the Board of Review, the conclusion that such is within the reasonable intendment of the order as a whole is untenable; being in conflict with both the fundamental principle above noticed and an established principle of construction of lex scripta, here applicable in view of the absurd consequences involved in the highly harmful effects of such an interpretation of special orders of this nature on military justice administration, and the discipline and efficiency of general court-martial commands, considered above. The special order in question is, of course, part of the law military (Winthrop, Reprint, p. 38). And in the leading case of *United States v. Kirby*, 7 Wall. 482, the Federal Supreme Court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." This principle was reaffirmed in *Hawaii v. Mankichi*, 190 U.S. 197, wherein the court in construing Congressional legislation in its application to the administration of criminal justice in the Hawaiian Islands, declared, as ground of rejection of a certain extreme view of language of the Newlands Resolution, that "the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress". As much might be said in favor of a rational and restrictive interpretation of the War Department special order in the instant case which would

regard the same as effectual to accomplish of its own force its manifest change-of-station and new assignment purpose, without coincident obstruction or disruption of Third Corps Area general court-martial proceedings. The Board of Review is therefore of the opinion that the taking effect of such order by delivery of the same to Captain Jackson through military channels did not have the further effect of thereby terminating his member status on the general court-martial constituted by aforementioned paragraph 14, of Special Orders No. 165, Headquarters Third Corps Area, but that at most there devolved upon the Third Corps Area commander the administrative duty in the premises, if further sessions of the court requiring the presence of the law member were contemplated, to cause Captain Jackson to be made available therefor by the War Department (his new station being within the territorial limits of the Third Corps Area) or by formal order to relieve him as law member of such court and appoint some other suitable officer in his stead. The conclusion here expressed is not without the support of Judge Advocate General opinions in related cases. C. M. 107645, Mahoney - quoting from the opinion of the Acting Judge Advocate General, dated January 26, 1918 - involved the following question:

"The original order appointing the court in this case is dated July 1, 1917, and details a court composed of twelve members and the judge advocate. On August 17, 1917, a subsequent order affecting the detail for this court was issued. This relieved one member of the court and detailed him as judge advocate in place of the original judge advocate who was relieved from duty with the court. This left the court consisting of eleven members. On August 20, 1917, an additional order was published in which two additional officers were relieved from duty as members of the court, and five additional officers detailed. As thus constituted, taking the original order and the two additional orders into consideration, the court consisted of fourteen members. In the memorandum of the department judge advocate, to which reference has been made, it is conceded that a court composed of fourteen members is an illegal body and its proceedings null and void, but the judge advocate contends that inasmuch as on August 20th, 21st and 24th, respectively, three members of the court were relieved by War Department orders from

duty on the Canal Zone and commissioned in the National Army, leaving the Canal Zone August 26, 1917, their relief from duty in the Canal Department acted as a constructive and permanent relief from detail as members of the court and that by reason of the operation of the War Department orders in the cases of these three officers a court which was manifestly illegal before the issuance of these orders was made legal."

In rejecting the contention of the department judge advocate, the Acting Judge Advocate General held in part:

"It is obvious that the precedents relied upon are not in point, for an officer who is dismissed or one who is retired, unless he be retained in active service, becomes ineligible for further duty as a member of a court-martial. This is not the case with an officer who has merely received an order relieving him from duty with a certain command. His eligibility further to sit as a member of a court-martial in a particular case could not be determined by the fact that he had received an order relieving him from duty at a given point."

In C.M. 134245 (Reilly) the question arose whether a special order of June 16, 1919, relieving First Lieutenant John G. Edwards, Infantry, from duty at Camp Jackson, S. C., and detailing him for duty at Fort Des Moines, Iowa, automatically operated to relieve him from detail on a Camp Jackson general court-martial appointed by the camp commander. The Board of Review and The Judge Advocate General held that the order did not so operate and rested this conclusion on the following reasoning:

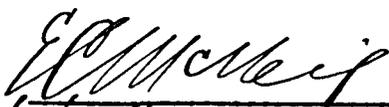
"It is obvious that an officer who is dismissed or one who is retired, unless he be retained in active service, cannot be continued as a member of a court-martial to which he may have been detailed. Such an officer is no longer capable of serving on a court-martial. The reasoning in such a case, however, does not apply to an officer who has merely received an order for transfer of station, unless such order in any way affects his qualifications as a member of the court-martial. Orders issued by the War Department requiring a change of station from one department to another, while they, of course, supersede the orders of the department commander, do not

operate as a rescission of such order. The War Department order may itself be rescinded or modified before it is complied with. The officer removed from duty in one department, by a War Department order, may be returned there by another order, and should this prove to be the case during the life of the court upon which he was detailed as a member, his qualifications to serve, and indeed his duty to serve thereon, cannot be questioned. During his absence he would be as much a member of the court as would other officers detailed thereon, and his absence would have to be accounted for in the record of each case tried. If he should prove to have been but temporarily detached, the court which may have been rendered legal during his absence by such detachment would, by the same token, be rendered illegal upon his return, and so the question of the legality of a court-martial would be an uncertain thing, which would never be safely determined by a review of the record."

Another question involved in the ultimate question whether the court which tried the case in hand was competent to sit on the trial thereof may be thus stated: Does the absence of the law member from the trial of a case not specifically directed to be tried with the law member present invalidate the proceedings? The pertinent provisions of the 8th Article of War, read in connection with those of the 18th and 31st Articles, are, it must be conceded, ambiguous to the extent of not being conclusive, upon their face, of this question. But these new provisions of the revised Articles of War were contemporaneously construed by the War Department as not making the presence of the law member necessary to the validity of the trial proceedings, and have been continuously so construed by the War Department and the President (T.A.G. letter of instructions of September 22, 1921, subject, general court-martial jurisdiction; Manual for Courts-Martial, 1921, par. 85 a; Manual for Courts-Martial, 1928, par. 38 c). The cited provisions of statute law have consequently been clarified and rendered definitive in this particular by executive interpretation in the course of administration of the Articles of War. In *Swendig v. Washington Water Power Company* (1924), 265 U.S. 322, 331, the Federal Supreme Court, citing the earlier case of *Logan v. Davis* (1914), 223 U.S. 613, 627, declared it to be "a settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons". No such reasons are believed to exist in this

instance, and the question under consideration is no longer an open one in military administration. See *Edwards v. Darvy*, 12 Wheat. 206, 210; *U.S. v. Graham*, 110 U.S. 219; *U.S. v. Philbrick*, 120 U.S. 52, 59; *U.S. v. Johnston*, 124 U.S. 236, 253; *U.S. v. Alabama G.S.R. Co.*, 142 U.S. 615, 621.

For the foregoing reasons, the Board of Review is of the opinion that the court duly sworn to try the instant case and before which trial was had was a legally constituted tribunal.

 _____, Judge Advocate.

 _____, Judge Advocate.

_____, Judge Advocate.

1. I concur in the conclusions reached by the majority of the Board in paragraph 1 of the holding, for the reason that the order relieving Captain Jackson from duty at Baltimore did not, according to my interpretation of paragraph 5b, AR 170-10, Change 2, January 1, 1930, operate to remove him from the jurisdiction of the Commanding General, Third Corps Area, in matters pertaining to the administration of military justice.

2. I do not concur in the effect of the views expressed in paragraph 2 of the majority holding.

 _____, Judge Advocate.



Military Justice WAR DEPARTMENT
C.M. 193971. OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

FEB 10 1931

U N I T E D S T A T E S	)	FIFTH CORPS AREA
)	
vs.	)	Trial by G.C.M. convened at
	)	Fort Thomas, Kentucky, October
Major METCALFE REED	)	29, 30, 1930. Dismissal.
(O-3855), Infantry.)	

OPINION by the BOARD OF REVIEW
McHEIL, CONNOR and MOFFETT, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

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

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

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

Specification: In that Major Metcalfe Reed, Infantry, for the purpose of obtaining a loan of THREE HUNDRED (\$300.00) DOLLARS from the Fidelity Loan and Investment Company, of Columbus, Georgia, did, at Fort Thomas, Kentucky, on or about November 5, 1928, with intent to defraud falsely write and forge the signature of Chaplain Ralph W. Rogers, as indorser to a certain promissory note, which has since been lost or destroyed or is in the hands of Major Metcalfe Reed, which was in words and figures in substance as follows:

"Fort Thomas, Kentucky, November 5, 1928

One year after date I promise to pay to the order of Fidelity Loan and Investment Company, Columbus, Georgia, THREE HUNDRED (\$300.00) DOLLARS.

(Signed) Metcalfe Reed.
(Indorsed) Ralph W. Rogers."

Which said promissory note indorsed as aforesaid was a writing of a private nature which might operate to the prejudice of another.

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

Specification: In that Major Metcalfe Reed, Infantry, did, at Fort Thomas, Kentucky, on or about November 5, 1928, with intent to defraud wilfully, unlawfully, and feloniously utter as true and genuine a certain instrument purporting to be an endorsed promissory note, which has since been lost or destroyed or is in the hands of Major Metcalfe Reed, which was in words and figures in substance as follows:

"Fort Thomas, Kentucky, November 5, 1928,

One year after date I promise to pay to the order of Fidelity Loan and Investment Company, Columbus, Georgia, THREE HUNDRED (\$300.00) DOLLARS.

(Signed) Metcalfe Reed
(Indorsed) Ralph W. Rogers."

A writing of a private nature which might operate to the prejudice of another, which said promissory note as respects the said indorsement "Ralph W. Rogers" was, as he, the said Major Metcalfe Reed, Infantry, then well knew, falsely made and forged.

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

Specification 1: (Not Guilty).

Specification 2: (Not Guilty).

Specification 3: In that Major Metcalfe Reed, Infantry, did, at Fort Thomas, Kentucky, on or about March 12, 1929, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a written report to the said Commanding Officer, in words as follows: "All personal bills and debts in Cincinnati or in this community have been settled and closed; or arrangements for payment has been made that has been declared satisfactory by the parties concerned" which report was known by the said Major Metcalfe Reed, Infantry, to be untrue in that on this date March 12, 1929, the said Major Metcalfe Reed, Infantry, did owe one Cincinnati Club, Cincinnati, Ohio, \$18.75 and had not made arrangements for payment that were declared satisfactory by said Cincinnati Club.

Specification 4: In that Major Metcalfe Reed, Infantry, did, at Fort Thomas, Kentucky, on or about March 12, 1929, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a

written report to the said Commanding Officer, in words as follows: "All personal bills and debts in Cincinnati or in this community have been settled and closed; or arrangements for payment has been made that has been declared satisfactory by the parties concerned" which report was known by the said Major Metcalfe Reed, Infantry, to be untrue in that on this date March 12, 1929, the said Major Metcalfe Reed, Infantry, did owe one H. A. Woestman, Fort Thomas, Kentucky, \$32.61 and had not made arrangements for payment that were declared satisfactory by the said H. A. Woestman.

Specification 5: (Not Guilty).

Specification 6: In that Major Metcalfe Reed, Infantry, did, at Fort Thomas, Kentucky, on or about March 12, 1929, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a written report to the said Commanding Officer, in words as follows: "All personal bills and debts in Cincinnati or in this community have been settled and closed; or arrangements for payment has been made that has been declared satisfactory by the parties concerned" which report was known by the said Major Metcalfe Reed, Infantry, to be untrue in that on this date March 12, 1929, the said Major Metcalfe Reed, Infantry, did owe one French Bros. Bauer Co., Cincinnati, Ohio, \$19.80 and had not made arrangements for payment that were declared satisfactory by the said French Bros. Bauer Co.

Accused pleaded not guilty to all the charges and specifications, and was found guilty of Charges I and II and the specifications thereunder, not guilty of Specifications 1, 2 and 5, Charge III, guilty of Specification 3, Charge III, substituting the figures "\$18.85" for the figures "\$18.75", and guilty of Charge III and Specifications 4 and 6 thereof. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service of the United States. The reviewing authority approved the sentence and forwarded the record for the action of the President under the 48th Article of War.

3. As to Charges I and II and the single specification under each, the evidence shows that accused, while on duty at Fort Thomas, Kentucky, addressed a letter dated October 30, 1928, to the Fidelity Loan and Investment Company, Columbus, Georgia (hereafter referred to as the Loan Company) in which he made application for a loan of \$300.00 (R. 9,10; Ex. 1). Pursuant to such application, the Loan Company mailed a note to the accused prepared for that amount (R.8). Accused returned the note with his own signature and the signature of "Ralph W. Rogers" as indorser thereon (R. 9), whereupon W. T. Drane, Secretary and Treasurer of the Loan Company, approved the loan which was made upon the assumption that the indorsement was in fact that of Chaplain Ralph W. Rogers, who according to the Army List and Directory was at that time stationed at Fort Thomas, Kentucky (R.10,11; Ex. 2). The note was not available as evidence in the trial because it was eventually paid in full (R. 22) and "evidently had been mailed to Major Reed" (R. 9). On or about September 26, 1930, when the note was requested by the Commanding General, Hawaiian Department, on behalf of the Government, accused stated that he did not have it (R. 59). The note was dated sometime in November, 1928, but the loan was not made until December and then with an agreement that it was to be paid in twelve monthly installments of \$25 each (R. 9). After accused failed to pay the first two installments when due, the Loan Company addressed a letter to Chaplain Ralph W. Rogers, Fort Thomas, Kentucky, February 19, 1929, and advised him in substance that he was indorser on a note of \$300.00 for Major Metcalfe Reed; that the first two installments were in arrears; and requested him to see that they were taken care of at once (R. 11,30; Ex. 3). Upon receipt of this communication Chaplain Rogers went to accused and "told him that I had a letter that I did not understand and he told me that he had received one like it, that that was another Rogers, to file it in my archives". Chaplain Rogers, under date of February 21, 1929, wrote the Loan Company to the effect that he had not indorsed such a note and requested that it be forwarded to the Highland Bank, Fort Thomas, Kentucky, where he desired to inspect the signature (R. 12,31; Ex. 4). The Loan Company then wrote accused a letter in which was inclosed a copy of Chaplain Roger's letter (R. 15), and under date of March 5, 1929, accused replied as follows:

"In reply to your letter of the 25th ult., allow me to state that Chaplain Rogers has been set right in regard to the matter and it will therefore not be necessary to send the note to the local bank for his inspection." (R. 15; Ex. 6)

When the Loan Company failed to send the note for inspection as requested, Chaplain Rogers notified Colonel Waldron, the Post Commander, in order to have the matter cleared up before accused left Fort Thomas. Sometime thereafter, Colonel Waldron notified Chaplain Rogers to report to him at headquarters. Upon reporting he met accused, outside the door, and there accused,

"told me that I signed that note, in other words, using his words 'You signed that note' and I told him that I did not sign it, and he repeated the statement and I told him that he knew I didn't sign it, but if I could help him in any way I would be glad to do it".

Accused thereupon asked Chaplain Rogers to forget "whether I signed it or not; I told him that I could, I might if I heard nothing further about it, and he assured me I would hear nothing more about it" (R. 32,33). At sometime during the course of this conversation accused asked Chaplain Rogers if he could keep a secret. Upon receiving an affirmative reply accused said "I signed it, I couldn't find you" (R. 39,42). When Colonel Waldron asked Chaplain Rogers in the presence of accused whether he had signed the note or not, he replied:

"I told him that Major Reed said I signed it and then he said that I was a great fellow forgetting whether I signed a piece of paper, telling me I might sign my life away some time" (R. 33).

Chaplain Rogers never in fact signed the note in question as an indorser nor did he ever authorize accused or anyone else to sign his name to the note. At no time did he assume responsibility for his purported signature on the note (R. 36). On March 8, 1929, accused addressed a letter to the Loan Company and inclosed three checks covering three installments, with the request that they be cashed "as they became due". In the meantime he left Fort Thomas on leave of absence preceding his transfer to Hawaii (R. 15,16; Ex. 7). Chaplain Rogers heard nothing further about the note until about July 26, 1929, when he received another letter from the Loan Company advising him that the accused was again delinquent on two payments (R. 33,16; Ex. 8). After some further correspondence (R.18,19,34, 35; Exs. 10,11), the Loan Company forwarded the note to the Highland Bank, Fort Thomas, Kentucky, where Chaplain Rogers examined the instrument in the presence and with the assistance of the cashier. Both found that the signature "Ralph W. Rogers" appearing thereon

resembled the signature of Chaplain Rogers but that it was in fact a forgery if intended for his signature (R. 35,36,43-54). Earlier in the fall of 1928, Chaplain Rogers indorsed a note for accused and, when the note was later renewed, he also indorsed the renewal note (R. 40).

As to Specifications 3, 4 and 6 of which accused was found guilty under Charge III, the evidence shows that under date of March 13, 1929, accused executed what is commonly known as a clearance certificate to the Commanding Officer of Fort Thomas, Kentucky, as follows:

"1. Having been relieved from further duty and station at this post by paragraph 16 Special Orders No 36 W.D. dated Jan 16/29; I hereby certify that:

* * * * *

c. All personal bills and debts in Cincinnati, or in this community have been settled and closed; or arrangements for payment has been made that has been declared satisfactory by the parties concerned.

Metcalfe Reed
Major, 10th Inf." (R.60,61;Ex.12)

As to Specification 3, the evidence shows that accused was a member of the Cincinnati Club, Cincinnati, Ohio, and that he became indebted to the club for dues, taxes and house account to the extent of \$18.85 (R. 75). During the latter part of 1928, accused tendered his resignation as a member of the club and in January, 1929, stated to the assistant secretary of the club that he would pay his account after the first of February (R. 74). This accused failed to do. He did not make or attempt to make any arrangement with the club for the extension of credit (R. 75). The debt was finally paid in February, 1930 (R. 73).

As to Specification 4, the evidence shows that accused had an open account with the Woestman Drug Store, Fort Thomas, Kentucky (R. 88). On or about March 8, 1929, accused entered the store and made some purchases which were added to his account. At that time he notified the owner, H. A. Woestman, that he had been transferred to Hawaii and requested him to get his bill ready and said that he would take care of it. On March 13, 1929, the amount due totaled \$32.61. About March 15, 1929, a boy was sent from the drug store to the home of accused with the bill where it was discovered that

accused had already departed. The bill was subsequently forwarded to accused (R. 88-90), and was settled in March, 1930 (R. 91). Accused made no application to the drug store for extension of credit, and Mr. Woestman "understood that he probably would take care of it before he left". (R.89)

As to Specification 6, the evidence shows that accused was, prior to March 13, 1929, indebted to the French Brothers Bauer Company, Cincinnati, Ohio, to the extent of \$19.80 (R. 78). No application for the extension of credit came to the attention of the credit manager. The bill was unpaid on March 14, 1929, and remained unpaid until sometime thereafter (R. 79).

4. The defense read in evidence a stipulation (R. 99) to the effect that if Mrs. Zella Reed, wife of accused, were present she would testify substantially that she was aware of the financial affairs of the household and that prior to March 13, 1929, she was aware of the fact that Major Reed was required by orders to make a certificate to the Post Commander to the effect that all bills had been paid or that satisfactory arrangements for payment had been made with the parties concerned. She realized that Major Reed did not have sufficient funds to pay all outstanding bills and at the same time allow him the necessary money for expenses incident to the trip to Hawaii, and that it was a matter of considerable worry to him. A few days prior to March 13, 1929, she accompanied Major Reed to the Drug Store of Mr. H. A. Woestman in Fort Thomas, and heard Major Reed tell Mr. Woestman that he did not wish to settle his bill at that time because he wanted it to include subsequent purchases. But he requested Mr. Woestman to send a complete statement which would be paid at a later date. Mr. Woestman said that was satisfactory. Shortly before March 13, 1929, she heard Major Reed call the French Brothers Bauer Company on the telephone and speak to some one there regarding an extension of time for payment (R.99,100).

The defense also read in evidence a stipulation to the effect that if Mr. Saxon, Office Manager, French Brothers Bauer Company, were present he would testify substantially that on or about March 10, 1929, two clerks whose principal duties consisted in receiving telephone calls and transmitting information to proper officials, were found negligent and later discharged (R. 101).

The accused took the stand under oath and, as to the offenses alleged in the Specifications under Charges I and II, he testified substantially that in the fall of 1928 he had occasion to ask

the Fidelity Loan and Investment Company for a loan of \$300. In due time the Loan Company sent the customary paper for signature and indorsement. Thereafter he sent the note with a personal memorandum to Chaplain Rogers, by a houseboy who was then in his employ, with the request

"that he endorse this application for me, if he could do so. At that time I was for some reason, I don't remember exactly why, going in town, and on my return that evening I found this document on my desk with a signature on the reverse side in words 'Ralph W. Rogers' which I assumed to be his. I was---I never made a study of Chaplain Rogers' handwriting but the appearance and from the few times that I had seen his signature, it appeared perfectly correct".

Thereafter he forwarded the note to the Loan Company and received the money requested. When Chaplain Rogers spoke to him about the note, accused testified

"His remarks at that time were very surprising to me, caused me to wonder whether I was seeing things or whether he had suffered a lapse of memory. I still believed at that time that he had endorsed the note. However, I went home, questioned this house boy and after bringing pressure to bear he finally admitted that he had not seen Chaplain Rogers, that he had signed the note himself in an endeavor to help me".

Due to the fact that the houseboy was so contrite and begged not to be turned in,

"I said nothing about it. When Chaplain Rogers again spoke to me and I replied to him, I feel sure that in view of his testimony, he misunderstood my reply, which was not that I signed the note but that I knew who signed the note. Knowing that I was about to go on foreign service and knowing that the payments on the note would be taken care of, I asked him, in substance, to overlook the matter - there was no forgery on my part; there was no knowledge of any forgery at the time the note was forwarded. There was no intent to defraud".

He does not "think" that he ever advised the Loan Company that the Rogers' signature was a forgery (R. 124). Accused also contended that there was no necessity of forgery in that he could have obtained legitimate indorsements from other parties (R. 106). After he arrived in Hawaii he sent a check (R. 107;Ex.A) as soon as possible to the Loan Company for the entire balance due (R. 105-106). On cross examination, he testified that the houseboy's name was Denton, that at that time he was a discharged prisoner working in the capacity of a civilian employee and that he had no knowledge of his present whereabouts (R. 116). After he discovered the forgery he made no effort at the time to disclose it (R. 119) nor did he make an effort to locate the civilian Denton before trial (R. 125). The houseboy had been discharged sometime after his arrival in Hawaii (R. 126).

As to the specifications of which he was found guilty under Charge III, accused admitted on the stand that he signed the clearance certificate (Ex. 12) on or about March 13, 1929 (R. 102). He considered the indebtedness to the Cincinnati Club one that could be carried forward and made the certificate because he had not received word at the time that his resignation had been accepted. Believing that he was still a member, he felt that it was satisfactory to pay the obligation at a later time (R. 103,104). As to Specification 6 he admitted that he owed the French Brothers Bauer Company the amount alleged to be due but on calling them on the telephone a "member of the female sex" answered, and in the presence of Mrs. Reed he stated "the circumstances" to her and when she replied that it would be all right he felt justified in signing the certificate (R. 104). Accused does not remember making a statement in 1930 to the Hawaiian Department Inspector to the effect that both he and his wife were of the opinion that the French Brothers Bauer account had been paid and that proper credit therefor had never been given him (R. 122-124).

Lieutenant Colonel Herbert E. Mann, Cavalry, Fort Thomas, Kentucky, testified for the defense in effect that he had known accused for about four years but that he was not familiar with his financial circumstances in November, 1928. In answer to the question "would you at that time have indorsed a note for him for about \$300.00?" he replied in effect that he might have signed it at that time providing he could have done so without serious inconvenience to himself and family. He remembered that accused had a houseboy but he did not know the boy (R. 128).

It was further stipulated that if accused's wife were present she would testify in substance as follows:

"I know one George Denton who worked in our house as a prisoner at the United States Disciplinary Barracks, Fort Leavenworth, Kansas. He later in the summer of 1928 came to work for us as a servant at Fort Thomas, Kentucky. At that time, he had been discharged as a prisoner. He remained with us until we went to Hawaii and accompanied us there. Up to this time he was considered trustworthy. After arrival in Hawaii, I learned that he was not trustworthy--that he lied, stole and was so untrustworthy, generally, that we were compelled to discharge him from our employ. He was reported to have left Hawaii and his present whereabouts are unknown to me" (R. 129).

Mr. Myron S. Baker, a civilian of Fort Thomas, Kentucky, testified that he had ^{been} acquainted with accused for about three years, that in November 1928, he would have signed a note for \$300 for accused, and that he did sign a note for him shortly before he left Fort Thomas, around March 1929.

5. Such evidence warrants findings that at the times and places alleged in the Specification, Charge I, and the Specification, Charge II, accused obtained a loan of \$300 from the Fidelity Loan and Investment Company, Columbus, Georgia, which was procured and secured by a promissory note with an indorsement thereon consisting of the signature of Chaplain Ralph W. Rogers, falsely made by the accused. Intent to procure credit by the fraudulent means of the falsely made signature is evident throughout the record. Accused's attempt to persuade Chaplain Rogers to acknowledge the signature as being true and genuine, after the discovery of the forgery, and admission to the Chaplain of authorship of the signature are irreconcilable with his subsequent claim of innocence and reveal the same fraudulent purpose as his first statement to the Chaplain to the effect that the signature was that of another Rogers. Accused's explanation that he obtained possession of the instrument with the false indorsement innocently through the wrongful acts of the houseboy is under all of the facts and circumstances of record unworthy of serious consideration. Needless to say the false signature might easily have operated to the prejudice of either Chaplain Rogers or the Loan Company. That it did not actually do so constitutes no defense to the charge. The evidence clearly establishes the offenses of forgery and uttering in violation respectively of the 93d and 96th Articles of War.

As to the findings of guilty under Specifications 3, 4 and 6, Charge III, the evidence shows that accused executed at the time and place alleged a certificate to the Commanding Officer, Fort Thomas, Kentucky, wherein he certified that all of his personal bills and debts in the community had been settled or that arrangements for payment had been made that has been declared satisfactory by the parties concerned. The evidence establishes that at the time the report was executed accused did owe and had in each instance failed to settle the obligations which the proof showed to be due. Accepting at its face value the testimony of the defense as to accused's arrangement with his creditors prior to signing the clearance certificate, still, in the opinion of the Board of Review, the steps taken by accused were not an equivalent of a definite accord with the creditor concerned or such as to create, in the mind of an educated and experienced Army officer, an honest belief that he was justified in certifying that he had made arrangements satisfactory to the creditors named in Specifications 3, 4 and 6 of Charge III. On the other hand, the evidence supports the findings that he made the certificate falsely with the intent to deceive as alleged. Such is conduct violative of the provisions of the 95th Article of War.

6. The note forming the basis of the Specifications, Charges I and II, having been mailed to accused by the Loan Company and he, failing to produce it upon demand therefor by the Government, parol evidence as to its contents was properly received by the court (Paragraph 16, Manual for Courts-Martial).

Over objection by the defense, there was admitted in evidence at the request of the prosecution certain correspondence, in the form of letters, between the Loan Company and Chaplain Rogers relative to the latter's purported signature on the note (R.10,13, 14,15,17,18,19; Exs. 5 and 10). The court should have excluded this correspondence as constituting nothing more than written hearsay, namely, the unsworn extrajudicial declarations of persons who, in fact, were witnesses before the court and testified as to the facts contained therein without resort to the correspondence as memoranda to refresh memory or for any other purpose (Wharton's Criminal Evidence, Sec. 527 e; People v. McLaughlin, 44 N.E. 1017; State v. Ames, 94 N.W. 231). It cannot be said, however, that any substantial right of accused was infringed within the meaning of Article of War 50 $\frac{1}{2}$ by the erroneous admission of the correspondence since all the information contained therein was developed by legal testimony of the writer and the recipient of the correspondence.

The making of the false certificate, alleged as the basis for Specifications 2, 3, 4, 5 and 6, Charge III, constituted but a single offense and the allegations of the five specifications should have been consolidated into one specification. Since, however, conviction on the allegations of any one of the five specifications supports the sentence in its entirety, it cannot be said that the defective pleading affected accused's substantial rights. No objection thereto was at any time made by accused.

All of the questions raised by counsel for accused in their brief accompanying the record of trial have been carefully considered by the Board of Review. In this brief, counsel, among other things, contend that Chaplain Rogers, by stating to Colonel Waldron "* * * Major Reed said I signed it * * *", thereby ratified or condoned the forgery of the signature. This position is wholly untenable since neither the quoted statement nor any other evidence of record is susceptible of the construction sought to be placed upon it in the brief. Granting that there was evidence supporting the contention, it would still afford no legal defense, for the reason that where the evidence shows, as it does in this case, "* * * that the instrument uttered was a forgery and that accused knew that it was a forgery when he uttered it, testimony of an agreement by the party whose name was forged to condone so far as he could the offense committed, is properly excluded" (26 Corpus Juris, page 968; Jordan v. State, 143 S.W. 623). No other question sought to be raised by the brief is deemed sufficiently substantial to require notice here.

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

"Cadet M.A. 14 June 11; 2 lt. of Inf. 12 June 15;
1 lt. 1 July 16; capt. 15 May 17; maj. (temp.)
17 June 18 to 28 Jan. 20; maj. 12 July 20 (recess
apmt. expired 4 Mar. 21); maj. 20 July 20; (c)
capt. (Nov. 4, 22); maj. 11 Feb. 25".

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

violation of the 95th Article of War, and is authorized for violations of the 93rd and 96th Articles of War.

J. M. Clegg, Judge Advocate.

J. W. Cannon, Judge Advocate.

C. W. Moffett, Judge Advocate.

To The Judge Advocate General.



Military Justice
C.M. 194171.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Jan. 22, 1931.

UNITED STATES	)	FIRST CORPS AREA
)	
vs.	)	Trial by G.C.M. convened at
	)	Fort Williams, Maine, December
Private First Class MICHAEL	)	22, 1930. Dishonorable dis-
J. ROGERS (6131051), and	)	charge and confinement for one
Private JOHN P. RILEY	)	(1) year as to each accused.
(6105934), both of Service	)	Disciplinary Barracks.
Company, 5th Infantry.)	

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

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and found to be legally sufficient to support the findings of guilty of Charge I and its specification, as to each accused.

2. By the Specification, Charge II, it is alleged that accused, acting jointly and in pursuance of a common intent, did wrongfully destroy one foot locker, property of the United States. The record fails to show ownership as alleged, which is an essential averment of the offense charged.

The maximum punishment authorized by paragraph 104 c, Manual for Courts-Martial, for the offense of which accused were properly found guilty under Charge I and its specification, larceny of property of value less than \$20.00, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

3. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its specification; legally insufficient to support the findings of guilty of Charge II and its specification, and legally sufficient to support only so much of the sentence as to each accused as involves dishonorable discharge, forfeiture of all pay and

allowances due or to become due, and confinement at hard labor for six months.

E. M. Key Judge Advocate.

D. M. Cameron Judge Advocate.

C. M. [unclear] Judge Advocate.

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

Military Justice
 CM 194200.

Mar. 13, 1931.

U N I T E D S T A T E S	)	HAWAIIAN SEPARATE COAST ARTILLERY
	)	BRIGADE.
v.)	
	)	Trial by G. C. M., convened at
Private JOHN L. SANDERSON	)	Fort Kamehameha, T. H., Decem-
(6541357), Headquarters	)	ber 2, 1930. Dishonorable dis-
Battery, 15th Coast Artil-	)	charge and confinement for three
lery.	)	(3) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
 McNEIL, CONNOR and MOFFETT, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and found legally sufficient to support the findings of guilty, as modified by the reviewing authority, of Specification 5, Charge I, and Specifications 1 and 2, Charge II, and Charge II.

2. The general defectiveness of the trial proceedings in the instant case has called for a careful scrutiny of the entire record of trial to the end that, in furtherance of justice, the accused's legal rights be fully protected, as provided in the Articles of War. No novel question is presented, and no extended discussion is required (CM 184295, Hall).

As to the offenses, burglary, assault with intent to commit a felony, and larceny, alleged to have been committed on October 11, 1930 (Specifications 1, 2 and 3, Charge I), of which accused has been found guilty: because of the many serious errors committed during the trial proceedings and the inherent weakness of the evidence of accused's guilt, it is the opinion of the Board of Review that the substantial rights of the accused were injuriously affected and that the findings of guilty of these specifications should be vacated.

Noteworthy irregularities which compel this conclusion when considered together and in connection with the weakness of inculpatory

evidence are:

The defense counsel, First Lieutenant John J. Johnson, was the company commander of accused, the officer who signed and swore to the charges, and also was called and testified as a witness for the prosecution; method of testifying of the single witness to the offenses charged in Specifications 1, 2, and 3, Charge I, - a Chinese laborer, by means of an interpreter who was his employer and also owner of the house alleged to have been burglarized and who himself testified later as a witness for the prosecution; failure of counsel to cross-examine this sole prosecution witness on the vital matter of identification as to which the proof was not satisfactory; failure of the defense counsel to introduce corroborative evidence of alibi, stated by him to be available (R. 40), and which would have constituted a complete defense to these serious crimes; deficient examination by the defense counsel and court of accused as a witness in his own behalf respecting the criminal acts alleged to have been committed on October 11, 1930, in view of his indicated desire to testify in respect thereto (R. 37-38); rejection by defense counsel of accused's explanation on the witness stand to the effect that he went absent without leave in order to avoid transfer to Fort Kamehameha, by saying in his closing argument (R. 41) "Sanderson got scared and went absent", thus in effect suggesting that he went away because of a guilty conscience.

3. As to the three simple assaults on October 25, 1930 (Specification 5, Charge I, Specifications 1 and 2, Charge II), of which accused, by the action of the court and the reviewing authority, stands convicted, since by his own testimony on the witness stand, he substantially admitted the assaults, he could not as to those offenses, be prejudiced by the errors noted above. For simple assault, the maximum punishment by confinement, authorized by paragraph 104 c, Manual for Courts-Martial, is confinement at hard labor for three months; for three such simple assaults the maximum punishment authorized is dishonorable discharge, total forfeitures and confinement at hard labor for nine months.

4. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of specifications 1, 2 and 3, Charge I; legally sufficient to support the findings of guilty, as modified by the reviewing authority, of Specification 5, Charge I, and Specifications 1 and 2, Charge II, and only so much of the sentence as includes dishonorable discharge, forfeiture of all pay and allowances due or to become due, and con-

finement at hard labor for nine months, in a place other than a penitentiary.

E. P. Miller, Judge Advocate.

J. M. Connor, Judge Advocate.

C. W. Moffett, Judge Advocate.

Specification; and legally sufficient to support the sentence.

E. M. Chees, Judge Advocate.
J. W. Cannon, Judge Advocate.
C. W. Moffitt, Judge Advocate.

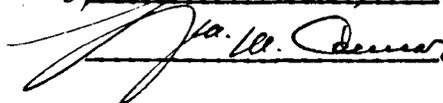
bodily harm, commit an assault upon Sergeant Earl Buras, Detachment, Quartermaster Corps, by shooting him in the neck with a dangerous weapon, to wit, a .32 caliber revolver.

He pleaded not guilty to, and was found guilty of, both charges and the specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The accusatory averments of the Specification, Charge I, are inconsistent with those of the Specification, Charge II, and, in the opinion of the Board of Review, the finding upon the latter, warranted by the evidence, requires the setting aside of the finding upon the former. As accused, upon sufficient competent evidence, was found guilty of an assault with a dangerous weapon with the specific intent to do bodily harm as alleged in the Specification of Charge II, the more serious of the two alleged offenses in which a single criminal act is involved, the court could not also find him guilty of the offense alleged in the Specification of Charge I, which, at most, embodies an intent to shoot without causing bodily injury of any kind to the person named therein. In view, however, of the nature of the two offenses charged, the evidence before the court and the proceedings had, it is clear that the substantial rights of accused were not injuriously affected by the error noticed. We are led to this conclusion by the fact that although the maximum punishment authorized by paragraph 104 c, Manual for Courts-Martial, 1928, for the offense alleged in the Specification of Charge II is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for not exceeding five years, the sentence adjudged is only dishonorable discharge, total forfeitures, and three years confinement.

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

 , Judge Advocate.

 , Judge Advocate.

_____, Judge Advocate.

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

Military Justice
C. M. No. 194353

Mar. 18, 1931

U N I T E D S T A T E S	)	S E V E N T H C O R P S A R E A
)	
v.	)	Trial by G.C.M., convened at Fort
	)	Robinson, Nebraska, December 11,
Privates WILLIAM H. HYDEN	)	1930. Dishonorable discharge and
(6647317) and JOHNIE SWIFT	)	confinement for eighteen (18)
(6366249), both of Battery	)	months in case of each accused.
E, 4th Field Artillery.	)	Disciplinary barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and MOFFETT, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review, and found legally sufficient to support the sentence as to each accused.

2. The substantial question of law presented by the record of trial in this case has to do with the proper standard of value in the matter of the averment in the larceny accusation of value in excess of twenty dollars of the two Army overcoats, property of the United States furnished and intended for the military service thereof, alleged to have been stolen by both accused and of the theft of which they have been convicted in the instant proceedings. The value of the stolen articles is made the measure of confinement imposable by paragraph 104 c, Manual for Courts-Martial (Table of Maximum Punishments), and the question arises: Is the proper standard of value in such a case that of replacement cost, whereof the court could take judicial notice and whereon the prosecution relied, amounting in the case in hand to twenty dollars and fifty-two cents?

The Texas Court of Appeals laid down the following rule on the subject in the very language of its noted expounder, in *Martinez v. State*, 16 Tex. App. 128:

"What is this proper standard in cases of theft? Mr. Bishop says: 'The word "value" is, like most others, even in legal language, slightly variable in meaning; but, ordinarily for the purposes of this inquiry, it signifies the sum for which the like goods, are, at the time, commonly bought and sold in the market. If a thing has a value to the owner, though to no one else, to steal it is larceny, its "value, as to the rest of the world," being, in the language of Grose, Judge, "immaterial." Still, in determining the grade of the offense, the value merely to the owner is not the standard for the jury. Yet, a thing not bought and sold in the market may have a value, as when it is an article fitted for a specific use of the owners, and worthless for every other purpose. To attempt to test it by the open market, where it is never offered for sale, and is never bought, would be absurd. In reason, the cost of replacing it would ordinarily be the standard of its value.' (2 Bish. Crim. Prac., sec. 751.)

Adopting the foregoing as the correct rule, the proper standard of value in this case was the market value of the saddle, if there was any market for such property. If it had no market value, then the amount that it would cost to replace it would be the standard of its worth."

This rule of decision was reaffirmed by this court in *Roberts v. State* (1911), 135 S.W. 144; *Childress v. State* (1922), 241 S.W. 1029; and *Cunningham v. State* (1922), 236 S.W. 89. The concept of value, as determined by replacement cost, in the law of larceny, in respect of that species of valuable property only of value to the owner, the value thereof to the rest of world being immaterial, is at least as old in English criminal law as *Rex v. Clarke*, 2 Leach (4th Ed.) 1036, in which it prevailed as the rule of decision, and was introduced into the Federal criminal law in 1850 by Mr. Justice Story in the learned opinion of the Federal Circuit Court in *U. S. v. Moulton*, 27 Fed. Cas. 11, 16. In the decision of the latter case it was plainly the controlling factor.

The Board of Review is of opinion that the foregoing rule of decision as to replacement cost, on grounds of both reason and utility, should be adhered to in military justice adjudication whenever the reason of the rule renders the same essentially applicable, and that it correctly prescribes the standard of value in cases involving value of government articles of a distinctive character made specially for use in the military service and not having a market value in their manufactured form, in which is included the instant case involving the value of stolen Army overcoats, whose replacement cost is evidenced by a published price list made a subject of judicial notice by paragraph 125, Manual for Courts-Martial. The well known serviceable condition of such species of military property enhances the reasonableness of the rule of replacement cost as a proper standard of value in determining the punishment for offenses relating thereto in accordance with the prescribed Table of Maximum Punishments.

3. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty upon each Charge and Specification and the sentence, as to each accused in this case.

J. M. Meyer, Judge Advocate.

J. W. Cannon, Judge Advocate.

C. M. S. S., Judge Advocate.



WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
C. M. 194359.

Feb. 4, 1931.

UNITED STATES)) v.)) Private First Class WILFRED) R. SADLER (6810020), Head-) quarters and Service Company,) 11th Engineers.)	PANAMA CANAL DIVISION Trial by G. C. M., convened at Fort Clayton, Canal Zone, Dec- ember 22, 1930. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
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HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and MOFFETT, Judge Advocates
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate

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

2. The substantial question presented by the record of trial in this case is whether the evidence is legally sufficient as to the intent of accused to permanently deprive the owner of the automobile of his property, a necessary element of the offense of larceny.

Summarized, such evidence shows only that on Saturday afternoon, November 1, 1930, the owner left his automobile parked, ignition key in place, in the vicinity of his quarters at Corozal, Canal Zone; that at 9:00 p.m. the car could not be found; and that between two and three o'clock, of the following morning, accused and another soldier, both under the influence of intoxicating liquor, were arrested in Panama City, while driving the car in question.

The fact that the time of the wrongful act was a Saturday night on the first of the month; that accused, when arrested, was drunk as was also his soldier companion; the proximity of the place of arrest of accused and recovery of the car to the place of taking; and the absence of circumstances indicative of a purpose to desert the service combine to reflect a possible and probable purpose on the part of accused to make wrongful use of the automobile for a pleasure drive of short duration only and to negative an intent on his part to permanently deprive the owner thereof. The case, therefore, is within the principle of C.M. 193315 (Rosborough); and on the evidence of record, in the opinion of the Board of Review, is not substantially shown to be one of larcenous taking of the automobile, i.e., with intent to permanently deprive the owner thereof, but is rather a case of wrongful

taking and carrying away by accused of the automobile described in the Specification, without the consent of the owner, in violation of the 96th Article of War (C.M. 189463, Goulet). The latter is a lesser included offense of larceny as denounced in the 93d Article of War, and conviction thereof may be punished by the sentence approved in the case in hand (C.M. 193315, Rosborough).

3. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification and Charge as involves a finding of guilty of wrongfully taking and carrying away the automobile described in the Specification, at the time and place therein alleged, without the consent of the owner, in violation of the 96th Article of War, and legally sufficient to support the sentence.

E. M. Lewis Judge Advocate.

J. W. Cannon Judge Advocate.

C. W. Moffett Judge Advocate.

Military Justice
C.M. 194412.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

FEB 2 1931

U N I T E D S T A T E S	)	UNITED STATES MILITARY ACADEMY
)	
vs.	)	Trial by G.C.M. convened at West
	)	Point, New York, December 19,
Cadet PAUL E. CHAPPELL,	)	1930. Suspension without pay and
First Class, United States	)	allowances until January 1, 1932.
Corps of Cadets.)	

OPINION by the BOARD OF REVIEW
McNEIL, CONNOR and MOFFETT, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate

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

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

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

Specification: In that Cadet Paul E. Chappell, First Class, United States Corps of Cadets, was at West Point, New York, on or about November 27, 1930, drunk in barracks.

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

Specification: In that Cadet Paul E. Chappell, First Class, United States Corps of Cadets, did, at West Point, New York, on or about November 27, 1930, drink intoxicating liquor in violation of paragraph 132, Regulations for the United States Military Academy.

The accused pleaded not guilty to Charge I and its specification, guilty to Charge II and its specification, and was found guilty of the Specification, Charge I, not guilty of Charge I but guilty of violation of the 96th Article of War, and guilty of Charge II and its specification. No evidence of previous convictions was introduced. He was sentenced "to be suspended without pay and allowances for one (1) year, at the

end of which time he will join the then First Class". The findings and sentence were not announced. The reviewing authority, on January 13, 1931, approved only so much of the sentence "as involves suspension without pay and allowances until January 1, 1932; at the expiration of which time he will join the then First Class", and forwarded the record for action under the 48th Article of War.

EVIDENCE FOR THE PROSECUTION

3. On November 27, 1930 (Thanksgiving Day), Captain E. W. Timberlake, Coast Artillery Corps, while on duty as Officer in Charge at Headquarters United States Corps of Cadets, received a report, at the conclusion of the evening meal, from the Cadet Officer of the Day that accused had been reported absent at supper formation (R. 7). After making some unsuccessful efforts to ascertain the reason for his absence (R. 7-8), Captain Timberlake, in company with the Cadet Officer of the Day, proceeded to the room of accused, 1733. As he entered the 17th Division, he discovered a "reek of alcoholic liquor in the air, very strong, and several wet spots on the floor * * *, and a great deal of confusion going on up above." There were five cadets in room 1733, including accused. With one exception they were very busy, "mopping the floor, closing the doors, fanning the window with towels and apparently straightening up the room" (R. 8). Captain Timberlake immediately ordered accused to step forward and, when he did so, discovered that "something was materially wrong with his physical being" (R. 9). There was every evidence of sickness caused by alcoholic liquor in the room, although no bottles were found. The accused was "stupidly and staggeringly drunk" (R. 10). This was evident from his "weaving in attempting to stand up, and his absolute inability to put on his blouse, and to fathom immediately my requests and my orders". He was physically and mentally incapable of performing any military duty (R. 11). He was thereafter conducted to the hospital and turned over to Major Hildrup, the Medical Officer of the Day, for examination (R. 10).

Major Don G. Hildrup, Medical Corps, examined accused at the hospital between seven and eight o'clock on the evening of November 27th, and found him drunk. He "was incoherent; his reflexes were greatly diminished; his coordination was gone; his pupils were dilated, and he had an odor of alcoholic liquor on his person" (R. 14). He made no disturbance and was sick and nauseated (R. 15).

Three cadets, called as witnesses for the prosecution, testified that they saw accused partake of liquor in room 1733 during the course of the afternoon. Cadet Ray L. Leinster, 1st Class, was present and saw accused take a drink in his room at about 4:30 P.M. (R. 16). Cadet John C. Price, 3rd Class, visited the room from about 3:30 to

about 5:00 P.M. and saw accused take a drink (R. 22). There was a card game going on, but no noise or singing (R. 23). Accused was not disorderly, and did not appear to be drunk during that time (R. 24). Cadet Glenn F. Rogers, 1st Class, entered the room about 4:00 P.M. "after the game when the cadets came from the stadium". He saw accused take a drink (R. 25), but did not know what kind of liquor it was. Accused was absent from supper formation and after supper he was lying on his bed practically unconscious (R. 26-28).

EVIDENCE FOR THE DEFENSE

Staff Sergeant Heinrich Schmidt, in charge of the Rating and Disciplinary Division of Cadet Headquarters, testified, after refreshing his memory from records pertaining to accused, that accused attended the Kansas State Agricultural College from 1924 to 1927, where he was a member of Phi Kappa Alpha Fraternity, the Dramatic Society, the Music Society, the Glee Club, the Civil Engineering Society and the Student's Council. He was also a member of the R.O.T.C. from 1924 to 1927 with the grade of 2nd Lieutenant. His record as to demerits, while a cadet, was above average and his military rating in appearance, leadership, activity and scholarship was excellent (R. 29-32).

Major Frederick W. Boye, Cavalry, Commanding the Cavalry Detachment, United States Military Academy, testified that accused came particularly to his attention as a cadet coach in Intramural Polo and his work was outstanding to such an extent that he made a special report of it to the Commandant of Cadets, a thing he had never done before. Knowing accused's work and character, Major Boye stated that he would be extremely desirous of having him as a 2nd Lieutenant in any organization which he might command, regardless of the outcome of the present charges (R. 33, 34). Five other officers who are instructors at the Military Academy, appeared as character witnesses for the defense. Major B. F. Caffey, Jr., Assistant Professor of Law, considers him a superior cadet, an outstanding man in the present First Class and excellent ^{officer} material (R. 35). Captain Frank F. Reed, Ordnance Department, believes that accused's integrity is above question, and that there are not more than four or five members of the First Class who show more promise on technical work connected with the Army than does accused (R. 36-37). First Lieutenant William L. Nelson, Infantry, Instructor in Government, Economics and History, testified that considering "his appearance, his work, his attitude in the class", accused is a very superior cadet (R. 38). First Lieutenant D. J. Leehey, Corps of Engineers, Instructor in Engineering, considers accused above the average

usually expected in the first section (R. 39); and First Lieutenant G. B. Conrad, Field Artillery, on duty in the Department of Tactics and the officer who signed the charges, testified that he has known accused for over three years, and considers that he has "marked ability; his integrity is above question", and that he would make a very good officer (R. 40). Frederick C. Mayer, Chapel Organist at the Military Academy, testified that accused had one of the finest bass voices that had been in the Corps in twenty years, but what had primarily awakened his admiration of accused was his earnest effort and attention to every bit of his work which was unusual in a voluntary organization such as the choir. He considers accused "head and shoulders above the average cadet" (R. 42-43).

Six cadets, all members of the First Class, were called as character witnesses for the defense and testified in substance that accused was never seen to take a drink until this occasion. Cadet Lieutenant Robert Allen Stunkard testified -

"I have never known a better man in all my life; * * * he has impressed me as having something more than the rest of the men I have known; * * * he seems to have more of a settled view as to what he is going to do and what he wants out of life, * * *". (R. 44.)

Cadet Lieutenant Walter Henry Esdorn stated "I have always had the very highest opinion of Paul Chappell's character; he has always impressed me as being a man of the highest moral principles; I have admired him for his moral character more than any other man in the Corps" (R. 45, 46). Cadet First Sergeant Charles Owen Decker, said,

"As far as integrity is concerned there is not a man living that is more honest and truthful and just. * * * I have always thought of him as being more or less one of these Rock of Gibraltar kind of cadets, the kind of a man who is unshakable. * * * I think he is just as solid as he ever was; just as fine a man; just as fine a cadet, one of our best Cadets" (R. 47).

Cadet Captain Theodore W. Parker testified "he is one of the most able men in the class; I would trust him anywhere" (R. 49); Cadet Captain Frederick Hayes Warren stated, "he is respected very highly by his class because of his character and ideals, and admired for his ability" (R. 50); and Cadet Sergeant Van Hugo Bond said, "he is very conscientious; when it comes to duty he considers his duty first before any other thing; * * * I do not know of a man who could be any better than he" (R. 52).

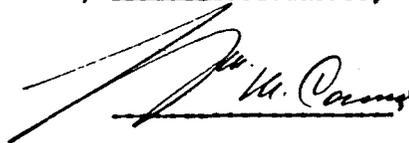
Accused elected to remain silent before the court (R. 53).

4. The evidence as to Charge I and the specification thereunder shows that on the afternoon of November 27, 1930, accused drank intoxicating liquor in his room, and later in the evening was discovered in a nauseated and drunken condition. Paragraph 132, Regulations for the United States Military Academy, provides that any cadet who shall drink or be found under the influence of intoxicating liquor, shall be dismissed or otherwise less severely punished. The evidence of record, together with the pleas of guilty to Charge II and its specification, support the findings of the court, and the sentence is authorized for the offenses.

5. The Cadet Register shows that accused was admitted to the Military Academy from Kansas (Senator Capper) on July 1, 1927, and that he was 24 years of age on October 31, 1930.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and confirmation thereof is authorized by law.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

To The Judge Advocate General.



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

Military Justice
C. M. 194441

U N I T E D S T A T E S	)	FIRST DIVISION
)	
vs.	)	Trial by G.C.M., convened at
	)	Fort Niagara, New York, December
Private MICHAEL MAURO	)	31, 1930. Dishonorable dis-
(6698571), Company G, 28th	)	charge, suspended, and confine-
Infantry.	)	ment for six (6) months.
	)	Disciplinary Barracks.

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

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Michael Mauro, Company G, 28th Infantry, did, at Fort Niagara, New York, on or about November 8, 1930, wrongfully and unlawfully attempt to sell one olivedrab woolen blanket, value about \$4.80, property of the United States, issued for use in the military service thereof.

Accused pleaded not guilty to, and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He

was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months. The reviewing authority approved the sentence, directed its execution but suspended the dishonorable discharge and designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement. The sentence was published in General Court-Martial Order No. 36, Headquarters First Division, January 19, 1931.

3. The evidence shows that on November 8, 1930, accused made arrangements to ride to Buffalo with Private Paul Kula, Company G, 28th Infantry, in the latter's automobile. In consideration for the ride accused agreed to obtain credit for some necessary gasoline at Clark's service station (R. 5). At about supper time Private Liscousky, Company G, 28th Infantry (R. 16), went "up stairs" and saw accused with Private Bratz, where shortly afterwards, Private Kula joined them. He partly overheard a conversation, and heard accused agree to buy gasoline. In the meantime, he had seen accused and Private Bratz acting in a suspicious manner near his (Liscousky's) bunk. When he first went up stairs he saw them near it and it looked as though one of them had disturbed his blankets. Accused seemed excited and then took a blanket off of his own bunk and said "I'm going to take my blanket down to the basement to sleep." Shortly thereafter accused, together with Privates Kula and Bratz, left the barracks and Private Liscousky, thinking that something was wrong, reported the matter to Sergeant St. Laurent (R. 16-18).

When Sergeant St. Laurent received the above report he got Corporal Tanner and Corporal Bates to accompany him in his car, and followed the car wherein accused was riding. The car stopped at Clark's service station in Youngstown and accused went into the office. While he was in the office, Sergeant St. Laurent ordered Corporals Bates and Tanner to search the car. A search was made and a blanket was found in the car. Thereupon accused and the soldiers with him were taken to the guardhouse and a report was made to Captain Brown (R. 11, 12). The blanket, when discovered in the car was folded up and spread out the full length of the seat (R. 21). It was a government blanket, valued at \$4.80, and bore the markings 28-G-55, the Company number of Private Bratz (R. 13, 22, 23, 25).

Captain Paul H. Brown, 28th Infantry, thereafter investigated the case and, after warning accused as to his rights, he voluntarily stated in substance that he wanted to go to Niagara Falls with Privates Kula and Bratz. He (accused) agreed to buy the gasoline necessary for the trip. He took along one of his blankets to wrap around

his legs to keep warm. He had no money but expected to get some gasoline on credit as he had previously done (R. 24). The blanket that was taken from Private Kula's car was exhibited before the court and was marked as though it had been issued to Private Bratz. There was no evidence to show that any of accused's property was missing but Bratz was short blankets as well as other property (R. 23-25).

Mr. Clark, the owner of the gas station, Youngstown, N. Y., saw accused on November 8, 1930, when he came into his place of business and asked "if I bought blankets". When answered in the negative, accused walked right out again. Accused did not have a blanket at the time (R. 26), nor did he attempt to sell one (R. 28).

Kula's car was a coupe. The glass on the right hand side was broken out and a part of the roof was off. Kula testified that the night was cold (R. 7-8) but Sergeant St. Laurent contradicted this statement (R. 12). The night of November 6th or 7th there was a blanket in the car which was used to keep men who were riding in the rumble seat warm (R. 29).

4. The substantial question presented by the record of trial is whether the evidence affords a sufficient basis for the findings of guilty. Viewed in the light most favorable to the prosecution such evidence shows only that on the evening in question accused and Privates Bratz and Kula were acting in a suspicious manner with reference to blankets in their squad room. Later the three left the barracks with accused in possession of a government blanket which had been issued to Bratz. After accused had agreed to buy gasoline, the three entered a coupe belonging to Kula and drove to a nearby filling station. There accused left his two companions seated in the car, entered the filling station empty handed, and asked the owner whether he bought blankets. Upon receiving a negative reply accused said nothing further but immediately departed. While he was in the filling station, a sergeant and two corporals who had been following Kula's car removed from the seat of the car a folded government blanket on which Bratz was seated.

As said by the court in *United States v. Stephens*, 12 Fed. 54,

" * * * the subject of attempt to commit crime is 'less understood by the courts' and 'more obscure in the text-books' than any other branch of the criminal law. Bish. Crim. Law, Section 657. And certainly there is none in some respects more intricate and difficult of comprehension. It is

almost impossible to comprehend all cases of attempt in a definition that does not necessarily run into a mere enumeration of instances. It is easy to say that there must be a combination of intent and act - an attempt to commit a crime and an act done in pursuance of such intent, which falls short of the thing intended.

There are a class of acts which may be fairly said to be done in pursuance of or in combination with intent to commit a crime, but are not in a legal sense part of it, and therefore do not with such intent constitute an indictable attempt; for instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of preliminary preparations - conditions, not causes - and, although co-existent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions, without which the shooting or poisoning could not take place, but they are not in the eyes of the law the cause of either."

In *Wooldridge v. United States*, 237 Fed. 778, the court quotes from *State v. Taylor*, 4 L.R.A. (N.S.) (Oreg.) 417; 8 Ann. Cas. 627, and adopts the following definition:

"To constitute an attempt, there must be something more than a mere intention to commit the offense, and preparation for its commission is not sufficient. Some overt act must be done toward its commission, but which falls short of the completed crime. It need not be the last proximate act before the consummation of the offense, but it must be some act directed toward the commission of the offense after the preparations are made."

The Manual for Courts-Martial, page 190, provides:

"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).

An intent to commit a crime, not accompanied by an overt act to carry out the intent does not constitute an attempt. For example, a purchase of matches with intent to burn a haystack is not an attempt. * * * nor is mere preparation to do a criminal act."

However, as said by the court in Stokes v. State, 21 L.R.A. (Miss.) 898:

"It is useless to undertake to reconcile the authorities on the subject of what constitutes an attempt, or what is an overt act, * * *. It is equally impossible for us to undertake to lay down any rule on this subject which would serve as a guide in all future cases. To a very great extent each and every case must stand on its own facts."

It is clear, however, that in all jurisdictions there must be the intent accompanied by an overt act, an act extending beyond mere preparation. The act relied upon to supply this vital element in the case at hand could, under all the circumstances, be nothing more than accused's inquiry of the filling station proprietor as to whether he purchased blankets. Certainly there can be no logical contention that any of his preceding acts extended beyond mere preparation. Under the law the inquiry constituted no offer to sell and was at most only preliminary and preparatory negotiation leading to a possible sale agreement. Cox v. Denton, 180 Pac. (Kans.) 261. Can it be said that an act, pronounced by the law to be only a preliminary negotiation, was such as amounted to an overt act, as distinguished from mere preparation, within the meaning of the definitions of attempt as above set forth? It might well be said that the phrases "preliminary negotiation" and "mere preparation" are synonymous. Granting that there was an intent and an offer to sell at the time of making the inquiry, what is there in the record to show that the intent and the offer related to the specific blanket accused is charged with attempting to sell? It would seem that one offering for sale an article such as a blanket would have displayed it, at the time of the offer, for inspection by the prospective purchaser. Instead the blanket in this case was never removed from Kula's car and remained in possession of its lawful custodian, Bratz, to whom it had been issued.

There is evidence showing that accused agreed to purchase gasoline prior to removing the blanket from the barracks; but what weight can be attached to this testimony when it is considered that such

evidence shows that he stated he expected to obtain the gasoline through a credit arrangement and that the blanket which he is alleged to have attempted to sell was one for which Bratz, and not accused, was responsible? In view of these circumstances, it might well be argued that accused's inquiry related to a contemplated future transaction rather than a present one.

The weakness of this case lies in the failure of the evidence to show design on the part of accused. As stated in the Stokes case, supra,

* * * * Whenever the design of a person to commit a crime is clearly shown, slight acts done in the furtherance of this design will constitute an attempt * * * *;

but in the case at hand there is no evidence of design or intent to sell the blanket that is not offset by other evidence negating guilty intent. In the numerous cases examined by the Board, where evidence of the overt act was slight, there was a clear showing of intent, an element lacking in the case at hand. But granting that it was accused's intention to sell the blanket at the time of his inquiry of the filling station proprietor, his act, in the opinion of the Board, amounted to nothing more than mere preparation to perpetrate the offense charged.

The evidence is almost wholly circumstantial and when it is considered that the night was cold; that the state of repair of Kula's car rendered a blanket essential to the comfort of passengers; and that the blanket found in the car had been issued to Bratz, the circumstances indicative of guilt lose much of their probative force and effect.

In the often cited case of People v. Murray, 14 Calif. 160, quoted from ⁱⁿ the Stephens case, supra, the accused was convicted of attempting to contract an incestuous marriage with a niece. The evidence showed only that he had expressed a determination to contract the marriage, eloped with the niece for that purpose, and requested another to go for a magistrate to perform the ceremony. In discussing this evidence the court said:

"It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide

difference. The preparation consists of devising or arranging means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made; * * * but until the officer was engaged, and the parties stood before him ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifest by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the party."

The facts in this case, although infinitely stronger by reason of the positive declaration of intent, are strikingly parallel to those in the case at hand. The asportation of the blanket from the barracks and the inquiry of the filling station proprietor might well be compared to the elopement and the effort to obtain a magistrate, yet the court, notwithstanding that the latter facts were accompanied by a positive declaration of intent, held that there was no showing of attempt. Can we then, in the face of this sound doctrine of law, say that mere suspicious conduct, asportation of the blanket and the inquiry constitute the offense of attempt? This case clearly falls within the principle of the leading case of Hicks v. Commonwealth, 9 S.E. (Va.) 1024, and under the settled rule of decision there stated, the Board of Review concludes, in the language of the court that:

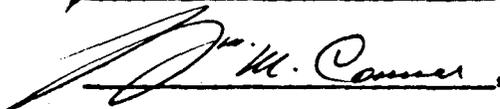
"There has been no direct act done towards the commission of the offense, and, consequently, no attempt, in a legal sense, to commit the crime, has been established. In other words, the acts proved, no matter how, in a moral point of view, they may be regarded, do not in the eye of the law approximate sufficiently near to the commission of" unlawful sale "to advance the conduct of the prisoner beyond the sphere of mere intent."

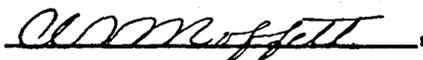
There being no proof of the overt act, the evidence is, in the opinion of the Board of Review, insufficient to sustain the allegation of attempted sale (C.M. 190611, Maszeski; C.M. 185778, Kiera). Stephens, Wooldridge, Stokes, Taylor, Hicks and Murray cases supra;

Seiden v. United States, 16 Fed. (2d) 197; Ex parte Turner, 104 Pac. (Okla.) 1071; McDowell v. State, 98 Sou. (Ala.) 701; Groves v. State, 59 L.R.A. (Ga.) 598; State v. Hurley, 6 L.R.A. (N.S.) (Vt.) 804; People v. Young, 47 L.R.A. (Mich.) 108; People v. Sullivan, 63 L.R.A. (N.Y.) 353.

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

 , Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.

To The Judge Advocate General.

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

Military Justice
CM 194471

FEB 25 1931

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,
Cadet SAMUEL C. RUSSELL,	)	December 22, 1930. Sus-
First Class, United States	)	pension until January 1,
Corps of Cadets.	)	1932.

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

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

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

CHARGE I: Violation of the 95th Article of War. (Not Guilty.)

Specification 1: (Not Guilty.)

Specification 2: (Not Guilty.)

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

Specification: In that Cadet Samuel C. Russell, First Class, United States Corps of Cadets, did, at West Point, New York, on or about the 27th day of November, 1930, drink intoxicating liquor in violation of paragraph 132, Regulations for the United States Military Academy.

He pleaded not guilty to all the charges and specifications and was found not guilty of Charge I and the specifications thereunder,

but guilty of Charge II and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced "to be suspended without pay and allowances for one year, when he will join the then First Class". The reviewing authority approved only so much of the sentence "as involves suspension without pay and allowances until January 1, 1932; at the expiration of which time he will join the then First Class", and forwarded the record for the action of the President under the 48th Article of War.

EVIDENCE FOR THE PROSECUTION

3. On the afternoon of November 27, 1930 (Thanksgiving Day), Captain E. W. Timberlake, Coast Artillery Corps, was Officer in Charge of the Corps of Cadets and Cadet Headquarters, West Point, New York. Cadet Chappell was reported absent and Captain Timberlake went to make an inspection of his room - No. 1733. On entering the 17th Division, he was "struck by the odor of liquor" and saw several spots on the floor of the hallway (R. 8). Call to quarters had not yet sounded but there was an unusual amount of confusion centering around room 1733. Upon entering, he found accused with several other cadets "making a great deal of noise cleaning up the room, closing doors, lockers and so forth, and making various attempts to resuscitate Cadet Chappell" (R. 9). Accused appeared to be drunk. He was unsteady, his face was flushed, and there was a strong odor of alcohol on his breath. Thereupon accused and the other cadets were conducted to the hospital and turned over to Major Hilldrup for examination (R. 10). Major Don G. Hilldrup, Medical Corps, examined accused at the hospital about 8:00 p.m., November 27, 1930, and found him "under the influence of liquor"; "his face was flushed, his pupils were dilated, his reflexes were sluggish, his coordination was subnormal, and he had a distinct odor of alcohol on his breath" (R. 14,15). While at the hospital he was in no way disorderly, disrespectful or insubordinate (R. 17). Captain Francis A. Macon, Jr., Infantry, made an inspection of the 17th Division about 7:25 p.m. He searched accused's room and discovered a flask in the middle drawer of his desk. Upon shaking this flask it sounded as though it contained a few drops and when the cork was removed it smelled like liquor (R. 23). This flask was identified and received in evidence (R. 24). It still retained the odor of liquor. Ownership was not established (R. 29). Cadet Clifford McC. Snyder, Second Class, saw accused in room 1733 and was under the impression, but not sure, that accused took a drink because "I saw him cough and wipe his lips". However, he did not see a glass in his hand nor did he recall whether accused had

a bottle or not (R. 30,31). Cadet Roy L. Leinster, First Class, was present during the afternoon in room 1733 and saw drinking going on, but did not see accused take a drink (R. 33). Accused, however, was "unusually exhilarated" and "probably would not have been able to perform any duties required of him as a cadet" (R. 34).

EVIDENCE FOR THE DEFENSE

Captain William S. Eley, Infantry, testified that about 8:00 p.m. (R. 42) on the evening of November 27, 1930, he was called to the hospital and requested to look at and determine the condition of several cadets, including accused. He talked to accused and smelled his breath. Accused had a drowsy appearance which Captain Eley "felt at that time might have been caused by drink" (R. 40), but he "could detect nothing on his breath, and he stood up, answering my questions, and otherwise showing no positive signs of being under the influence of liquor". Captain Eley believed that accused could have delivered a message, but "from his appearance", he would not have given him any military duties to perform. If he had seen accused outside, "based on what I saw of him, I would not have made any report of his condition". He was not drunk at that time (R. 41-42). Cadet Lieutenant Wilbur S. Jones saw accused in the mess hall at supper on November 27th about 6:20 p.m. (R. 46) and talked to him about some correspondence from the publishers of the "Howitzer" concerning the June Week section, of which accused was in charge. He discussed the correspondence intelligently and witness did not notice anything wrong with him (R. 45), and smelled no liquor on his breath (R. 46). He knows accused intimately, and stated "I can think of no man in the Cadet Corps I would place higher than Mr. Russell as to ability and integrity; * * * honorable as any man I have known; as to ability I would not hesitate to name Mr. Russell among the four most brilliant men in the class" (R. 43). He is not easily led, his convictions are whole-hearted, and when he makes up his mind about a thing, he cannot be influenced to do wrong (R. 44).

Captain Francis A. Macon, Jr., saw accused when he returned to his room at about 8:15 p.m. At that time his face was flushed, but "I would not have called him drunk without further examination". He walked "perfectly normally as far as I could judge" (R. 25,26). Captain Macon commanded the company of which accused was supply sergeant and entertained the highest opinion of his character. He had more opportunity to observe him than most of the cadets in the company due to his duties as camp supply sergeant, and "he was always very careful and exact in the performance of his duties, and perfectly trustworthy" (R. 26).

Three other officers, instructors of accused, testified for the defense. First Lieutenant O. L. Nelson, Infantry, Depart-

ment of Economics, Government and History, had accused in the first section and considered him as capable a student as any in the section; his attitude was excellent; his work was superior, and his general conduct and the impression he created was "superior" (R. 36,37). First Lieutenant Clarence C. Clendenen, Cavalry, Department of English, stated that his opinion of accused's character, ability and integrity had always been "very high", and he was very favorably impressed by accused's work as a platoon leader on maneuvers (R. 38). First Lieutenant W. S. Broberg, Ordnance Department, had accused in the first section. At the last standing, he stood number 21 in Ordnance and Gunnery and has been a "very good cadet" in the section room. His character and trustworthiness was never questioned (R. 39).

Three additional cadets of the First Class appeared as character witnesses. Cadet Captain Frederick H. Warren testified that he knew accused intimately and that he had never seen him take a drink nor under the influence of liquor. He was greatly respected in his class because of his high character, and for his principles and the way he had always acted in his three and one-half years of cadetship (R. 48,49). Cadet Captain Theodore W. Parker has known accused intimately for about two years. He never saw him under the influence of liquor. He considers that accused has "every quality of good character"; he is trustworthy and honest, very popular in the class; "one of the very best men in the class" (R. 49-50). Cadet First Sergeant Charles L. Decker has never seen accused take a drink nor under the influence of liquor, although he has been with him on furlough on several occasions when a man who wanted liquor would certainly have taken advantage of the opportunity. He distinctly remembers one occasion when accused refused a drink. As to his integrity, it is "unshakable"; as to character, "I have seen him get out of bed when he was hospitalized with influenza and help another one of his classmates who was deficient * * *; he has sacrificed himself for his classmates; he is probably the most brilliant man in his class and has one of the finest characters" (R. 50-51).

Accused elected to remain silent before the court (R. 53).

4. The evidence shows that accused entered a room in the cadet barracks between 5:00 and 5:30 p.m. on the afternoon of November 27, 1930, where a number of other cadets were seen to partake of liquor. There is no direct evidence in the record of trial to show that accused was seen to take a drink. One witness testified that

he saw the accused cough and wipe his lips under circumstances that led him to believe that he did probably take a drink. Evidence that the accused later in the evening was found under the influence of liquor by the medical officer who examined him, together with the other circumstances in the case, legally support the findings of the court. Paragraph 132, Regulations for the United States Military Academy, provides that any cadet who shall drink or be found under the influence of intoxicating liquor shall be dismissed or otherwise less severely punished. The sentence is legally authorized for the offense of drinking intoxicating liquor.

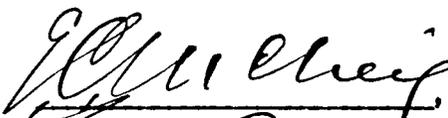
5. The Cadet Register shows that accused was admitted to the Military Academy from the Third Congressional District of Missouri on July 1, 1927, and that he was 21 years of age April 26, 1930.

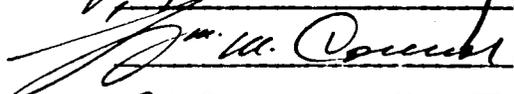
6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and that confirmation is authorized by law.

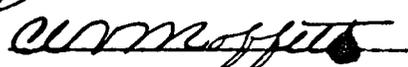
E. P. McHenry, Judge Advocate.
J. W. Deane, Judge Advocate.
C. W. Moffett, Judge Advocate.

constituted the essence and scope of the testimony of this witness; not the narration of a fact. His declarations, therefore, are not substantial evidence of either the truth or falsity of the story read by him on the witness stand, as to which his examination by the prosecution and the court was deficient. The defense announcement of "no objection", above referred to, manifestly does not alter the character of the testimonial assertion of the witness.

3. For the foregoing reason, the Board of Review holds the record of trial legally insufficient to support the finding of guilty upon Specification 1, but legally sufficient to support the findings of guilty upon the Charge and Specification 2 thereunder, and legally sufficient to support the sentence.


_____, Judge Advocate.


_____, Judge Advocate.


_____, Judge Advocate.

MAR 17 1931

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

Military Justice
C.M. 194563

U N I T E D S T A T E S	)	UNITED STATES MILITARY ACADEMY
)	
vs.	)	Trial by G.C.M., con-
	)	vened at West Point,
Cadet JOHN G. ONDRICK,	)	New York, January 15,
First Class, United States	)	1931. Dismissal.
Corps of Cadets.)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Cadet John G. Ondrick, 1st Class, United States Corps of Cadets, was at West Point, New York, on or about January 1, 1931, drunk in post, in a public place, to wit, the area of central cadet barracks.

Accused pleaded not guilty, and was found guilty of the Specification, not guilty of the Charge, but guilty of violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the Prosecution.

On the afternoon of January 1, 1931, First Lieutenant Daniel DeBardleben, Cavalry, was "Officer in Charge" at West Point, New York (R. 5). Shortly after 6:00 o'clock on the evening of that date he noticed the accused "coming through the North Sallyport of Central Barracks". His attention was directed to accused at that time because "he was dressed in civilian clothes, in violation of existing regulations". He called accused and asked him why he was in civilian clothes. During the course of the ensuing conversation, Lieutenant DeBardleben gained a suspicion from the "tone and nature of his reply" that he had been drinking. He thereupon directed accused to follow him to the office of the Officer in Charge, where he also directed accused "to blow his breath in my face, which he did, and I detected a pronounced odor of liquor" (R. 6). Three other officers were called for the purpose of inspecting accused, and no further investigation took place until they arrived and "viewed the accused" (R. 6-7). At that time, between 6:10 and 6:30 P.M., a further investigation took place which resulted in the opinion of the Officer in Charge that accused was "under the influence of liquor - drunk. * * * in such a condition as regards sobriety that he could not successfully and efficiently perform all of the duties of a cadet. His speech was abnormal, thick and somewhat incoherent." He was not "down" drunk nor obnoxiously drunk, but "incapable of performing all the duties of a cadet; for example, that of Officer of the Day. The normal duties of a cadet in ranks he could have performed satisfactorily" (R. 7). He saw accused execute an "about face", a "right face", and salute (R. 8). His answers to questions were in point (R. 12). There was no "material" impairment, but there was a "sensible" impairment of his mental faculties (R. 7). There was no sensible impairment of his physical faculties (R. 8). On cross examination, Lieutenant DeBardleben admitted in substance that if accused had been dressed in uniform he would have observed no reason for calling him; that he was in no way disrespectful or insubordinate and that he "precisely" obeyed all directions and commands (R. 9); that "under the definition in the Manual", accused was drunk but without reference to such definition "he was under the influence of liquor and not drunk, as is most commonly known". The occurrence in the area did not seem to attract the attention of any of the cadets who were "rambling" about in the vicinity at that time (R. 10).

First Lieutenant Philip E. Gallagher, Infantry, testified that he was called to the office of the Officer in Charge on the evening of January 1, 1931, where he saw accused and where he "was given a direct order to make up my mind whether he was drunk or not". At this time, Lieutenant DeBardleben, Lieutenant Crist, Captain Goode, and Colonel Richardson were present (R. 13). As a result of his observations he formed the opinion that accused was drunk (R. 12) -

"His manner was that of a drunken man. I detected a definite odor of liquor on his breath. His speech was rather thick and hesitant, that of a man who had been drinking. I had him go through various movements -- walking forward and backward, stopping and about facing and his manner at that time, while he did not stagger a great deal, he was unsteady and gave the impression of being intoxicated * * *. I should say that his mind was definitely befuddled from the effect of liquor, basing that solely on the manner in which he answered questions and the hesitancy in his speech."

He was also of the opinion that accused was not able to perform the duties of a cadet; that he was both "mentally" and "physically" incapacitated (R. 13). The very positive effort on the part of accused to control his movements was in the opinion of the witness "more of an indication of drunkenness than the unsteadiness * * *. That was quite noticeable on the part of accused, more than the elaborate or great amount of staggering" (R. 14, 15). On cross examination this witness admitted that the accused made logical answers to questions; that he had reasons to feel that accused's mentality was "somewhat impaired by liquor"; that he had no great difficulty in walking; that he was in no way disorderly or insubordinate (R. 13, 14).

First Lieutenant William E. Crist, Infantry, testified that he was called to the office of the Officer in Charge on the evening of January 1st, "to look over the accused, Cadet Ondrick, question him and try to determine my opinion as to whether he was drunk" (R. 15). As a result he formed the opinion that he did not have full and complete control of his mental and physical faculties. His speech was thick, and "he had that form of rigidity which he did not have when I knew him as a cadet in my company" (R. 16). He could probably have marched to the mess hall, but witness would not have wanted him "in a responsible position in case of fire, or something like that." He was drunk but not disgustingly so, "nor did I see him stagger". He did nothing of an insubordinate or disorderly nature (R. 17).

Captain Henry A. Barber, Infantry, while on duty in the orderly room receiving cadets on their return from Christmas leave, saw the accused shortly before 5:00 o'clock. He appeared perfectly sober. About 6:15 he was called to the office of the Officer in Charge "to inspect Cadet Ondrick and take him down to the hospital for examination". Before leaving for the hospital, he smelled his breath and discovered nothing at the time. While going down the steps accused

staggered slightly and while crossing the area (covered with ice - R. 9) he "occasionally staggered" and witness then smelled a strong odor of liquor (R. 18). He had no great difficulty in walking but "slipped occasionally, as any one might have done, but made a poor job of recovering". He formed the opinion that accused was drunk (R. 20). Witness took Cadet Ondrick to the Medical Officer of the Day, Captain DeWitt, and asked him "to examine him as to his condition of sobriety". (R. 19) On cross-examination, this witness testified that when he accosted accused outside the office of the Officer in Charge, he did not seem to be a drunken man (R. 20).

A deposition of Captain William F. DeWitt, Medical Corps, was received in evidence with the consent of the defense due to the sickness and the resulting inability of the witness to attend the trial (R. 21; Ex. A). Captain DeWitt testified in substance that he examined accused at about 6:15 p.m., January 1, 1931. As a result of this examination he formed the opinion that accused was under the influence of alcoholic liquor. There was an odor of liquor on his breath. His gait was staggering. His actions were incoordinated, his reflexes were "not marked" but somewhat disturbed. His pupils were dilated. His speech was slurring and his enunciation was poor. When directed to close his eyes and put his heels and toes together, "he stood and wobbled a great deal more than is normal". He was not sick but "very orderly and patient", and went up to the ward and there went to bed. Witness did not see him again until about 8:00 p.m., when he inspected the ward and found him sleeping and "snoring loudly". The next morning there was a distinct change in his character of speech.

Evidence for the Defense.

Eleven cadets testified in behalf of the accused. A substantial summary of the testimony of each follows: Cadet Lieutenant Edwin J. Messinger, First Class, saw accused at about 5:00 p.m., on January 1, 1931, when he came back from Christmas leave. There was no evidence of liquor on him at that time, Accused had a "strong unswerving character" and enjoyed a very good reputation in the Corps of Cadets and the First Class (R. 22-23). Cadet Alfred Gay, First Class, was in the same room at the time and saw the accused enter, where he just said "hello" and then went over to report to the Tactical Officer. He had no reason to believe accused was under the influence of liquor and considered him, after an acquaintance of four years,

"a very excellent man, * *. Unquestionably honest and a strong character * * *. I am sure he has taken every obligation and duty at the Military Academy---earnestly and sincerely" (R. 24).

Cadet R. H. Griffith, First Class, saw accused on the stoop of North Barracks at about 5:15 p.m., January 1, 1931, where he talked to him for a few minutes. He noticed no liquor on his person, nor on his breath, and he appeared to be perfectly sober (R. 27). Cadet Sergeant G. A. Farris, First Class, was in the north sally-port of Central Barracks on the evening of January 1st, where accused approached him from the north and they walked side by side into the area. Just as they turned into the area, they were stopped by Lieutenant DeBardleben, who said "You man in civilian clothes, are you a cadet?" He thereafter saw accused follow Lieutenant DeBardleben over to "the guardhouse". He smelled no liquor on his breath and saw no evidence of his being under the influence of liquor (R. 27-29). Cadet John R. Skeldon, First Class, saw and heard Lieutenant DeBardleben call "You man in civilian clothing, are you a cadet?" and thereafter recognized accused by his walk. He saw them walk toward the South Guardhouse, across the ice, "and he was perfectly normal". Witness is intimately acquainted with accused and "I think he has one of the finest characters in the class". He had never seen him under the influence of liquor nor did he ever see him take a drink (R. 29-30). Cadet Sergeant H. W. Taul, First Class, was in the hospital because he had an operation on his nose. His whole face was distorted, and none of his friends could recognize him. He met a number of cadets who failed to recognize him, but about 6:30 on January 1st, while eating supper in bed, accused entered his ward, and witness was surprised to find that accused recognized him without hesitation and said, "Taul, they have me arrested for being drunk, can you imagine that?" Witness thought accused must have had "full utilization of all his powers of observation" and noticed nothing irregular about his movements "whatever". Accused afterwards undressed and went to bed. (R. 31-34.) Cadet M. L. Haskin, Third Class, saw accused in the ward at the hospital where he had a conversation with him. "He asked me if I thought he was drunk * * * and asked me to smell his breath". This was done and witness discovered no odor of liquor. Accused did not stagger but was "somewhat excited". (R. 34-36.)

In corroboration of the two preceding witnesses, Miss C. E. Dunn, Second Lieutenant, Army Nurse Corps, testified that she was on duty at the time and observed accused from about 6:45 until 7:00 o'clock on January 1st. Accused told her that he was not intoxicated and did not know "why they put him up there". She noticed no evidence of liquor

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and in her opinion he was not drunk though he seemed to be excited (R. 25-26).

Cadet Lieutenant Wilbur S. Jones, First Class, testified that he had known accused ever since he entered the Academy July 1, 1927. He considered him "to be very high minded and to have the utmost integrity", and never saw him under the influence of liquor (R. 40). Cadet First Sergeant Charles L. Decker, First Class, expressed his estimate of accused's character and ability as a man of "unusual culture and refinement". All of his classmates admired him because he joined the Army in order to "come into West Point" and had worked his way to the top. Accused studied good literature; his honor is exemplary. Witness never saw him take a drink (R. 41). Cadet Captain F. H. Warren, First Class, testified that in the opinion of his classmates accused was a man of high character and integrity; that they particularly respected him for his convictions and "exceptional" cultural instincts. He never saw him intoxicated and never saw him take a drink (R. 41-42). Cadet Captain H. L. Bays, First Class, testified that he was intimately acquainted with accused, and said "I don't think there is a man in the Corps of Cadets who has a finer character. I have never seen him display an ungentlemanly trait. I would trust him completely" (R. 43).

Three commissioned officers appeared and testified for the defense. Captain Henry A. Brickley, Infantry, Department of Modern languages, became acquainted with accused when the latter was still in the Army and before receiving his appointment to West Point. Then and ever since, he has had numerous occasions to observe accused and always believed him to be an exceptionally fine young man, a very fine cadet. "I don't think he was addicted to any sort of drink at all" (R. 36-38). Second Lieutenant Irving A. Duffy, Infantry, Department of Law, had the accused in one of his sections. As a student he considered him "exceptionally good" and his character impressed him "as being excellent". He would be "very happy" to have accused serve under him as an officer (R. 38-39). First Lieutenant Donald A. Fay, Infantry, testified that in his opinion the conduct and behavior of accused measured up to the standard expected of cadets; that he applied himself and stood above average in the second section in Economics (R. 39).

4. The evidence thus shows that accused returned to West Point from Christmas leave at about 5:00 P.M., January 1st, 1931, when he checked in at the orderly room of his company and where Captain Barber observed him in civilian clothes, apparently sober. About an hour

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later, around 6:00 p.m., Lieutenant DeBardleben saw accused coming through the north sally-port of Central Barracks still dressed in civilian clothes. Except for that circumstance, he appeared normal, but after engaging him in a conversation, accused's actions and speech aroused Lieutenant DeBardleben's suspicions as to his sobriety. He was thereafter taken to the office of the Officer in Charge where five officers examined him for the purpose of determining his state of sobriety. The accused was required to blow his breath, to salute, to march, and to execute the different facings. Three of the officers testified that accused had a distinct odor of liquor on his breath. All arrived at a conclusion that the mental and physical faculties of accused were "sensibly" impaired as the result of intoxicating liquor and that he was therefore drunk within the meaning of the Manual for Courts-Martial. The medical officer, who examined him, detected an odor of liquor on his breath and came to the conclusion that he was under the influence of intoxicating liquor to such an extent that his mental and physical faculties were materially impaired so as to render him unable to satisfactorily perform all the normal duties of a cadet. This opinion was arrived at after he put accused through various tests as to reflexes, coordination and muscular control.

Five witnesses for the defense, all of whom had some close contact with accused within an hour before he was taken to the hospital, were of the opinion that accused was sober. Three witnesses, including a nurse, who saw accused immediately after he was admitted to the hospital, observed no evidence of drunkenness.

5. The examination of the record of trial and pronouncement of opinion by the Board of Review in this case, as required by the second paragraph of Article of War 50¹/₂, necessitate the weighing of the evidence of record and ascertainment of the law applicable to the proved facts as a part of the proceeding of ultimate adjudication of the case by the confirming authority.

Substantial questions presented by the record are whether the evidence is legally sufficient to support the findings of guilty, and if so, whether the sentence is proper.

It is clear that under the law laid down by paragraphs 126 and 145, Manual for Courts-Martial, the military law definition of drunkenness is "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties * * *." After carefully weighing the evidence the Board of Review is constrained to the opinion that accused's appearance, actions and conduct on the afternoon in question brought him within the all-encircling boundaries of this definition. The evidence in this case,

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in the opinion of the Board of Review, discloses a condition of drunkenness only because we are bound by this law and prohibited from accepting the ordinary meaning of the word "drunk" as it is defined by numerous civil courts and lexicographers.

These latter authorities define the word as meaning under the influence of intoxicating liquor to such an extent as to have lost normal control of one's bodily and mental faculties and commonly to evince a disposition to violence, quarrelsomeness and bestiality (Brooke v. State, 111 S.W. 471, Standard Dictionary); under the influence of intoxicating liquors to the extent that they affect one's acts or conduct so that persons coming in contact with him could readily see and know that the intoxicating liquors were affecting him in that respect (St. Louis, etc., R. Co. v. Waters, 152 S.W. 137); under the influence of an intoxicant, * * * so that the use of the faculties is materially impaired (Harris, etc., R. Co. v. Robinson, 140 S.W. 434, Webster's International Dictionary); so far under the influence of intoxicating liquor that one's passions are visibly excited or his judgments impaired by the liquor (State v. Pierce, 21 N.W. 195, Bouvier Law Dictionary). The Funk and Wagnall's definition is similar to that given in the Brooke case and Standard Dictionary, supra, but as further evidence of drunkenness it adds silly and amorous conduct.

Certainly the evidence of record does not bring accused's conduct within the purview of these latter definitions. On the contrary, it shows a degree of intoxication so slight as to be revealed only after accused had been subjected to physical tests designed to discover the recent drinking of alcoholic liquor. His failure to successfully pass these tests might well have been the result, in part at least, of nervousness and the excitement of the moment rather than over-indulgence in intoxicating liquor. Clearly the record shows that the witnesses to this examination of accused's person had been specifically directed to determine his condition and that their conclusions were based on the definition of drunkenness as given by the Manual for Courts-Martial rather than the common and accepted meaning of the term in civil life. It was generally admitted by the witnesses that accused's condition would never have been discovered had he not been subjected to these tests.

What, then, is a proper punishment for the degree of intoxication shown as a result of this examination and to what extent should higher authority be governed by the extremely severe sentence awarded by the court in this case? In the Federal criminal practice, it may here be observed, the rule is that, "In all cases it

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is not only the right, but the duty, of the court to take into consideration all the facts and circumstances surrounding each criminal transaction, in order to determine the degree of the guilt of the accused and the punishment that should be inflicted" (Clark v. United States, 268 Fed. 329, 331-332). This rule of practice has been ingrafted into court-martial procedure by a provision of the Manual for Courts-Martial reading, "Appropriate action should be taken where the court has imposed an unwarranted though legal punishment. * * * In every case the punishment should be graded according to the circumstances of the offense" (par. 87b), and is binding upon court, reviewing authority, and confirming authority, alike. A comprehensive statement of the considerations which should govern the court in the fixing of punishment is contained in paragraph 80, and reads as follows:

"To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment. See 102-104 (Punishments). In the exercise of any discretion the court may have in fixing the punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof made material by the limitations on punishment. The members should bear in mind that the punishment imposed must be justified by the necessities of justice and discipline."

It does not appear why accused's conduct was alleged as a violation of the 95th Article of War, an Article designed to cover the case of one who has dishonored or disgraced himself, one who has done that which, if proven, "exhibits him as morally unworthy to remain a member of the honorable profession of arms", and for which there is but one punishment prescribed - dismissal. As declared by Major General George B. McClellan, in General Orders 111, Headquarters Army of the Potomac, March 25, 1862:

****no officer or soldier can be drunk, in public, without scandalizing the army in some degree, and bringing discredit on the service: but this is not what is meant by conduct unbecoming an officer and a gentleman.

These words imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self-respect."

The court by its findings showed that in its judgment accused's conduct was not such as brought it within the purview of this Article, yet, after mitigating the seriousness of the offense, it proceeded to impose the same punishment prescribed for the graver offense. It is impossible to determine to what extent the court was influenced in imposing the severest possible sentence within its power by the action of the convening authority in submitting the case to it as a violation of the 95th Article of War. Another possible influence may be found in the erroneous and misleading closing argument of the trial judge advocate, wherein he said:

"The defense has introduced a number of character witnesses. Character evidence can have only one effect, it tends to negative facts. Now, if the court believes that the prosecution has established every fact which I have enumerated, it is bound to discount that character testimony. The fact that accused has been sainted makes no difference in this case. It can't change the results, if the facts are true. Character evidence, assuming that the facts are believed, must, like reasonable doubt, pass out of the picture with the solution of this problem, and it cannot play any further part in this case. * * * A court-martial is not acting properly or efficiently in the exercise of its duties unless it comes to the court with full knowledge of the state of discipline of the command and of those factors that tend to weaken discipline and of the policy of the commander as to the manner in which threats against discipline should be handled. There is another principle and that is that the court-martial should aid and not hinder the appointing authority. In other words, the court-martial should never tie his hands * * *. If there is any reason why clemency should be extended to this accused, that is a matter which should

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reside in the hands of the reviewing authority and not be taken in consideration by the court in reaching their sentence." (Underscoring supplied.)

It thus appears that the trial judge advocate, an instructor in law at the Military Academy, one charged with the duty of properly advising the court and on whose judgment it had a right to rely, in language which will admit of no other interpretation, advised the court, in effect, that evidence of accused's good character could not be considered in adjudging the sentence. This clearly contravenes paragraphs 80 and 111 of the Manual for Courts-Martial, which require in effect that evidence of an accused's good character be considered in determining what punishment should be adjudged. The argument quoted, therefore, constitutes error as to matter of procedure, noteworthy, but in the opinion of the Board of Review, not invalidating the trial proceedings.

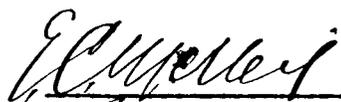
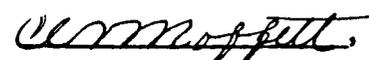
As the 96th Article of War, under which the accused stands convicted, provides for punishment at the discretion of the court governed in this case by the above cited provisions of the Manual for Courts-Martial, the Board of Review concludes, upon a careful scrutiny of the record of trial, that the punishment imposed is "unwarranted though legal" within the intendment of above quoted paragraph 87b. Accused was shown to be of good character, had no previous convictions, and there were no aggravating circumstances connected with his offense, yet he received the maximum of punishment for the minimum of intoxication. Had this cadet been convicted of appearing, in the full uniform of his corps, in a public theatre, or at divine worship in New York City, in a sodden, beastly, drunken condition, no punishment could have been awarded him more severe than that here inflicted for his offense of appearing in civilian clothes upon his return from Christmas leave, in the quasi-privacy of the area of cadet barracks in a border-line condition of technical drunkenness. Punishment of offenses, civil and military, is justified on the theories that a wrongdoer should not escape the consequences of his wrongful act and that a wholesome example should be set that would deter others from the commission of like offenses. Doubtless this last theory accounts for the type of prosecution had in this case. But regardless of the necessity for extreme punishment as an example - which is not apparent - respect for military justice is, in the opinion of the Board of Review, more to be desired in our future officers than is fear of the punitive consequences of indulgence in intoxicating liquor. Nothing so destroys respect for law as does that ultra-rigorous administration of justice which notices the forms but not the substance of procedural law.

Cadet court-martial trials for the past twenty years have been studied by the Board and in no instance has a sentence of dismissal been awarded for such a degree of intoxication, without other circumstances of aggravation, as is shown to have existed in the instant case. In two cases which arose at the Military Academy just prior to the commission of accused's offense, court-martial proceedings resulted in sentences of suspension for one year, although the degree of intoxication in one case certainly equaled that of the case in hand and, in the other one the accused was drunk to the point of nausea and vomit. These facts are deemed worthy of consideration in determining what constitutes a proper sentence in this case.

While it is appreciated that the highest degree of discipline must be maintained at the Military Academy and every effort should be devoted towards supporting authorities charged with this duty, it is the opinion of the Board of Review that the sentence in this case is, in the eye of the law, indefensibly punitive. /It is believed that a sentence not to exceed suspension until January 1, 1932, would fully serve the ends of justice and discipline and be more in accord with the law and evidence of record.

6. The Cadet Register shows that accused was born in Massachusetts, September 5, 1906, and was admitted to the Military Academy from the Army, July 1, 1927. As a fourth classman he stood 124 in academic standing in a class of 310; as a third classman 124 in a class of 302; and as a second classman 221 in a class of 300.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and that confirmation thereof is authorized by law, but recommends that the sentence be commuted to suspension without pay and allowances from the United States Military Academy until January 1, 1932.

 , Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

jointly, and in pursuance of a common intent, did, at Fort George G. Meade, Maryland, on or about January 17, 1931, feloniously take, steal, and carry away one Chevrolet automobile, value about \$450.00, the property of Major Douglass T. Greene, Infantry (Tanks).

Specification 2: In that Private First Class Albert Elber-son, Company B, 1st Tank Regiment, Private John C. Allen, Company B, 1st Tank Regiment, Private Walter J. Hughes, 1st Combat Train, 6th Field Artillery (attached to the School for Bakers and Cooks), and Private John L. Kozo, Battery C, 6th Field Artillery (attached to the School for Bakers and Cooks), acting jointly, and in pursuance of a common intent, did, at Brocmall, Delaware County, Pennsylvania, on or about January 18, 1931, feloniously take, steal, and carry away ten (10) gallons of gasoline, value about \$1.90, the property of one Clark B. Wright, of Brocmall, Delaware County, Pennsylvania.

Each accused pleaded not guilty to the Charge and Specifications there- under. Accused Elber-son and Hughes were found not guilty and acquitted. Accused Allen was found not guilty of Specification 1, guilty of Specification 2, with exceptions, and guilty of the Charge. Accused Kozo was found guilty of Specification 1 except the words "Private First Class Albert Elber-son, Company B, 1st Tank Regiment, Private John C. Allen, Company B, 1st Tank Regiment, Private Walter J. Hughes, 1st Combat Train, 6th Field Artillery (attached to the School for Bakers and Cooks) and", and except the words "acting jointly, and in pursuance of a common intent" and excepting the figures "\$450.00", substituting therefor the figures "\$200.00", of the excepted words and figures not guilty and of the substituted figures guilty; guilty of Specification 2, except the words "Private First Class Albert Elber-son, Company B, 1st Tank Regiment, Private Walter J. Hughes, 1st Combat Train, 6th Field Artillery (attached to the School for Bakers and Cooks)", of the excepted words not guilty, and guilty of the Charge. No evidence of previous convictions was introduced. Accused Allen was sentenced to confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period. Accused Kozo was sen- tenced 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 as to accused Allen, ordered its execution, and designated Fort George G. Meade, Maryland, as the place of confinement; approved the sentence as to accused Kozo, ordered its execution, but suspended the dishonorable discharge, and designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement. The sentences were published

in General Court-Martial Order No. 92, Headquarters Third Corps Area, March 6, 1931.

3. The evidence for the prosecution as to Specification 1 may be substantially summarized as follows:

On the evening of January 17, 1931, Major Douglass T. Greene, Executive Officer of the Tank School, Fort George G. Meade, Maryland, drove his automobile, a Chevrolet Sedan, Maryland license 211-230, to the Post Gymnasium where he parked about 8:10 p.m., for the purpose of witnessing a basket-ball game. After the game, about 9:00 p.m., he discovered that his car was gone. He estimated the value of the car at \$425 and gave no one permission to take it (R. 11-12). About 1:25 a.m., January 18, 1931, police officer Thomas F. O'Connor, Ardmore, Pennsylvania, stopped a car in Haverford Township, Pennsylvania, in which the four accused were riding. During a brief conversation, the police officer asked them for the "Owner's and driver's" cards, and on their inability to comply with the request, he placed them all in arrest (R. 24-25), and confined them in the station house (R. 26). The car was searched but no cards (R. 26) or baggage was found (R. 30). The accused were arrested because of what the police officer considered suspicious circumstances (R. 29). About 11:00 a.m., January 18, Samuel Seigle, Superintendent of Police, Haverford Township, Pennsylvania, went to the station house and interviewed the accused. All were dressed in civilian clothes. Allen and Koza occupied one cell and the others an adjoining cell. All admitted that they came from "Camp Meade". One accused (indicated but not identified in record) said the car belonged to him. When asked where his cards were he replied that he had none. The superintendent thereupon

"told them they were lying, and I wasn't going to waste my time talking to them. I said I was going to leave and was coming back later, and for them to think it over, that they had better come across or I would send them up the road" (R. 31).

A short time thereafter they called the superintendent back, when accused Allen admitted "we took the car", stating further that the car belonged to Major Greene because "we found a piece of paper in the car and it had Major Greene's name on it". The other accused concurred in this admission (R. 32). Major Greene was immediately notified by telegram (R. 36) and on January 19, 1931, he went to the police station at Haverford, Pennsylvania, where he identified, and recovered the possession of his car (R. 13). On the same day the accused were returned to military control and were taken back to Fort Meade, Maryland, under guard (R. 14).

As to Specification 2, the evidence shows that, on January 18th, a car, bearing Maryland license 211-230 (R. 20) drove up to a gas station operated by Mrs. Elizabeth Kirk Wright and her husband, Mr. Wright, in Brocnall, Pennsylvania (R. 18, 19). Mrs. Wright identified accused Allen and Kozo as two of the four young men who were riding in the car at that time (R. 21). She was unable to identify any one of the accused as the driver of the car, but stated that the two who occupied the front seat requested her to fill the tank with gasoline. The one who was driving ordered the kind, and the other ordered the quantity (R. 23). Ten gallons of gasoline were thereupon poured into the tank of the car (R. 19). As soon as the attendant removed the gas hose, and before she was able to replace the cap of the tank, "the car started down the road as fast as they could go." The gasoline was the property of Mr. and Mrs. Wright and was valued at \$1.90 (R. 20). Mrs. Wright immediately notified the police and later delivered the cap of the gasoline tank to the police superintendent, and at which time she saw two of the accused at the station (R. 22, 23). Investigation proved that the gasoline cap of the Chevrolet car driven by accused was missing and that the cap delivered by Mrs. Wright, proved a perfect fit (R. 37).

EVIDENCE FOR THE DEFENSE.

Captain John C. Sandlin, Infantry (Tanks), testified as to the good character of accused Elberson (R. 40-41). Private First Class Lamar Hay testified that men of B Company are authorized to sign out on a pass book showing the hour of departure and the hour of return. He saw all four of the accused in the hall of B Company between seven and nine o'clock January 17, 1931. Later he saw all four accused leave the barracks dressed in civilian clothes. None carried any bundles or other baggage with them. A pass book of Company B was introduced in evidence showing departure entries as to accused Elberson and Allen as follows: "Baltimore 1-17-31 9 P.M." (R. 42-45, Ex. A.)

Accused Elberson chose to take the stand in his own behalf. In substance he testified that he and accused Allen intended to go to Baltimore by rail (R. 49-50), but accused Kozo invited them to go by automobile (R. 50). Kozo had a car parked near the building and all four accused left together (R. 51). Witness knew nothing about the ownership of the car that Kozo was driving (R. 52). Before arriving in Baltimore all agreed to go to Allen's home in Oil City, Pennsylvania (R. 52). In answer to the question by defense counsel, "When did you first learn that this car was stolen property?", witness replied "After we were arrested" (R. 53). He assumed that Kozo owned the car or had a right to drive it (R. 59). Kozo drove the car and Allen sat in the front seat with him. Witness and Hughes rode in the rear seat (R. 54).

Accused Allen took the stand and corroborated in every respect Elberson's testimony as to Kozo's connection with the automobile (R. 67, 68). All had authority to be absent until reveille Monday morning (R. 69). He did not know the car was stolen property until after they were arrested. After the apprehension, Kozo admitted to witness that the car belonged to Major Greene and that he got it from the gymnasium (R. 70). As to the larceny of the gasoline, he admitted that he was riding in the front seat with Kozo. The latter ordered the gasoline and drove off without paying for it. Witness said nothing to Kozo about the affair in that there was "nothing I could say" (R. 71, 72). He made no protest because "I figured it was none of my business" (R. 75).

Accused Hughes took the stand and in substance testified that he had planned earlier in the evening to go to Baltimore with Allen. Subsequently he was invited to ride in an automobile driven by Kozo (R. 83-85). He knew nothing about the larceny of the car until about 8:00 or 9:00 a.m., Sunday morning when he became aware of the circumstances while locked in the cell (R. 87). He was out for a pleasure trip and intended to be back before reveille Monday morning (R. 87).

The record is silent as to whether accused Kozo was advised of his rights, nor does it show that he was afforded the opportunity to testify or make a statement.

4. The substantial question presented by the record of trial is whether accused Kozo was afforded a fair and impartial trial by reason of the court's refusal to grant the severance requested by the defense. As grounds for the request, counsel stated that the defense of the other accused would be antagonistic to that of Kozo, and that

"It is the duty of the defense to present the truth and the facts in the case, and if certain evidence to be introduced by the defense would seriously affect the interests of any of the co-accused, I feel I could not properly defend him before this court" (R. 8).

He further stated:

"If it please the court in the case of three of the accused, the defense intends to have the accused take the stand, and the testimony they will give on the stand is seriously prejudicial to the other co-accused" (R. 8).

The law member overruled the motion and the case proceeded to trial. At the close of the case for the prosecution, the evidence as to the

extent of participation of the several accused in the larceny of the automobile alleged in Specification 1, was, to say the least, doubtful. It is evident throughout the record that the defense counsel prepared a defense for three of the accused directly antagonistic to accused Kozo. Not only did the defense counsel attempt, by his method in the direct examination of his own witnesses, to prove that Kozo was a thief and the one and only thief, but in his argument to the court, he stated:

"The evidence as brought out all the way through shows that these men were in an automobile. It points very clearly to the fact that one man was the thief, was the man that actually took this car. In the opinion of defense the man who committed the act, who went to the automobile, turned on the ignition, stepped on the starter and drove it away is the man that is guilty of larceny." (R. 92.)

It is thus clear that the defense counsel was nothing other than a self-imposed prosecutor as far as the rights and privileges of accused Kozo were concerned and that the latter was deprived of counsel guaranteed to him under the express provisions of the 11th and 17th Articles of War and paragraphs 6, 43 and 45, Manual for Courts-Martial. The latter paragraph in part defines the duties of a defense counsel in the following language:

"He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence."

In the opinion of the Board of Review the defense counsel utterly and wholly failed to perform this duty as to accused Kozo, although he should not be held responsible since he properly attempted to secure a severance. Obviously it would be prejudicial error to try an accused under military law without a defense counsel; hence, all the more reason for error when it is clearly shown that the appointed defense counsel acted as a prosecutor in fact. Failure on the part of the court to grant a severance, when it became apparent that the defense counsel planned to convict Kozo in order to acquit the other accused, resulted in fatal error.

5. For the foregoing reasons, it is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence as to accused Kozo.

W. M. H. G., Judge Advocate.

J. W. Cannon, Judge Advocate.

C. M. Moffett, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
C.M. No. 195035

U N I T E D S T A T E S	)	E I G H T H C O R P S A R E A
)	
vs.	)	Trial by G.C.M., convened at
	)	Fort Huachuca, Arizona, Febru-
Private WILLICE TALLEY	)	ary 24, 1931. Dishonorable
(R-2966608), Company H,	)	discharge and confinement for
25th Infantry.	)	twenty (20) years. Disciplinary
	)	Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and MOFFETT, 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.

2. The instant case is one of assault with intent to commit rape in violation of the 93rd Article of War. The evidence shows the person assaulted - sole prosecution witness of the acts of accused constituting assault - was a white woman and the accused a negro man. She was, on the night of the assault, unprotected in the quarters of her husband (an Army officer) in which accused then lived in the capacity of an off-duty servant. Her husband's absence at the time from the quarters and post was known to accused. Viewing her testimony in the light of the conviction based thereon and the conflict between it and that of accused as a defense witness, the conclusion is inevitable that the trial court gave it full credence as against the exculpatory testimony of accused, which in the adjudication of the case it was authorized and empowered to do, even to resting conviction of accused thereon (Manual for Courts-Martial, par. 124; 4 Bl. Com. 213, 214; Brittain v. State, 153 S.E. 622; Thompson v. State, 86 So. 871).

The substantial question presented by the record of trial

is whether, according to the testimony of this prosecution witness adjudged credible by the court, the acts done by accused were sufficient to constitute an assault with an intention to ravish her. His words to her accompanying his assault, which failed of purpose through her resistance followed by his desistance, were: "Turn out the lights, I want to talk to you"; repeating "Turn off the lights", and adding "If you call I will shoot" - all spoken while making an assault upon her with a loaded pistol in the living room, where at the time she was seated in front of the fireplace engaged in reading.

The rule of decision on the question here presented is, in the opinion of this Board, that of *Brittain v. State*, supra, decided by the Court of Appeals of Georgia on June 10, 1930, and there best stated. In that case a conviction of assault with intent to rape was held authorized by the evidence, and the question of criminal intent to be for the jury and not for the court. The facts appear in the third sentence (accosting of white girl by colored boy on the street at night) of the doctrinal part of the decision contained in the following excerpt:

"In the case of *Watkins v. State*, 68 Ga. 832, the second headnote is as follows: 'Where a man hailed a woman walking along a pathway, and holding something in his hand and saying he had plenty of money, told her to go into a gully, and on her retreating, drew a pistol, and advancing upon her, ordered her to turn back, and she escaped by flight, a verdict of assault with intent to rape, approved by the presiding judge, will not be set aside as unsupported by evidence. (a) The fact of proximity of a house and public road to the scene of the transaction may have rendered the effort fruitless, but did not render it guiltless.' Where the evidence shows that a 16 year old white girl is alone and unprotected on the street at night, and a colored boy of approximately the same age steps in front of her, stops, asks her name and where she lives, points a pistol at her, and orders her to go into a vacant lot, and tells her that he will shoot her heart out if she does not go, and will shoot her if she hollers, the jury are authorized to find that he intended to rape her. Let it be borne in mind that the reference to a colored boy and a white girl has no relation to race prejudice; but the difference in race may always be considered by the jury in a case of this kind. As was said by Chief Justice

Bleckley in the case of Jackson v. State, 91 Ga. 330 (2), 18 S.E. 132, 133, 44 Am. St. Rep. 25, 'The doctrine of the court's charge to the jury that, upon the question of intention, social customs, founded on race differences, and the fact that the man was a negro and the girl a white person, might be taken into consideration, is undoubtedly correct. * * * Not the faintest trace of a reason appears on which he could have founded any hope or expectation of consent. * * * The difference of sex, to say nothing of the difference of race, would afford ample ground for directing attention to this element of the case.' As said in Ware v. State, 67 Ga. 352, 'What other motive could he have had? She was unknown to him. She was unprotected. * * * The fiendish flame of lust alone could impel him to such acts. In seeking the motives of human conduct, the jury need not stop where the proof ceases; inferences and deductions from human conduct are proper to be considered where they flow naturally from the facts proved. And such conduct as this points with reasonable, if not with unerring, certainty to the lawless intent he had in view.'"

See also, on the point of race difference as productive of intent to ravish in assault cases of this character, the Pumphrey Case, *infra*.

Of the intent in assault with intent to rape, it was said in Pumphrey v. State, 47 So. 156:

"As to this offense the law looks beyond the act done and embraces the accompanying intent. It is the intent that raises the act to the gravity of a felony, and calls down upon it the greater severity of punishment. Intent, we know, being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence."

See also People v. Moore, 100 Pac. 688, 689:

"In all such cases the intent with which an assault is committed is a fact which

can only be inferred from the outward act and the surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proved afford no reasonable ground for the inference drawn."

Of the termination of the assault by the desistance of accused as affecting the criminality thereof, the court in the Pumphrey Case declared:

"In the instant case, if the accused, a negro, under the excitement of lust and with the intention of gratifying it by force, entered the bedroom of Mrs. Crimm, a white woman, about 10 o'clock in the night, and with such intention got upon her person, on the bed in which she was sleeping, though he abandoned his design upon her springing from the bed and opening the door, we apprehend that it could not be said, as a matter of law, that he was not guilty of an assault with intent to ravish."

Paragraph 149 1, Manual for Courts-Martial, declares hereon: "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted."

It is further to be noted that neither a spoken desire for sexual intercourse (*Dickens v. People*, 152 Pac. 909, 911) nor any physical contact of the offender with the person assaulted is necessary to prove the element of intent to consummate sexual intercourse by force in the crime of assault with intent to rape (*Jackson v. State*, 18 S.E. 132, 133). As was said by the Supreme Court of Georgia, speaking by Chief Justice Bleckley, in the last cited case:

"No actual touching of the woman's person is necessary to complete the assault. There need be nothing more than the intention to accomplish sexual intercourse presently by force, and the active prosecution of that intention until a situation of immediate, present danger to the woman is produced."

We conclude, therefore, that in the case before us the attempt to commit a violent injury upon the woman above referred to by ravishment is complete.

3. For the foregoing reasons, the Board of Review is of the opinion that the record of trial in the instant case is legally sufficient to support the findings and sentence.

H. W. Clark, Judge Advocate.

J. M. Connor, Judge Advocate.

C. M. Moffett, Judge Advocate.



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

Board of Review
C. M. No. 195212

APR 10 1931

U N I T E D S T A T E S	)	F I R S T D I V I S I O N
)	
vs.	)	Trial by G.C.M., convened at
	)	Fort Hamilton, New York, March
Private First Class EARL B.	)	6 and 13, 1931. Dishonorable
ROBINSON (6701633), Company	)	discharge and confinement for
H, 18th Infantry.	)	one (1) year. Disciplinary
	)	Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and MOFFETT, Judge Advocates.

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

2. By the Specification of the Charge it is alleged that accused did take, steal, and carry away one open face, 7-jewel, Elgin watch of the value of about \$50.00. The only testimony as to the value of the watch is that of the owner who stated: "Well, as far as I know my mother bought that for me; it was bought at pre-war prices; I think she paid around \$50.00 for it; I don't know just the exact amount she paid for it." (R. 10.) It was further shown that the watch was purchased and had been in use approximately twenty-five years prior to the trial (R. 12). The watch was before the court. It was not shown that the witness who testified as to the value of the watch was an expert or was otherwise qualified to express an opinion as to its value, and, under the circumstances, such testimony is not sufficient to support the finding of value in excess of \$20.00. In view of the nature of the property its inspection by the court did not alone justify any finding of value other than that it was of some value (C.M. 144763, Parker; C.M. 192911, Weckerle). The evidence is legally sufficient to support only so much of the findings of guilty of the offense charged as

involves a finding of guilty of larceny of the watch described, of some value, an offense for which the maximum punishment by confinement authorized by paragraph 104 c of the Manual for Courts-Martial is confinement at hard labor for six months.

3. For the reason stated, the Board of Review holds the record legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as involves a finding of guilty of larceny of the watch described, of some value, 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.

[Signature], Judge Advocate.

[Signature], Judge Advocate.

[Signature], Judge Advocate.

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

Military Justice
C.M. 195219

JUN 16 1931

U N I T E D S T A T E S	)	SECOND CORPS AREA
)	
vs.	)	Trial by G.C.M., convened at
	)	Governors Island, New York,
Captain ELWIN S. FERRAND,	)	January 27, February 24, 25,
Signal Corps.	)	1931. Dismissal.

OPINION of the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates.
ORIGINAL EXAMINATION by GUERIN, Judge Advocate.

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

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

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

Specification 1: In that Captain Elwin S. Ferrand, Signal Corps, did, at Fort Monmouth, New Jersey, on or about the 31st day of July, 1929, with intent to deceive Lieutenant Colonel then Major Clyde L. Eastman, Signal Corps, who was at that time making an official audit of the accounts of the officers' mess fund at Fort Monmouth, New Jersey, of which fund the said Captain Ferrand was then custodian, officially present to the said Lieutenant Colonel then Major Eastman an official certificate made by the said Captain Ferrand in the council book of said officers' mess in words and figures as follows, to wit:

"I certify that, to the best of my knowledge and belief the following is a complete and accurate statement as of this date.

"(a) of all outstanding debts and obligations - payable from the mess fund. \$1289.09. Current Bills.

"(b) of all the amounts due the mess fund all bills for July.

"(c) of all outstanding checks not reported by bank, pertaining to this fund,"

which certificate was then known by the said Captain Ferrand to be untrue in that he knew at the time of presenting such certificate that the outstanding past-due debts and obligations payable from the said mess fund amounted at that time to a sum much greater than \$1,289.09, and current bills to wit, approximately \$2751.70.

Specification 2: In that Captain Elwin S. Ferrand, Signal Corps, did, at Fort Monmouth, New Jersey, on or about July 31, 1929, with intent to deceive Lieutenant Colonel then Major Clyde L. Eastman, Signal Corps, who was at that time making an official audit of the officers' mess fund at Fort Monmouth, New Jersey, of which fund the said Captain Ferrand was at that time the custodian, officially state to the said Lieutenant Colonel then Major Eastman that the total outstanding bills against said officers' mess amounted to \$1,289.09 and current bills, which said statement was then known by the said Captain Ferrand to be untrue in that on July 31, 1929, the outstanding past-due obligations of said officers' mess amounted to a sum much greater than \$1,289.09, and current bills to wit, approximately \$2751.70.

Specification 3: (Plea under statute of limitations sustained.)

Specification 4: In that Captain Elwin S. Ferrand, Signal Corps, did, at Fort Monmouth, New Jersey, on or about March 31, 1929, with intent to deceive the officer or officers auditing the Athletic Fund at Fort Monmouth, New Jersey, of which fund he was at that time custodian, make and enter an

official certificate on voucher number 9 to said Athletic Fund for March, 1929, dated March 31, 1929, in words and figures, as follows, to wit:

"Reimbursement from Officers' Mess Fund for checks drawn against the Post Athletic Fund in error in the following amounts:

\$102.87
35.00
<u>72.75</u>
\$210.62,"

which said certificate was known by the said Captain Ferrand to be untrue in that none of said checks was drawn against the Post Athletic Fund in error but were all intentionally and knowingly so drawn by the said Captain Ferrand.

Specification 5: In that Captain Elwin S. Ferrand, Signal Corps, did, at Fort Monmouth, New Jersey, on or about the 6th day of September, 1929, with intent to deceive Major H. R. Kutz, I.G.D., who was at that time making an official investigation of the officers' mess fund at Fort Monmouth, New Jersey, officially state to the said Major Kutz that the checks against the bank account of the Fort Monmouth Athletic Fund in the Second National Bank & Trust Company of Red Bank, New Jersey, in favor of Mike's Wonder Market for \$113.85, dated November 19, 1928; for \$72.75, dated January 19, 1929; for \$102.87, dated February 25, 1929, and for \$144.78, dated May 27, 1929, were all drawn through error or mistake from the Athletic Fund at Fort Monmouth, New Jersey, in payment of indebtedness due by the officers' mess fund at Fort Monmouth, New Jersey, to Mike's Wonder Market, or words to that effect, which said statement was known by the said Captain Ferrand to be untrue in that none of said checks was drawn through error or mistake but all of the same were drawn knowingly and intentionally by the said Captain Ferrand.

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

Specification 1: (Plea under statute of limitations sustained.)

Specification 2: (Plea under statute of limitations sustained.)

Specification 3: In that Captain Elwin S. Ferrand, Signal Corps, did, at Fort Monmouth, New Jersey, on or about the 25th day of February, 1929, knowingly and willfully misappropriate the sum of \$102.87, property of the athletic fund at Fort Monmouth, New Jersey, of which he was at the time custodian, by wrongfully paying to Mike's Wonder Market, with funds belonging to said athletic fund, a bill in that amount, due and owing by the officers' mess at Fort Monmouth, New Jersey.

Specification 4: In that Captain Elwin S. Ferrand, Signal Corps, did, at Fort Monmouth, New Jersey, on or about the 25th day of February, 1929, knowingly and willfully misappropriate the sum of \$35.00, property of the athletic fund at Fort Monmouth, New Jersey, by wrongfully and unlawfully withdrawing the same from the bank account of said athletic fund and depositing it to the credit of the officers' mess fund at Fort Monmouth, New Jersey.

Upon arraignment accused entered pleas in bar of trial under the statute of limitations as to Specification 3, Charge I, and Specifications 1 and 2, Charge II, all of which the court sustained. He pleaded not guilty to, and was found guilty of, the charges and the remaining specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. In this case certain salient facts are established by uncontroverted evidence. While they are not all expressly admitted, none is substantially denied by the defense. They may be summarized as follows:

The accused, at his own suggestion (R. 147), was detailed as Officer in Charge of the officers' mess at Fort Monmouth, New Jersey, on August 29, 1927 (R. 67; Ex. 62); and on September 22, of the same year, he took over from his predecessor and receipted for the mess fund then amounting to \$54.11 with no outstanding indebtedness (Ex. 1).

He remained mess officer until July 31, 1929, when his accounts were audited by Major (now Lieutenant Colonel) Clyde L. Eastman, and the mess fund was turned over to the successor of accused (R. 67, 68; Ex. 30 and 48). At this time there was but \$27.11 in the fund while the outstanding indebtedness amounted to upwards of \$2750.00, including current bills totalling about \$400.00. Thus the outstanding obligations of the fund, exclusive of current bills, amounted on July 31, 1929, to upwards of \$2300.00 (Ex. 2, 31-47, 53 and 54; R. 54-66). On that date, accused submitted to Major Eastman as official auditing officer the mess fund council book for the month of July, 1929, which contained the following certificate, dated July 31, 1929, and signed by accused:

"I certify that, to the best of my knowledge and belief the following is a complete and accurate statement as of this date.

(a) of all outstanding debts and obligations - payable from the mess fund \$1289.09. Current Bills.

(b) of all the amounts due the mess fund all bills for July.

(c) of all outstanding checks not reported by bank pertaining to mess fund." (Ex. 30 and 48; R. 68, 70, 71.)

At the same time accused made statements to Major Eastman as to what bills were outstanding (R. 72-75), and Major Eastman, upon the information furnished by the accused, signed a certificate of audit which contained the following:

"Outstanding bills as per list posted herein: Schmidt Bros. 1219.35 - Burton Davis \$79.74."

The word "posted" quoted above appears to have been changed from "pasted" to "posted", the change bearing the initials of Major Eastman (Ex. 30, 48).

From about May, 1928, until about August 1, 1929, accused was also custodian of the post athletic fund at Fort Monmouth (R. 67, 68). The bank account of the mess fund was in the "Long Branch Trust Company" of Long Branch, New Jersey (Ex. 4, 21, and 52), while that of the athletic fund was in "The Second National Bank & Trust Company" of Red Bank, New Jersey (Ex. 3, 9, 13, 17 and 26). Among the dealers from whom the mess was accustomed to purchase supplies was Mike's Wonder

Market, conducted by Mike P. Savoth, a former soldier, who was familiar with the custom in the Army of paying bills not later than the 10th of the month following that in which the bills were incurred. Relying upon this custom, Savoth or his wife made a practice of making demand upon accused shortly after the 10th of the month when bills for the preceding month had not been paid (R. 86, 87, 92-94). On November 19, 1928, January 19, 1929, February 25, 1929, and May 27, 1929, accused drew checks against the athletic fund account in "The Second National Bank & Trust Company" of Red Bank, in favor of Mike's Wonder Market, for, respectively, \$113.85, \$72.75, \$102.87, and \$144.78 (Ex. 3, 9, 13 and 26), in payment of supplies furnished to the officers' mess (Ex. 7, 8, 11, 12, 15, 16, 28 and 29). On the respective dates of the four checks above mentioned the balance to the credit of the mess fund bank account was \$40.08, \$46.64, \$4.06 and \$84.48, not sufficient in any case to pay the respective amounts of the bills against the mess fund to pay which the checks were drawn against the athletic fund account (Ex. 4, 6, 10, 11, 14, 15, and 27; R. 37-38, 178-186).

On February 25, 1929, accused drew against the athletic fund bank account a check payable to "Cash" for \$35.00 (Ex. 17), which on that date was deposited to the credit of the mess fund bank account (Ex. 14; R. 37, 38). On February 20, 1929, the bank account of the mess fund was overdrawn in the sum of \$7.27. The following day a check for \$23.67 upon the mess fund account came into the bank. Had this check been paid the overdraft would have amounted to \$30.94. The bank notified accused that the mess fund account was overdrawn and that the check for \$23.67 would be held until such time as the accused could make a deposit to cover it (R. 36-38).

On March 31, 1929, accused, as mess officer, issued a check (Ex. 21) against the mess fund bank account in favor of the post athletic fund for \$210.62, which amount is entered in the athletic fund council book under date of March 31, 1929, as Voucher 9, being a receipt from officers' mess fund (Ex 23). Voucher 9, dated March 31, 1929, bears the following statement signed by the accused:

"Reimbursement from Officers' Mess fund for checks drawn against Post Athletic Fund in error in the following amounts:

\$102.87	
35.00	
72.75	
<u>\$210.62"</u>	(Ex. 22).

On September 6, 7 and 8, 1929, Major H. R. Kutz, I.G.D., was making an official investigation of certain alleged irregularities in the conduct and accounts of the officers' mess fund at Fort Monmouth, in the course of which investigation he questioned accused concerning the four checks hereinabove mentioned, all payable to Mike's Wonder Market, for, respectively, \$113.85, \$72.75, \$102.87, and \$144.78; and as to each of these checks the accused stated that the payment represented by it was made through error from the athletic fund (R. 97-98).

4. From the facts summarized above, established by uncontroverted evidence and not substantially questioned by the defense, it appears that the accused on or about July 31, 1929, presented to Major Eastman who at that time was making an official audit of the accounts of the mess fund in question, the official certificate set forth in Specification 1, Charge I, and that said certificate was not true; that the accused made and entered the certificate set forth in Specification 4, Charge I; that he made to Major Kutz the statement alleged in Specification 5, Charge I; that he misappropriated the sum mentioned in Specification 3, Charge II, money of the athletic fund at Fort Monmouth, by using the same to pay a bill against the mess fund; and that he misappropriated the \$35.00, money of the athletic fund, mentioned in Specification 4, Charge II, by depositing it or permitting it to be deposited to the credit of the officers' mess fund.

As to Specification 1, Charge I, the only remaining question, therefore, is as to whether the false certificate therein mentioned was known by accused to be false and was made with intent to deceive Major Eastman. As to Specification 2, Charge I, certain somewhat conflicting evidence must be considered hereinafter with reference to whether or not accused made the statements alleged in that specification. Pleas of the statute of limitations having been sustained as to Specification 3, Charge I, and Specifications 1 and 2, Charge II, these three specifications need not be considered. As to Specifications 4 and 5, Charge I, the only remaining questions are as to whether the drawing of the checks mentioned in those two specifications was in fact due to an innocent mistake on the part of accused. As to Specifications 3 and 4, Charge II, the only question remaining is as to whether accused knowingly and willfully made the misappropriations therein alleged.

5. Lieutenant Colonel (formerly Major) Eastman testified that when he audited the mess account on July 31, 1929, accused told him what the outstanding bills were and that he could not have known from any other source (R. 72). He further testified that the \$1289.09 mentioned in the accused's certificate he understood to mean outstanding obligations in addition to current bills (R. 72). Colonel Eastman,

when testifying as a witness for the prosecution on January 27, 1931, was unable to recall with exactness the content of the oral and written data furnished him by accused on the occasion of the mess fund audit on July 31, 1929, in explanation and amplification of the latter's certificate of outstanding obligations of the officers mess on that date, but his best recollection of the matter is that accused presented to him a list of current bills and stated that in addition to the indebtedness mentioned in Colonel Eastman's certificate and the amount of indebtedness mentioned in accused's certificate there might be one or two minor bills other than current bills (R. 71-82).

The accused himself testified in substance with reference to Specifications 1 and 2, Charge I, that he submitted to Colonel Eastman at the time the mess fund was audited a list of outstanding bills of which he had learned after signing his certificate in the council book and that this list did not include current bills. He testified further in substance that he reported to Colonel Eastman all outstanding bills, other than current bills, of which he had any knowledge (R. 154, 176, 177).

6. As to the checks drawn upon the athletic fund to pay obligations of the mess fund the contention of accused is that these checks were all drawn through mistake; that he was overburdened with work and could not give proper attention to mess fund matters and, simply through an innocent error, he drew the checks from the wrong check book (R. 179-183).

As to the check on the athletic fund for \$35.00 payable to the order of "Cash" and deposited to the credit of the mess fund, which is mentioned in Specification 4, Charge II, accused testified in substance that the check was drawn as a guarantee for an athletic game and that he did not know definitely how it came to be deposited to the credit of the mess fund, the inference from the testimony being that this was also an innocent mistake (R. 149-151).

It clearly appears from the testimony of Second Lieutenant Russell A. Wilson, who was Assistant Athletic Officer at the time the \$35.00 check was drawn, that no guarantee of \$35.00 was given for any game at about that time (R. 221, 222).

As to Specifications 1 and 2, Charge I, the contention of the defense that the auditing officer was given full information as to all outstanding indebtedness cannot be accepted. It is inconceivable that accused, had he furnished the list as claimed by him showing substantial obligations in addition to those covered by his certificate, would have allowed that certificate to remain unchanged; and it is still more incredible that the auditing officer would have made the

certificate which he signed had he been informed by the accused that the outstanding obligations of the fund were approximately twice what he certified them to be. The certificate under such circumstances would have constituted a false official statement by the auditing officer. Careful examination of the council book itself for the month of July, 1929, fails to disclose the slightest indication that any paper had ever been pasted into it; and the word "posted" appearing in the auditing officer's certificate to have been changed from "pasted" and initialed by the auditing officer, together with the fact that the words "outstanding bills as per list posted herein" are followed by a colon separating them from the two accounts mentioned, "Schmidt Bros. 1219.35 - Burton Davis \$79.74", clearly indicates that the auditing officer considered at the time that those two accounts constituted the entire outstanding indebtedness of the mess exclusive of current bills and that the "list posted" consisted of those two bills.

In the opinion of the Board of Review the evidence leaves no reasonable doubt that the false certificate mentioned in Specification 1, Charge I, and the false statement mentioned in Specification 2, Charge I, were made with intent to deceive and that consequently the accused is guilty of these two specifications. The proved recurrence (five instances) of coincident payment demand, insufficiency of mess fund, sufficiency of athletic fund, and drawing of check on the latter fund to discharge an obligation against the former, constitutes overwhelming proof of a purposeful course of action as distinguished from unwitting error in the press of business, and therefore of false official statements violative of the 95th Article of War touching such wrongful check drawing, as charged. This proof is augmented by that of his previous payment from his company fund of a mess fund obligation for dishes in the sum of \$27.00 before accused had even assumed custody of the latter, but at a time when the bank balance to the credit thereof did not admit of such payment.

As above concluded, no credence can be given to accused's claim that the four checks drawn in favor of Mike's Wonder Market on the athletic fund in payment of obligations of the mess fund were drawn through innocent mistake. The bank accounts of the two funds were in different banks in different cities. Checks upon the mess fund account were of a yellowish color (Ex. 4, 21), were larger in size than checks upon the athletic fund account, bore printed serial numbers above 3000 and were signed by the accused's name over the printed words "Mess Officer". The four checks in question drawn in favor of Mike's Wonder Market (Ex. 3, 9, 13 and 26) are of a blueish color, and bear no printed serial numbers, the numbers being written in with a pen and all being under 200. These checks had stamped on them at the

place for signature the following words: "The Athletic Fund, 1st Lt. S. C., Fort Monmouth, N.J., Custodian." The four checks in question were signed with the accused's name over the words "The Athletic Fund" and the words "Capt. S.C." were written with a pen over the printed words "1st Lt. S.C.". It is also significant that each of these checks was drawn to pay a mess fund bill at a time when the creditor was endeavoring to collect and when the mess fund bank account did not contain sufficient available funds to pay the particular bill. It is too great a tax upon human credulity to believe that accused in drawing these checks was not aware of the fact that he was using athletic fund money to pay mess fund bills. It follows that the certificate mentioned in Specification 4, Charge I, and the statement mentioned in Specification 5, Charge I, were both known by accused to be false and were made with intent to deceive. It also follows that accused is guilty of the misappropriation alleged in Specification 3, Charge II. Of the misappropriation of \$35.00 charged in Specification 4, Charge II, there is no satisfactory explanation, and all of the circumstances as hereinabove summarized clearly establish that the accused drew the check in this sum upon the athletic fund account and deposited it to the credit of the mess fund with full knowledge of what he was doing.

In the matter of the numerous duties of Captain Ferrand, the evidence shows that while detailed as Officer in Charge of the officers mess and officers quarters at Fort Monmouth he also performed the duties of commanding officer of Company A, 51st Signal Battalion, until May, 1928, and battalion adjutant thereafter; officer in command of headquarters detachment and the band; battalion personnel adjutant; custodian of the headquarters company fund, band fund, and, after May, 1928, of the post athletic fund; battalion supply officer; supply officer of the post motor transport; assistant motor transport officer; post executive officer and post personnel officer for about one month; adjutant, C.M.T.C. and R.O.T.C. camps during summer training season of 1928 and 1929; in addition, until April, 1929, to normal post duties such as general and special courts-martial, guard, and surveying officer; and that the aforementioned duties in their entirety were more than he could properly perform, requiring on his part almost constant day work until 5:30 p.m. and much night work in his quarters (R. 67-68, 85, 111-114, 152-153).

The evidence further shows that the entire outstanding indebtedness of the officers mess on July 31, 1929, was subsequently satisfied by the father of accused. (Ex. 50, R. 155-156.)

7. The Official Army Register shows the accused's service as follows: "Pvt. and Pvt. 1 cl. Co. B 1 Fld. Sig. Bn. N.Y. N.G. 19 June 16 to 23 Dec. 16; 1 lt. Sig. Sec. O.R.C. 11 June 17; accepted 9 July 17; active duty 20 July 17; capt. Sig. C.U.S.A. 12 Nov. 18; accepted 15 Nov. 18; vacated 24 Sept. 20. _____ 1 lt. Sig. C. 1 July 20; accepted 24 Sept. 20; capt. 1 July 20."

8. The court was legally constituted. No errors injuriously

affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. Dismissal is mandatory for violation of the 95th Article of War.

E. M. [unclear], Judge Advocate.

[unclear], Judge Advocate.

[unclear], Judge Advocate.

To The Judge Advocate General.

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

Specification: In that Private Abraham Gilmore, Company "D", 33d Infantry, did, at Fort Clayton, Canal Zone, on or about October 4th, 1930, desert the service of the United States and did remain absent in desertion until he was apprehended in the Republic of Panama on or about October 16th, 1930.

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

Specification 1: In that Private Abraham Gilmore, Company "D", 33d Infantry, did, at Fort Clayton, C. Z., on or about October 6th, 1930, feloniously take, steal and carry away one Tailor made Blouse, value about \$10.00, the property of Private Marvin West, Company "D", 33d Infantry.

Specification 2: In that Private Abraham Gilmore, Company "D", 33d Infantry, did, at Fort Clayton, C. Z., on or about October 6th, 1930, feloniously take, steal and carry away one pair of Shoes marching, value about \$3.65, property of the United States issued for use in the military service to Private Thomas A. Brown, Company "D", 33d Infantry.

Specification 3: In that Private Abraham Gilmore, Company "D", 33d Infantry, did, at Fort Clayton, C. Z., on or about October 6, 1930, feloniously take, steal and carry away one Garrison Belt of the value of about \$0.65, the property of the United States issued for use in the military service to Private Marvin West, Company "D", 33d Infantry.

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

Specification 1: In that Private Abraham Gilmore, Company "D", 33d Infantry, having received a lawful order from 1st Sergeant Lanham, Company "D", 33d Infantry, to "Report to the 'NCO' in charge of quarters and remain there until the Company Commander could see him the following morning," the said Sergeant Lanham being in the execution of his office, did at Fort Clayton, C. Z., on or about September 30th, 1930, fail to obey the same.

Specification 2: In that Private Abraham Gilmore, Company "D", 33d Infantry, was on or about October 16th, 1930, found in the Republic of Panama without proper written authority. This in violation of paragraph 10, Section I, Panama Canal Department Regulations, 1928.

He pleaded not guilty to each of the foregoing charges and specifications, and on the hearing and revision proceedings, was found guilty thereof, save as otherwise noted in the succeeding paragraph in respect of the Specification, Charge I, and Specification 1, Charge III. 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 and designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The Board of Review, by reason of defects apparent on the face of the highly defective record of trial, holds the same, upon careful consideration, to be legally insufficient to support (a) the finding of guilty, with exception and substitution, as to the Specification of Charge I and said Charge, and (b) the implied approval by the reviewing authority of the ineffectual finding of the court respecting Specification 1 of Charge III, neither of which is noticed in reviewing authority action on the case.

As to (a) above, the court, upon the specification in question, made a finding of guilty "except the words 'without proper leave absent himself from his station at Fort Clayton, Canal Zone, from about 12:01 a.m. October 1, 1930 to about 12:01 a.m. October 2, 1930', substituting therefor the words, 'at Fort Clayton, Canal Zone, on or about October 1, 1930, fail to repair at the fixed time to the properly appointed place'; of the excepted words 'Not Guilty', of the substituted words, 'Guilty'" (R. 43). The substituted matter, howsoever involved for punishment purposes in the allegation of the specification in question on which accused was arraigned and to which he pleaded not guilty, states in essence, in the opinion of the Board of Review, a wrongful act separate and distinct from that set out in such allegation, and therefore the attempted substitution is unauthorized in court-martial procedure and the conviction upon this specification, invalid. This disposes of Charge I and the Specification thereunder.

As to (b) above, the court "finds the accused, upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, of Charge III as to Specification 1, 'Not Guilty',

but 'Guilty' of violation of the 93rd Article of War" (R. 43).

This is tantamount to no finding whatever upon Specification 1 itself; and the omission so to find can not be supplied by interpretation in the view of the Board. There was, therefore, no effectual adjudication by the court in respect of this Specification itself whereon implied reviewing authority approval (approval of the sentence) could legally rest. Consequently, the Board holds for naught such implied approval of the reviewing authority.

4. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings of guilty as to the Specification of Charge I and Charge I and the implied approval by the reviewing authority of the ineffectual finding of the court respecting Specification 1 of Charge III, but legally sufficient to support the findings of guilty of Charge II and its Specification, Charge III and Specifications 2 and 3 thereunder, Charge IV and the specifications thereunder, and the sentence.

E. M. Kelley, Judge Advocate.

J. W. Quinn, Judge Advocate.

C. M. Jett, Judge Advocate.

Military Justice
O.M. 195294.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

JUL 20 1931

U N I T E D S T A T E S	)	PANAMA CANAL DIVISION
)	
vs.	)	Trial by G.C.M. convened at Fort
	)	Clayton, Canal Zone, March 2,
General Prisoners ENRIQUE	)	1931. Confinement for one (1)
FERNANDEZ, JOHN SMITH and	)	year in case of each accused.
ERNEST F. STOWELL.	)	Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates

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

2. Each of the three general prisoners, Fernandez, Smith and Stowell, was separately charged with violation of the 69th Article of War in like specifications alleging escape from confinement at Quarry Heights, Canal Zone, "on or about January 17th, 1931". The three sets of charges were, upon completion of formal investigation, referred for trial to one and the same general court-martial convened by the Commanding General, Panama Canal Division, and, by wrapper indorsement of Division Headquarters addressed to the trial judge advocate containing such reference, it was directed, "These accused will be tried jointly". Accordingly, the three accused were tried together at one time on such separate charges, the trial judge advocate, at the inception of the trial, reading to the court the above-quoted direction as to common trial, and no objection thereto on the part of the court or any of accused or their counsel (duly appointed defense counsel) being noted in the record of trial (R. 5). Each accused was found guilty as charged, and the convictions duly approved in published General Court-Martial Orders. Consequently, viewing the whole proceeding in its most prejudicial aspect, the basic question of law here involved may be thus stated: May separately charged offenders (not joint offenders) simultaneously and severally committing offenses of the same character in the same place provable by the same witnesses be tried together at one time by the same court-martial, whenever a common trial is directed by the convening authority and no objection thereto is made by any accused?

3. So far as our examination of the authorities goes, this question is an open one in military law. Colonel Winthrop, our most authoritative

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text-writer, discusses "The joining of several persons in one Charge" (Reprint, p. 145) and remarks that it "may always be resorted to where a single act of offense has been committed by two or more soldiers or officers in concert and in pursuance of a common intent" (Id.), but his limited discussion of the joint prosecution of joint offenders and the text of the Digest of Opinions of The Judge Advocate General cited by him thereon (Digest, 1895, pp. 232-233) are by no means conclusive of the question before us, stated above. Therefore, resort must be had to the decisions of Federal appellate courts in criminal cases.

Callaghan v. U.S., 299 F. 172, decided by the Circuit Court of Appeals, Eighth Circuit, April 28, 1924, was a case involving various offenses against the Prohibition Law. Three criminal informations respectively charged A, B, and C; A, B, and D; and A, B, E, and F. The offenses in each information were jointly charged and were in fact separate and distinct from those contained in the other two (different alleged wrongful acts of sale by different persons at different times) as appears from the recited averments of the three informations. The five defendants then in custody were tried together "without objection" on the part of any, and B was convicted under each of the three informations and D under the second. Both sued out writs of error. In passing upon the assignment of error touching the allowance of but three peremptory challenges, the Court of Appeals held that while there could be no consolidation of the three informations under section 1024, Revised Statutes, since the offenses charged therein "could not have been joined in separate counts in one information" (citing *McElroy v. U.S.*, 164 U.S. 76) yet "the prosecution and the defendants in the several informations could consent to one trial by the same jury; but that gave the court no right to deny them their peremptory challenges, three on each of the three separate informations". Putting out of view matters not relevant to the question before us, it suffices here to note that the court, in effect, held that the common trial, "without objection", of different defendants on three informations for different wrongful acts, even though done at different times, was a valid proceeding, and that failure to object at the time of such trial was tantamount to "consent" thereto.

Brown v. U.S., 143 F. 60, decided by the same appellate court January 19, 1906, involved the trying together of three indictments against the same four persons, jointly charged in each indictment with three offenses of using the mails in execution of a scheme to defraud contrary to law. The statute creating such offenses provided: "The indictment, information, or complaint, may severally charge offenses to the number of three, when committed within the same six calendar months". The offenses charged in the three indictments exceeded in the aggregate both the number and time limit fixed in this provision; and so could not have been combined in one indictment, or consolidated for joint trial under section 1024 of the Revised Statutes, despite the common element of a single scheme to defraud. Hence, for joint trial purposes the case was one against the same parties for different offenses. By trial

court order, however, the three indictments were tried together over defendants' objections. The Court of Appeals held: "The court was invested with the discretion to direct that the indictments be thus tried together independently of any statute upon the subject", remarking that the record did not show a consolidation of the indictments within the meaning of the statute, "but rather that they were merely tried together as separate indictments to avoid unnecessary delay and expense, in the interest of both the government and the defendants". The citation at this point in the opinion, per Van Bevanter, then Circuit Judge, shows that the court thought a certain dictum of the Federal Supreme Court on the general subject of a single trial of offenses as an exertion of inherent power of the trial court (Logan v. U.S., 144 U.S. 263, 306) to have a substantial bearing on the Brown Case. The concluding statement of the holding in the Brown Case, here analyzed, reads: "In these circumstances it cannot be said that there was any error or abuse of discretion in trying the indictments together". Let it again be noted that in that case the common trial of the three indictments was had over the objection of the four defendants charged in each.

Another case very much in point is the recent one of Zedd v. U.S., 11 F. (2d) 96, decided by the Circuit Court of Appeals, Fourth Circuit, January 13, 1926. In that case three informations were filed, each charging a different defendant with separate wrongdoing in violation of the Prohibition Law, committed (except as to one lot of whisky, part of the accusation against the greatest offender) on the same day, and provable by the same Federal officers. As further appears from the opinion of the court, "The court below, against their objection, directed that the charges against all of them should be submitted to the same jury and tried together at one time, although separate verdicts were to be returned and in fact were". All the defendants were convicted and prosecuted error; one assignment being grounded on the court's order of common trial against their objection. The Circuit Court of Appeals, in reversing the judgments below, held that "no order of consolidation could have been properly made against the objection of the defendants or any of them; remarking that "The exercise of the power of consolidating indictments against separate persons will often be a delicate one", and that "Those who are not even charged with having united to commit the crime should not be forced, against their will, to a common trial". The language of the holding itself and related expressions of the court in this case, e.g., "that is by refusing to compel separately indicted individuals, against their objection, to go to a common trial", warrants, we think, the conclusion that on the face of the decision the invalidating circumstance in the common trial ordered in the Zedd Case was the timely objection thereto of the plaintiffs in error, and that in the absence of such objection the submission of the charges against all of them to the same jury and their trial together at one time ending in separate verdicts against each would have been lawful.

Certainly there is nothing essentially repugnant to the principle of justice according to law, or that of due process of law, in the mere common trial - a trying together at one time by the same court-martial - of separately charged offenders separately offending against military law by distinct wrongful acts of the same character, at the same time, in the same place, and provable by the same witnesses, in the absence of objection thereto by any accused. Military service conditions readily suggest themselves whereunder, in time of peace and certainly in time of war, such a joint trial would conduce to combat and administrative efficiency, promote economy and greatly reduce the time consumed in necessary administrative and judicial action on court-martial cases, as well as accord with the personal convenience and interests of the accused themselves. Such considerations and judicial recognition of the ends of the procedural law military have been a controlling factor in the course of decision thereon and have entered largely into the making of the distinctive military court law of pleading and practice (7 Ops. Atty. Gen. 604; Carter v. McLaughry, 183 U.S. 365, 386, 390, 393; 1 Winthrop 219; 22 Ops. Atty. Gen. 595).

Accordingly, though Federal appellate courts are disposed to speak cautiously on the subject, we are convinced that the herein analyzed Federal cases and sound principle alike make for an affirmative answer to the question of law above propounded, whether separately charged offenders (not joint offenders) simultaneously and severally committing offenses of the same character, in the same place, provable by the same witnesses, may be tried together at one time by the same court-martial, whenever a common trial is directed by the convening authority and no objection thereto is made by any accused. As the common trial in the instant case was had without objection on the part of any accused, and as the order for such common trial addressed to the trial judge advocate, in our view thereof, cannot reasonably be construed as so inflexible or binding upon the court as to forbid either the making or sustaining of any objection to common trial by the accused or any of them, we are of opinion that such common trial was in itself a valid proceeding.

4. By this conclusion we are brought to the consideration of another substantial question presented by the record of trial, namely, whether, in the circumstances of this case, each accused having previously announced "No challenges for cause", the immediately following incident on the trial, prior to the arraignment, constitutes error of procedure injuriously affecting the substantial rights of accused within the meaning of the 37th Article of War:

Trial Judge Advocate: The Trial Judge Advocate wishes to advise the accused that they are entitled, as a side, to one peremptory challenge, and ask them if they desire to exercise that right.

Defense Counsel: The accused desire to exercise that right in the case of Captain Wood.

The President: Captain Wood will be excused.
 Captain Wood then withdrew" (R. 6).

Thereafter accused answered in the negative the question whether they objected to any other member of the court.

The 18th Article of War provides, "Each side shall be entitled to one peremptory challenge". Expository of this provision is the following passage from paragraph 58 d, Manual for Courts-Martial: "In a joint trial all the accused constitute the 'side' (A.W. 18) of the defense and are entitled to but one peremptory challenge".

Examination of the decisions of Federal appellate courts touching the subject of peremptory challenges in cases of a common trial of separately charged defendants or separate charges against a single defendant, as distinguished from a trial of two or more criminal indictments consolidated as authorized by section 1024, Revised Statutes, shows a practical unanimity of judicial opinion to the effect that "The parties in selecting the jury are severally entitled to a number of peremptory challenges according to the aggregate they would have possessed had the trials been separately had" (Zedd v. U.S., supra; Gallagher v. U.S., supra; Brown v. U.S., supra; Betts v. U.S. 132 Fed. 228). Conceding for the purpose of this case, as we are disposed to do in harmony with judicial opinion just cited, that "joint trial" as used in paragraph 58 d, M.C.M., quoted supra, does not include the common trial had in this case, and that the 18th Article of War in its application thereto would require that each accused be permitted to exercise one peremptory challenge, and that the unchallenged statement of the trial judge advocate as to the right of peremptory challenge was error, nevertheless we are of opinion that, in the situation disclosed by the record of trial, the same does not constitute error injuriously affecting the substantial rights of the accused. There were nine members of the court present to conduct the trial, and no challenges whatever for cause by any accused. The court in its entirety, as to the case in hand, was therefore presumptively capable of holding a fair and impartial trial. For a numerical reason, it was to the manifest advantage of the accused, under the two-thirds conviction rule, to exercise one peremptory challenge, and this defense counsel did. For the same reason, to have challenged further would have as manifestly operated to their ^{dis}advantage from the numerical viewpoint. So that we are of opinion that failure to further peremptorily challenge was not harmful to the interests of the accused. The incontestable proof of guilt furnished by the evidence enforces this conclusion. Possibilities of prejudice to their interests caused by their failure to exercise more than one peremptory challenge are thus relegated to the realm of fanciful speculation. The principle of reversible error predicated of any restriction by the civil tribunals of the exercise of peremptory challenge in trial by jury consisting of twelve persons whose unanimous vote is necessary to conviction is, in the nature of the case in hand, inapplicable thereto.

5. For related court-martial cases on the basic question of law, supra, see C.M. Nos. 192452-192453, Stivers-Gerle; 191464, Emerso-Mouse-Radkey; 192835, Bennett-Hotaling; 111785, Whitaker-Baker; 116228, Schonsfsky-Dalloen; 118765, Tolan-Kirwin-Stevens; 168683, Nicholson, et al; 168030, Wall-Butler; 192504, Horst-Oaks; 134341, Johnston.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Board of Review
CM 195322

MAY 18 1931

U N I T E D S T A T E S)	UNITED STATES MILITARY ACADEMY
v.)	Trial by G. C. M., convened
Cadet RICHARD L. HENDERSON,)	at West Point, New York, March
Fourth Class, United States)	16 and 17, 1931. Dismissal.
Corps of Cadets.)	

OPINION of the BOARD OF REVIEW -
SMITH, BURDETT and UNDERHILL, 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 charge and specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Cadet Richard L. Henderson, Fourth Class, United States Corps of Cadets, did, at West Point, New York, on or about February 11, 1931, wrongfully and with intent to deceive his instructor, First Lieutenant Maxwell W. Tracy, Coast Artillery Corps, present to the Department of English at the United States Military Academy, through First Lieutenant Maxwell W. Tracy, Coast Artillery Corps, as an assigned written recitation in English which was required and upon which he was to be graded, a written composition over his own signature, indicating by the submission of the said composition over his signature that the composition was his own honest personal effort, when in truth and in fact the said Cadet Richard L. Henderson well knew that it was not his own honest, personal

effort, but was in substance and in effect a copy of an article entitled "Bonus-Burst" which appeared on pages 11 and 12 in the newsmagazine "Time" of the issue for February 9, 1931.

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

Evidence for the prosecution.

3. A printed pamphlet entitled "Notes on Fourth Class English" (Exhibit A, R. 6), contains class assignments and directions for preparing lessons. It was issued to all members of the Fourth Class, of which the accused was a member, at the beginning of the fall term 1930 (R. 6, 10, 19). The following paragraph, appearing on page 3 thereof, was assigned reading for the first lesson of the course (R. 7, 10; Exhibit A, p. 3), and was brought to the attention of the members of the Fourth Class at a lecture in September, 1930, at which time the cadets were fully informed as to the seriousness of plagiarism (R. 10, 21), the accused being present on this occasion (R. 20, 22):

"Plagiarism.- Plagiarism is the act of stealing or appropriating as one's own the words, ideas, literary works, etc., of another. Such act is a serious offense and unworthy of a cadet and a gentleman.

Cadets are encouraged to seek ideas and pertinent material for their composition work. But these ideas and data must be used only in preparation for the actual written product which must be the cadet's own honest, personal effort. In all cases where outside source material is used, the cadet must give a bibliography of works consulted. If actual phrases, clauses, sentences or larger portions of a work are copied, the quoted elements must be inclosed in quotation marks or otherwise acknowledged.

Another equally pernicious form of plagiarism consists in having a composition written, revised, corrected or reviewed by another cadet. Cadets are forbidden to turn in, as their own, compositions thus prepared or reviewed.

Each cadet will sign his name at the end of his composition. A signature signifies that the particular manuscript is the honest, personal effort of the signer, and that these instructions have been carried out in spirit as well as in letter".

There was no evidence that the above rules had ever been rescinded.

The section of the Fourth Class of which the accused was a member was directed to prepare an editorial "at home", to be turned in on February 11, 1931. This was the first time when cadets of this class were required to write on a subject which required research (R. 33). Four subjects, including the "Bonus Bill", were assigned by the Instructor in English, First Lieutenant Maxwell W. Tracy, who directed that the cadets could write on any one of the four subjects and told them that they could find a copy of the "New York Times" and the "Literary Digest" in the library which they could use, otherwise the usual instructions were to be in force (R. 27). The cadets were to be graded on these editorials (R. 30). Written exercises had previously been required of this class (Exhibit A, pp. 4, 5), and written work turned in by cadets was almost invariably graded and the papers bearing a notation of the grades were returned to them (R. 11). On February 11, 1931, in connection with this lesson, the accused turned in a document, written in ink and signed at the end in pencil, entitled "The Veterans Bonus Question" (R. 28, 29; Exhibit B).

Prosecution and defense stipulated that the signature at the bottom of the last page of the composition submitted by accused (Exhibit B) was, in fact, the signature of the accused (R. 29), and accused, being advised that he need not agree to the stipulation, nevertheless agreed to it (R. 30).

Without objection by the defense, the prosecution introduced in evidence a copy of the news magazine "Time" for February 9, 1931 (R. 13; Exhibit C), of which a copy was on file in the Military Academy library (R. 31). The following is a comparison of the composition submitted by the accused and an article entitled "Bonus-Burst" in the magazine. Matter crossed out appears in "Time" (Exhibit C) but not in the composition (Exhibit B); matter underscored appears in the composition but not in the magazine; other matter appears in both. The paragraphing below is in accordance with Exhibit C; the composition shows a new paragraph beginning with the phrase "Certificates of \$3,400,000,000", but not new paragraphs beginning with the words "Bankers too", or with the words "The compromise to increase".

BONUS-BURSTThe Veterans' Bonus Question.

Almost-overnight-last-week-a-little,-suppressed-idea-burst upon-the-nation-as-a-fully-fledged-legislative-movement. The-little-idea-that-the-U-S-pay-its-world-war-veterans-their-adjusted-compensation-certificates-(commonly-called 'The-Bonus') in-cash, and-NOW. Congress-is-in-a-quandry-over-the-question-of-whether-or-not-to-pay-the-veterans-of-the-World-War-their-adjusted-compensation-certificates. The-question-at-first-glance-seems-simplicity-itself, but-a-perusal-of-the "facts-of-the-case" reveals-complications-enough.

The-little-idea-had-flashed-across-some-veteran's-brain-last-summer. Some-months-ago, a-veteran-conceived-the-idea-that-he-and-his-fellow-warriors-ought-to-be-compensated-immediately. He-passed-it-this-thought-on/. presently-At-length-it-was-advocated-by-a-large-minority-of-the-American-Legion/ on-these-counts: (1) the-Government-did-not-issue-almost-unnegotiable-certificates-to-the-railroads-and-contractors-for-their-War-losses; (2) it-such-compensation-would-put-new-Depression-raising-cash-into-circulation. Investigation-disclosed-these-facts-showed-many-things-of-interest-to-those-concerned/. eCertificates-of-\$3,400,000,000-face-value-has-been-issued-to-3,680,704-veterans-since-1925. Today-At-the-present-day,they-are-worth-just-52%-of-their-face-value. Veterans-can-borrow-22%-of-that-value-from-banks-or-from-the-U/S/United-States. In-the-Federal-sinking-fund-for-their-retirement-is-only-some-\$625,000,000. To-pay-them-off-at-this-time-would-necessitate-a-bond-issue-of-about-\$2,775,000,000 (THE-Deer-8). For-these-or-other-reasons-the-American-Legion-did-not,-at-its-autumn-meeting/ vote-to-support-the-idea.

But-bills-legislating-it-had-been-presented-in-Congress-meanwhile/ A-bill-drawn-presented-by-Representative-Wright-Patman-of-Texas-went-into-the-House-Ways-&-and-Means-Committee, and-gathered-dust-there. Under-the-rules, no-method-of-getting-it-out-was-possible-except/ (1) to-have-the-committee-formally-formerly-report-it-out, or (2) to-have-the-213-Representatives-sign-a-petition-forcing-it-to-the-House-floor. Mr.-Patman-circulated-such-a-petition, failed-by-some-75-signatures-names-to-obtain-his-end. And-many-a-Congressman-Representatives-who-disapproved-of-hated-the-bill/ yet-who-feared-afraid-of-the-veterans/ vote-if-he-had-to-they-(the-Representatives)-failed-to-sign-the-petition-oppose-it, was-were-glad-the-committee-men-had-held-it-inactive. The-Chief-grounds-reason-for-the-committee's-inaction: lack-of-American-Legion-support

Then, ~~fortnight~~ two weeks ago, the American Legion reversed its stand and ~~came plumping out~~ went for the bill (TIME, Feb. 8). ~~Forthwith~~ Mr. Patman got ~~some more signatures~~ names. ~~Also a storm of counter and compromise proposals burst in both House and Senate.~~ Three proposals stood out: (1) to pay the present value; (2) to pay the present value plus 25%; (3) to increase the present loan or collateral value up to 50% of the face value.

The Administration became quite ~~obviously~~ was frightened. Secretary Andrew Mellon ~~was~~ glad ~~to appear before the Senate Finance Committee.~~ He declared that ~~without qualification,~~ the Treasury Department could not sell \$3,400,000,000 worth of bonds at the present time except on terms which it would be very hard to justify. He ~~warned that~~ Such a sale, he stated would ~~disorganize the Government and other security markets.~~

Bankers and businessmen swarmed to support Secretary Mellon too, were strong in their support of Mellon. They contended that the ~~proposal to put~~ idea of putting extra cash into circulation was unsound economics, inasmuch as it was unknown if and how the money would be spent. ~~They also warned that the extra burden of the payment in taxes and depressed prices, particularly with the Government facing a deficit, would fall hardest of all on Veteran Jim Jobless.~~ ~~While the argument went on, domestic bond prices dropped about \$18 and Government 4 1/2% dropped \$27 per \$1,000 bonds.~~ ~~Agitators for the cash Bonus cried Manipulation!~~ Bankers, really worried, The Congressmen were in straits and looked glum.

Puzzled Congressmen were therefore in a dilemma ~~between the veterans and the financiers.~~ The compromise to increase the loan up to 50% of the face value They seemed most likely to pass ~~last week to take the compromise measure, that of increasing the loan value of the certificates.~~

Evidence for the defense

4. The accused, having been advised of his rights, testified in substance as follows: On February 10, 1931, in connection with the above-mentioned assignment in English for February 11, 1931, he went to the library and picked up the magazine "Time" and saw the article "Bonus-Burst", which he used for his composition (R. 55); that after

taking very full notes of the article in the library (R. 60), he went to his room and wrote the editorial (Exhibit B; R. 56); he did not have a copy of the magazine "Time" in his room when he wrote the article; he was in a hurry as he wanted to devote some time to mathematics, which subject, at that time, was difficult for him; he discussed his notes with five cadets and six cadets saw him writing the notes in the library; there was no intent on his part to deceive (R. 56); on Wednesday afternoon, February 11, 1931, in the classroom, when the section marcher was told by Instructor Tracy to collect the papers, accused signed his name in pencil at the end of the editorial and turned it in; he had forgotten to sign his name until that time; he also forgot to append a bibliography (R. 57) and to put quotation marks in; this was the first theme he had which required outside work and he had never before had occasion to use the library for any other source material; he had never before had occasion to append a bibliography to a composition; he had a copy of Exhibit A ("Notes on Fourth Class English") and had read the instructions therein under the heading of "Plagiarism"; these instructions regarding plagiarism were also covered in a lesson in the fall term (R. 58); his sense of right and wrong would tell him to acknowledge literary matter copied from someone else's work; his signature on the paper was placed thereon only to avoid being reported; he turned the paper in for the purpose of being graded (R. 59), though he had not thought about the matter, and the instructions in Exhibit A had made little impression on him (R. 61), as he was not in the habit of doing such things (R. 62).

Four cadets testified that accused had, on February 10 and 11, 1931, exhibited to them and to other cadets certain notes which he had taken from "Time" on the Bonus question (R. 36, 39, 40, 43, 47). Two of these witnesses stated that the notes were abbreviated, and not intelligible to them (R. 37, 42). One of them testified that accused had the notes with him when writing his composition (R. 44). Three of them testified that accused had informed them and others as to the source of the notes (R. 41, 44, 48), and one of them testified that accused had advocated that all the other men whose rooms were on the same floor of barracks use the same source material for their own composition (R. 43). One of these witnesses testified that accused had not shown him the composition (Exhibit B) and he had not seen it before it was turned in (R. 38). Three of these witnesses, and five other cadets, testified to the good character of the accused (R. 38, 46, 49, 50, 51, 52, 53, 54). The defense read into the record a Special Order from Headquarters, United States Military Academy, assigning minor punishments to two cadets for allegedly similar offenses (R. 65), and introduced in evidence a paper submitted by accused on a previous occasion without signature (Exhibit D, R. 24).

CONCLUSIONS

5. No question was raised at the trial as to the identity of the accused as the person named in the specification and his identity was admitted by his plea of not guilty. It is admitted by the accused and otherwise clearly established that in the preparation of the composition, which he is charged with plagiarizing, he relied upon the article "Bonus-Burst" contained in the issue of the news-magazine "Time" of February 9, 1931, and that he used that article as a source of material for his composition. A comparison of his composition with the article discloses that he copied whole passages from the article without giving credit through quotation marks or otherwise. The thought, expression and arrangement of the accused's composition are in substance and effect that of the article contained in the magazine "Time".

The evidence further establishes beyond a reasonable doubt that the accused, on or about February 11, 1931, presented the said composition to the Department of English at the United States Military Academy, through his instructor, First Lieutenant Maxwell W. Tracy, Coast Artillery Corps, as an assigned written recitation in English, which was required and upon which he was to be graded; that he submitted it over his own signature; that he indicated by such submission that the composition was his own honest personal effort, and that in truth and in fact the accused well knew that said composition was not his own honest personal effort, but was in substance and effect a copy of the said article entitled "Bonus-Burst".

6. Such facts being established, the only remaining elements of the offense charged to be considered are: (a) Whether the omission of quotation marks, or other indicia of source, was due to an intent to deceive; (b) whether, if it was due to an intent to deceive, the offense alleged amounts to conduct unbecoming an officer and a gentleman, and (c) whether the sentence is one appropriate to the offense and authorized by law.

7. With reference to the question whether the accused intended to deceive, "A sane person is presumed to have intended the natural and probable consequences of acts which he is shown to have committed" (Manual for Courts-Martial, 1928, p. 110). Of itself the submission of a written exercise in classroom to be graded is tantamount to an assertion that the exercise is (unless prior instructions or other circumstances indicate the contrary) the honest, personal effort of the student who submits it. This assertion was strengthened by the instructions contained in Exhibit A which had been brought to the attention of the accused and by the fact that the accused signed his name

at the end of the composition. The natural and probable consequence of the submission by a student to his instructor of a plagiarized composition, under the circumstances disclosed by the evidence in this case, is to deceive the instructor and to cause him to believe that the composition is the honest, personal effort of the student. Except for the fact that the instructor had read the original article, an actual deceit would no doubt have been effected.

8. The inference that the accused intended to deceive his instructor in manner and form as alleged is strengthened by the following circumstances: The first paragraph of the composition - about the only original expression therein - was different from the opening paragraph of the article. In copying passages from the article into the composition, which were inclosed in quotation marks in the article, the accused omitted the quotation marks from his composition. The article contained two references to prior issues of the magazine inclosed in parentheses, viz: "(TIME, Dec. 6)" and "(TIME, Feb. 2)"; these were left out of the composition, though expressions immediately preceding and following the first, and closely preceding and following the second, reference, were used.

9. On the other hand, the plea of not guilty denied the intent to deceive, and the accused, under leading questions from his counsel, specifically testified that he forgot to append a bibliography to his composition and forgot to inclose in quotation marks the parts copied from the article in "Time", and that he did not intend to deceive his instructor. The court was warranted, as it evidently did, in disbelieving this testimony.

10. The defense further sought to overcome the presumption of intent by introducing testimony showing that the accused made no concealment of the fact that he had consulted the magazine article and made notes therefrom; but on the other hand, told his comrades about it, showed his notes to them, and suggested the article as an available source of material. Such testimony, however, can have little weight in this case, because such publicity as was given was limited to other cadets and to the disclosure of procedure on the part of the accused which was wholly authorized by the regulations. There was no evidence to show that any of the cadets who read his notes or knew of their source had access to his composition, knew how closely he had followed the article therein, or knew that he had submitted it without giving due credit to the magazine article.

In this connection it may be noted that the evidence shows that the article from which he copied was contained in a magazine not in-

eluded among those which his instructor had suggested as a source, and that, so far as the record shows, the accused did not consult any of the suggested sources.

11. The court had an opportunity to observe the demeanor of the witnesses and to weigh their testimony, and was fully warranted in deciding, as it evidently did, that the inference of intent, arising from the act of the accused and the circumstances of the case as above stated, was not overcome by the evidence of good character of the accused, or otherwise; and in believing that the intent, as alleged, was established beyond a reasonable doubt. There is nothing in the record which would lead the Board of Review to a different conclusion.

12. Having found the accused guilty of the specification as charged, the court was warranted in finding that the acts and intent alleged and proved constituted conduct unbecoming an officer and a gentleman, in violation of the 95th Article of War. The sentence was legal and mandatory on the court for the offense of which the accused stood convicted.

13. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty and such as to warrant confirmation of the sentence.

14. The court was legally constituted. No errors injuriously affecting the substantially rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and the confirmation thereof.

15. The Board of Review is not unanimous on the question of a recommendation to clemency. A supplementary report by the Board, and a minority report by one member, on the question, are appended.

Hugh C. Smith Judge Advocate.
W. M. Burdett Judge Advocate.
Frank M. Huddell Judge Advocate.

The Board of Review (one member dissenting) is further of the opinion that the accused, Cadet Richard L. Henderson, has demonstrated his unfitness to become an officer of the Army, and that the necessity of maintaining a high standard of personal integrity

both among the cadets of the United States Military Academy and among the commissioned personnel of the Army makes it advisable that the sentence of dismissal be carried into execution.

AmBurdett Judge Advocate.
Levin Klunder Judge Advocate.

I realize the necessity of maintaining high standards of honor among cadets, as well as among officers of the Army and I do not minimize the gravity of the offense of which the accused, Cadet Richard L. Henderson stands convicted, nor do I believe that his conduct should be excused or condoned, however, under all of the facts and circumstances disclosed by the record of trial, I deem the sentence, though mandatory on the court, too severe, as my experience has taught me that it is the certainty of punishment for wrong doing that deters rather than the severity of punishment.

The considerations which lead me to this conclusion are:

- (a) The accused had been at the Military Academy less than 8 months.
- (b) The composition which he is charged with plagiarizing is the first he had been required to write which necessitated research outside of his text books.
- (c) A lesser punishment than dismissal will be sufficient for the offense of which he stands convicted and will have a like deterrent effect upon him and also upon other cadets.
- (d) His previous good character.

I recommend, therefore, that the sentence to dismissal be confirmed but commuted to suspension from the United States Military Academy until January 1, 1932, without pay or allowances, at the expiration of which time he should join the then fourth class.

Hugh C. Smith
 Colonel, J.A.G.D.,
 Member of the Board of Review.

1st Ind.

War Department, J.A.G.O., MAY 18 1931 - To The Secretary of War.

1. The record of trial and accompanying papers in the case of Cadet Richard L. Henderson, Fourth Class, United States Corps of Cadets, together with the foregoing opinion of the Board of Review, are transmitted herewith, pursuant to Article of War 50 $\frac{1}{2}$, for the action of the President.

2. The Board of Review finds the record legally sufficient to support the sentence, and a majority of the Board recommend that the sentence be carried into execution. One member of the Board recommends that the sentence be confirmed but commuted to suspension without pay and allowances until January 1, 1932.

3. Certain facts disclosed by the record of trial and accompanying papers, taken in connection with a letter which was received in this office about March 30, 1931, from the reviewing authority, the Superintendent of the Military Academy, constrain me to recommend that the sentence be vacated and a rehearing of the case be had before a court-martial appointed by the President.

4. The record of trial shows that final adjournment of the court in this case took place on March 17, 1931, and that the reviewing authority acted on the case on April 8, 1931. The papers accompanying the record show that the staff judge advocate, pursuant to Article of War 46 and regulations prescribed by the President (p. 75, M.C.M. 1928), submitted to the reviewing authority a written review of the case under date of April 8, 1931. The statute cited (A.W. 46) requires, in pertinent part, that:

"Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. * * *." (Underscoring supplied)

A letter from the Superintendent of the Military Academy to The Judge Advocate General, bearing date of March 26, 1931, thirteen days prior to the date of the review of the staff judge advocate and the date of the action of the Superintendent as reviewing authority, was received in The Judge Advocate General's Office on

or about March 30, 1931. In this letter the case of Cadet Henderson was discussed. Some of the statements in the letter are outside of the evidence of record; and the conclusion that "The remainder of the article, about six pages, was copied word for word, comma for comma and period for period from 'Time'", is not supported by the evidence. The original of this letter, together with its inclosure, is transmitted herewith.

5. Under the circumstances, a recognition of his approval as valid and effective would, in my opinion, be contrary to the spirit, if not the letter, of Article of War 8, which after enumerating the commanders authorized to appoint general courts-martial, provides:

"* * * when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, * * *."

6. The reviewing authority is in legal effect a member of the court and as such must base his judgment on the record alone. The following quotation from the opinion of the United States Supreme Court in the case of Runkle v. United States, (122 U.S. 557), although it refers to the President as the reviewing authority, is equally applicable to any reviewing authority:

"Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the army of the United

States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried. In this connection the following remarks of Attorney General Bates, in an opinion furnished President Lincoln, under date of March 12, 1864, 11 Opinions Attorneys General, 21, are appropriate:

'Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law.'

It would appear that the reviewing authority in this case had reached a conclusion as to the guilt of the accused, and as to the degree of guilt, before he had read and considered the record of trial and before he had received and considered the review of his staff judge advocate. Similar attitude by a member of a court prior to trial would disqualify, as no judicial determination on the evidence could be made. The same rule applies as to the disqualification of the reviewing authority.

7. I inclose herewith the following papers:

a. List of alleged irregularities submitted by Julia Henderson, the mother of Cadet Henderson;

b. Letter dated March 26, 1931, from the Superintendent of the Military Academy, to The Judge

Advocate General, and inclosure;

c. Letters from Senator Copeland to the Secretary of War dated April 14 and April 13, 1931. The latter carrying as inclosure a copy of the memorandum listed under d.

d. Memorandum submitted to Honorable James S. Whitley, M.C., on behalf of Cadet Henderson.

e. A draft of a letter for your signature, transmitting the record to the President for his action, together with a form of executive action designed to carry into effect the recommendation hereinabove made, should it meet with your approval.



Blanton Winship,
Major General,
The Judge Advocate General.

6 Incls.

- ✓ Incl.1-List of alleged irregularities.
- ✓ Incl.2-Letter dated March 26, 1931, from Supt. of Mil. Ac. to Judge Advocate General. (with 1 Incl.)
- ✓ Incl.3-Letter from Senator Copeland to Sec. of War, April 14, 1931.
- ✓ Incl.4-Letter from Senator Copeland to Sec. of War, April 13, 1931.
- ✓ Incl.5-Memorandum submitted by Hon. James S. Whitley, M.C.
- ✓ Incl.6-Draft of letter for signature of Sec. of War (with 1 incl.)

10 Received A. G. O. MAY 28 1931

Cadet Henderson resigned before action by the President.

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

(225)

MAY 13 1931

Military Justice
CM 195323.

U N I T E D S T A T E S	)	SIXTH CORPS AREA
)	
v.	)	Trial by G. C. M., convened at
	)	Fort Sheridan, Illinois, Febru-
Privates FELIX F. HOWANIC	)	ary 17 and March 31, 1931. Dis-
(6804045), Company I, 2nd	)	honorable discharge and confine-
Infantry, and GEORGE H.	)	ment for one (1) month in case
SWEAZEY (6801496), Company	)	of each accused. Fort Sheridan,
L, 2nd Infantry.	)	Illinois.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates.
ORIGINAL EXAMINATION by JACKSON, Judge Advocate.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. Accused were tried upon the following Charge and specifications:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Felix F. Howanic, Company "I", Second Infantry and Private George H. Sweazey, Company "L", Second Infantry, acting jointly, and in pursuance of a common intent, did, at Fort Sheridan, Illinois, on or about the 14th day of July, 1930, feloniously take, steal and carry away, beef, butter and pork, of a value of about twenty-four dollars (\$24.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private Felix F. Howanic, Company "I", Second Infantry, and Private George H. Sweazey, Company "L", Second Infantry, acting

jointly, and in pursuance of a common intent, did, at Highwood, Illinois, on or about the 14th day of July, 1930, wrongfully and knowingly sell beef, butter and pork of a value of about twenty-four dollars (\$24.00), property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Private Felix F. Howanic, Company "I", Second Infantry, and Private George H. Sweazey, Company "L", Second Infantry, acting jointly, and in pursuance of a common intent, did, at Fort Sheridan, Illinois, on or about the 21st day of July, 1930, feloniously take, steal and carry away, butter of the value of about twelve dollars (\$12.00), property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Private Felix F. Howanic, Company "I", Second Infantry, and Private George H. Sweazey, Company "L", Second Infantry, acting jointly, and in pursuance of a common intent, did, at Highwood, Illinois, on or about the 21st day of July, 1930, wrongfully and knowingly sell butter of the value of about twelve dollars (\$12.00), property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to the Charge and specifications and each was found of Specifications 1 and 2, guilty except the words "Beef, Butter, and Pork" and the words and figures "twenty four dollars (\$24.00)", substituting therefor, respectively, the words "Subsistence Stores" and the words and figures "Six dollars (\$6.00)", of the excepted words and figures not guilty, of the substituted words and figures guilty; of Specifications 3 and 4, guilty, except the word "Butter" and the words and figures "twelve dollars (\$12.00)", substituting therefor respectively the words "Subsistence Stores" and the words and figures "four dollars and fifty cents (\$4.50)", of the excepted words and figures not guilty, of the substituted words and figures guilty. No evidence of previous convictions was introduced in the case of either accused. Each received a sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five months. The reviewing authority approved the sentences, reduced the period of confinement

as to each accused to one month, designated Fort Sheridan, Illinois, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. Accused were charged under Article of War 94 with the theft and sale of specific articles of Government property, viz., "beef, butter and pork" in Specifications 1 and 2, and "butter" in Specifications 3 and 4. By exceptions and substitutions, the court found accused not guilty of larceny of the articles charged, but guilty of larceny of "subsistence supplies", a generic term applicable to numerous articles, including beef, butter and pork. In criminal cases the proof must conform to the charge (Wharton on Criminal Evidence, Sections 121, 122, 123; 36 C.J. 851,852). The proof necessary in a larceny case must include

"(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property" (page 173, M.C.M.).

Also,

"It is elementary that one accused of a crime must be definitely apprised of the offenses charged against him and what he must be prepared to meet * * *. An accused, therefore, cannot be legally convicted of an offense of which he has had no notice and with which he is not charged" (CM 120949, Espinosa; CM 120948, Garcia).

In effect, the court found accused guilty of the larceny of articles of subsistence supplies other than those specifically named in the several specifications. Under the well established rules of procedure governing courts-martial, the court was without power to make such substitution, such power being limited to changes which do not "change the nature or identity of any offense charged in the specification" (paragraph 78 c, M.C.M.). The court's action in substituting other articles of the same general character but exclusive of those alleged amounted in each instance to conviction of an offense essentially separate and distinct from that charged. This it could not do (CM 189741, Mulkey; CM 129356, Mumford; CM 110910, Brooks).

4. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings

and sentence as to each accused.

E. Miller, Judge Advocate.
J. W. Connor, Judge Advocate.
Rossman, Judge Advocate.

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

Board of Review
 C. M. No. 195373

May 23, 1931.

U N I T E D S T A T E S	)	NINTH CORPS AREA
)	
vs.	)	Trial by G.C.M., convened at
	)	March Field, Riverside,
Second Lieutenant CHARLES	)	California, March 30, 1931.
E. BEAUCHAMP (Infantry),	)	Dismissal.
Air Corps.)	

OPINION by the BOARD OF REVIEW
 McNEIL, CONNOR and BRENNAN, 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. Accused was tried upon the following charges and specifications:

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

Specification: In that Second Lieutenant Charles E. Beauchamp, (Infantry), Air Corps, was, at Riverside, California, on or about February 19, 1931, in a public place, to wit, the police station of the city of Riverside, drunk and disorderly, to the disgrace of the military service.

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

Specification 1: In that Second Lieutenant Charles E. Beauchamp, (Infantry), Air Corps, did, at Riverside, California, on or about February 19, 1931, drive a vehicle, to wit, an automobile, on a public highway, while drunk.

Specification 2: In that Second Lieutenant Charles E. Beauchamp, (Infantry), Air Corps, was, at March Field, California, on or about February 20, 1931, drunk and disorderly.

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

Specification: In that Second Lieutenant Charles E. Beauchamp, (Infantry), Air Corps, having been duly placed in arrest at March Field, California, on or about February 20th, 1931, did, at March Field, California, on or about March 15th, 1931, break said arrest before he was set at liberty by proper authority.

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

3. The evidence for the prosecution is substantially as follows:

Walter E. Hartman, a police officer of the City of Riverside, California, testified that on the night of February 19, 1931, his attention having been attracted by the noise of brakes, he saw an automobile go through a boulevard stop at a street intersection in Riverside, proceed up the boulevard for a block, "going from one side to another", and then turn into Seventh Street (R. 9, 10). Witness commandeered another car and followed. On Seventh Street he saw the first car stop and, on reaching it, alighted and saw accused "standing behind a palm tree". Witness then questioned accused concerning his driving, but he did not reply and "just stood there with a silly grin" (R. 10). Accused's speech was "fair" and he "held himself pretty fair", but his breath bore the odor of liquor (R. 14). He was "intoxicated" (R. 10, 15). Hartman told accused that he was not in proper condition to drive a car and that he must go to the police station. Accused agreed and the two entered the car, witness permitting accused to drive, as he "didn't want to argue with him" (R. 10, 12). Accused drove three or four blocks to the police station, the police officer sitting next to him, and frequently holding the wheel because accused appeared to be intoxicated and continued to talk to a man driving another car beside them (R. 10, 11, 15). At the station accused was booked for "driving while intoxicated" (R. 10). (Specification 1, Charge II.)

Between 11 p.m. and 12 p.m. (R. 16), while he was being

booked at the police station, accused, in the presence of police officers, including Sergeant Speer and Inspector Scott, protested against being confined, but he was placed in a cell notwithstanding his protest, and thereupon he gave vent to offensive and "profane" language to and concerning the police officer (R. 14-16, 24, 25, 28), saying to Hartman that he would "see to" him "at a later date" and "I have a mind to put a bullet through your neck" (R. 10, 16, 18, 24). The latter paid no attention to him because of his intoxicated condition (R. 10). In the course of a search of accused, his property including a ring was taken from him. He demanded the return of the ring and "used quite a bit of abusive and vulgar language" with reference to it (R. 16). Hartman testified that accused was disorderly "only to the point where he used profane language and threatened to put bullets in my neck" (R. 13). Sergeant Speer testified that accused was in what he would describe as "a crazy drunk condition" at the police station (R. 23). While in the cell accused "shook the bars and gate" and used loud, abusive and profane language (R. 17). Staff Sergeant John Cort, Provost Sergeant, testified that he was at the police station for about a half hour and that accused was there "drunk, very drunk, and was using abusive language and talking the line of chatter that drunk men use * * * He called the police officer vile names and used vulgar language in general". At the request of the police, accused was examined at the station at about 11:55 p.m., February 19th, by Dr. H. L. Ratliff, a physician and surgeon of Riverside, who found his pulse to be 108, his gait "poor, staggers", his pupils dilated, his speech impaired, his breath alcoholic, and his coordination poor, and concluded that accused was under the "influence of Alcohol extent 2nd stage". This physician testified that he recognized three stages of intoxication and that he would not classify a person under the third stage unless he were "down and couldn't get up or was asleep". The witness stated that he could not define the term "grossly drunk" as related to his own classification by stages. During the examination accused was slightly abusive and belligerent (although not to witness) and made four or five obscene and profane remarks. In witness' opinion accused was in such a condition that he could not safely operate an automobile (R. 20-22). No liquor was found on the person of accused but a bottle with about "two teaspoons of gin" was found in his car (R. 18). (None of the witnesses stated the actual language used by accused, saying that it could not be repeated in the presence of the lady reporter, and only a few persons, members of the police force, witnessed the misconduct of accused at the station.) (Charge I and its Specification.)

At about 12:40 a.m., February 20th, accused was turned over by the Riverside police to Sergeant Cort, Provost Sergeant, who, in company with two of the civil police officers took him to March Field, California, his station, and there turned him over to First Lieutenant A. G. Stitt, Air Corps, Officer of the Day (R. 16, 25, 27). Lieutenant Stitt testified that accused "was very badly under the influence of liquor

and staggered. His speech was more or less incoherent." Witness and Sergeant Cort took him by the arms and led him to his quarters. On the way to his quarters he "was continually talking loudly and using profane, abusive language" (R. 30). At his quarters accused was told to go to bed, but protested and insisted on returning to Riverside for his car. Lieutenant Stitt told him he must remain in the quarters, and stayed with him in the room for half an hour or so. On leaving, Stitt waited outside and accused soon appeared in his overcoat, apparently ready to go to town. He was taken back to his room and this time went to bed (R. 31, 32). His "language during the entire proceedings was loud, vulgarly profane and insulting in the extreme to a man that was sober", and "enough to constitute a nuisance" (R. 31, 32). (Specification 2, Charge II.)

At about 8:30 a.m., February 20th, while accused was apparently in the proper possession of his faculties and not under the influence of liquor, he was, by order of the Post Commander, orally informed by the Post Adjutant that he was in arrest in quarters, and that he must remain in his quarters at all times except when going for his meals (R. 36). He apparently understood the orders given him. On February 28th, the limits of his arrest were extended to the limits of March Field, and he was so informed (R. 36, 37, 38). At about 2 a.m., March 15, 1931 (R. 39), while he was still in arrest with limits as described (R. 36), he appeared at the "White Spot" restaurant in Riverside, California, and remained there for a few minutes (R. 39, 43). (Additional Charge and its Specification.)

Accused elected to remain silent before the court and no evidence was introduced in his behalf.

4. The uncontroverted evidence for the prosecution properly before the court, summarized above, establishes conclusively that accused, on the night of February 19, 1931, within the city of Riverside, California, operated an automobile on a public highway while drunk, and was at March Field, California, later during the same night, drunk and disorderly, the disorderly conduct consisting of utterances described as profane and offensive, while in a state of alcoholic intoxication, as respectively charged in Specifications 1 and 2 of Charge II. The evidence likewise proves the breach of arrest, while duly restricted to the limits of the post, at the time and place stated in the Specification of the Additional Charge. The Board of Review, upon close scrutiny of the record of trial, perceives therein no substantial question either of law or fact with respect to the findings of guilty upon the above-mentioned charges and specifications.

Respecting the accusatory averment in the Specification of Charge I, laid under the 95th Article of War, that accused was drunk

and disorderly in the police station of the city of Riverside to the disgrace of the military service, on or about February 19, 1931, the uncontroverted evidence for the prosecution properly before the court, summarized above, establishes that accused was at the time and place stated drunk to the extent of manifest impairment of self-control, physical and mental, and disorderly in the presence and hearing of a few police officers, about midnight, shortly before he was returned by them to military control. His misconduct in the police station consisted mainly of utterances not recited on the trial, but described as loud, abusive, vulgar and profane, addressed to the police officers who had incurred his ill-will, and was occasioned, though not justified in law or fact, by his confinement in a cell and the removal from his person of certain articles, including a ring, belonging to him. The finding of guilty on the Specification under consideration should, therefore, not be disturbed.

A more difficult question arises in the consideration of the finding of guilty upon the Charge here involved, namely, Violation of the 95th Article of War, which Article reads, "Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." This Article was last reenacted in the Army Reorganization Act of 1920 in a form which, as respects the conduct there denounced, has not been changed since the initial Army Code of 1806. It is elementary, therefore, that the indefinite words, "conduct unbecoming an officer and a gentleman", were last used by Congress in the sense fixed by more than a century of administration (U.S. v. Falk, 204 U.S. 143, 152; Komada v. U.S., 215 U.S. 392, 396). Touching the language of the Article, the Federal Circuit Court of Appeals, Eighth Circuit, in *McRae v. Henkes*, 273 Fed. 108, 112, "understand in a broad sense the offense, but confess a lack of knowledge of its definite limitations, and also admit a superior capacity in the military court over the civil to deal with it". And of the Article as a whole, Attorney General Brewster said in the famous case of General Swaim (18 Ops. Atty. Gen. 118):

"The punishment annexed to a conviction under that article clearly indicates that prosecutions under it should be limited to the more serious class of offenses."

Colonel Winthrop, our most authoritative writer on military law, whose expository word and conclusions evolved from exhaustive research are generally accepted as law by the Federal courts (e.g., *Carter v. McClaghry*, 183 U.S. 365), remarks of the textual force of the word "unbecoming" in the Article:

"'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).

His general conclusion as to the scope of the Article is as follows:

"To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. 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" (Reprint, pp. 711-712).

This learned writer cites with approval the following pronouncement of General McClellan in G.O. 111, Army of the Potomac, 1862:

"These words ('conduct unbecoming' etc.) imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self respect" (Reprint, p. 712).

In considering the delimitation of the Article as established by "the principal offenses which, in practice, as indicated mainly by the General Orders, have been charged and prosecuted under this Article" (Reprint, p. 713), Colonel Winthrop, respecting cases of drunkenness properly cognizable thereunder, reaches this conclusion: "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Reprint, p. 717).

Viewing the Article under consideration in the light of the legislative intent presumed to be incorporated in its reenactment in 1920, determinable by the foregoing citations of authority, the Board of Review is unanimously of opinion that the record is completely lacking in evidence from which the court or the reviewing and confirming authorities could determine that the accused's language and conduct in the police station were such as to transcend the line of demarcation between service-discrediting conduct in violation of the 96th Article of War

and the more reprehensible conduct violative of the 95th Article of War, and accordingly finds that the uncontroverted evidence supporting the finding upon the Specification of Charge I, does not support the approved finding of guilty of violation of the 95th Article of War, but does sustain a finding of guilty of violation of the 96th Article of War. The proved misconduct of accused clearly and gravely infringes that provision of the 96th Article of War reading, "all conduct of a nature to bring discredit upon the military service", but is not by the Board of Review considered to be "conduct intended to be stigmatized by" the 95th Article of War (in the words of Colonel Winthrop relative to that Article (Reprint, p. 712) then known as the Sixty-first Article).

5. At the time of trial, accused was 23 years and 2 months of age. His service is shown by the official Army Register as follows: "Cadet M.A. 1 July 26; 2nd Lt. of Inf. 12 June 30; A.C. 12 Sept. 30."

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of Charge I as involves a finding of guilty of violation of the 96th Article of War, legally sufficient to support the findings as to the remaining charges, all specifications and the sentence, and warrants confirmation thereof. Dismissal is authorized for violations of the 69th and 96th Articles of War.

E. M. McCreary, Judge Advocate.

J. W. Cannon, Judge Advocate.

Prosser, Judge Advocate.

To The Judge Advocate General.

C. M. No. 195373

1st Ind.

War Department, J.A.G.O., MAY 23 1931

To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Second Lieutenant Charles E. Beauchamp (Infantry), Air Corps (C.M. No. 195373), together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review that the evidence does not afford a basis for the finding that the conduct alleged in Charge I and its Specification was "conduct unbecoming an officer and a gentleman". I therefore recommend that only so much of the findings of guilty of Charge I and its Specification be confirmed as involves findings that at the time and place alleged the accused was drunk and disorderly in violation of the 96th Article of War. The conduct of accused at Riverside and at March Field, California, on the night of February 19-20, 1931, together with his breach of arrest on March 15, 1931, warrants the sentence of dismissal, although the court might not have adjudged dismissal had the findings conformed to the evidence in the case.

3. Lieutenant Beauchamp was born in Michigan on January 23, 1908. He graduated from the Port Austin (Michigan) High School in 1925, and from the United States Military Academy on June 12, 1930, standing No. 197 in a class of 245. It is understood that while at the Military Academy he was captain of the cadet baseball team. He was detailed in the Air Corps on September 12, 1930, and since then has been a student officer at the Air Corps Primary Flying School at March Field, California.

His efficiency report for the period September 12 to December 31, 1930, reports him an average officer, and states: "Appears to be a good young officer. Somewhat inclined to be impulsive and thoughtless, but is intelligent, has a pleasing personality and with proper supervision, should develop into a good officer".

On November 22, 1930, he was reprimanded under the 104th Article of War by the Commandant of the School for becoming intoxicated and creating a disturbance at Riverside, California, on November 15, 1930, which resulted in his detention by the civil authorities.

4. Although the record of trial warrants confirmation of the sentence, the ends of justice, in my opinion, do not require its immediate execution. Possible grounds for such executive forbearance are disclosed by the record of trial and accompanying papers. From a

statement of defense counsel in his behalf, it appears that accused, when arrested, was on his way to a cafe to procure "black coffee" to check the effects of liquor drunk at a social function which he had just attended. Apart from his evident intoxication, his conduct immediately following his arrest was, so far as appears, unexceptionable; but preliminary to his confinement in a cell, he was searched and a ring removed from his finger. This treatment, presumably contemporaneous with telephonic communication in his presence and hearing with the military authorities looking to his return to military control, apparently had the effect of infuriating him and, doubtless, contributed to his disorderly conduct there.

In a formal investigation of the breach of arrest charge, the following testimony was taken:

"Testimony of Stuart F. Crawford, 2nd Lt., Air Corps (Field Artillery), March Field, Riverside, California. Student officer.

'I know the accused. On the early morning of March 15, 1931, Lt. Beauchamp and I, being hungry, decided to get some sandwiches. We drove down by the Post Exchange restaurant but as it was closed, we went down to the Sunset Cafe, at the edge of the reservation. As this restaurant was also closed we drove along the road looking for an open cafe. They were all closed, however, so we went into Riverside and stopped at Holstrom's Cafe. We went inside this restaurant and ordered some sandwiches. We did not eat the sandwiches in the restaurant, but had them put in a paper sack and took them with us. In all we were only away from March Field about a half hour. We did not go any where except to Holstrom's Cafe.'"

"The accused having been warned of his rights, made the following unsworn statement:

'Early in the morning of March 15, 1931, Lt. Crawford and I got hungry and decided we would go to the Post Exchange Restaurant and get something to eat. When we left the Officers' Club, we had no intention of going off of the reservation and I had no idea of breaking arrest. Upon finding the restaurant closed, one of us conceived the idea of going to the Sunset Cafe at the edge of the reservation. I did not think anything about it so far as breaking arrest was concerned. The Sunset Cafe was also closed, so we kept on

driving but all of the restaurants between here and Riverside were closed. We went on into Riverside and went into the Brite Spot, or Holstrom's Cafe, and ordered two sandwiches, which we had put into a paper sack, and came on back to March Field. Prior to the time I went into Riverside on the morning of March 15, 1931, I had been placed under arrest and restricted to the limits of the post. I considered this more or less as a confinement and did not take it as a real arrest. I was placed under arrest by Lt. Sharon. When I was first placed under arrest, I was put in regular arrest in quarters but about a week later the restriction was lifted to mean the limits of the post. I did not really understand whether I was really under arrest, just confined to the post, or just what it was. I do not think that it would have been possible for us to have gotten anything to eat in the Club at that time of night."

5. I recommend that the sentence be confirmed, but in view of the uncertainty that the court would have imposed a sentence of dismissal had the available evidence in extenuation been brought out and had the court reached the findings justified by the evidence of record, I recommend that the execution thereof be suspended. In a somewhat similar case of Lieutenant Moran of the Air Corps, who was convicted of a violation of the 95th Article of War, the sentence of dismissal was remitted after a suspension of about two years (G.C.M.O. No. 21, W.D., Dec. 7, 1926; G.C.M.O. No. 1, W.D., Jan. 7, 1929).

6. 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 designed to carry into effect the recommendations hereinabove made should they meet with approval.



A. W. Brown,
Colonel, J.A.G.D.,
Acting The Judge Advocate General.

4 Incls.

- Incl. 1- Record of Trial.
- " 2- Opin. of Bd. of Rev.
- " 3- Draft of letter for
sig. Sec. of War.
- " 4- Form of executive action.

dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

E. M. Kelley, Judge Advocate.

J. W. Cannon, Judge Advocate.

R. S. Sherman, Judge Advocate.

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

Military Justice
C. M. No. 195513

JUN 8 - 1931

U N I T E D S T A T E S	)	FIFTH CORPS AREA
)	
vs.	)	Trial by G.C.M., convened at
	)	Fort Thomas, Kentucky, October
Captain JOHN O. GROSE (O-7128), Infantry.	)	30, 1930, and March 3, 4 and 5,
	)	1931. Dismissal.

OPINION by the BOARD OF REVIEW
McNEEL, CONNOR and BRENNAN, Judge Advocates,
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

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

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

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

Specification 1: In that Captain John O. Crose, Infantry, did, at Fort Thomas, Kentucky, on or about August 15, 1930, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a written report to the said Commanding Officer in words as follows: "All personal bills and debts in Cincinnati or in this community have been settled and closed; or arrangements for payment has been made that has been declared satisfactory by the parties concerned" which report was known by the said Captain John O. Crose, Infantry, to be untrue in that on this date August 15, 1930, the said Captain John O. Crose, Infantry, did owe the Fort Thomas Dry Cleaning Company approximately one hundred ninety three and 56/100 dollars (\$193.56) more or less, and had not made arrangements for payment that were declared satisfactory by the said Fort Thomas Dry Cleaning Company.

Specification 2: In that Captain John O. Crose, Infantry, did at Fort Thomas, Kentucky, on or about November 28, 1929, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a written report to the said Commanding Officer in words as follows: "I certify that I owe the following amount to the persons and firms indicated and this is a complete list of my indebtedness" which report was known by the said Captain John O. Crose, Infantry, to be untrue in that on this date November 28, 1929, the said Captain John O. Crose, Infantry, did owe one R. Kravitz one hundred forty and 41/100 dollars (\$140.41) more or less and this item was not included in his list of indebtedness.

Specification 3: In that Captain John O. Crose, Infantry, did, at Fort Thomas, Kentucky, on or about November 28, 1929, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a written report to the said Commanding Officer in words as follows: "I certify that I owe the following amount to the persons and firms indicated and this is a complete list of my indebtedness" which report was known by the said Captain John O. Crose, Infantry, to be untrue in that on this date November 28, 1929, the said Captain John O. Crose, Infantry, did owe one Private Charlie Bishop, Company E, 10th Infantry, approximately eighty five and no/100 dollars (\$85.00) more or less and this item was not included in his list of indebtedness.

Specification 4: In that Captain John O. Crose, Infantry, did, at Fort Thomas, Kentucky, on or about November 28, 1929, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a written report to the said Commanding Officer in words as follows: "I certify that I owe the following amount to the persons and firms indicated and this is a complete list of my indebtedness" which report was known by the said Captain John O. Crose, Infantry, to be untrue in that on this date November 28, 1929, the said Captain John O. Crose, Infantry, did owe one Sergeant Loranza Sexton, Company E, 10th Infantry, approximately one hundred fifteen and no/100 dollars (\$115.00) more or less and this item was not included in his list of indebtedness.

Specification 5: (Not guilty.)

Specification 6: In that Captain John O. Crose, Infantry, then Company Commander of Company E, 10th Infantry, by virtue of his office as said Company Commander, did, at Fort Thomas, Kentucky, on or about March 26, 1929, with intent to deceive, wrongfully and unlawfully make, and utter to the Fort Thomas Dry Cleaning Company, Fort Thomas, Kentucky, a certain check in words and figures as follows, to wit:

First National Bank, Anniston, Ala. March 26, 1929
 Pay to the order of R. Kraritz \$75.00
 Seventy-five and no/100 Dollars.

John O. Crose

in payment of company collections of the said Company E, 10th Infantry, collected and intended for the said Fort Thomas Dry Cleaning Company, he the said Captain John O. Crose, Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the said First National Bank for the payment of the said check.

Specification 7: In that Captain John O. Crose, Infantry, then Company Commander of Company E, 10th Infantry, by virtue of his office as said Company Commander, did, at Fort Thomas, Kentucky, on or about October 31, 1929, with intent to deceive, wrongfully and unlawfully make and utter to the Fort Thomas Dry Cleaning Company, Fort Thomas, Kentucky, a certain check in words and figures as follows, to wit:

First National Bank, Anniston, Ala. October 31, 1929. No. _____
 Pay to the order of R. Kravitz \$65.41
 Sixty-Five and 41/100 Dollars

John O. Crose

in payment of company collections of the said Company E, 10th Infantry, collected and intended for the said Fort Thomas Dry Cleaning Company, he the said Captain John O. Crose, Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the said First National Bank for the payment of the said check.

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

Specification 1: In that Captain John O. Crose, Infantry, being indebted to Sergeant Loranza Sexton, Company E, 10th Infantry, in the sum of \$218.00, more or less, for a private loan to the said Captain John O. Crose, Infantry, which amount became due and payable on or about August 15, 1930, did, at Fort Thomas, Kentucky, and Indianapolis, Indiana, from August 15, 1930, to September 23, 1930, dishonorably fail and neglect to pay said debt.

Specification 2: (Not guilty.)

Specification 3: In that Captain John O. Crose, Infantry, being indebted to Sergeant John R. Hester and Corporal Buford Walden, jointly, both of Company E, 10th Infantry, in the sum of \$77.00, more or less, for a private loan to the said Captain John O. Crose, Infantry, which amount became due and payable on or about September 5, 1930, did, at Fort Thomas, Kentucky, and Indianapolis, Indiana, from September 5 to September 23, 1930, dishonorably fail and neglect to pay said debt.

Specification 4: (Not guilty.)

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

Specification: In that Captain John O. Crose, Infantry, then Company Commander of Company "E", 10th Infantry, did, at Fort Thomas, Kentucky, approximately between the dates of March 26, 1929 and August 15, 1930, feloniously embezzle by fraudulently converting to his own use money of the Company funds, Company "E" 10th Infantry, amounting to one hundred ninety three and 56/100 dollars (\$193.56) more or less, collected from the members of said Company "E", 10th Infantry, and entrusted to him by said members of Company "E", 10th Infantry, for the purpose of applying the same to the use and benefit of said company and intended for the Fort Thomas Dry Cleaning Company.

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

Specification: In that Captain John O. Crose, Infantry DOL, with intent to deceive 2d Lt. Myron S. Baker, M.A.-Res., did at Cincinnati, Ohio, on or about August 9, 1930, state to said 2d Lt. Myron S. Baker, M.A.-Res., that the sum of Three Hundred and Fifty Dollars, (\$350.00) would

liquidate all of his, Captain Crose's indebtedness, he well knowing that such statement was false and by means thereof did obtain the signature of said 2d Lt. Myron S. Baker, M.A.-Res., as a co-maker on a note for Three Hundred and Fifty Dollars, (\$350.00) and did by means of this note receive from the Morris Plan Bank, Cincinnati, Ohio, the sum of Three Hundred and Fifty Dollars (\$350.00).

SECOND ADDITIONAL CHARGES.

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

Specification: (Plea in abatement sustained.)

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

Specification: In that Captain John O. Crose, 10th Infantry, did, at Fort Thomas, Kentucky, on or about November 28, 1929, with intent to deceive the Commanding Officer, Fort Thomas, Kentucky, officially make and submit a written report to the said Commanding Officer, in words as follows: "I certify that I owe the following amounts to the persons and firms indicated and this is a complete list of my indebtedness" which report was known by the said Captain John O. Crose, 10th Infantry, to be untrue in that on this date November 28, 1929, the said Captain John O. Crose, 10th Infantry, did owe one Mr. Walter C. Temple, Metemora, Indiana (formerly Sergeant Company "E" 10th Infantry) approximately Six Hundred and No/100 Dollars (\$600.00) more or less and this item was not included in his list of indebtedness.

Accused pleaded not guilty to all the charges and specifications. He was found guilty of Charge I and Specifications 1, 2, 3 and 4 thereunder, not guilty of Specification 5, Charge I, and guilty of Specifications 6 and 7, Charge I, excepting in each instance the words "and not intending that he should have", of the excepted words not guilty; guilty of Charge II and Specifications 1 and 3 thereunder, not guilty of Specifications 2 and 4, Charge II; guilty of the Specification, Charge III, except the words "money of the company funds Company 'E' Tenth Infantry amounting to \$193.56, more or less, collected from the members of said Company 'E' Tenth Infantry and entrusted to him by said members of Company 'E' Tenth Infantry, for the purpose of applying same to the use and benefit of said company and intended for the Fort Thomas

Dry Cleaning Company", substituting therefor respectively the words "certain moneys of enlisted men of Company 'E' Tenth Infantry, amounting to \$193.50 more or less, collected from members of said Company 'E' Tenth Infantry, entrusted to him by said members of Company 'E' Tenth Infantry, for the purpose of applying same to paying certain bills owed by said members of Company 'E', Tenth Infantry to the Fort Thomas Dry Cleaning Company", of the excepted words not guilty, of the substituted words guilty, and guilty of Charge III; guilty of the First Additional Charge and its Specification, and of Charge II of the Second Additional Charges and its Specification. Charge I of the Second Additional Charges and its Specification were stricken out by the court (R. 85). No evidence of previous convictions was introduced. He was sentenced "to be dismissed from the Service". The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

Evidence for the Prosecution.

3. Substantially summarized the evidence shows that accused reported for duty at Fort Thomas, Kentucky, during the month of May, 1927. Some time thereafter he was assigned to, and assumed command of Company E, 10th Infantry, and with the exception of several short periods of absence with leave he remained in command of that company until finally relieved on August 7, 1930 (R. 92, 94).

On November 21, 1929, the commanding officer of the 10th Infantry referred certain correspondence to accused by indorsement, which contained the following direction:

"In compliance with 5th Indorsement you will submit, with the return of this communication, a complete list of your indebtedness; with a statement showing the monthly payments you can make, to the extent of your ability."
(R. 96, Ex. 9.)

In compliance with the foregoing, accused, on November 28, 1929, returned the communication to his commanding officer by a signed indorsement (Ex. 9), reading as follows:

"I certify that I owe the following amounts to the persons and firms indicated and this is a complete list of my indebtedness. I can make a payment of about \$100.00 per month.

1st National Bank, Anniston, Alabama,-----	\$950.00
Service Finance Corporation -----	675.00
Federal Service Finance Corporation -----	150.00
Cliff M. Averett -----	125.00
Fort Thomas Bank, Fort Thomas, Ky. -----	330.00
Dr. Topmueller -----	34.00
Dr. Crawford -----	40.00
Brotherhood National Bank -----	350.00
TOTAL	<u>\$2,654.00</u>

(Signed) JOHN O. CROSE,
Captain, 10th Infantry."

A substantially similar certificate in accused's own handwriting was introduced as Exhibit 8 (R. 95, 96). The evidence shows that accused, on the date he made the above certificate, had other outstanding obligations referred to below, not included in the above report. On March 26, 1929, he drew a check in payment of an obligation to R. Kravitz for \$75.00, and again on October 31, 1929, a check for \$65.41 payable to R. Kravitz, both of which were protested because of insufficient funds on deposit in the bank on which drawn, The First National Bank of Anniston, Alabama. The aggregate amount of \$140.41 was therefore due (R. 119-121, 141; Ex. 12, 13), which remained unpaid at the time of trial, though payment was frequently requested (R. 122-123, 152), (Specification 2, Charge I).

At the same time accused was indebted to Private Charlie Bishop, Company E, 10th Infantry, who loaned accused \$100.00 in March or April, 1929 (R. 190). This loan remained unpaid until on or about November, 1930 (R. 191), (Specification 3, Charge I).

Accused was also on November 28, 1929, indebted to Sergeant Loranza Sexton, Company E, 10th Infantry, to the extent of \$115.00 (R. 198). Sergeant Sexton loaned accused \$15.00 in February, 1928, and thereafter borrowed \$250.00 from a bank at the instance of accused and loaned him that amount during October or November, 1928. Within the next two months accused paid Sergeant Sexton \$150.00 (R. 197) but the balance of \$115.00 remained due and unpaid until August 5, 1930 (R. 198), (Specification 4, Charge I).

In addition to the foregoing, the evidence shows that accused borrowed \$600.00 from Walter C. Temple of Rushville, Indiana, who at the time of the loan was a sergeant in Company E, 10th Infantry. This loan of \$600.00 was contracted on June 28, 1929, and remained due until part was paid in the spring, and the balance thereof during the latter part of 1930 (R. 111-112), (Charge II, Second Additional Charges and Specification thereunder).

Pursuant to War Department Orders, dated July 7, 1930, accused was relieved from duty at Fort Thomas, Kentucky, on or about August 7, 1930. At the same time he was granted leave of absence for 25 days pending change of station to Indianapolis, Indiana (R. 94, 102). Before leaving his station at Fort Thomas, Kentucky, accused executed a certificate of clearance to his commanding officer, which was required by post regulations, wherein, among other things, he certified that:

"All personal bills and debts in Cincinnati, or in this community have been settled and closed; or arrangements for payment has been made that has been declared satisfactory by the parties concerned" (R. 94-95; Ex. 7).

The certificate was not dated and the record fails to show exactly when it was actually executed. After his leave of absence took effect, accused was instructed not to leave the post until he presented his clearance to the commanding officer in person (R. 102). By referring to the date affixed to other papers connected with his clearance (R. 106, 105; Ex. 10, 11) and the fact that his assignment to quarters terminated on August 15, 1930, it was reasonably established that he executed the certificate on or about August 15, 1930, as alleged (R. 110). The evidence shows that at the time he executed the certificate of clearance, not only were the two protested checks for \$75.00 and \$65.41 drawn to the proprietor of the Fort Thomas Dry Cleaning Company, still due and unpaid, but in addition he had contracted a further obligation in the amount of \$53.15, making the total amount due the Fort Thomas Dry Cleaning Company, \$193.56, as alleged (R. 151, 152), (Specification 1, Charge I).

The evidence as to Specifications 6 and 7, Charge I, shows that accused, while commanding Company E, 10th Infantry, acted as agent for the Fort Thomas Dry Cleaning Company, in that he agreed to collect money due the Dry Cleaning Company from the soldiers of his organization for work and services performed (R. 114), and was to receive or retain ten per cent of the amount thus collected. At the end of each month it was customary for the Dry Cleaning Company to present accused with a bill showing the name and the amount due from each man of the organization who had work done at the Dry Cleaning Company (R. 115). For a time accused delivered to the company the actual cash so collected but later began to remit by personal checks to the proprietor thereof (R. 117). On March 26, 1929, accused delivered such a check, drawn on the 1st National Bank of Anniston, Alabama, payable to R. Kravitz, the proprietor referred to, for \$75.00, which was protested by the bank

on account of insufficient funds. The check having been misplaced, was not available as evidence before the court, but the prosecution introduced in evidence the formal notice of protest thereof executed by the bank upon which it had been drawn (R. 120-121; Ex. 13), (Specification 6, Charge I). It was also shown that accused, on October 31, 1929, drew a similar check for \$65.41 on the same bank, payable to R. Kravitz, in lieu of cash for the collections of the month. This check was received in evidence, showing on its face that it had also been protested for non-payment (R. 119; Ex. 12), (Specification 7, Charge I). Mr. J. T. Gardner, Vice President of the First National Bank of Anniston, Alabama, identified both Exhibits 12 and 13, and testified that both checks were dishonored because when the check drawn in March was presented accused had no balance on deposit, and when the other check was presented accused had insufficient funds to his credit (R. 141). After the last check was presented for payment accused never had sufficient funds on deposit to meet it (R. 145). In addition to the two checks above referred to, accused owed a further obligation of \$93.15 to the Fort Thomas Dry Cleaning Company for collections made about a month before he was relieved of command. Mrs. Kravitz, wife of the proprietor, testified that accused admitted the bill, paid \$40.00 in four payments of \$10.00 each, and agreed to pay the balance of \$53.15 before his departure from the post (R. 152, 157, 158). When witness threatened to tell the Colonel unless he settled the bill, he replied, "You won't do that, if you do, I will restrict my whole company coming to your place of business". He also said, "I will get lucky some day, my pony will come in and I will pay you" (R. 153). Including the dishonored checks, accused was therefore indebted to the Fort Thomas Dry Cleaning Company to the extent of \$193.71 (R. 131). To that extent he failed to account for the proceeds collected nor did he ever make the checks good (R. 151-152), Charge III and its Specification).

As to Specification 1, Charge II, the evidence already reviewed shows that accused was indebted to Sergeant Loranza Sexton to the extent of \$115.00 on November 28, 1929, at the time he made the false certificate as alleged in Specification 4, Charge I. He continued to owe that amount until August 5, 1930 (R. 198) when Sergeant Sexton loaned him another \$100.00 (R. 197), and accused promised to pay Sergeant Sexton the entire amount due by August 15, 1930. Accused thereafter left Fort Thomas and has never since satisfied the obligation though a demand for payment was made in a letter addressed to accused (R. 198-200), which letter accused never answered (R. 203). Accused still owes Sergeant Sexton \$216.00 (R. 42).

In addition to the foregoing, accused obtained a loan from Corporal Buford Walden, Company E, 10th Infantry, on August 11, 1930. Corporal Walden borrowed the money on his own note at the Fort Thomas

Bank in the amount of \$80.00. Sergeant Saxton indorsed the note, but Sergeant Hester and Sergeant Tobe Kindred, both of Company E, 10th Infantry, verbally agreed to be responsible for the obligation (R. 210-211; Ex. 16, 18). For this note Corporal Walden obtained \$75.00, which was in turn loaned to accused who promised to repay the loan by September 1, 1930, but then and thereafter failed to do so. Corporal Walden and Sergeant Kindred each contributed \$40.00 to pay off the note (Ex. 18), Specification 3, Charge II).

As to the Specification, First Additional Charge, the evidence shows that accused approached 2nd Lieut. Myron S. Baker, Medical Reserve Corps, Fort Thomas, Kentucky, some time before accused left the post, and induced him to sign, as co-maker, a note for accused in the amount of \$350.00 at the Morris Plan Bank (R. 174). Lt. Baker testified that accused led him to believe that he needed \$350.00 in order to clear him of all obligations before leaving the vicinity of Fort Thomas (R. 175-176). With this understanding, and with the expressed assurance of accused that he would meet the payments when due, witness was induced to sign the note. Thereafter, on September 9 or 29, 1930, witness was notified by the bank that accused failed to meet a payment when due (R. 175).

Evidence for the Defense.

The defense recalled Captain R. F. Fairchild, 10th Infantry, Post Adjutant, who identified Memorandum No. 103, Fort Thomas, Kentucky, August 20, 1926. The memorandum was received in evidence and shows that the Post Commander on that date issued orders to prohibit any individual or organization within the command to act as collecting agent for private corporations or persons doing business with the personnel on the post (R. 219; Ex. A).

Accused, on advice of counsel, chose to remain silent before the court (R. 224-225).

4. The evidence for the prosecution thus establishes the execution by accused of a certificate to the effect that he was indebted only to eight firms and persons as set out in the certificate, and that accused at that time owed the other debts as alleged in Specifications 2, 3 and 4, Charge I, and in the Specification, Charge II, Second Additional Charges. It is clear that accused had knowledge of the omitted debts and that he deliberately concealed them because one covered money embezzled by him and the other three were for loans from soldiers of his company. The evidence further establishes the execution

of the certificate of clearance as alleged in Specification 1, Charge I, and that it was false because he deliberately omitted therefrom his debt to the Fort Thomas Dry Cleaning Company covering money collected for that company but not paid over to it. The evidence further establishes that accused drew two checks on the First National Bank of Anniston, Alabama, as alleged in Specifications 6 and 7, Charge I, that they were protested by the bank when presented because he had insufficient funds on deposit to meet them, and that they have ever since remained unpaid. The circumstances under which the checks were drawn, viz., to cover collections made by him and which it was his duty to promptly pay over to the creditor, justified the findings of guilty. As to the Specification, First Additional Charge, the evidence shows that accused induced Myron S. Baker, a reserve officer, to sign his note for \$350.00 by means of the false representations alleged, and that he received the money from the bank on this note. All of the acts above considered were false official reports or false representations knowingly and deliberately made, or dishonest failure to pay over money collected by him for another which he was duty bound to turn over promptly, and therefore in each instance constituted conduct unbecoming an officer and a gentleman in violation of the 95th Article of War.

The evidence also establishes the indebtedness to soldiers of his company as alleged in Specifications 1 and 3, Charge II, and his neglect and failure to pay them when due in accordance with his promise. This constitutes a violation of the 96th Article of War.

As to the Specification under Charge III, the court made certain exceptions and substitutions, finding the accused not guilty of the excepted words and guilty of the substituted words and of the charge. The only material change in the specification resulting from the action of the court was the finding that the money entrusted to him was "moneys of enlisted men of Company E, Tenth Infantry" instead of "money of the company funds, Company E, 10th Infantry", as alleged in the specification. A variance in allegation and proof as to ownership of property alleged to have been stolen or embezzled is normally fatal to the conviction. In the instant case the variance is immaterial. The accused was fully apprised by the language used in the original specification of all the elements of the offense charged against him and the erroneous legal conclusion of the drafter of the specification that the money pertained to the "company funds" rather than to individual enlisted men did not deceive the accused, hamper his defense, nor otherwise materially adversely affect him. One substantial test as to whether or not the variance is material is to determine whether or not the record of trial in its entirety could be used to sustain a plea in bar of trial for a second prosecution by the

Government for the same offense. In the opinion of the Board of Review the record would sustain such plea. The findings of the court under Charge III and its Specification are valid.

5. The accused was arraigned on October 30, 1930, on the original charges and specifications, at which time the defense interposed a plea of insanity. The trial of the case was thereupon continued, and accused was sent to Walter Reed Hospital where a board of medical officers/appointed to examine into and report upon his mental condition. On March 3, 1931, the court reconvened to proceed with the case, when the prosecution offered in evidence a deposition of Major P. S. Madigan, Medical Corps, Chief of the Neuro-Psychiatric Section, Walter Reed General Hospital (R. 11; Ex. 1), who testified therein substantially, that he was president of the board of medical officers that was convened pursuant to verbal authority of the Commanding General, Walter Reed Hospital, to examine into and report upon the mental condition of accused. He identified the report of the board attached to the deposition, also his own signature and that of Major C. C. Odom, Medical Corps, and Major William C. Porter, Medical Corps, who were the other members of the board detailed to assist in the examination of accused. The report shows that accused was admitted to Walter Reed Hospital for observation on November 8, 1930, and remained under the observation of the board until December 19, 1930. The report shows that the board considered the original charge sheet, dated September 23, 1930, and the additional charge sheet, dated October 29, 1930, as well as evidence submitted for the prosecution and the defense. The board also considered a letter submitted by the wife of accused who related some unusual peculiarities observed in accused's conduct. The board also received information that the father of accused had at one time been a patient in the State Hospital for the Insane at Indianapolis, Indiana. After observing accused since his admission to Walter Reed Hospital the board found as follows:

"On admission to this hospital patient appeared depressed and worried and wept when discussing his financial affairs or his family. Was oriented as to time, place and person. Stated that he had contemplated suicide but believed it to be a cowardly act. Stated that certain officers at Fort Thomas had persecuted him in their attempts to get him out of the service. He was quite hypochondriacal, complaining of headache and various minor ailments, but aside from a mild, chronic sinusitis, no physical disability has been found.

For a short period after admission he asked for hypnotics, but for the past month has made no such requests and has not required any aid in this respect. He has expressed nothing that is definitely delusional, has denied hallucinations, and no psychosis has been demonstrated.

At the present time tears come into his eyes when speaking about his financial affairs, the future of his family, or, the possibility of court martial proceedings. At such times he offers no defense for his actions but does express great contrition and self-sympathy. At such times complains of subjective nervousness. Frankly states that if he were out of debt that he would be all right in every way.

Aside from the sinusitis, maxillary, left, mild, sub-acute, he has no disability or condition which would prevent him from performing full military duty.

The board, having examined Captain John O. Crose, O-7128, Infantry, D.O.L., from a medical point of view to determine his mental capacity and condition to learn whether he has suffered or does suffer from any mental defect or derangement marking him as either temporarily or permanently abnormal, and, having considered the history of the case and all information available, agreed on the following findings:

FINDINGS:

1. That there was no feature of abnormality in the mental condition of Captain John O. Crose, O-7128, Infantry, D.O.L., which rendered him not susceptible to ordinary human motives or appreciation of right or wrong or to the normal control of his actions on:

June 1, 1927;
 March 26, 1929;
 October 31, 1929;
 November 28, 1929;
 August 9, 1930;
 August 15, 1930;
 September 1, 1930;
 September 5, 1930;
 September 23, 1930;

the dates of his alleged wrongful acts.

2. That, at the present time, there is no feature of abnormality in the mental condition of Captain John O. Crose, O-7128, Infantry, D.O.L., which renders him not susceptible to ordinary human motives or appreciation of right or wrong or to the normal control of his actions, and, he is capable of conducting his defense intelligently."

The defense introduced in evidence two depositions of Mrs. Florence Cones of Thorntown, Indiana, who testified in substance that accused's mother died at the time of his birth; that when he was 12 days old "he was brought to my home where he was reared" (R. 12; Ex. 3). She also knew his father well before he died and submitted with her deposition a certificate of the Superintendent of the Central State Hospital at Indianapolis, Indiana, showing that accused's father had been an inmate there, admitted January 30, 1884, at the age of 32, diagnosed, among other things, as Melancholia, violent; had threatened violence to self and others, discharged November 20, 1884, cured; again admitted April 2, 1885, diagnosed Melancholia Rec., mistakes persons and strangers for near relatives; in conversation a confusion of ideas; discharged October 6, 1885, cured (R. 11; Ex. 2). In Exhibit 3 witness testified that she always considered accused well balanced mentally until about April, 1929. At that time she saw him after an absence of several years when, "I was greatly surprised at his changed condition and the way he acted. He appeared to be mentally unbalanced, and acted very peculiar. He would often leave the house and be gone for several days at a time without even saying a word about where he had been. He appeared to be extremely nervous, and would make unintelligent remarks. * * * It is my opinion that since April 1929, Captain Crose has not at all times been responsible for his acts."

The defense also introduced in evidence depositions of George W. Ritter, a salesman, 4212 Sunset Avenue, Indianapolis, Indiana, and Melva Ritter, of the same address, who in substance testified that they had known accused since childhood. While stationed at Fort Thomas, Kentucky, accused since the fall of 1929 visited in their home on several occasions. Both, for similar reasons given, expressed opinions that accused was not at all times able to distinguish between right and wrong (R. 12; Ex. 4, 5).

Several witnesses appeared for the defense. Myron S. Baker, Medical Reserve Corps, became intimately acquainted with accused during the time accused was stationed at Fort Thomas. He observed that he was often depressed and that at times he would cry like a child (R. 13, 14). For various other stated reasons witness was of opinion that accused was not capable to look after his own affairs (R. 17, 18). Mr. R. Kravitz and Mrs. Kravitz of Fort Thomas often saw accused cry when he came into their place of business to adjust his financial obligations (R. 21-22, 30-31). Ralph W. Rogers, Chaplain, Fort Thomas, Kentucky, was intimately acquainted with accused. Before any charges were brought against accused, witness had suggested to Major Dow, Medical Officer, that accused should be observed for his mental condition (R. 24). He stated his reason:

"As a rule, Captain Crose seemed to be laboring under a mental condition rather than abnormal in that discussing various conditions, more especially, and conditions of the Post, he would break down and cry, which seemed to me rather peculiar and then learning of the various things that he had done, led me to question whether he really was normal or not." (R. 25)

Sergeant Tobe Kindred and Sergeant Loranza Sexton, both of Company E, 10th Infantry, testified in substance that accused appeared mentally unbalanced at times. Members of the company frequently saw him crying before and after charges were brought against him (R. 31-45).

Lieutenant Colonel Everett N. Bowman, 10th Infantry, appeared for the prosecution in rebuttal. In substance he testified that in his opinion accused was responsible for his acts (R. 45-58). Major Harry B. Crea, 10th Infantry, who served as battalion commander of accused from June, 1928, until about August, 1930, testified in substance that he observed nothing to cause him to doubt accused's mental responsibility (R. 58-59).

6. Pursuant to paragraph 63, Manual for Courts-Martial, the court had jurisdiction to try the issue of insanity. The defense was given every opportunity to present its case. The court considered all of the evidence, saw and heard the witnesses on the stand, and it must be presumed that proper weight was given to the credibility of each. After due consideration, the court voted on the issue and found accused sane. In the opinion of the Board of Review, the record of trial raises no reasonable doubt as to the sanity of accused.

7. His statement of service as shown by the Army Register is as follows:

"2 lt. Inf. Sec. O.R.C. 15
 Aug. 17; accepted 15 Aug. 17; active
 duty 15 Aug. 17; vacated 8 Nov. 17;
 capt. of Inf. U.S.A. 22 Aug. 18;
 accepted 11 Sept. 18; hon. dis. 30
 June 20. - 2d lt. of Inf. 26 Oct.
 17; accepted 8 Nov. 17; 1 lt. (temp.)
 26 Oct. 17; 1 lt. 22 May 18; capt.
 1 July 20."

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

J. M. Cleary, Judge Advocate.

W. M. Connor, Judge Advocate.

P. S. Brennan, Judge Advocate.

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

Military Justice
C.M.No. 195562

MAY 21 1931

U N I T E D S T A T E S	)	THIRD CORPS AREA
)	
vs.	)	Trial by G.C.M., convened at
	)	Fort Eustis, Virginia, April
Private CHARLES K. STOVER	)	20, 1931. Three (3) months
(6836228), Service Company,	)	confinement and forfeiture of
34th Infantry.	)	\$14.00 per month for a like
	)	period. Fort Eustis,
	)	Virginia.

OPINION of the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates,
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate.

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Charles K. Stover, Service Company, 34th Infantry, being on guard and posted as a sentinel, was at Fort Eustis, Virginia, on or about March 26th, 1931, found sleeping upon his post.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced.

He was sentenced to be confined at hard labor for three months and to forfeit fourteen dollars per month for a like period. The reviewing authority approved the sentence, directed its execution, and designated Fort Eustis, Virginia, as the place of confinement. The sentence was published in General Court-Martial Orders No. 151, Headquarters Third Corps Area, May 1, 1931.

3. The evidence for the prosecution shows that at 11:00 p.m. on March 26, 1931, accused was posted as a sentinel of the second relief of the 34th Infantry Motor Park Guard at Fort Eustis, Virginia. His tour on post was from 11:00 p.m. to 1:00 a.m. (R. 10, 14-16, Ex. 2). The written Special Orders for the sentry, in addition to other usual instructions, required him to patrol inside the Motor Park, to "carefully examine the interior of all open garages, the closed garages and the paint shop", to see that the doors of all buildings are closed and locked and to allow no vehicles or other government property to be removed from the Park without authority (R. 12, Ex. 1). It was also customary during the winter for the sentry to go into the dispatcher's office to "keep an eye on the fire because of the fire hazard and also to keep the fire going" (R. 13). From 25 to 30 minutes would be required for the sentry "to inspect all these buildings" (R. 16). About 12:15 a.m., Second Lieutenant William J. Latimer, Jr., the Officer of the Day, rode his motorcycle twice around the park which comprised the post of the sentry, but could not find him (R. 6). Accompanied by the Corporal of the Guard, he then walked around the post, but neither was able to locate accused (R. 6, 15), whereupon Lieutenant Latimer sent the Corporal to the guardhouse to turn out the guard, and he himself went into the dispatcher's office. Upon first entering, Lieutenant Latimer looked around, but did not see accused. The fire in the stove was burning brightly. The stove door was open and the glare from the fire blinded him so that he could not see in back of the stove. Lieutenant Latimer was in the room about two minutes, and as he was about to leave the office, he heard "some rustling" in a corner of the room and then observed accused emerging from behind the stove. Accused "was in a very dozey condition and looked as though he had been asleep". His gun was in an opposite corner of the room. Upon being questioned, accused stated that he had gone into the dispatcher's office to see about the fire in the stove. He said he had not heard the Officer of the Day in the Park (R. 6, 9, 10). Lieutenant Latimer did not see the sentry asleep, but testified, "There is no doubt in my mind whatever but what the sentry was asleep" (R. 7). During the entire inspection the Officer of the Day was not challenged by the sentry (R. 10).

The accused testified that on the night in question he heard a noise in the dispatcher's office and went in to investigate. While inside he stirred up the fire. He also wanted to get his feet warm.

He denied that he was asleep at any time. He heard the Officer of the Day when he came into the Park but went into another building to inspect it and the Officer of the Day passed while he, the accused, was inside the building. The Officer of the Day was too far away to be challenged (R. 17-18).

Captain David H. Finley testified that accused had been a member of his company for about a year, was a soldier of excellent character, and he would believe the statement made by him (R. 19).

4. The evidence shows that accused was on guard and posted as a sentinel as alleged in the Specification of the Charge, and that, when found by the Officer of the Day, he was in the dispatcher's office, a place where he was required to go to observe the fire and keep it going. No witness saw accused asleep, or even sitting down or reclining in an attitude of sleep. Testimony that he failed to challenge the Officer of the Day during his three rounds of the Motor Park, and that, when found in the dispatcher's office, he "was in a very dopey condition and looked as though he had been asleep" is too uncertain in probative effect to furnish a foundation of substantial evidence for a finding that he was asleep. The testimony of the Officer of the Day is based entirely upon a conclusion which of itself is insufficient to warrant conviction.

5. The charge sheet shows that at the time of the commission of the offense accused was 19 $\frac{1}{2}$ years of age, and that he enlisted on March 27, 1930, with no prior service.

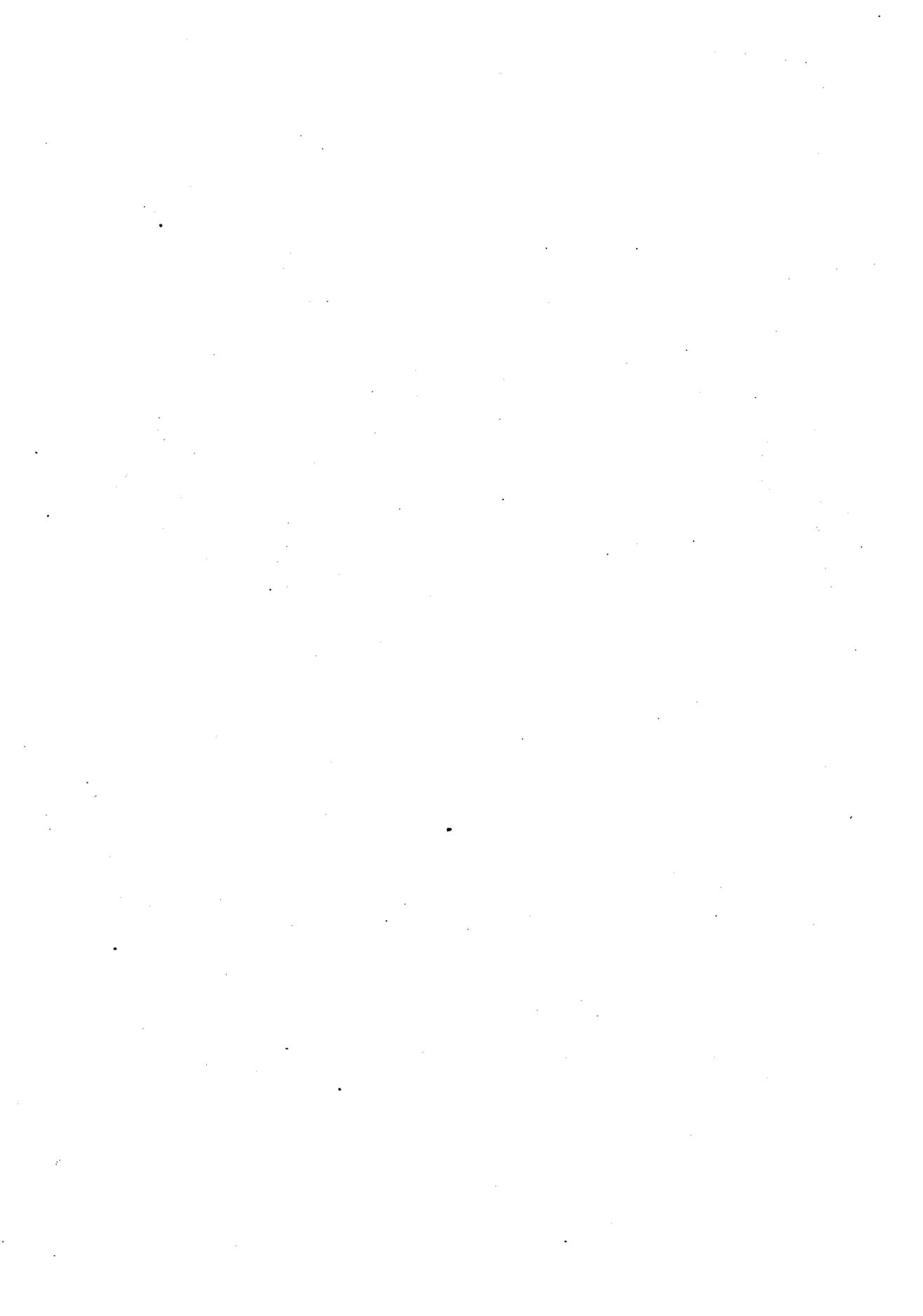
6. For the reasons hereinabove stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence.

H. Miller, Judge Advocate.

D. W. Conroy, Judge Advocate.

R. R. Ruman, Judge Advocate.

To The Judge Advocate General.



Military Justice
C.M. 195687.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

July 10, 1931

UNITED STATES)

THIRD CORPS AREA

vs.)

Trial by G.C.M. convened at
Fort George G. Meade, Mary-
land, March 26 and 27, 1931.
Dishonorable discharge and
confinement for four (4) years.
Penitentiary.

Corporal WILLIAM E. STANSBURY)
(R-2381338), Company E, Second)
Tank Regiment.)

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Corporal William E. Stansbury, Company "E", Second Tank Regiment, did, at Fort George G. Meade, Maryland, on or about February 14, 1931, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Private Herbert F. Goney.

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 four (4) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. In view of the conclusions of the Board of Review, herein-after expressed, a statement of the evidence in this case is not necessary. Only one witness, Private Herbert F. Goney, Company E, 2nd Tank Regiment, testified directly as to the commission by accused of the alleged offense (R. 9-20). This witness' story is difficult to believe. Upon being recalled later in the trial, this witness admitted that he had told conflicting stories about the matter and had deliberately lied in some respects (R. 40-43). The only

other material testimony tending to establish accused's guilt was the testimony of Private Kenneth M. Fravel, 59th Service Squadron (R. 20-23), Private Stanley A. Keppley, 1st Medical Regiment (R. 23-27), Private James E. Cordell, Co. C, 1st Tank Regiment (R. 30-33), and Private W. C. Bess, Co. C, 1st Tank Regiment (R. 33-34), all of whom testified to an admission made by the accused, which admission was substantially a confession. The accused took the stand as a witness and testified in sharp and direct contradiction to the testimony given by witnesses for the prosecution. He unqualifiedly denied the act charged against him, and stated that the four privates referred to above who testified to his admission testified falsely. After the accused completed his testimony, several witnesses were called by the court and were questioned in regard to the condition of accused as to sobriety at the approximate time the offense was alleged to have been committed. Upon the completion of the testimony of these witnesses the court took a recess. When the court resumed its sitting, the law member made the following statement:

"The court would like to hear evidence as to the reputation of the witnesses Cordell and Bess, for truth and veracity, and also of Fravel and Keppley. How long would it take the trial judge advocate to secure that testimony?" (R. 68).

Thereupon the court took a short recess and the trial judge advocate produced for the court five or six witnesses who were examined as to the reputation of the witnesses named for truth and veracity. Upon the conclusion of the testimony of these witnesses the court closed and found the accused guilty of the Charge and Specification.

With the exception of Private Goney, the witnesses of the prosecution were not impeached by the defense. It is well settled that the introduction of character testimony to support the character of an unimpeached witness is reversible error. *Ford v. U.S.* (CCA) 3 F. (2d) 104; *Harris v. U. S.* (CCA) 16 F. (2d) 117; *Bolling v. U.S.* (CCA) 18 F. (2d) 863. In the case last cited the court, while recognizing the rule, held that upon the whole record the rights of the accused were not materially adversely affected. In the instant case, it is clear that serious error was committed by the court in receiving the testimony of witnesses in support of the character of certain witnesses for the prosecution, and that paragraphs 75, 111, and 124, Manual for Courts-Martial, were thereby infringed. The events of the trial as stated briefly above establish that this error in the admission of evidence injuriously affected the substantial rights of the accused.

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

E. H. Kelley Judge Advocate.

J. W. Carnes Judge Advocate.

R. S. ... Judge Advocate.



automatic, Colt, value about \$26.38; one pistol automatic Savage, value about \$38.50; one Glass, field, with case, value about \$39.00; one officer's Sam Browne belt, less shoulder straps, value about \$12.50; one wrist watch, value about \$125.00; one wrist watch, value about \$40.00; one pair cotton O.D. long trousers, value about \$3.50; one wind-breaker jacket, value about \$5.50; and about \$10.00 in cash, total value about \$300.38, the property of 1st Lieutenant Donald H. Nelson, Cavalry.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for seven and one-half years. The reviewing authority approved the sentence, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that accused absented himself without leave from Fort Bliss, Texas, on February 21, 1931, was dropped as a deserter on February 22, 1931 (R. 7; Ex. 1), and, on March 4, 1931, was turned over to the Police Department of Los Angeles, California, "by the Railroad Company as a vagabond". At that time he was dressed in old working clothes and said that he ran away from the Army and wanted to get back into it as soon as he could (R. 20; Ex. 2).

The evidence further shows that accused had been working as striker for Lieutenant Donald H. Nelson, Cavalry; that on the day in question he was in the Lieutenant's quarters (R. 9); that the Lieutenant gave him a written list of things he wanted him to do, then left his quarters about 2:15 p. m., returned about 5:30 p. m. and attempted to get in touch with accused but could not find him; that about 8:15 p. m., he checked his belongings in his quarters and found the property alleged in the Specification of Charge II, and of the approximate value therein stated, to be missing (R. 10); that so far as Lieutenant Nelson knew no one other than accused was in his quarters during the afternoon (R. 11); that accused had unlimited access to his unlocked quarters, as in fact did any other person; that they were in disorder after accused left and that none of the work outlined for accused had been accomplished; that all of the property was more or less in a concealed condition but not under lock (R. 13), and that accused should not have known the location of the property (R. 14).

The defense counsel stated in his closing argument that none of the stolen property was recovered and none of it was found in accused's possession.

4. The single substantial question presented by the record of trial in the instant case is the sufficiency of the evidence to support the conviction of Charge II and its Specification. The uncontroverted evidence for the prosecution, in the opinion of the Board of Review, is too slightly inculpatory in effect to even approximate proof of the alleged larceny by the accused. Though he had the opportunity to take the stolen articles and his disappearance was contemporaneous with that of the property, it is also reasonably possible that another, knowing of accused's sudden departure, took advantage of it as an opportune time to go to Lieutenant Nelson's quarters and commit the larceny alleged. Proof of mere opportunity to commit a crime is not sufficient to establish guilt (C.M. 154726, Hall; Buntain v. State, 15 Tex. App. 490). The proved fact that accused absconded at the time the larceny in the case in hand was committed is circumstantial evidence tending to show him to be the perpetrator of the crime (Alberty v. U.S., 162 U.S. 499, 510; France v. State, 60 S.W. 236, 238).

The probative quality, value, and test of sufficiency of circumstantial evidence in criminal proceedings is comprehensively expounded in the following excerpt from the charge of the Federal Circuit Court to the jury in U.S. v. Hart, 162 Fed. 192, 196-197:

"The value of such evidence depends mainly on the conclusive nature of the circumstances relied on to establish the controverted fact. Where circumstances are relied on entirely to justify a conviction, the circumstances must not only be consistent with guilt, but inconsistent with innocence. Just what state of circumstances will amount to proof can never be a matter of general definition. That circumstantial evidence is not only legal evidence and proper to be considered by you but a well-connected train of circumstances is as much conclusive of a fact as the greatest array of direct evidence. The true test always of such evidence is the sufficiency and weight of the evidence to satisfy your minds and consciences to the exclusion of every reasonable doubt of defendant's guilt."

And the Manual for Courts-Martial declares (p. 63):

"A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inference from them."

See also the leading case of *People v. Rzezioz*, 206 N. Y. 269, 99 N. E. 557.

Applying the test of sufficiency as formulated in *U. S. v. Hart*, supra, to the circumstantial fact of flight of accused considered in connection with his opportunity to steal the property of Lieutenant Nelson, we have no difficulty in reaching the conclusion that there is a clear failure of proof of guilt on his part. In *Alberty v. U. S.*, 162 U. S. 499-511, the Supreme Court of the United States condemned the proposition that the circumstantial fact of flight alone is sufficient to create a presumption of guilt, the court remarking in its discussion of the subject:

"While undoubtedly the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt; at the same time, as was observed in *Ryan v. The People*, 79 N. W. 593, 'there are so many reasons for such conduct consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances.'"

Moreover, as desertion without apparent cause is of such frequent occurrence in the military service, the disappearance of a soldier who had opportunity to commit a crime would hardly justify more than a suspicion against him in respect thereof. In *Buntain v. State*, supra, as in this case, the question on appellate review was not one of weighing conflicting evidence or passing upon the credibility of witnesses or determining whether facts relied on to prove the ultimate fact in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justified the conclusion of guilt as a logical inference from such circumstantial facts. On that question that court said:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which,

under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. 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 * * *. 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 citizens."

In a word: justice according to law demands more than that accused be guilty; it demands that he be proved guilty.

The evidence for the prosecution in this case stands uncontroverted in the record. According to that evidence the maximum of reasonable probatory effect, we conclude that the conviction of larceny in this case must be set aside because (to adopt the language of the New York Court of Appeals in the circumstantial evidence case of *People v. Rzezicz, supra*), "The inferences from the facts shown are not sufficiently conclusive as we have seen to exclude all other inferences and to justify the judgment obtained against him."

5. The accused enlisted July 9, 1929, and was 20 years old at the time of the commission of the offense.

6. For the reasons hereinabove stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of Charge II and its Specification, but legally sufficient to support the findings of guilty of Charge I and its Specification, and only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years.



WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Board of Review
C. M. No. 195772

UNITED STATES	)	THIRD CORPS AREA
)	
vs.	)	Trial by G. C. M., convened
	)	at Baltimore, Maryland, April
Captain READ WIPPRECHT	)	21st and May 13th and 14th,
(O-7427), Ordnance De-	)	and at Aberdeen Proving Ground,
partment.	)	May 7th, 8th, and 9th, 1931.
	)	Dismissal.

OPINION by the BOARD OF REVIEW
McNEIL, CONNOR and GUERIN, 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. Accused was tried upon the following charges and specifications:

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

Specification 1: In that Captain Read Wipprecht, Ordnance Department, then commanding officer of the 44th Ordnance Company and official custodian of its company fund, did, at Bel Air, Maryland, on or about March 14, 1929, feloniously embezzle by fraudulently converting to his own use four certain United States Government Liberty Bonds of the aggregate value of \$400.00, part of such company fund, property of that company for the use of the enlisted men thereof, entrusted to him as such official custodian pursuant to Army Regulations for the use and benefit of the enlisted men.

Specification 2: In that Captain Read Wipprecht, Ordnance Department, then commanding officer of the 44th Ordnance Company and official custodian of

its company fund, did, at Aberdeen Proving Ground, Maryland, on or about April 22, 1929, feloniously embezzle by fraudulently converting to his own use the sum of \$398.80, part of such company fund, property of that company for the use of the enlisted men, entrusted to him as such official custodian pursuant to Army Regulations for the use and benefit of the enlisted men.

Specification 3: (Not guilty.)

Specification 4: (Not guilty.)

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

Specification 1: In that Captain Read Wipprecht, Ordnance Department, then commanding officer of the 44th Ordnance Company, and official custodian of its company fund, did, at Aberdeen Proving Ground, Maryland, on or about April 22, 1929, with intent to deceive, make and file as voucher No. 15, to the account of said fund for April, 1929, an official certificate in words and figures as follows:

"I certify that I have purchased 400.00 worth of Liberty Bonds for the Co fund & same are in deposit box 1st Natl Bank Aberdeen Md Voucher No. 15 Read Wipprecht Amount \$398.80, Expenditure (Liberty Bonds) Date 4/12/29."

which certificate, as he, the said Captain Read Wipprecht, then well knew, was false and untrue, in that he had not on April 12, 1929, or on any other date during April, 1929, purchased any Liberty Bonds for said fund.

Specification 2: In that Captain Read Wipprecht, Ordnance Department, then commanding officer of the 44th Ordnance Company and official custodian of its company fund, did, at Aberdeen Proving Ground, Maryland, on or about May 10, 1929, with intent to deceive, officially certify in the council book of said company, that the account of said fund for April, 1929, was

correct, which certificate, as he, the said Captain Read Wipprecht, then well knew, was false and untrue, in that the account so certified contained an entry indicating that the sum of \$398.80 had been expended on April 12, 1929, for the purchase of Liberty Bonds, whereas no Liberty Bonds had been purchased for said fund on the date indicated by said entry, or on any other date during April, 1929.

Specification 3: In that Captain Read Wipprecht, Ordnance Department, then commanding officer of the 44th Ordnance Company and official custodian of its company fund, did, at Aberdeen Proving Ground, Maryland, on or about August 3, 1929, with intent to deceive, make an entry in the account of said fund indicating that he had on July 31, 1929, sold certain Liberty Bonds belonging to said fund, and did, in writing, officially certify the account containing said entry to be correct, which entry and certificate, as he, the said Captain Read Wipprecht, then well knew, were both false and untrue, in that no such sale of Liberty Bonds had occurred, and which certificate was further false and untrue in that the account so certified contained an entry to the effect that the Custodian had drawn \$200.00 in cash on July 30, 1929, to make change for company collections, whereas, as he, the said Captain Read Wipprecht, then well knew, no such transaction had occurred on the date indicated or on any other date during July, 1929.

Specification 4: (Not guilty.)

Specification 5: (Not guilty.)

Specification 6: (Not guilty.)

Specification 7: In that Captain Read Wipprecht, Ordnance Department, did, at Aberdeen Proving Ground, Maryland, Fort Bliss, Texas, and elsewhere, wrongfully and with intent fraudulently to secure temporary financial credit, make and utter over his own signature, on or about the dates, upon the banks, for the amounts, and to the persons hereinafter respectively specified, worthless checks as follows, to wit:

DATE (on or about)	ON	AMOUNT	UPPERED TO
June 15, 1929	Guaranty State Bank of San Antonio, Texas	\$ 75.00	F. Poughkeepsie Aberdeen Prov.Gr.,Md.
June 20, 1929	Guaranty State Bank of San Antonio, Texas	90.00	F. Poughkeepsie Aberdeen Prov Gr Md
Aug. 1929	Guaranty State Bank of San Antonio, Texas	170.00	F. Poughkeepsie Aberdeen Prov Gr Md
Jan. 16, 1930	First National Bank of El Paso, Texas	12.31	Ord.Supply Officer Aberdeen Prov Gr Md
Oct. 8, 1930	First National Bank of El Paso, Texas	40.00	Capt. Earl Hendry, U. S. Army
Jan. 6, 1931	First National Bank of El Paso, Texas	57.00	Service Finance Corporation.
Jan. 17, 1931	First National Bank of El Paso, Texas	10.00	Post Exchange, Fort Bliss, Texas

in each instance without there being sufficient funds in or credit with the bank upon which the check was drawn to meet the check in full upon its presentation.

On the arraignment, the defendant, by plea in abatement, challenged the sufficiency of Specification 1 of Charge I on the ground of vagueness and indefiniteness of description of the four certain United States Government Liberty Bonds of the aggregate value of \$400.00, subject thereof, and urged that accused "should be furnished with specific information as to these four bonds" (R. 11). A similar plea on the same ground was interposed to Specification 4 of this Charge. We think these pleas in abatement were properly overruled. A more exact description of the Liberty Bonds alleged to have been embezzled is not required by the law of criminal pleading in civil tribunals and, a fortiori, by that of courts-martial. As was said by the court in the leading case of *Commonwealth v. Butterick*, 100 Mass. 1, 97 Am. Dec. 65, respecting the sufficiency of an allegation of "one bond of the United States of America, for the payment of money, issued by authority of law, of the denomination of five hundred dollars, and of the value of five hundred dollars; sundry other bonds of the United States of America, for the payment of money, issued by authority of law, and of the aggregate value

of one thousand dollars", in an indictment for embezzlement:

"The objection that the description of the property alleged to have been embezzled is vague and indefinite does not appear to be well founded. The language used is sufficiently definite and intelligible to identify the property and show that it was such as may be the subject of embezzlement. No greater particularity of description is requisite in an indictment for embezzlement than in one for larceny, in which such a description would be sufficient."

See also hereon, State v. Meyers, 68 Mo. 266; Bass v. Commonwealth (Ky.), 300 S.W. 866; U. S. v. Eccles, 181 Fed. 906; Carter v. McClaughry, 183 U.S. 365, 386; 7 Op. Atty. Gen. 601; Weinhandler v. U.S., 20 F. (2d) 359; Manual for Courts-Martial, paragraph 29.

Accused pleaded not guilty to all the charges and specifications, and was found guilty of Specifications 1 and 2, Charge I; not guilty of Specifications 3 and 4, Charge I; guilty of Charge I; guilty of Specifications 1 and 2, Charge II; guilty of Specification 3, Charge II, except the words, "and which certificate was further false and untrue in that the account so certified contained an entry to the effect that the Custodian had drawn \$200.00 in cash on July 30, 1929, to make change for company collections, whereas, as he, defendant Captain Read Wipprecht, then well knew, no such transaction had occurred on the date indicated or on any other date during July, 1929"; of the excepted words, not guilty; not guilty of Specifications 4, 5 and 6, Charge II; guilty of Specification 7, Charge II; and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service". The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. Such evidence as relates only to specifications of which the accused was found not guilty will not be considered in this review. With the exception of Specification 7, Charge II, all specifications under which the accused was found guilty are so closely interrelated that they may conveniently be considered together. Specification 7, Charge II, will be discussed separately.

4. Many of the facts involved in Specifications 1 and 2, Charge I, and Specifications 1, 2 and 3, Charge II, are undisputed. They not only are established by uncontradicted evidence introduced by the prosecution, but are not controverted or questioned by the defense, and most of them specifically appear from the testimony of the accused himself.

In so far as it appears material to discuss them in this review the substance of these undisputed facts is hereinafter summarized.

5. When the accused became the Commanding Officer of the 44th Ordnance Company at Aberdeen Proving Ground on March 4, 1929, and, as official custodian, took over and receipted for the company fund, he received from his predecessor, as part of that fund, six \$100.00 Liberty Bonds (R. 106, 107, 329; Pros. Ex. 6). No record of the numbers of these bonds appears to have been kept in the company at that time (R. 330) and no witness testified directly to what those numbers were. The accused remained in command of the 44th Ordnance Company until August 1, 1929, when he was relieved (Pros. Ex. 30). On August 10, 1929, his company fund accounts were inspected (R. 378; Pros. Ex. 14) and he turned over to his successor the fund, which included two \$100.00 First Liberty Loan Bonds numbered, respectively, D00305699 and E00305700, and four \$100.00 Fourth Liberty Loan Bonds, numbered, respectively, A05435401, D03119174, E03119175 and H01838058.

These facts, standing alone, would undoubtedly warrant the conclusion that the six bonds turned over by the accused to his successor on August 10, 1929, were the identical six bonds received by the accused from his predecessor on March 4, 1929. Before finally reaching this conclusion, however, other evidence, which will be stated later, must be considered.

6. On March 14, 1929, the accused negotiated a personal loan of \$400.00 from the Second National Bank at Bel Air, Maryland, giving his note dated March 14, 1929, for \$406.32, principal and interest, payable in ninety days. As collateral security he deposited with the bank four \$100.00 Liberty Bonds, which the records of the bank show to have been as follows: two \$100.00 First Liberty Loan Bonds, numbered, respectively, D00305699 and E00305700, and two \$100.00 Fourth Liberty Loan Bonds numbered, respectively, E03119175 and A05435401 (R. 63, 64, 67, 330, 331; Ex. 25).

On April 22, 1929, the accused drew check No. 2398 against the company fund account in the 1st National Bank of Aberdeen, Maryland, for \$398.80, payable to "Bank" (the purpose designation space on the face thereof being left blank). This check is stamped "Paid 4-22-29", and the corresponding stub, also dated April 22, 1929, indicates that it was issued for "Liberty Bonds 400.00" (Ex. 10). On that same day at the 1st National Bank of Aberdeen he exchanged the check for a cashier's draft for the same amount, payable to his own order. He then, on the same day, went to the Second National Bank at Bel Air, Maryland,

and paid off his personal loan, using for the purpose the cashier's draft mentioned above, together with a small amount of cash, and received back his note and the four Liberty Bonds which he had deposited as collateral (R. 334, 335, Ex. 25).

7. The undisputed facts thus far summarized, if not otherwise explained, would inevitably give rise to the conclusion that the accused, on March 14, 1929, did wrongfully convert to his own use four \$100.00 Liberty Bonds belonging to the company fund, as alleged in Specification 1, Charge I, and on April 22, 1929, did wrongfully convert to his own use the sum of \$398.80, property of the company fund, as alleged in Specification 2, Charge I.

8. In the company fund account for April, 1929 (Ex. 8, P. 1), under date of April 12th, there appears in the "Expenditures" column an entry of \$398.80, described as "Liberty Bonds", with a reference to Voucher No. 15 (Ex. 9), which voucher reads as follows:

"I certify that I have purchased 400.00
worth of Liberty Bonds for the Co. fund and same
are in deposit box 1st Natl. Bank, Aberdeen, Md.
Read Wipprecht.

Voucher No. 15
Amount \$398.80 (Expenditures)
(Liberty Bonds)
Date 4-12-29."

This voucher was filed with the company fund records. Under date of May 10, 1929, the accused signed a certificate in the council book that the account of the company fund for April, 1929, was correct (Ex. 8, P.2). This certificate also shows as assets of the fund "\$1000 Liberty Bonds in Safe Deposit Box 1st Natl Bank" and the certificates to the accounts for May and June, 1929, both signed by the accused, contain similar notations (Ex. 11, P. 2 and Ex. 13, P. 2).

9. In the company fund account for July, 1929, there appears under "Receipts", an entry of \$400.00, described as "Sale of Liberty Bonds \$400.00". This entry is dated July 31st, is the last entry in the account for that month, refers to Voucher No. 18, is in the handwriting of the accused, and appears to have been written with ink different from that used in the other entries. The totals in the account appear to have been altered to show an increase of \$400.00 in receipts (Ex. 14, P. 1). Following this July account is a certificate dated August 3, 1929, that the account "is correct". In the certificate the amount of cash stated as being in "personal possession" has obviously been changed at sometime from \$182.61 to \$582.61, and the amount of Liberty Bonds

shown has been changed from \$1000.00 to \$600.00 (Ex. 14, P. 2). Voucher No. 18, referred to above, could not be found among the company fund records although each commanding officer of the 44th Ordnance Company, from August 1, 1929, to the time of the trial, testified that the company fund vouchers for the month of July, 1929, had remained intact from the time he received them from his predecessor until he turned them over to his successor.

10. If the purchase and sale of Liberty Bonds indicated, respectively, by the council book entries described above were in fact made, then it would follow that the voucher and the two certificates described respectively in Specifications 1, 2 and 3, Charge II, were not false as alleged. If, however, the purchase of four bonds took place on April 12th, when, as is admitted, the four bonds deposited by the accused as collateral security for his personal loan were still held by the bank, it is obvious that this purchase would not account for the four bonds so deposited as collateral being a part of the company fund when it was turned over by the accused to his successor. If the purchase was made on or after April 22nd, the date on which the collateral security was concededly released by the bank, it is, of course, possible that these bonds were the ones purchased for the fund and did not belong to the fund on March 14, 1929. Thus, in so far as concerns Specifications 1 and 2, Charge I, and Specifications 1, 2 and 3, Charge II, the only questions of fact to be determined are whether or not four \$100.00 Liberty Bonds were purchased by the accused for the company fund as indicated by the council book; if so, whether or not this purchase was before April 22, 1929; and whether or not the sale of Liberty Bonds indicated by the council book entry was in fact effected.

11. Thus far, only undisputed facts have been considered. It becomes necessary now to discuss disputed questions and the evidence relating thereto.

12. The company fund accounts of the 44th Ordnance Company for the first quarter of the year 1929 were officially audited by Major A. S. Buyers in April, 1929. He testified that the accused, who was then the company commander, submitted the accounts and supporting papers to him on April 18, 1929, but that the audit could not be completed on that day because the accused failed to present the \$600.00 worth of Liberty Bonds listed as belonging to the fund; that, upon being called upon to produce the bonds, the accused stated that "he had them in the bank in Aberdeen", and promised to bring them in; and that on April 22, 1929, the accused presented the bonds, the audit was completed, and a report thereof was addressed to the Post Commander (R. 112, 113). This report was dated April 22, 1929 (Def. Ex. A). The certificate of

audit in the council book was dated April 18, 1929 (Pros. Ex. 7, P. 2). Major Buyers testified that the reason for the certificate being so dated was that it was on April 18th that he began the audit and completed it except for the verification of the bonds, and that he saw no bonds prior to April 22nd (R. 113, 114).

The accused testified that he took the company fund records and the six \$100.00 Liberty Bonds to Major Buyers' office for audit and inspection on April 18, 1929, and that on that date Major Buyers looked at the bonds, commenced the audit and had almost completed it when an interruption occurred; whereupon the accused left the office, taking the bonds with him (R. 374, 375, 377, 484); that several days later, upon being informed by Major Buyers that the audit was completed, the accused called and got the books and papers, but that he did not remember taking the bonds with him on this latter occasion; and that nothing whatever was then said about the bonds (R. 374, 375, 376, 486).

For the stated purpose of showing that the accused was aware of a custom of officers auditing company funds at Aberdeen Proving Ground not to require the production of securities but to accept the custodian's certificate that they were in a safe deposit box (R. 128), the prosecution introduced in evidence a letter written by the accused to Captain Morris K. Barroll, Jr., early in March, 1928, when Major Rice was about to inspect Captain Barroll's company fund account and it appeared that the key to the safe deposit box, supposed to contain certain securities, could not be found (R. 287, 288). The letter contained the following statement:

"Major Rice says he does not want securities brought out of safe deposit boxes. As long as they are listed in fund books is sufficient" (Ex. 29).

13. In July, 1929, Major Robert W. Daniels officially audited accused's company fund accounts for the second quarter of the year, from April 1 to June 30, 1929 (R. 133; Ex. 13, P. 2). His certificate of inspection (Ex. 13, P. 2) mentioned "\$1000 Liberty Bonds" among the assets. He testified, however, that he did not see the bonds, but "took the company commander's word for it" (R. 134). The accused contradicted this testimony of Major Daniels and testified that, at this audit, he submitted ten \$100.00 Liberty Bonds and that Major Daniels saw them, but made no comment about them (R. 376, 377).

It is to be noted that, if Major Daniels' testimony with reference

to this audit be correct, nobody is shown to have seen the accused in possession of the ten Liberty Bonds during the time that accused claims, and, as hereinabove shown, the council book indicates, that number of bonds should have been in the fund.

14. The explanation given by accused of his use of money belonging to the company fund in paying off his personal loan on April 22, 1929, and of the presence as part of the fund, when turned over to his successor, of the identical bonds which, on March 14, 1929, he had deposited as collateral security, is, according to his testimony, substantially as follows:

About April 22, 1929, he decided the company fund had so much money on hand that it would be well for it to purchase some more Liberty Bonds in order to get the benefit of the interest thereon. It had been the custom to keep about \$1000 on hand and he found that, if he were to purchase \$400.00 worth of Liberty Bonds, this would leave about \$1000 on hand. Also, at this same time, he was desirous of making some changes in his own personal investments. Accordingly, he decided to sell to the fund the four Liberty Bonds, his own personal property, which he had deposited with the Second National Bank at Bel Air as collateral security, and to use the proceeds of this sale in paying his note to the bank, thus saving interest on the note. He ascertained the market quotation on his four bonds and, according to that quotation, the market value of the bonds, including accrued interest, amounted to \$398.80. It was for this reason that check No. 2398, drawn against the company fund bank account on April 22, 1929, was for this exact amount.

He testified that he did not consult with anyone about this proposed purchase of bonds and that he saw no impropriety in selling his own personal property to himself as custodian of the company fund. According to his testimony, as soon as the transaction of April 22nd at the bank in Bel Air had been completed, he considered that the four bonds in question had become the property of the company fund, and accordingly he deposited them immediately with the other bonds belonging to the fund in the company fund safe deposit box where they remained thereafter.

This explanation is ingenious and, if true, would indicate an innocent intent. In determining what credence should be given it, however, a number of circumstances appearing in evidence must be considered. It is rather a strange coincidence that these four bonds were purchased for the fund by the accused on the very day that Major Buyers testified the accused exhibited for the first time the six bonds for which Major

Buyers had called in connection with the company fund audit he was then making. Also there seems to be no explanation of the fact that the alleged purchase of bonds is shown in the council book as of April 12th, and the supporting voucher signed by the accused bears that same date, while it is clearly established by the check for \$398.80 marked "Paid 4-22-29" (Ex. 10), by the testimony of Mr. Wylie Hopkins, President of the Second National Bank at Bel Air (R. 68), by the bank record (Ex. 25), and by accused's own testimony (R. 334) that his note for \$400 was not paid and the collateral security therefor was not released until April 22, 1929. It is also somewhat remarkable that the voucher supporting this alleged purchase of bonds (Ex. 9) in no wise indicates that they were bought from the accused himself and fails to show how the price of \$398.80 was computed. Moreover, it is not to be forgotten that the accused, at least at some time previous, understood that it would not be necessary to exhibit securities to an auditing officer (Ex. 29). These peculiar circumstances might well cause some suspicion that there was something about the transaction of April 22nd that accused preferred to conceal. This suspicion ripens into a practical certainty when one considers certain testimony given by the accused to Lieutenant Colonel John Cooke on January 19, 1931, when accused was under investigation at Fort Bliss, Texas. In that testimony the accused, when asked what he did with the four bonds he had put up as collateral security when they were returned to him by the bank, gave the following answer:

"The bonds that I used as collateral for the loan at the Second National Bank, Bel Air, Maryland, remained in my possession until they were again used for that same purpose - I believe the next time being the loan at the First National Bank, Havre de Grace, Maryland" (Ex. 28, P. 16).

Also, at that same investigation and on the same day, the accused, when asked to account for the fact that the identical bonds which he had given as security for the loan from the Second National Bank of Bel Air were found in the company fund in October, answered as follows:

"The only explanation is that these bonds were purchased in some subsequent transaction for the company fund, either by myself or my successor."

Accused's explanation of the obvious discrepancy between his testimony of January, 19, 1931, and his testimony at the trial, is as follows:

"At that time the report of the Inspector of the Third Corps Area, had been shown to me, which included a statement that the bonds that were in possession of the Company

from October 20, 1930, were also in the possession of the Company at the time I took over the company fund. I had before me a photostatic copy of the audit of Major Buyers in which he stated that he had audited the fund on April 18. The bank statement was also inclosed with the Inspector's report that they had the bonds put up for collateral in their possession on April 22d. I knew that I had shown Major Buyers the bonds of the company fund at the time I had taken the books to him for audit. They could not be the same bonds. I was naturally confused, as there were several statements in the Inspector's report that I could not reconcile with the facts. They also made a statement that I had made a loan at the Havre de Grace Banking & Trust Company. I was positive that I had not made a loan at the Havre de Grace Banking & Trust Company, but I had made a loan at the First National Bank of Havre de Grace. These statements, as well as the incompleteness of the record before me, made it necessary that we assume that the Inspector's statements were correct and if the Inspector's statements were correct I informed my Commanding Officer, Major Woodberry that I doubted my sanity if I had made and done such things, and that I was going to the hospital for observation as to my sanity. Subsequent information received from the Havre de Grace Banking & Trust Company showed they denied that I ever made a loan at their bank and that they had furnished no information that I had made a loan at that bank, although the Inspector stated positively that I had made such a loan. That statement was made in consideration of certain facts that were presented to me at that time which have been changed since that time without any opportunity being given me to change my statement, to make it in consideration of the change of basic facts upon which the evidence was being given" (R. 336-337).

This attempted explanation must be read in the light of the fact that, when the accused gave the testimony quoted above on January 19, 1931, he had already, on or before December 9, 1930, read all essential documents connected with the investigation (Ex. 28, P. 9) and had, therefore, at least one month and ten days to consider the statement that the bonds put up by him as collateral security were found in the possession of the company fund in October, 1930, and that those same bonds had been turned over to him by his predecessor as part of the company fund; of the fact that on December 18, 1930, he had heard a summary of the allegations then pending against him, including one that he had used four \$100.00 Liberty Bonds belonging to the company fund as collateral security for his personal loan of March 14, 1929 (Ex. 28, P. 10), and was furnished with a copy of this summary (Ex. 28, P. 12);

and of the fact that he had had the benefit of consultation with legal counsel (Ex. 28, P. 10). It would seem impossible, therefore, that he could have been taken by surprise, as his attempted explanation intimates, when he testified on January 19, 1931; and surely, in the forty or more days he had had to think things over, he should have been able to recover from the mental confusion and fears for his sanity of which he complains. Also, it is hard to believe that, after his long period of reflection and consultation with counsel, he could fail to remember the peculiar circumstances of his using company funds to pay his personal indebtedness and simultaneously purchasing from himself for the company fund the bonds which he had previously used as collateral security and immediately placing them with other company fund bonds in the company safe deposit box - circumstances about which he testified so clearly at his trial and which would have explained the subsequent presence of the four bonds in question in the company fund. Yet, in his testimony on January 19, 1931, he specifically stated that he did not remember from whom or when he purchased the four Liberty Bonds he claimed to have bought for the company fund (R. 28, P. 9). And another significant fact is that nothing in the record of the investigation at Fort Bliss (Ex. 28, pp. 9-24), and nothing elsewhere in the record of trial, indicates that on January 19, 1931, the accused had any reason even to suspect that it was known that he had used company funds to pay off his personal note or to anticipate that he would have to explain this irregularity. It seems more than possible, in view of the situation as known to him when he testified on January 19, 1931, that he considered it safer for him not to make the explanation which he gave at his trial. Indeed, it seems more likely that that explanation never occurred to him at that time, but originated in his mind only after he discovered that his use of company funds to pay his own indebtedness was known and that he would be called upon to defend against a charge of having embezzled the funds so used.

It is true that if, as claimed by the accused, Major Buyers saw the six bonds on April 18, 1929, and if Major Daniels checked the ten bonds at the time of his audit in July, these two facts would go far to support the claim of the defense that the bonds deposited as collateral security did not at that time belong to the company fund and that the accused did purchase four bonds for the company fund on April 22, 1929. Major Buyers is very positive, however, in his testimony that the first time he saw the bonds was on April 22, 1929, and Major Daniels is equally positive that he did not check any bonds at the time of his audit in July, 1929. Neither of these witnesses appears to have any interest in the result of the case and neither was impeached, while the accused has the very deepest interest and three officers swore that his reputation for truth and veracity was bad and that they would not believe him

under oath in a case involving his own interests (R. 418, 423, 424, 426, 434).

In view of all the facts and circumstances outlined above, the Board of Review is forced to concur in the conclusion evidently reached by the court that the supposed purchase of bonds for the company fund was never made and that the bonds put up by the accused as collateral security for his note were at the time the property of the company fund. If this conclusion be correct, it necessarily follows that there was no sale of company fund bonds; for there would never have been more than six \$100 bonds in the company fund during the time accused was custodian thereof, and had he sold four of them there would be only two remaining. Yet he turned over six \$100 bonds to his successor.

15. Aside, however, from the circumstances discussed in the last preceding paragraph, there are others that tend strongly to cast doubt upon the claim of the accused that, just about the time he was relieved from command of the 44th Ordnance Company, he sold four bonds belonging to the company fund.

At the trial accused testified that his reason for making this sale was to provide funds for the purchase of instruments to equip a string orchestra in the company (R. 332). No such reason was given by him when he testified at the investigation conducted by Lieutenant Colonel Cocke at Fort Bliss. At that time, on January 19, 1931, the sole reason given by him for the sale was stated as follows:

"The reason bonds were sold was because the post exchange installed a soda fountain at a large expense and it would be several months before a dividend would be declared and the cash balance was not ample to carry this period of time" (Ex. 28, P. 14).

It is true there is no direct inconsistency between the two reasons given. Both might have existed at the same time; but it is somewhat strange that one reason should have been uppermost in the mind of the accused when he testified on January 19, 1931, and quite a different reason when he testified at the trial.

The alleged sale of bonds is entered in the company fund account under date of July 31, 1929 (Ex. 14, P. 1); but accused testified that the entry was not made till August 10th, when the accounts were being audited (R. 448). He further testified, however, that according to his recollection the sale was not actually completed until a little after July 31st,

probably August 1st or 2nd (R. 449); though negotiations therefor had been started before the issuance of the orders relieving him of command of the company and appointing Lieutenant Franklin as his successor. He thought the bonds were sent to Baltimore for sale on July 30th or 31st (R. 455). The orders were dated July 30, 1929, and relieved him as of August 1st (Ex. 30), which was at least ten days earlier than he had anticipated (R. 455). At the time of arranging the sale, he testified, he expected to leave Aberdeen Proving Ground about August 20th, pursuant to War Department Orders which had issued in June (R. 333); and he had been informed in April that his station would be changed shortly after the summer training activities which would end August 15th (R. 333,4).

It appears strange, to say the least, that, knowing as he did that he was to be relieved so shortly, he would dispose of bonds to provide funds to equip an orchestra with instruments without any knowledge as to whether his successor would care to carry out this project or not.

Certain other circumstances of this alleged sale strike one as unusual. The entry in the council book shows the proceeds of the sale of the four \$100 bonds was exactly \$400 (Ex. 14, P. 1). How much of this amount was for principal and how much for accrued interest, does not appear and accused was unable to tell (R. 452-4). Accused testified that he received an invoice showing the sale from the people in Baltimore who made it, which he included with his voucher (R. 448; 452). The voucher and invoice could not be found. The transaction, according to the testimony of the accused, was with people in Baltimore. Why the bonds were not sold through a local bank in Aberdeen or Bel Air is not explained. Accused was absolutely unable to say to whom or through whom the bonds were sold or to give any information by which the purchaser or broker might be located (R. 451).

16. The foregoing conclusions lead (inevitably) to the further conclusion that the findings of guilty under Specifications 1 and 2, Charge I, and Specifications 1, 2 and 3, Charge II, were fully sustained by the evidence, and that the respective findings upon these specifications of Charges I and II support the findings of guilty as to both Charges. Into the formation of this conclusion, the following legal considerations have entered.

The substantive criminal law governing this case has its source in the single word "embezzlement" in the 93rd Article of War. On its meaning Federal statutory law is silent. In the application of law to facts in this case our working basis must be that definite wrongdoing

which Congress had in mind and expressly made punishable when this Article was made to embody this term, and which we will now notice.

From Blackstone's exposition of offenses against private property in his famous Commentaries on the Laws of England (4 Bl. Com.230 et seq.) it appears that this term was unknown to the common law and is entirely a creation of statute. The wrongdoing known as embezzlement was by the common law merely "a breach of civil trust", in the words of Blackstone. The origin and scope of this statutory offense is well described by the court of last resort of Massachusetts in *Commonwealth v. Hays*, 74 Am. Dec. 662, in the following portion of the court's opinion:

"The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they had a relation of confidence or trust towards their employers or principals, and thereby became possessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently converted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation which is essential to the proof of the crime of larceny. *Bazeley's Case*, 2 East P.C. 571, 2 Leach C.C. 973. The statutes relating to embezzlement were intended to embrace this class of offenses; and it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudulent conversion of money or chattels is not shown to exist."

It was the general statutory concept of embezzlement, prevalent at the time, that Congress undoubtedly had in mind in enacting the first section of the Act of March 3, 1875, "to punish certain larcenies and the receivers of stolen goods" (18 Stat. 479) which provides "that any person who shall embezzle, steal, or purloin any money, goods, chattels, records, or property of the United States, shall be deemed guilty of felony" etc., which very provision was continued in force by the Federal Penal Code of 1910, constituting section 47 thereof and carrying a penalty for violation of not more than five thousand dollars fine or five years imprisonment or both. In the leading case of *Moore v. United States*, 160 U.S. 268, 40 L. ed. 422, decided by the Supreme Court of the United

States in 1895, there was involved the sufficiency of an indictment for embezzlement under the foregoing provision, which required a definition of the term "embezzle", contained therein, in order to dispose of the case. The Supreme Court declared its meaning in a single sentence, reaffirmed in *Grin v. Shine* (1902), 187 U.S. 181, 196, reading as follows, and contained in paragraph 149 h, Manual for Courts-Martial: "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted or into whose hands it has lawfully come". And as this holding of the Federal Supreme Court fixed the meaning of "embezzle" in the Act of March 3, 1875, in respect of Federal Government property generally, exactly so it fixed the meaning of "embezzles" in the old 60th Article of War (present 94th) in the revised code of 1874, in respect of military persons and military property, when the substance of that Article first appeared on the statute books as sections 1 and 2 of the Act of March 2, 1863, enacted to meet Civil War conditions. Likewise, and directly bearing upon the case in hand, *Moore v. United States*, supra, fixed the meaning of "embezzlement" in the aforementioned "Various Crimes", Article of War 93, in respect of persons subject to military law and personal property whether public or private, when that Article was thereafter first enacted, as part of the revised code of August 29, 1916.

In the instant case, accused must be credited with the intent to restore the used company fund bonds and money and with performance of such intent, when turning over such fund to his successor in command. But his wrongful temporary personal use thereof constitutes embezzlement in violation of Article of War 93, nevertheless. In support of this conclusion is the recent *Nihoof Case*, C.M. 167487, wherein the President, as confirming authority, lays down the doctrine that where a wrongful conversion has been shown the intention of the accused to restore at some future time the money used is of no avail as a defense to embezzlement, and that any such technical distinction on the point of fraudulent intent is without foundation in law and has no place in the administration of military justice. To the same effect is the later *Lawrence Case*, C.M. 173656. On this very question, and that also of the temporary pledging of the company fund bonds in the instant case constituting an embezzlement thereof, see *Henry v. United States*, 273 Fed. 330.

17. In arriving at the conclusions hereinabove expressed, the Board of Review has not taken into consideration a line of evidence introduced by the prosecution as to the admissibility of which some question might be raised, though no such point is made by the accused or his counsel.

After the prosecution had rested, a motion was made by the defense to strike out certain testimony bearing directly upon Specification 1,

Charge I, and indirectly upon the other specifications hereof above discussed, on the ground that the prosecution had failed completely to show that the bonds deposited by the accused as collateral security on March 14, 1929, were at that time the property of the company fund (R. 271-3). Thereupon the prosecution, though contending that the evidence thus far introduced was sufficient, asked permission to reopen the prosecution's case "and show quite conclusively" that the bonds "now in the fund" belonged to the company fund prior to its being taken over by the accused on March 4, 1929 (R. 273-4).

The permission was granted and the prosecution called as a witness Captain Morris K. Barroll, Jr. (R. 274), who testified, in substance, as follows:

He was in command of the 44th Ordnance Company from July, 1927, to August, 1928, except for a period of two months' leave beginning about the middle of December, 1927. During witness' absence on leave the accused was in command and had custody of the company fund (R. 275). When witness turned over the funds to the accused, it contained two Liberty Bonds, one for \$1000 and the other for \$100, which were about to be redeemed; and witness suggested to accused that the bonds be redeemed and the proceeds reinvested in Treasury Certificates (R. 276). Accused's receipt for the fund including "Liberty Bonds 1129.69" (Ex. 20) is dated December 13, 1927, which is probably the correct date of the transfer. The accused's certificate to the company fund account for December, 1927 (Ex. 21, P. 2) lists "\$1100 in Liberty Bonds in safe deposit box in First National Bank, Aberdeen, Md." (R. 278) and is in the same form as when the record was returned to the witness when he resumed custody of the fund (R. 278, 279). The certificate to the account for January, 1928, signed by the accused (Ex. 22, P. 2) mentions "\$1100.00 Treasury Certificates in safe deposit box at First National Bank, Aberdeen, Md." with the words "Treasury Certificates" crossed out and the words "Liberty Bonds" substituted in red ink in the handwriting of the witness (R. 279). The certificate to the company fund account for the period February 1-14, 1928, signed by the accused (Ex. 23, P. 2), also mentions "\$1100 treasury certificates in safe deposit box 1st Natl Bank, Aberdeen, Md." (R. 279). When witness returned from leave about the middle of February, February 14th according to witness' recollection, the accused returned the council book to witness and the latter wished to verify the Treasury Certificates listed therein as part of the fund. As witness remembered, accused said the key to the safe deposit box had been misplaced; and for this reason witness deferred taking over the accounts for a day or two, when, since accused stated that he could not find the key, witness, on February 18th, receipted for the fund, noting an exception, however, as to the Treasury Certificates which he could not verify without the safe

deposit box key (R. 280, 281; Ex. 23, P. 1). In this noted exception the words "Treasury Certificates" are lined out and the words "Liberty Bonds" substituted, the alteration being initialed by the witness (R.281; Ex. 23. P. 1). The bank was asked to procure a new key (R.281) and when this had been done, witness, in the presence of two employees of the bank, opened the safe deposit box and found it empty (R. 281, 282). According to witness' recollection, this was in April. He at once notified the commanding officer and waited at the bank until accused joined him there within a half hour (R. 282). After accused had verified the fact that the box was empty and had made inquiries as to the possibility of any unauthorized person having gained access to the box, he and the witness returned to Aberdeen Proving Ground. There accused told the commanding officer that it was possible he had left the securities in his own safe deposit box either in Baltimore or Washington. He was instructed by the commanding officer to go immediately to Baltimore, look up the securities and bring them in (R. 283). Witness believed it was about a week later that accused came to him on the target range and delivered an envelope containing \$1100 in Liberty Bonds (R. 283-4), each bond being for \$100, except possibly two or four which may have been for \$50 each. Witness gave accused a note to the Adjutant saying that he had received from accused \$1100 in Liberty Bonds (R. 284, 286; Ex. 50). The note bears the official time stamp of the Adjutant's office at Aberdeen Proving Ground dated April 24, 1928 (R. 287; Ex. 50). Shortly afterwards witness made a record of the numbers and denominations of the bonds received from the accused, but he testified that he had been unable to find this record (R. 284) and without it could not state either the numbers of the bonds or to what issue or issues they belonged (R. 290-1). The company council records for the period of witness' absence on leave contain no entry showing redemption or sale of bonds and accused turned over to witness no voucher covering any sale, redemption or purchase of bonds (R. 285). Of the \$1100 in Liberty Bonds received by witness from the accused, witness sold one \$100 bond on June 12, 1928 (R. 289). The remaining \$1000 in bonds, he turned over to his successor, Lieutenant Robbins, about August 6, 1928 (R. 290).

At the close of Captain Barroll's testimony, the prosecution stated that it had been introduced solely for the purpose of meeting the statement of the defense in support of the motion to strike - in other words, to prove that the six Liberty Bonds turned over by accused when he was relieved in August, 1929, were among those received by Captain Barroll from the accused in 1928 - "and should be considered by the court for that purpose only" (R. 292). Since Captain Barroll was unable to tell either the numbers of the bonds received by him from the accused and subsequently turned over to his successor or to

what issues they belonged, it is not seen how his testimony added anything to the evidence already introduced to show that bonds hypothecated by the accused belonged to the company fund at the time of such hypothecation.

In his direct testimony the accused, with reference to his handling of the company fund during the two months that he was temporarily in command of the company while Captain Barroll was absent on leave, testified that he found the bonds belonging to the company fund in his personal safe deposit box in Baltimore the very day that the company box was opened and found to be empty and that he delivered the bonds to Captain Barroll the following morning (R. 384-385).

Notwithstanding the statement of the prosecution hereinabove mentioned, to the effect that Captain Barroll's testimony should only be considered for the purpose of showing that the four bonds deposited by the accused as collateral security for his personal loan at that time belonged to the company fund, the trial judge advocate in his cross-examination endeavored to obtain an admission from the accused that he had misapplied the proceeds of the redemption of the bonds turned over to him by Captain Barroll and that he had to borrow money in order to purchase the Liberty Bonds delivered by him to Captain Barroll in April, 1928 (R. 443-447).

It is true that the testimony of Captain Barroll might tend to indicate the probability that accused, during his temporary custody of the company fund from December, 1927, to February, 1928, was guilty of embezzlement of part of that fund; and the general rule, of course, is that evidence of prior offenses not charged is not admissible. To this general rule, however, there are exceptions; and when, in an embezzlement case, evidence of prior conduct of the accused will serve to show intent or system, such evidence is admissible notwithstanding the fact that it may tend to show the commission of a prior offense. In this case it is believed that the conduct of accused with reference to the bonds belonging to the company fund when it was in his custody in the winter of 1927-1928 was so similar to his conduct with reference to the company fund bonds in 1929, that evidence of his earlier conduct was admissible as tending to show his system of embezzlement. In any event, the other evidence of accused's guilt as hereinabove outlined is so overwhelming, in the opinion of the Board of Review, that the result cannot have been changed by the introduction of Captain Barroll's testimony.

18. Specification 7, Charge II, is so inartificially drawn as to raise some doubt as to its legal sufficiency to support a conviction under it. It alleges the making and uttering by the accused, at sundry places and on different dates covering a period from June 15, 1929, to January 17, 1931, of seven "worthless" checks, without, in each instance,

having, at the time, sufficient funds in or credit with the bank to meet the check upon its presentation. It appears probable that the specification was intended to allege one course of conduct unbecoming an officer and a gentleman and not separate offenses; but, if it is to be regarded as purporting to allege seven different offenses, it was, of course, subject to objection on the ground of multifariousness. No such objection was made, however, and, in the absence thereof such a defect is not fatal. Consequently the possible defect of multifariousness may be disregarded.

The specification fails to allege that the accused, at the time of making and uttering each check, either knew or was chargeable with knowledge that he had not sufficient funds in or credit with the bank to meet the check and it also fails to allege that he did not expect or intend to have sufficient funds or credit to meet the check when presented. The description of the checks as "worthless" does not supply any of these allegations, for it adds nothing substantial to the allegation of lack of funds and credit in the bank at the time. The mere making and uttering of a check, without having in bank sufficient funds or credit to meet it, does not in and of itself constitute an offense, even though something of value be obtained in exchange for it. The action may be perfectly innocent. For example, the maker of the check may not know that his funds and credit are insufficient and his lack of such knowledge may be due to an innocent miscalculation or other mistake or be otherwise excusable; or he may inform the person to whom the check is uttered that his funds and credit at the bank are insufficient; or he may post-date the check and utter it upon the understanding that it will not be presented until some time later when he knows his credit at the bank will be sufficient; or, without saying anything of his lack of funds and credit, he may utter the check innocently and, on perfectly reasonable grounds, feeling certain and intending that he will have sufficient funds in bank by the time the check can be presented for payment. It follows that a specification seeking to charge the uttering of a worthless check as an offense should allege facts negating the hypothesis that the uttering was innocent.

Where a series of transactions is charged as constituting a single course of conduct unbecoming an officer and a gentleman and it does not appear from the allegations that any one of the separate transactions relied upon was reprehensible, the specification is fatally defective. In this case, however, the specification contains an allegation that the accused made and uttered the checks in question "with intent fraudulently to secure temporary financial credit". It is believed that, for the purpose of this review and in the light of the views hereinafter expressed, the Board of Review is warranted in assuming, but without conceding,

that this allegation is sufficient to negative the hypothesis of innocent making and uttering, and that, consequently, the specification does state an offense, however much the form adopted is to be deprecated. Upon this assumption the gist of the offense - or offenses, if it was intended to charge the making and uttering of each check as a separate offense - is the specific intent to obtain a particular consideration of value, namely "temporary financial credit". Consequently to sustain the finding the evidence must establish the specific intent alleged.

The first two checks mentioned in the specification, dated respectively June 15 and June 20, 1929, were returned protested on, respectively, June 22 and June 25, 1929, for nonpayment on account of insufficient funds (Ex. 35, 36, 38 and 39; R. 201, 202, 226, 227); and the records of the bank on which they were drawn show that on neither the respective dates of the checks nor the respective dates of the protests did the accused have to his credit a balance sufficient to meet either check (Ex. 43, P. 9). Each check was in payment of a previously contracted indebtedness connected with certain gambling transactions (R. 200, 387), and each was promptly made good by the accused upon being notified that payment had been refused (R. 226, 227, 387).

The third check, dated August 20, 1929, for \$170 payable to F. Poughkeepsie, was returned unpaid (R. 189, 203, 225, 239) and bearing a protest stamp dated September 3, 1929 (Ex. 32). The records of the bank upon which it was drawn show that, on its date, August 20, 1929, accused's balance was \$247.83 (Ex. 43, P. 9), but that on September 3, 1929, this balance had been reduced to \$17.83. Thus the allegation that accused made and uttered this check, without having sufficient funds or credit at the bank to meet it, is not sustained. This check was given as payment of a previously contracted indebtedness connected with gambling transactions (R. 203), which indebtedness the payee claimed and still claims was due from the latter to the former (R. 207-210, 213, 214, 234, 235). Accused testified, however, that shortly after issuing the check, he learned that he owed the payee nothing, and, for this reason, instructed the bank to stop payment (R. 369, 391, 403, 440, 441). Apparently this check has not been made good. Some corroboration of accused's claim that there was a controversy as to whether accused owed the payee the amount of this check or not is to be found, at least inferentially, in the testimony of the latter (R. 207, 236, 237, 239).

The fourth check mentioned in the specification, dated January 16, 1930, for \$12.31, payable to the Ordnance Supply Officer at Aberdeen Proving Ground, was returned "on account of insufficient funds" (Ex. 27; R. 114, 115). It was given, just as accused was about to leave the post,

in payment of a previously contracted bill (R. 114, 117, 391, 392). The bank records show that, on the date of the check, January 16, 1930, accused had a balance to his credit of \$75.44 (Ex. 49, P. 8). Thus the allegation that accused, at the time of making and uttering this check, did not have at the bank sufficient funds or credit to meet it, is not sustained. Indorsements on the check indicate that it was not presented for payment at the bank on which it was drawn until after January 20, 1930 (Ex. 27, P. 3), and on that date accused's balance was reduced to \$11.22. This balance was not increased until January 31, 1930, when, at the close of business for the day, it was \$373.99 (Ex. 49, P. 8). Upon being notified of the nonpayment of this check, accused promptly made it good (R. 117, 120).

The fifth check in question, dated October 8, 1930, for \$40.00, is not in evidence. It was given in payment of a loan made by Captain Earl Hendry to the accused (Ex. 44, P. 2; R. 396) about ten days before the date of the check. Captain Hendry testified that, immediately upon its being returned unpaid, accused made it good (Ex. 44, P. 2; R. 396). The records of the bank show that at no time between October 7 and October 16, 1930, was accused's balance as much as \$40.00 (Ex. 49, P. 9).

The sixth check, being for \$57.00, payable to Service Finance Corporation, is dated January 9, 1931 (Ex. 46, P. 5), although the specification gives the date as January 6, 1931. It was given in payment of a past due installment of a previously contracted indebtedness. It was received by the payee on January 12, 1931, and was returned about January 17, 1931, marked insufficient funds. Having been redeposited on January 21, 1931, it was again returned marked insufficient funds on January 26, 1931 (Ex. 46, P. 2). The bank records show that, on January 9, 1931, the date of this check, accused's balance was raised by deposits to \$58.88 (Ex. 49, P. 10). Here again the allegation that accused's funds and credit at the bank, at the time of making and uttering the check, were not sufficient to meet it, is not sustained. On January 10, 1931, the balance was reduced below the amount of the check and there were no further deposits until January 31, 1931, when the sum of \$322.12 was deposited (Ex. 49, P. 10). This check was later made good by the accused.

The seventh and last check is not in evidence. The date given in the specification is January 17, 1931. Captain Geoffrey Galway, Post Exchange Officer at Fort Bliss, Texas, testified that about January 17, 1931, accused presented at the Post Exchange his check dated about January 15, 1931, ^{for \$10.00} payable to the Post Exchange, and received

\$10.00 for it. The check was deposited, and the Exchange, on being notified by the bank of its return on account of insufficient funds, "took it up", and later the accused refunded the amount of the check (Ex. 47, P. 2). The bank records show that accused's balance from January 10 to January 31, 1931, was less than \$10.00.

The accused testified that each of the seven checks in question was made and uttered by him in the belief that his balance at the bank was sufficient to meet it (R. 388, 402, 438). In each instance he undertook to explain how it happened that, when the check was presented at the bank for payment, he had not sufficient funds to his credit to meet it (R. 388, 393-402, 406-411, 475-480, 518). His explanations do not seem unreasonable; but, in view of the conclusion hereinafter reached, it would serve no purpose to set them forth in detail.

As hereinabove indicated, the gist of the offense or offenses sought to be charged in the specification under consideration is the intent "fraudulently to obtain temporary financial credit". The evidence, as indicated above, shows that each check, except the last, was given in payment of an indebtedness contracted some time before. The credit, if any, in the case of each of the first six checks, clearly was obtained before the giving of the check. The last check was given to obtain \$10.00 and no credit was obtained. It seems clear, therefore, that none of the checks in question was given with intent to obtain credit. The gist of the offense or offenses not having been proved, it follows that the evidence does not sustain the finding of guilty of Specification 7, Charge II.

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

"2 lt. F.A. Sec. O.R.C. 15 Aug. 17;
accepted 15 Aug. 17; active duty 15 Aug.
17; vacated 16 Nov. 17.- 2 lt. of Cav.
26 Oct. 17; accepted 16 Nov. 17; 1 lt.
(temp.) 26 Oct. 17; 1 lt. 7 Sept. 19;
Ord. Dept. 7 May 20; capt. 1 July 20;
trfd. to Ord. Dept. 14 May 24."

20. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion

that the record of trial is not legally sufficient to support the finding of guilty of Specification 7, Charge II, but is legally sufficient to support the findings of guilty of the remaining charges and specifications, and the sentence, and warrants confirmation thereof. Dismissal is mandatory on conviction of violation of the 95th Article of War.

J. C. McNeil, Judge Advocate.

J. M. Conroy, Judge Advocate.

Mark E. Quinn, Judge Advocate.

To The Judge Advocate General.



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

Specification: In that. Private Frank La Val, Jr., Hq. Btry. & CT, 1st Bn., 6th F.A., Fort Hoyle, Maryland, did at Edgewood Arsenal, Maryland, on or about April 8th, 1931, feloniously take, steal, and carry away one automatic pistol Caliber 45, of the value of about \$26.38, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to all charges and specifications, and was found guilty of the Specification, Charge I, except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", of the excepted words not guilty and of the substituted words guilty, not guilty of Charge I but guilty of violation of the 61st Article of War, and guilty of all other 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 six months. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on April 7, 1931, accused was detailed by the 1st Sergeant of his organization "by authority of the Battery Commander" as one of three privates in charge of Corporal Capellini to compose an honor guard over the body of a deceased member of the battery (R. 6-11) which was in the morgue at the Post Hospital at Edgewood Arsenal, Maryland (R. 13). Accused drew a Colt automatic, caliber .45, pistol from the supply room and reported to Corporal Capellini about 12 o'clock. The guard was not mounted. He walked one tour of duty on post and, when the corporal next went to relieve him about 3:00 a.m., he could not be found (R. 13-15). His equipment was promptly checked at the barracks and it was found that his civilian clothes were gone, but the pistol could not be found (R. 6-7). His foot locker was unlocked with the key in the lock (R. 8). On April 21, 1931, accused returned to the barracks dressed in civilian clothes. He stated to Sergeant Mason, in charge of quarters, that he went absent because he was put on guard just after coming out of the hospital. He also said that he left his pistol in his foot locker (R. 18-19).

Accused did not testify or make any statement to the court and no evidence was introduced in his behalf.

4. Charge II and its Specification charges an offense in violation of the 86th Article of War which reads:

"MISBEHAVIOR OF SENTINEL. - Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct."

A sentinel is a member of the guard who is actually on post in operations against the enemy, in charge of the prisoners or property, or with other special duties fixed by order of the commanding officer. Paragraph 4, TR 135-15, May 20, 1925 (Interior Guard Duty), which has replaced the pamphlet Manual of Interior Guard Duty, United States Army, 1914, provides:

"COMPOSITION. - a. An interior guard will be of such strength as the commanding officer may direct. It will be supervised by the officer of the day and commanded by the officer of the guard next in rank to the officer of the day, or by the senior noncommissioned officer of the guard if there be no officer of the guard. In large commands where there is more than one guard a field officer of the day may be detailed to supervise them."

The so-called guard of honor, wherefrom accused is presumed to have derived his sentinel status at the time of his absence, was not regularly detailed or mounted, but was detailed by the 1st Sergeant "by authority of the Battery Commander" who was informed by the "technical sergeant of the hospital" that it was customary to furnish an Honor Guard over the remains of a deceased member of the organization. The so-called guard of honor was not under the supervision of the Officer of the Day, and, so far as the record shows, was functioning without the knowledge or authority of the commanding officer. It must be held that accused was not on guard and posted as a sentinel within the meaning of the 86th Article of War, and consequently that the findings of guilty of Charge II and its Specification are contrary to law.

Absence without leave as found by the court under Charge I and its Specification is established, and, in view of the circumstances under which the pistol disappeared coupled with accused's failure to

offer any explanation, the larceny of the pistol as alleged in Charge III and its Specification is sufficiently established.

5. For the reasons hereinabove stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of Charge II and its Specification but legally sufficient to support the findings of guilty of Charges I and III and their specifications, and legally sufficient to support the sentence.

J. E. McKeef, Judge Advocate.
J. W. Cannon, Judge Advocate.
P. R. ..., Judge Advocate.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Board of Review
C. M. No. 195863

UNITED STATES	)	SECOND DIVISION
)	
vs.	)	Trial by G. C. M., convened at
	)	Fort Sam Houston, Texas, May
General Prisoner DOMINICK	)	14, 1931. Dishonorable discharge
ZUKOSKY.	)	(suspended) and confinement for
	)	six (6) months. Fort Sam
	)	Houston, Texas.

HOLDING by the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates.

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

2. The accused was arraigned May 14, 1931, on a charge and specification properly alleging that on June 2, 1928, he fraudulently enlisted in the Army in violation of the 54th Article of War. He pleaded guilty to, and was found guilty of, the charge and specification and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months (G.C.M.O. No. 134, Hdqrs. 2nd Div., June 1, 1931).

3. It appears that at the time of the arraignment more than two years had elapsed since the commission of the offense charged. Trial was therefore barred by the statute of limitations unless accused was absent from the jurisdiction of the United States, or was not amenable to military jurisdiction by reason of some manifest impediment, for a period sufficient to prevent the bar of the statute from becoming effective. (A. W. 39.) The record of trial does not disclose any facts taking the case out of the statute.

4. The statute of limitations is a defense and must be asserted at the trial by the defendant in a criminal case. Biddinger v.

Commissioner, etc., 245 U.S. 128; United States v. Brown, Fed. Case No. 14665 (2 Lowell 267). The defense may be raised by a special plea in bar of trial (United States v. Kissel, 173 Fed. Rep. 823) or by a plea of not guilty (United States v. Cook, 84 U.S. 168, 179. Whether or not a plea of not guilty asserts the defense in those cases where the bar of the statute is apparent from the pleading is not necessary to decide in this case, and decision on that point is expressly withheld. In the instant case the accused failed to assert the defense either by a special plea or by a plea of not guilty. Instead of asserting the defense he pleaded guilty. Whether the plea of guilty be considered as a waiver of the right of the accused to avail himself of the defense accorded him by the statute or as an admission by the accused that facts exist which take the case out of the statute, the result is the same, namely, a valid sentence on the plea of guilty.

5. The Board of Review has not overlooked the fact that the Attorney General, in several opinions, has held that a court-martial has no jurisdiction, even with the consent of the accused, to try a case which is barred by the statute (1 Ops. Atty. Gen. 383; 6 id. 239; 13 id. 462; 14 id. 265; 16 id. 170 (1878)). Careful consideration of these cases shows that they are essentially based on the assumption that the bar of the statute of limitations affects the jurisdiction of the court. Thus the Acting Attorney General, Mr. Bristow, states:

"It has been held that the 88th Article of War, above quoted, is a limitation upon the jurisdiction of courts-martial and presents an absolute bar to the trial * * * which can not be waived even by the accused." (13 Ops. Atty. Gen., supra.)

But the theory that the statute affects the jurisdiction of the court is expressly denied by the Federal courts. In re Davidson, 21 Fed. Rep. 618 (1884); Biddinger v. Commissioner, etc. (1917), supra. As the Federal courts have power to inquire into the jurisdiction of courts-martial (Carter v. Roberts, 177 U.S. 496), their decisions on questions of jurisdiction are authoritative and should generally be followed by the Board of Review.

6. In view of the intimation by various Attorneys General that the bar of the statute may not be waived by the accused, consideration of that point is necessary. Assuming, as appears to be the fact, that the opinions of the Attorneys General cited above are based upon a conclusion that the statute of limitations contained in the Articles of War affects the jurisdiction of the court to hear and

determine a case, the conclusion that an accused may not waive the bar of the statute is of course logical and consistent with the ruling on jurisdiction. It is conceded that jurisdiction can not be conferred by waiver. However, the Federal courts having overruled, in effect, the opinions of the Attorneys General that the statute affects the jurisdiction of the court, no sound reason is seen for now following these opinions that the bar of the statute may not be waived. It has been held that the protection afforded by the 5th and 6th Amendments to the Constitution may be waived (Levin v. United States, 5 Fed. (2d) 598 (certiorari denied, 269 U.S. 562); Grove v. United States, 3 Fed. (2d) 965 (certiorari denied, 268 U.S. 691)), and no sound reason is seen why the protection afforded by the statute of limitations may not likewise be waived.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the sentence. However, it appears that the staff judge advocate, the members of the court, the trial judge advocate, and the defense counsel, overlooked the fact that the statute of limitations might have been pleaded in this case. The Board of Review, while sustaining the validity of the sentence, feels that the equities of this case demand that the sentence be remitted in accord with the policy established in C. M. 188778 (Allen). Appropriate action looking to the remission of the sentence is recommended.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

tence but remitted the confinement, and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. The only question presented by the record is whether the failure to describe in the specification the grade and organization of the accused is an error which rendered the court without jurisdiction to try the accused. This question must be answered in the negative. Jurisdiction is a fact and not a matter of pleading (*Givens v. Zerbst*, *infra*). No form of pleading can confer jurisdiction; neither can an error in pleading divest a court of jurisdiction conferred by law. When the accused was arraigned he might have interposed a plea in abatement or a plea to the jurisdiction because of the faulty pleading. In the absence of either plea the question of jurisdiction was raised by the plea of not guilty. In either event the question is one for the court to decide on the evidence presented, and in the instant case the evidence conclusively establishes that the accused is a person subject to military law (R. 35). Such fact having been established, it would have been proper for the court to have directed that the specification be amended but its failure to do so, being a matter of form only, did not render the sentence void (A.W. 37). The record of trial conclusively establishes that the court was appointed by an officer empowered to appoint it (R. 1); that the membership of the court was in accordance with law with respect to number and competency to sit on the court (R. 2-4); that the court was invested by Act of Congress with power to try the person (R. 35; A.W. 12); and the offenses (R. 4, 5; A.W. 12, 93) charged; and that the sentence was within the maximum limits prescribed by the President for the offenses of which the accused was found guilty (R. 4, 5, 50; par. 104 c, M.C.M., 1928, p. 99). The only theory, therefore, upon which it may be held that the error in pleading was a fatal defect is that it "injuriously affected the substantial rights of the accused" (A.W. 37). It is obvious that the substantial rights of the accused were not affected in the slightest degree. No one knew better than the accused that he was a person subject to military law.

The conclusions herein expressed are supported by the principles laid down by the United States Supreme Court in *Givens v. Zerbst*, 255 U.S. 11. In that case the court, speaking through Mr. Chief Justice White, said:

"The question before us is thus a narrow one, since it comes only to this: In a case, such as that before us, where the power to convoke a court-martial is established on the face of the record and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?"

"Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record but simply met the collateral attack by showing that at the time of the trial the basis existed for the exertion by the court of the authority conferred upon it.

"It is true that general expressions will be found in some of the reported cases to the effect that wherever a fact upon which the jurisdiction of a court-martial or other court of limited jurisdiction depends is questioned it must appear in the record that such fact was established. But these expressions should be limited in accordance with the ruling which we now make. We so conclude because the complete right to collaterally assail the existence of every fact which was essential to the exercise by such a limited court of its authority, whether appearing on the face of the record or not, is wholly incompatible with the conception that, when a collateral attack is made, the face of the record is conclusive. Indeed, some of the leading cases make clear the incongruity of any other conclusion and serve to indicate that the expressions as to the face of the record contemplate, not the record assailed by the collateral attack, but the record established as the result of the proof heard on such attack. *Galpin v. Page*, 18 Wall. 350; *Runkle v. United States*, 122 U.S. 543."

The cases of *McClelland, C.M.* 153393 (1919), and *Dunmark, C.M.* 137123 (1920), in which conclusions were reached that similar defects in pleading were fatal errors, are expressly overruled. These cases, decided prior to the decision in the *Givens* case, *supra*, were decided at a time when The Judge Advocate General was overburdened with war-time work and when thorough research was difficult. As those decisions favored the accused, such research was not necessary. However, it is apparent that they are not in accord with the principle of the *Givens* case, *supra*, and the principle announced by Mr. Chief Justice Waite, speaking for the court, in *Railway Company v. Ramsey*, 89 U.S. 322, 326, in which it was stated that:

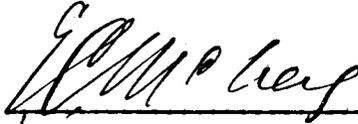
"In cases where the jurisdiction of the courts of the United States depends upon the character of the parties, as it no doubt does in this, the facts upon which it rests must, of course, somewhere appear in the record. They need not necessarily, however, be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record."

This principle was reaffirmed by the Supreme Court in the case of *Norton v. Larney*, 266 U.S. 511, in the following language:

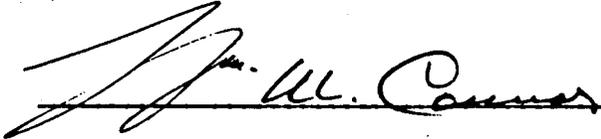
"* * * It is quite true that the jurisdiction of the Federal Court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings. * * * where, as here the jurisdictional facts appear upon the face of the record * * * it would be mere ceremony to reverse the decree and remit the purely formal making of the amendment to the lower court. We shall, therefore, consider the bill as amended to conform to the facts of record and sustain the jurisdiction * * *."

Moreover, the holdings in the McClelland and Dunmark cases contravene A. W. 37, which expressly provides that "the proceedings of a court-martial shall not be held invalid * * * for any error as to any matter of pleading " unless the error has injuriously affected the substantial rights of the accused.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the sentence.



Judge Advocate.



Judge Advocate.



Judge Advocate.

REC'D

JUL 15 1931

J. A. G. O.

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

Military Justice
CM 195931.

U N I T E D S T A T E S)

SECOND DIVISION

v.)

Private **SAM H. WILLIS**
(6419079), Second Tank
Company.)

Trial by G. C. M., convened at
 Fort Sam Houston, Texas, May
 5, 1931. Dishonorable discharge
 and confinement for one (1) year.
 Disciplinary Barracks.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support the findings of guilty of Charge II and the Specifications thereunder, and the Additional Charge and its Specification, and the sentence.
2. Under Charge I and its Specification, accused was tried for an assault alleged to have been committed, with intent to do bodily harm, "by pointing a dangerous weapon, to wit, a revolver, at said Bane". The specification is defective in that it fails to allege the commission of any acts by accused which, alone, would warrant any inference at law that accused in committing them had the intent to do bodily harm as alleged, and the proof fails to remedy the defect in that no evidence was introduced to show that accused attempted to use the pistol for any purpose other than as a threat by pointing the weapon as alleged. The evidence is therefore legally insufficient to sustain a finding that accused committed a felonious assault in violation of the 93rd Article of War, but legally sufficient to support a substituted finding that accused committed an assault with a dangerous weapon at the time and place alleged, as a lesser included wrongful act in violation of the 96th Article of War.
3. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of

guilty of Charge I and its Specification as finds that accused committed an assault with a dangerous weapon in violation of the 96th Article of War, and legally sufficient to support the findings of guilty of the other charges and specifications and the sentence.

J. P. McLeod, Judge Advocate.
W. W. Casner, Judge Advocate.
P. W. ..., Judge Advocate.

Military Justice
C. M. No. 195988

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

AUG 3 - 1931

U N I T E D S T A T E S	)	FIRST CAVALRY DIVISION
)	
vs.	)	Trial by G.C.M., convened at
	)	Fort Bliss, Texas, June 11, 1931.
Private CHARLES A. PARR	)	Dishonorable discharge (suspended)
(6745302), Battery C, 82nd	)	and confinement for one (1) year.
Field Artillery.	)	Disciplinary Barracks.

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

1. The record of trial in the case of the soldier named above, having been examined in The Judge Advocate General's Office and there found not legally sufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Charles A. Parr, Battery "C" 82nd Field Artillery, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about April 13, 1931, desert the service of the United States and did remain absent in desertion until he was apprehended at El Paso, Texas, on or about April 27, 1931.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 93, Headquarters First Cavalry Division, June 18, 1931.

3. The evidence for the prosecution shows that accused was at the time in question a soldier in Battery C, 82nd Field Artillery, stationed at Fort Bliss, Texas. On or about April 2, 1931, he was granted a pass authorizing his absence from the post for a period of five or six days. This was established by the testimony of the Acting First Sergeant. The same witness testified that accused was subsequently granted an extension to his pass, effective until April 12th, because the battery commander received a "communication from some doctor, who treated the accused". The battery thereafter (April 13, 1931) marched to Dona Ana, New Mexico, at which time accused "was absent from that formation and from then on." The witness produced and read from the morning report of the battery an entry under date of April 13, 1931, pertaining to accused as follows: "Private Parr from duty to A.W.O.L. 3:00am;" and under date of April 22d, "Private Parr A.W.O.L. to desertion". During the time the battery was away from the post someone was left behind in barracks. As to whether or not accused reported during that time witness replied, "No report was made to me by the people remaining in the garrison" (R. 9-10).

Arnold Green, Police Officer of El Paso, Texas, testified that he apprehended accused in El Paso, Texas, on April 27, 1931, "on information that he helped rob the Tularosa State Bank in New Mexico" (R. 6). At the time of apprehension accused was dressed in civilian clothes and, upon being questioned concerning the car he was then driving, immediately admitted that he was a soldier, explaining that he was absent because he "said he was on furlough and came back, and he intended to turn in, but did not turn in". Accused was taken to the police station for investigation and two days later was turned over to the military authorities at Fort Bliss, Texas (R. 7-8).

At the close of the case for the prosecution, the defense counsel stated that, "The accused has been warned of his rights as a witness and desires to remain silent" (R. 10).

4. The record of trial thus presents a question as to whether the evidence introduced is legally sufficient to support a finding that accused left the service with the specific intent, then or at some time during his absence, not to return. It conclusively appears that accused was granted permission to be absent on pass from April 2 to April 12, 1931. Neither the defense counsel nor the court made any inquiry as to where accused intended to spend the period of his authorized absence. The only competent evidence relevant to the issue is limited to the undisputed fact that he overstayed his authorized absence and that he was apprehended fourteen days thereafter in the city of El Paso adjacent to his own post while wearing civilian clothes.

The brevity of his unauthorized absence, his appearance at such a place where apprehension was so easy, and the fact that he made no effort to conceal his status as a soldier, tend strongly to negative an inference of desertion from the component facts of the case. The statement of the policeman that he apprehended accused "on information that he helped rob the Tularosa State Bank in New Mexico" was clearly incompetent and highly prejudicial hearsay, and, unexplained as it was in the record, its reception by the court, considered in connection with the inadequate evidence bearing on intent to desert, would require, in the opinion of the Board of Review, a holding that error injuriously affecting the substantial rights of the accused was thereby committed, but for the clear want of proof of such intent to desert, which of itself constrains the Board, in furtherance of justice according to law, to hold the evidence of record legally insufficient to support the findings of guilty of desertion.

The law is well settled that mere absence without leave is not satisfactory evidence of desertion unless it is much prolonged. The Manual for Courts-Martial prescribes (page 144) that:

"to warrant conviction of desertion, evidence, such as evidence of a prolonged absence or other circumstances, must be introduced from which the intent in desertion can be inferred." (Underscoring supplied.)

In C. M. No. 123404, Standlee, the Judge Advocate General held:

"The facts that the accused was apprehended and had been absent a month and six days are not sufficient to show that he went absent with intent not to return or that he afterwards entertained such intent."

So in C. M. 125904, Moore, it was held:

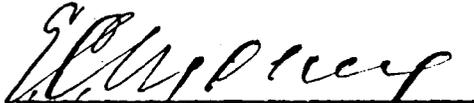
"It cannot be said that an unexplained absence without leave for eleven (11) days, even when terminated by apprehension constitutes desertion as a matter of law. It is undoubted that absence without leave may be so prolonged that, unexplained and terminated by apprehension, it may be said as a matter of law, to constitute desertion. Such a result, however, the law does not compel in the present case."

Above-cited cases were cited with approval in the opinion of the Board

of Review in the recent case, C. M. No. 189658 (Hawkins).

5. In view of the foregoing, it cannot be stated, as a matter of law, that the evidence affords substantial basis for a finding that accused had the intention to desert the service as alleged. It follows that the record is legally sufficient to support only so much of the findings of guilty as involves findings of absence without leave for the period alleged in the specification (fourteen days), the maximum authorized punishment for which, as fixed by paragraph 104 c, Manual for Courts-Martial, is confinement at hard labor for forty-two days and forfeiture of two-thirds of his pay per month for a like period.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, at the time and place alleged, absent himself without leave for the period alleged, in violation of the 61st Article of War, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for forty-two days and forfeiture of fourteen dollars of his pay per month for a like period.


 _____, Judge Advocate.


 _____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

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

Note: This accused was charged with both larceny and embezzlement of the funds property of the larceny being sustained, the embezzlement could not be. However, embezzlement could have been maintained if charged alone. See C.M. 147396 - Christopher - EIGHTH CORPS AREA 198485 - Wood. ✓

July 22, 1931.

Military Justice
CM 196032.

UNITED STATES)
v.)
Private THOMAS O. STANTON)
(6241239), 58th Service)
Squadron, Air Corps.)

Trial by G. C. M., convened at
Brooks Field, Texas, June 3,
1931. Dishonorable discharge
and confinement for five (5)
years. Disciplinary Barracks.

J. Lee.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates
ORIGINAL EXAMINATION by JACKSON, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Thomas O. Stanton, 58th Service Squadron, A. C., did, at Brooks Field, Texas, on or about May 1, 1931, feloniously take, steal, and carry away money, value about Sixty (\$60.00) Dollars, the property of 1st Lieutenant W. E. Baker, A.C.

Specification 2: In that Private Thomas O. Stanton, 58th Service Squadron, A.C., did, at Brooks Field, Texas, on or about May 1, 1931, feloniously embezzle by fraudulently converting to his own use one letter addressed to Wm. D. Foley, Fort Benning, Georgia, and the contents thereof, to wit: United States Currency of the Value of Sixty (\$60.00) Dollars, the property of First Lieutenant W. E. Baker, A.C., which came into his possession and control by virtue of his office as mail orderly.

He pleaded not guilty to, and was found guilty of, the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. The evidence shows that money had been disappearing from the incoming and outgoing mail at Brooks Field, Texas (R. 5); that about May 1, 1931, Corporal Crumley was in charge of the Postal Telegraph Office there and the handling of mail; that accused was working in the Brooks Field post office at the time, distributing and taking care of mail after it was brought from the city (R.14-19); that it was decided to set a trap by putting some bills in a letter and taking the numbers of the bills (R. 6); that Lieutenant W. E. Baker went to San Antonio on May 1, 1931, and conferred with the postal authorities; and that about 10:00 a.m., sixty dollars in five-dollar bills were placed by him in an envelope in the presence of Lieutenant Dayton; that prior to their being placed in the envelope the serial numbers were checked in the presence of Lieutenant Dayton (R. 12) and addressed to a soldier at Fort Benning, Georgia, the return address being that of Flying Cadet (Wm. D. Foley), Air Corps Primary Flying School, Brooks Field, Texas; that the envelope was then sealed after being checked again (R. 12); that about 10:00 o'clock Corporal Crumley was called to the adjutant's office and shown a letter addressed to a man in the 29th Infantry at Fort Benning, Georgia, and was told that the letter contained money and to watch and see that it got in the outgoing mail (R. 14); that Cadet Keenan, Assistant O. D., was asked by Lieutenant Dayton to mail a letter at the post office which he stated contained a sum of money; that he actually mailed the letter at the post box (R. 26); that about 11:30 Corporal Crumley left for dinner (R. 14), leaving accused arranging the mail to be readdressed and forwarded (R. 15); that the corporal returned at 11:45 and found the mail had already been tied up by accused according to sizes ready for delivery to San Antonio, and about 12:00 o'clock he relieved accused for dinner and, as soon as he left, searched through the packages of mail which were already tied up; that such packages contained all the mail in the office and the letter which was shown him in the adjutant's office was not to be found therein (R. 14), which fact was immediately reported to Lieutenant Baker, the Signal Officer; that Corporal Crumley went to accused who was in barracks and brought him to

Lieutenant Baker's office, then to the adjutant's office where he was searched (R. 15); that accused in the presence of Lieutenant Baker, Lieutenant Dayton and Corporal Crumley emptied his pockets and among the contents were found twelve five-dollar bills, whereof eleven were the original bills placed in aforementioned envelope and one additional bill (R. 11-12).

4. The applicable substantive law as to the difference between embezzlement and larceny, determinative of this case, is contained in the holding of the Supreme Court of the United States in the leading case of Moore v. United States, 160 U.S. 268, evaluated as a holding by that court itself and reaffirmed in the following excerpt from its opinion in the later case of Grin v. Shine, decided December 1, 1902, 187 U.S. 181, 196:

"These cases are strictly in line with that of Moore v. United States, 160 U.S. 268, in which we held that 'embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.'"

In the instant case, on the above-recited evidence of record, we are of the opinion that such physical control as accused acquired over the mail parcel containing the twelve five-dollar bills in the discharge of his duty, in the Brooks Field post office, to arrange and tie up pieces of mail for subsequent delivery to the San Antonio post office - a bare handling of the mail and no more - did not and could not make the opening of the sealed envelope and removal therefrom and carrying away by him of its money contents anything less than an unlawful original taking thereof without consent of the owner, within the criterion for differentiating larceny and embezzlement laid down by the Supreme Court in the quoted holding in Moore v. United States, supra. Therefore, we conclude that such taking by accused constituted larceny and not embezzlement on his part, and that his conviction of the latter offense is not supported by the evidence in this case.

5. From the charge sheet it appears accused enlisted August 16, 1929, with no prior service and that he was 20 years of age at the time of the commission of the offense.

6. For the reasons hereinabove stated, the Board of Review holds the record not legally sufficient to support the finding of guilty of Specification 2 of the Charge, but legally sufficient to support the finding of guilty of the Charge and Specification 1 thereunder, and the sentence.

E. M. Lewis, Judge Advocate.

Wm. H. Pomeroy, Judge Advocate.

Robertson, Judge Advocate.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
C. M. 196063

U N I T E D S T A T E S)) vs.)) First Lieutenant CLARENCE) R. MacIVER (O-10980), Air) Corps.)	THIRD CORPS AREA Trial by G. C. M., convened at Langley Field, Virginia, June 3 and 4, 1931. Dismissal.
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OPINION by the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

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

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

CHARGE: Violation of the 95th Article of war.

Specification 1: In that First Lieutenant Clarence R. MacIver, Air Corps, was at East Boston, Massachusetts, on or about October 7, 1930, in a public place, to wit, the Boston Airport, drunk and disorderly in uniform.

Specification 2: In that First Lieutenant Clarence R. MacIver, Air Corps, was, at Langley Field, Virginia, on or about January 23, 1931, in a public place, to wit, on a public street of the post of Langley Field, Virginia, drunk and disorderly in uniform.

Specification 3: In that First Lieutenant Clarence R. MacIver, Air Corps, was, at Langley Field, Virginia, on or about January 12, 1931, drunk and disorderly

in quarters.

Specification 4: (Not Guilty.)

Specification 5: In that First Lieutenant Clarence R. MacIver, Air Corps, was, at Langley Field, Virginia, on or about January 24, 1931, drunk, and disorderly in quarters.

Specification 6: In that First Lieutenant Clarence R. MacIver, Air Corps, did, at Langley Field, Virginia, on or about January 24, 1931, render himself unfit for military duty by the excessive use of intoxicants.

He pleaded not guilty to the Charge and the specifications thereunder, and was found not guilty of specification 4, guilty of Specifications 1, 3 and 6, guilty of Specifications 2 and 5 excepting in each instance the words "and disorderly", of the excepted words, not guilty, and guilty of 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 the 48th Article of War.

3. The material evidence for the prosecution shows that accused was assigned to duty at Langley Field, Virginia, May 7, 1929, and thereafter served as a member of that command (R. 7).

The offenses of which accused was convicted are alleged to have taken place on three separate occasions, namely, about October 7, 1930, at the Boston Airport, Massachusetts; on January 12, 1931, at Langley Field, Virginia; and on January 23 and 24, 1931, at Langley Field. The evidence will be set forth in this order.

Specification 1.

By official orders, issued October 4, 1930, from the Headquarters Second Bombardment Group, accused and a number of other officers and enlisted men were ordered to proceed with six airplanes to

Boston, Massachusetts, for the purpose of participating in the American Legion Convention held in that city from October 5 to 9, 1930 (R. 25, Ex. L). On October 7, 1930, accused was present at a social gathering in the National Guard locker room at Boston Airport, at which officers, ladies and civilians were present (R. 27). Intoxicating liquors were served at the party and every one was drinking (R. 36) but no one other than accused was disorderly (R. 27).

Four lieutenants of the Air Corps testified as to accused's conduct on that occasion, and all of them stated that he was drunk (R. 35, 49, 59, 68). When first observed, accused, dressed in uniform, was "sitting on a bench, kind of slumped over, head in his hands". He had been drinking and it appeared that "some one was going to have to take care of him." He started for the door, fell against it, crashed the glass from which he received a number of cuts on his face, and then fell to the floor, where he remained "doubled up". Members of the party, civilians and officers, gathered around to help. Lieutenants Harman and Power assisted accused to the flight surgeon's office because the wounds in his face "appeared more serious at the time than they turned out to be" (R. 26-30). He was unable to walk without staggering and was taken out a back way so as to attract as little attention as possible (R. 30, 35). When Major Cummings, the flight surgeon, attempted to administer first aid accused resisted by "shoving him away and waving his arms", so that it was necessary to hold him while the surgeon washed his wounds (R. 31), and gave him a hypodermic. Accused resisted the hypodermic and it was necessary to hold him down until he went to sleep (R. 33). He addressed obscene and profane language to the flight surgeon (R. 31, 43). At one time he got up from the cot in the surgeon's office and went to the toilet, and when he returned "his fly was open, he had urinated all over his pants". At that time he "asked the flight surgeon if he was a cocksucker and asked him if he would like to take a suck of his cock" (R. 55).

By stipulation it was agreed between the prosecution and the defense that if Major C. W. Cummings, Medical Corps, were present he would testify that accused was brought to his office on the afternoon of October 7, assisted by two other officers and was there treated for slight lacerations of the face and acute alcoholism; that accused was profane and disorderly and resisted medical treatment; and that a verbatim copy on the blotter of the dispensary concerning accused's case would, if introduced in evidence, show the following:

"Lacerations of the nose and face. Tripped and fell against the door. Alcoholism, acute. Wounds cleaned and swabbed with mercurochrome."
(R. 74, Ex. M.)

Specification 3.

On the morning of January 12, 1931, a tonsilectomy was performed on Mrs. MacIver, accused's wife, and later in the day she was returned to quarters under the care of Mrs. C. H. Meyers, a trained nurse (R. 133). The latter testified that she arrived at the home of accused during the afternoon where she saw him "quite intoxicated" (R. 152). About 9:30 p.m., witness, at the instance of accused's wife, requested accused to put his child to bed, but found him in such a condition that she was obliged to do it herself. Between the hours of 11:00 p.m. and 2:00 a.m., January 12-13, witness remained "up stairs" with Mrs. MacIver who was exceedingly nervous due to the condition of accused. During that time he was down stairs in his quarters drunk, "moving furniture" and creating a "general disorder" (R. 153). About 2:00 a.m., the nurse at the request of Mrs. MacIver attempted to quiet him. She found him lying on the floor, apparently asleep, "rolling and tossing" with the radio going "loud". She turned off the radio. Earlier in the evening she had requested accused to turn off the radio because it was annoying Mrs. MacIver, and to go to bed, neither of which he did (R. 155-156). About 2:15 a.m., she went to Lieutenant McCune's quarters where she called the Medical Officer of the Day, Captain Elvins (R. 156). She saw no liquor in the house but was positive that accused was drunk (R. 159-160). Captain Richard E. Elvins, Medical Corps, testified that after receiving a telephone call from Mrs. Meyers at about 3:00 a.m., January 13, 1931, he called the line Officer of the Day, Second Lieutenant James G. Pratt, Air Corps (R. 134), because he "felt it was as much a disciplinary matter as a medical matter" (R. 135). Thereafter they proceeded to the quarters of accused and found him lying on the floor of the living room which was in disorder - "smoking stands turned over, etc." Accused was drunk and had an odor of liquor on his breath. Mrs. MacIver was awake and was "nervous and apprehensive" (R. 137-138). Though accused was asleep (R. 139), and making no disturbance at the time, Captain Elvins administered a morphine hypodermic because he "wished him to remain quiet" (R. 138). First Lieutenant Milo McCune, Air Corps, arrived at accused's quarters at about the same time where he saw him lying on the floor apparently asleep. He noted evidence of disorder in that "a chair was pushed over against a table, the piano bench was upset or over on the side, cover of bench lying on the floor, rug ruffled up" (R. 98). He assisted Captain Elvins to administer a hypodermic (R. 100) and remained with accused until about 8:00 o'clock in the morning (R. 101).

Specifications 2, 5 and 6.

Major H. A. Dargue, Air Corps, Commanding Officer, Second Bombardment Group, while sitting with his wife in his automobile parked

in front of his own quarters at Langley Field, Virginia, about 10:30 p.m., on the evening of January 23, 1931 (R. 103), saw accused as he crossed the street about 100 feet in front. The headlights of the car shown on accused and then he stepped right under the electric light on the corner (R. 108). He was drunk and in uniform. He came up the sidewalk, passed by, continued toward his own quarters and disappeared in the darkness. His coat was unbuttoned, his hat was on the back of his head and his shirt showed all the way down the front (R. 103). He was "staggering up the sidewalk" in such condition that Major Dargue said he would not care to have any lady of the post or any officer or enlisted man see him (R. 104). Between 10:00 and 11:00 p.m., on the same evening, accused entered the quarters of Major Charles R. Glenn, Medical Corps, flight surgeon at Langley Field. He had a cigar in his mouth, dropped ashes "all over the place", started to tell a lot of "risque things" and had to be "shut up". There was a little slur in his speech and one eye was dilated and the other contracted which is typical of intoxication. Accused left shortly after he was "shut up" (R. 84). At this time he was drunk, and was "sloppily dressed" in uniform, his collar was unbuttoned and his coat open (R. 78). (Specification 2.)

Between 9:00 and 10:00 o'clock on the morning of January 24th, Major Dargue saw accused at the Operations Office. He was drunk. "He was flushed, quite nervous, stuttered considerably and suffering from the effects of alcoholic liquor" (R. 104). Just before noon, Major Dargue sent for accused in order to give him a warning in regard to the use of alcoholic liquor. Accused was under the influence of liquor at that time (R. 105). Major Glenn also saw accused at the Operations Office on the morning of January 24th, under the influence of liquor, and thereupon reported to the Group Commander that accused was unfit for flying duty because he was "drunker than a lord" (R. 79, 80). Major Dargue considered accused unfit for military duty on January 24th due to the excessive use of intoxicants (R. 105). (Specification 6.)

About 6:30 p.m., on the evening of January 24, 1931, First Lieutenant Lionel H. Dunlap was called to his own quarters where he found accused standing on the front porch. Upon asking accused if he wanted anything, he replied "Lets go outside and fight". He was drunk and Lieutenant Dunlap "talked him out of it". Accused's little daughter, Frances, was present at the time and Lieutenant Dunlap asked if she could stay with his little girl for the night. Accused said that he wanted her home and "left the house" (R. 120-121). Later in the evening, about 9:30 p.m., Mrs. Lionel H. Dunlap, who lived in adjoining quarters, heard a disturbance in accused's quarters.

The little daughter, Frances, was crying in an unusual manner and was heard to say "No, no, Daddy". Mrs. Dunlap thereupon called some of the neighbors including Mrs. Hammond and Mrs. Beaton, and with them went to accused's quarters where Mrs. Beaton secured the child from the second floor where the disturbance took place and left the house with her in her arms (R. 123, 125, Ex. O). Lieutenant Dunlap and Lieutenant Hammond arrived at the quarters at about the same time but did not see accused (R. 122, 123). On January 26, 1931, Major Dargue again called accused who, after being warned of his rights, made an admission (R. 106) to the effect that he had been drinking that day, that he had liquor in his quarters, that he did not remember what happened Saturday evening (January 24), but that liquor was the cause of it. Accused was thereupon ordered to the hospital (R. 115, Ex. N). (Specification 5.)

Evidence for the Defense.

Major David L. Robeson, Medical Corps, testified that accused was admitted to the hospital at Fort Monroe, Virginia, for observation as to alcoholism on January 26, 1931. He carefully examined accused about 8:00 p.m. and found no evidence of alcoholism, either acute or chronic, at that time (R. 161). The pupil of accused's right eye was larger than the left, but he later found that it was a permanent condition and was not due to alcohol "on January 26, 1931, or now" (R. 166). Second Lieutenant Casper P. West, Air Corps, testified that he accompanied accused to the hospital on January 26, 1931, and at that time accused appeared to be sober (R. 166-168). Second Lieutenant Edwin L. Tucker, Air Corps, testified that he took accused to the machine shop in his car "some time in January", the exact date he was unable to remember. Accused took a small antique to the shop for repairs. Accused appeared to be sober enough for duty though his breath did smell of alcohol (R. 168-170). Mr. D. K. Kirkpatrick, shop superintendent, saw accused when he came in with Lieutenant Tucker to get the small antique. He talked for a few minutes with accused who appeared perfectly sober. He was unable to fix the date other than some time in January (R. 170-172). First Lieutenant James E. Adams, Air Corps, remembered a conversation between accused and Major Dargue on January 24, 1931, when accused did not appear to be sober (R. 172, 175). Captain Frank D. Hackett, Air Corps, Commanding Officer, 20th Bombardment Squadron, testified that accused performed all of his duties satisfactorily on the flight to Boston, October 7, 1930 (R. 178-179).

Accused elected to make an unsworn statement (R. 180). As to Specification 1, he admitted being at the party in the National Guard locker room on the afternoon of October 7th, where a large mixed crowd

was present. In one end of the building, in a small room, a bar had been constructed where drinks were served. "I was at the door leaving the room when I was crowded into the glass door and pushed out through the door. As a result my face was scratched by broken glass and I had fallen on the floor on the other side. I then went to get patched up and was accompanied by Lieutenants Harman and Power over to the flight surgeon's office, in rather a daze you might say" (R. 181). He objected to the application of mercurochrome because "a face all smeared up with mercurochrome does not present a very good appearance". He also objected to the administration of morphine because, from past experience, such injections did not affect him "any too well" (R. 182).

As to his appearance on the street on the evening of January 23rd, he stated that he was returning home from Major Glenn's quarters, rather late in the evening, wearing his coat unbuttoned, and "I was not quite 'up to snuff', it might be stated as to uniform." He had some difficulty in walking since his right knee was puffed up because he had been playing handball and by doing so had aggravated an old football injury (R. 182-183). He saw Major Dargue in the Operations Office on Saturday morning, January 24, and discussed certain administrative matters concerning the accountability of airplanes. At the conclusion of the conference, "Major Dargue requested me to get a piece of metal" (the antique) "from the machine shop." In company with Lieutenant Tucker, he went to the machine shop and got it from Mr. Kirkpatrick, the superintendent. After delivering it to Major Dargue, there being no flying duty on Saturday, he spent the balance of the morning on organization matters. On the following Monday at about 6:00 p.m., "Major Dargue wanted me in his office" and at that time "I was directed to report to the hospital and then sent to Fort Monroe for examination. As has been shown, there was no evidence of alcoholism, either chronic or acute" (R. 184-185).

4. The evidence thus shows that, at the time and place alleged in Specification 1, accused was drunk and disgracefully so, in the presence of ladies and gentlemen at a public place. No one testified to actually seeing accused take a drink, but his conduct and appearance both in the Airport and in the flight surgeon's office, and his language to the flight surgeon, fully warrants the conclusion that he was drunk and disorderly under circumstances which obviously constituted a violation of the 95th Article of War.

As to Specification 3, the evidence likewise shows that accused was drunk and disorderly in his own quarters at the time and place alleged, in the presence of a trained nurse attending his wife, who

was sick as a post-operative patient. The Board of Review can come to no other conclusion but that the evidence supports the finding that accused, under all of the circumstances, was in a state of gross drunkenness unbecoming an officer and a gentleman attended by disorderly conduct in his quarters. In this instance his very drunkenness itself was so gross as to be in violation of the 95th Article of War when measured by the inhumanity which it caused him to display to his wife, who was at the time in the care of a trained nurse in his quarters and of whose condition he was utterly unmindful.

Under Specifications 2 and 5, the court found accused drunk at the times and places alleged, but found him not guilty, in each instance, of being "disorderly". Without further comment, the Board of Review is of opinion that the evidence fully supports the findings that accused was on both occasions drunk. In view, however, of the finding that accused was not disorderly and as the drunkenness was not flagrant or disreputable, the Board is of the opinion that the record is not legally sufficient to support the findings that accused thereby violated the 95th Article of War. His conduct, however, was clearly a violation of the 96th Article of War. In C. M. No. 195373, Beauchamp, the Board of Review considered the purview of the 95th Article of War as fixed by the legislative intent presumed to be incorporated in its reenactment in 1920 (*Caminetti v. U.S.*, 242 U.S. 487-488), and concurred in the authoritative conclusion of Colonel Winthrop, to the effect that an offense of the kind now under consideration, in order to constitute a violation of the 95th Article of War, must involve:

"Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused."

In view of the foregoing, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings that accused violated the 95th Article of War in being drunk as adjudged by the respective findings of guilty upon Specifications 2 and 5, but that it is legally sufficient to sustain findings that such drunkenness was in violation of the 96th Article of War.

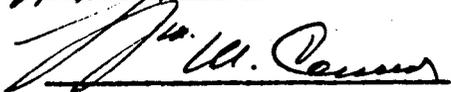
The offense alleged in Specification 6, rendering himself unfit for military duty by the excessive use of intoxicants, not being within the purview thereof, should not have been charged as a violation of the 95th Article of War. This specific offense, the Manual for Courts-Martial, page 187, expressly declares to be punishable as a violation of the 96th Article of War. The evidence is legally sufficient to support the finding of guilty of Specification 6 as a violation of Article of War 96.

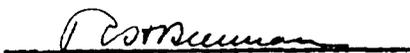
5. At the time of trial accused was 37 years of age. His service is shown by the official Army Register as follows:

"Hq. and M.G. Co. 1 Inf. Vt. N.G. 19 June 16 to 16 Sept. 16; mess sgt. and col. sgt. Hq. Co. 1 Inf. Vt. N.G. 3 Apr. 17 to 19 Oct. 17; Pvt. 1 cl. Av. Sec. Sig. E.R.C. 25 Oct. 17 to 13 May 18; 2 lt. Av. Sec. O.R.C. 14 May 18; accepted 14 May 18; active duty 14 May 18; vacated 8 Sept. 20.-- 2 lt. A.S. 1 July 20; accepted 8 Sept. 20; 1 lt. 1 July 20."

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 1 and 3 thereunder, legally sufficient to support the findings of guilty on Specifications 2, 5 and 6 as violations of the 96th Article of War, and legally sufficient to support the sentence. Dismissal is mandatory on conviction of violation of the 95th Article of War.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., JUL 31 1931 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of First Lieutenant Clarence R. MacIver, Air Corps, together with the foregoing opinion of the Board of Review.

2. A telegram suggesting clemency in this case having been referred to me for consideration, I have examined Lieutenant MacIver's military record with a view to determining whether or not I should recommend that clemency be extended. Lieutenant MacIver has in general been rated as an average officer, with a few ratings of above average. In the year 1927 he was officially commended by the Secretary of War for efficient performance of duty in connection with the mail service to the President during his summer vacation. In May, 1921, charges against him alleging drunkenness were disposed of by the administration of a reprimand. In November, 1925, he was convicted by general court-martial of being drunk in uniform and was sentenced to be reduced 250 files on the promotion list and to be reprimanded. In the reprimand administered by the department commander Lieutenant MacIver was warned that a continuation of his conduct would justify his separation from the service. In May, 1926, the President remitted so much of the sentence to loss of files as was in excess of the loss of 50 files. In June, 1929, the accused was sick in hospital not in line of duty, his illness having been diagnosed as "Alcoholism, acute". It appears that Lieutenant MacIver has had ample warning in the past that continuation of excessive drinking would result in the loss of his commission. These warnings have been ineffective to cause him to alter his habits and the clemency extended to him by the President has not aroused a spirit of gratitude evidenced by improved conduct. Two of the offenses of drunkenness of which the accused now stands convicted were so gross in character as to be properly found as conduct unbecoming an officer and a gentleman.

3. I concur in the opinion of the Board of Review and, for the reasons therein stated and because of the facts proven at the trial and the past history of this officer, recommend that the sentence be confirmed.

4. 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 designed to carry into effect the recommendation hereinabove made should it meet with approval.



Blanton Winship,
Major General,
The Judge Advocate General.

- 4 Incls.
Incl.1-Record of trial.
Incl.2-Opin. of Bd. of Rev.
Incl.3-Draft of letter for
sig. Sec. of War,
Incl.4-Form of executive action.



WAR DEPARTMENT

Military Justice
CM 196187

OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

AUG 3 - 1931

UNITED STATES	)	FIRST CAVALRY DIVISION
)	
vs.	)	Trial by G. C. M., convened at
	)	Fort Bliss, Texas, June 23, 1931.
Private JOE F. ROATH	)	Dishonorable discharge, suspended,
(6801514), Machine Gun	)	and confinement for one (1) year.
Troop, 7th Cavalry.	)	Disciplinary Barracks.

OPINION by the BOARD OF REVIEW,
McNEIL, CONNOR and BRENNAN, Judge Advocates,
ORIGINAL EXAMINATION by BENNETT, Judge Advocate.

1. The record of trial in the case of the soldier named above, having been examined in The Judge Advocate General's Office and there found not legally sufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Joe F. Roath, Machine Gun Troop, 7th Cavalry, did, at Fort Bliss, Texas, on or about April 27, 1931, desert the service of the United States and did remain absent in desertion until he was apprehended at El Paso, Texas, on or about May 15, 1931.

He pleaded not guilty to, and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 103, Headquarters First Cavalry Division, Fort Bliss, Texas, July 3, 1931.

3. The evidence shows that at reveille on April 27, 1931, accused was absent without leave from his organization stationed at Fort Bliss, Texas (R. 5, 6), and that he remained absent until apprehended by a deputy constable in El Paso, Texas, on May 15, 1931. At the time of apprehension accused was dressed in civilian clothing. The first sergeant of accused's organization testified that he had no reason, other than the absence, to make him believe that accused was deserting (R. 6).

Accused did not testify in his own behalf or make any statement to the court. His counsel made no statement in his behalf, other than to direct the attention of the court to the short period of absence and to the fact that there was no record of previous convictions. The charge sheet shows accused to be 21 years of age and that he enlisted November 30, 1928, without previous service in the Army.

4. The only evidence in the record that accused intended to quit the service is whatever inference may be drawn from his absence without leave for a period of eighteen days, his failure to return until apprehended, and the fact that he was dressed in civilian clothes at time of apprehension. Manual for Courts-Martial (1928), at p. 143, 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 ***."

The language just quoted appears in Manual for Courts-Martial, editions of 1917 and 1921.

The question arises in this case whether the absence was "much prolonged" and not satisfactorily explained within the meaning of the Manual. The Board of Review is convinced that the absence in this case cannot properly be deemed "much prolonged". The record discloses no evidence which tends to show an intention to desert. There is no proof that accused was under charges, or that charges against him were contemplated, or that any other matter had arisen that would induce him to attempt to separate himself from the service. He was apprehended in a city immediately adjoining the post of his organization, and the post from which he had absented himself. The fact that at the time of apprehension accused was dressed in civilian clothes cannot properly be said to show a fixed intention to desert the service, for the reason that it is a matter of common knowledge that enlisted men in peacetime are permitted to wear civilian clothing outside Army posts. As the Board views the record, the only proof to support one findings is the unauthorized

absence of accused, and absence without leave for a period of 18 days, unaccompanied by other proof of intention to remain permanently absent, is not sufficient to warrant the court in inferring from the absence alone an intent to desert.

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

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

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

"The facts that the accused was apprehended and had been absent a month and six days are not sufficient to show that he went absent with intent not to return or that he afterwards entertained such intent. It follows that the record is not legally sufficient to sustain the findings ***." (C. M. No. 123404, Standlea).

In C. M. No. 125904 (Moore), another wartime desertion case, the Acting Judge Advocate General stated:

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

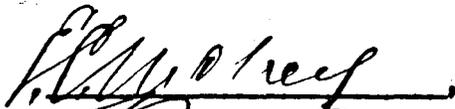
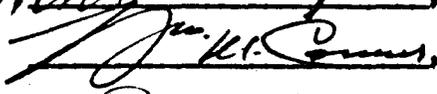
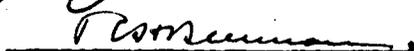
that absence without leave may be so prolonged that, unexplained and terminated by apprehension, it may be said, as a matter of law, to constitute desertion. Such a result, however, the law does not compel in the present case."

In C. M. No. 189658 (Hawkins), the Board of Review held with respect to a conviction of desertion at Fort Totten, New York, on October 14, 1929, terminated by apprehension at New York City, on November 2, 1929:

"*** that the absence cannot be deemed prolonged when viewed in the light of all the circumstances of the case. *** Mere absence without leave for twenty days under circumstances such as here shown, though terminated by apprehension, is not sufficient to form the basis of a reasonable and legally justifiable inference of intent to desert."

There is no fact or circumstance appearing of record in this case that precludes the application to it of the principle announced in the case last cited. There being no evidence from which the court might reasonably conclude that accused intended to desert, it follows that the record is legally sufficient to support only so much of the findings of guilty as involves findings of absence without leave for the period alleged in the specification (eighteen days), the maximum punishment for which, as fixed by paragraph 104 e of the Manual for Courts-Martial, is confinement at hard labor for fifty-four days and forfeiture of two-thirds of his pay per month for a like period.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that accused did, on April 27, 1931, at Fort Bliss, Texas, absent himself without leave and remain absent until apprehended at El Paso, Texas, on or about May 15, 1931, in violation of the 61st Article of War; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for fifty-four days and forfeiture of fourteen dollars per month for a like period.


 _____, Judge Advocate.

 _____, Judge Advocate.

 _____, Judge Advocate.

To The Judge Advocate General.

He pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three years. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50¹/₂.

3. The evidence, pertaining to Charge I and its Specification, briefly summarized, shows that accused assisted Private Fred L. Campbell in obtaining his bonus check, amounting to \$434.50, and in getting it cashed at a bank in Atlanta, and that in return for his help, Campbell gave him \$50.00 as they left the bank (R. 8; Ex. 1). Thereafter they had a couple of drinks together and then went to the apartment of a Mr. and Mrs. Moon, friends of accused (R. 25), where they had more drinks. Campbell stated that he wanted to have a good time before returning to his home station in Texas, and on the suggestion probably of Mrs. Moon or accused, both of whom came from Miami, they decided to go there in Moon's car. Campbell agreed to pay all or part of the expenses (R. 21-22, 30, 35; Ex. 1). They left Atlanta about 1:00 p.m., March 9, 1931, and arrived at Cordele, Georgia, about 4:00 p.m. Campbell testified that at this time he changed his mind about going to Florida and decided not to go any farther (Ex. 1). The accused, corroborated by the Moons, testified that Campbell had been riding in the rumble seat and was cold, that he had been talking about getting a woman to go with him, and that on arriving at Cordele, he said that he lived near there and that he knew a woman in the New Suwanee Hotel whom he could get to go with him, and that he wasn't going any further without a woman (R. 12, 30, 34). Whatever the reason, Campbell and accused entered the hotel, registered and were assigned Room 203, a double room with bath and toilet. Accused signed the two names on the register. Campbell offered a \$50.00 bill in payment for the room but it could not be changed and accused paid with a \$5.00 bill. Campbell remarked that it made no difference as it was all his money. A negro bell boy showed them to the room (R. 12, 14; Ex. 2, Cts. Ex. 1). Campbell was pretty drunk, "about as drunk as he could be without being passed out". Accused helped him across the street (R. 30). He staggered as he went to the elevator (Ex. 2). Campbell testified that he started to check his money with the clerk but accused said not to do it, that "he would look after me". At that time he had about \$350.00. After being in the room a few minutes, accused, according to Campbell, left, saying he was going to the toilet, and he (Campbell) went to sleep on the bed. He awoke in about half an hour and found

his money gone. Accused and the Moons could not be found (Ex. 1). Accused testified that he and Campbell had a drink in the room, and then Campbell went down the hall and "came back with this woman". Accused stepped out, and after waiting in the hall for 15 or 20 minutes, he knocked on the door and "hollered through the door" that they were going on if he did not come, and getting no answer, returned to the Moons. Mr. Moon said he wanted to get to Jacksonville that night so they went on (R. 12). The hotel proprietress testified that about 15 minutes after being assigned to the room, Campbell "rushed down stairs and was terribly excited. * * * He stated that Northrup had stolen his money and was running away." She sent a clerk to look for Northrup but he was not found (Ex. 2). Campbell testified that he had no woman in the room at any time and so far as he knows no one other than he himself and accused was in the room (Ex. 1). Accused and the Moons reached Miami on March 10th (Tuesday). The Moons returned to Atlanta the following Monday (March 16) and accused was there when they got back (R. 31). He returned again to Miami (R. 34) where he was carried on D.S. from March 25 (R. 6) and from which place he telegraphed Moon for \$25 on March 28th (R. 32; Court's Ex. 2). Accused returned to Fort McPherson for duty on April 2nd (R. 7). Private Campbell left Fort McPherson for his station at Fort Sam Houston, Texas, on March 13, 1931 (Ex. 1).

4. Accused also testified that while in Miami, he lived at home and his expenses were very small; that besides the \$50.00 given him by Campbell he had about \$100 which he had won gambling (R. 15). In order to impeach accused, the prosecution called three witnesses in rebuttal to show that he had no money on pay day and had borrowed \$15.00. Mr. R. W. Gossit testified that on February 28, 1931, accused brought him a promissory note for \$18.00 due March 31st, which he said was "signed by the Sergeant Major". Witness gave accused \$15.00 and when he went to the Sergeant Major, Simmons, after March 31st to collect it, the latter said he didn't sign it (R. 35-39). Master Sergeant A. E. Simmons, 22nd Infantry, whose name was signed to the note, testified that he did not sign the note. He had signed notes for accused payable to Mr. Gossit on two or three other occasions (R. 39-41). The defense objected to this evidence as irrelevant (R. 36), and again objected to testimony as to "any other crime not connected with this case" (R. 37). The trial judge advocate in reply stated:

"The purpose of the prosecution is two-fold, in this: That his testimony is not correct when he said that he had \$150.00 at the time; and, further to test the credibility of the witness, although the man is not accused of forging this

note. However, the fact that he did forge this note is good strong proof or argument against the credibility of the witness."

The law member overruled the objections and stated that he believed that "this testimony is perfectly proper" (R. 36-37). No instruction was given that it should not be considered in determining the guilt of accused of the larceny charged.

5. From the foregoing statement of the evidence, it appears that the conviction of the accused of stealing approximately \$370.00, property of Campbell, rests upon circumstantial evidence. Opportunity and flight are facts to be considered but they alone are not sufficient to support conviction (CM 195705 - Tyson). Whether together with the other circumstances shown in this case, the evidence is sufficient to support the conviction of larceny need not be decided, since, in the opinion of the Board of Review, the introduction by the prosecution of testimony showing that nine days before the offense charged, accused obtained \$15.00 by means of a forged signature, must be held an error which injuriously affected his substantial rights.

In Smith v. United States, 10 Fed. (2d) 787, CCA 9, the accused was indicted for selling drugs. Accused testified denying the charge. He was cross-examined as to collateral offenses, i.e., as to whether or not he had been previously engaged in selling narcotics. He denied that he had been so engaged. Thereupon two witnesses were called in rebuttal for the prosecution who testified that the defendant had been engaged in selling narcotics on occasions other than the one charged in the indictment. Error was assigned on the introduction of the rebuttal testimony. The court in reversing the conviction, said:

"The effect of the admission of the testimony so complained of was to show or tend to show against accused the commission of crimes independent of that for which he was on trial. With certain exceptions not applicable here, it is the well-settled rule that this cannot be done * * *. In People v. Molineaux (6 N.E. 286), the court said: 'This rule, so universally recognized and so firmly established in all English speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta.'"

In Cucchia v. United States, 17 Fed. (2d) 86, CCA 5, the defendant was indicted for attempting to bribe a prohibition officer. A United States commissioner was allowed to testify at the trial that the defendant had also offered him a bribe. The court reversed the conviction on the ground that the testimony authorized the jury to consider proof of bribery of the United States commissioner as proof of the alleged bribery of the prohibition agent. The court states the admission of such testimony was clearly prejudicial.

In Fabacher v. United States, 20 Fed. (2d) 736, CCA 5, the court reversed a conviction of conspiracy to violate the National Motor Vehicle Theft Act, evidence having been adduced at the trial that accused had been subject to an abandoned charge for violation of the liquor law. The court, after stating the general rule under discussion, held that introduction of the collateral evidence was not within any exception to the general rule.

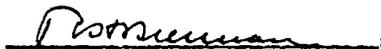
In Boyd v. United States, 142 U.S. 450, the accused was indicted and convicted of murder. It appeared in the evidence that the killing followed an attempt to rob. The trial court admitted, over objection, evidence tending to show that the accused had committed robberies in the neighborhood prior to the time of the murder charged. The Supreme Court reversed the conviction and remanded the case for a new trial, and, after pointing out that whether the accused committed the robberies prior to the killing was wholly apart from the inquiry as to the murder, said:

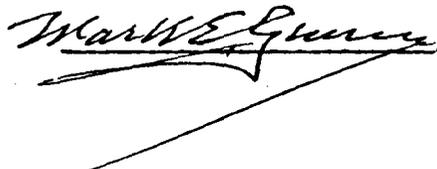
"They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the Government to introduce proof of them. They offered no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March and yet they may have been innocent of the murder of Danby in April. Proof of them only tended to prejudice the defendant with the jurors, to draw their mind away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

The question under consideration has been passed on by this office heretofore in the following cases: CM 114908, Martin; 151028, Obregon; 182775, Rudd; and 185961, Williams.

6. For the reasons hereinabove stated, the Board of Review holds the record legally insufficient to support the findings of guilty of Charge I and its Specification, but legally sufficient to support the findings of guilty of Charge II and its Specifications and legally sufficient to support only so much of the sentence as involves confinement at hard labor for sixty days and forfeiture of \$16.00 per month for a like period.

 Judge Advocate.

 Judge Advocate.

 Judge Advocate.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
CM 196199

UNITED STATES	)	EIGHTH CORPS AREA
)	
vs.	)	Trial by G. C. M., convened at
	)	Fort Crockett, Texas, June 9,
Private FRANK R. CASEY	)	1931. Dishonorable discharge
(6628835), 90th Attack	)	and confinement for four (4)
Squadron, Air Corps.	)	years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McNEIL, CONNOR and BRENNAN, Judge Advocates
ORIGINAL EXAMINATION by JONES, Judge Advocate.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following charges and specifications:

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

Specification: In that Private, then First Sergeant Frank R. Casey, 90th Attack Squadron, A.C., did, at Fort Crockett, Texas, on or about the 28th day of January, 1931, desert the service of the United States, and did remain absent in desertion until he was apprehended by Civil Authorities at Los Angeles, California, on or about the 6th day of February, 1931.

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

Specification 1: In that Private, then First Sergeant Frank R. Casey, 90th Attack Squadron, Air Corps, did, at Fort Crockett, Texas, on or about the 28th day of January, 1931, feloniously embezzle by fraudulently converting to his own use money of the value of One Hundred Eight Dollars and fifty-three cents (\$108.53), the property of the United States, intended for use

in the military service thereof, entrusted to him by Second Lieutenant J. H. Williamson, Air Reserve, for deposit in the Fund of the 90th Attack Squadron.

Specification 2: (Not Guilty)

Accused pleaded not guilty to all charges and specifications, and was found not guilty of Specification 2, Charge II, but guilty of Charge I and the Specification thereunder, guilty of Specification 1, Charge II, except the words and figures "One Hundred Eight Dollars and fifty-three cents (\$108.53)," substituting therefor the words and figures "Eighty-eight dollars (\$88.00)," of the excepted words not guilty and of the substituted words guilty, and guilty of Charge II. 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 four years. The reviewing authority approved the sentence, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. The evidence shows that on January 28, 1931, accused, then First Sergeant, 90th Attack Squadron, was absent without leave from his station, Fort Crockett, Texas (Ex. A). At the time accused owed local debts exceeding in amount \$300.00 (R. 16). By deposition it was shown that on February 6, 1931, he was apprehended at 758 Oakford Drive, Los Angeles, California, and was then dressed in civilian clothes (Exs. B, G).

The evidence further shows that on January 5, 1931, Second Lieutenant John H. Williamson, Air Reserve, was detailed by Lieutenant Beal, Squadron Commander, to collect the Squadron ration money from the Finance Officer, to make payment therefrom to the men rationed separately and to collect "board money" from certain persons taking meals at the organization mess (R. 23-24, 27, 40, 43). Lieutenant Williamson received from the Finance Officer on January 5, 1931, such ration money, amounting to about \$250.00, on the same date cashed the check representing part of that amount, and thereupon delivered the ration money to the accused with the direction "to pay the men off" (R. 27, 30). The men to whom this ration money was payable were, in the main, indebted to the Squadron fund in various sums, for meals furnished them, aggregating about one-third of the ration money, and collectable at time of payment thereof (R. 23). Of monies so collected the accused was authorized by Lieutenant Williamson to take charge (R. 30). No demand

was ever made on accused that he account for either the ration money or the board money received, nor did he turn over any money to Lieutenant Williamson (R. 27), nor had any deposit been made in bank between January 5 and January 28 to the credit of the Squadron fund (R. 34). It was stipulated that on January 5, 1931, fifteen men named in the stipulation paid accused \$63.75, board money from ration money received (R. 42), and that \$14.25 was paid about that date to accused by Sergeant Stone on account of civilians boarding at the Squadron (R. 43). Board money due the mess for the month of December, 1930, amounting to \$10.00, was also paid the accused by Sergeant Williamson (R. 43). On January 30, 1931, the Squadron Commander from his personal funds made good the amount of the Squadron fund found to be short (R. 25, 34).

4. Evidence offered by the defense to negative any presumption of an intent to desert showed that five or six days prior to his departure accused stated to Private Kermit R. Perkins, 90th Attack Squadron, Air Corps, "I guess I am just going to have to leave here for a while that is all" (R. 46), and that within three days after his departure accused wrote Miss Bernetta Wagner of Galveston, Texas, that he would be back in Galveston soon and would see her (R. 47).

Several witnesses were also called who testified that they had known accused for a year or more, and would have been willing to help him with money, political influence, or in any other possible way, had they been so requested by accused (R. 48-52). It was stipulated that Mr. Collus P. Suderman had offered to procure at his own expense a civilian attorney for accused.

It was also shown that accused's pay due on January 31, 1931, would have been \$135.30, that on January 27, 1931, he had a credit on his clothing allowance of \$78.75, and that he could have secured his discharge by purchase for \$60 (R. 53).

Evidence was presented by the defense showing that there were at least two keys for the safe at Squadron Headquarters (R. 56), in which ration money was at times kept (R. 38), and one of such keys was in the possession of the Supply Sergeant (R. 33).

Accused was fully advised of his right to testify and elected to remain silent.

5. The evidence in support of the Specification, Charge I, clearly shows that on January 28, 1931, accused was absent without leave from his station, Fort Crockett, Texas; that on that date he

was in debt to an amount greatly in excess of his month's pay and allowances due, and had not accounted for board receipts belonging to the Squadron fund; and that on February 6, 1931, he was apprehended at a place distant from his station (Los Angeles, California) dressed in civilian clothes.

The evidence in support of Specification 1, Charge II, shows that on January 5, 1931, the accused received from Second Lieutenant J. H. Williamson, Air Reserve, about \$250.00 in cash, public money, wherewith to pay the men of the Squadron who were rationed separately and when so doing collected from them certain sums due and payable to the Squadron fund for board, of which he was authorized to take charge. The evidence as to this specification does not show that accused failed to make proper payment of any part of the aforementioned public money received from Lieutenant Williamson. At most, it establishes no more than that accused wrongfully failed to pay over and account for various sums of board money amounting to \$88.00 due the Squadron fund from persons taking meals at the organization mess and paid by them to him. This would constitute at most a fraudulent conversion to personal use of monies entrusted to him by such persons, as contradistinguished from Lieutenant Williamson, and which belonged to the Squadron, as contradistinguished from public money, the property of the United States. It results, therefore, that the particular offense charged in this specification was not proved by the evidence of record, and that the finding of guilty thereon must be set aside.

Upon careful scrutiny of the record of trial we perceive therein no other question requiring notice here.

6. At the time of commission of the offense accused was 25 years and 4 months of age. He enlisted December 20, 1929, for three years, and had previously served one enlistment in Service Troop, 12th Cavalry, from which he was discharged November 27, 1926, as Corporal, with character very good, and one enlistment in 90th Attack Squadron, Air Corps, from which he was discharged December, 1929, as Corporal, with character excellent.

7. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and Specification 1 thereunder, legally sufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence



WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
GM 196371

SEP 21 1931

UNITED STATES	)	SIXTH CORPS AREA
)	
vs.	)	Trial by G. C. M., convened at
	)	Camp Custer, Michigan, July
Sergeant KARL E. STEENBERG	)	10, 1931. Dishonorable dis-
(6530671), Company G, 2nd	)	charge and confinement for five
Infantry.	)	(5) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates
ORIGINAL EXAMINATION by JONES, Judge Advocate.

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

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

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

Specification 1: In that Sergeant Karl E. Steenberg, Company G, 2nd Infantry, did, at Fort Wayne, Michigan, on or about June 1st, 1931, commit the crime of sodomy, be feloniously and against the order of nature having carnal connection with Private 1st Class Frank J. Wudyka, Company G, 2nd Infantry.

Specification 2: Assault with intent to commit sodomy.
(Not Guilty.)

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

Specification: In that Sergeant Karl E. Steenberg, Company G, 2nd Infantry, did, at Fort Wayne, Michigan, on or about February 1, 1930, take indecent liberties with the person of Private Roy A. Pitsch, Company G, 2nd Infantry, by wilfully handling and squeezing the penis of the said Private Pitsch, to the prejudice of good order and military discipline.

He pleaded not guilty to, and was found guilty of, the charges and specifications, with the exception of Specification 2 of Charge I, of which he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50 $\frac{1}{2}$.

3. In view of the conclusions of the Board of Review, herein-after expressed, a full statement of the evidence in this case is not necessary. Only one witness, Private Frank J. Wudyka, Company G, 2nd Infantry, testified directly as to the commission by accused of the offense alleged in Specification 1, Charge I. Only one witness, Private Roy A. Pitsch, testified directly as to the commission by accused of the offense alleged in the Specification of Charge II. Private Louis M. Jacobson testified as to the commission by the accused of the offense alleged in Specification 2, Charge I, of which accused was acquitted, and his testimony was designed to substantiate the testimony of Wudyka as to the date of the offense alleged in Specification 1, Charge I, but in fact only added to the confusion as to date which the testimony of Wudyka had injected into the case.

After the prosecution had presented its case in chief, the defense offered testimony to prove that accused was above average in intelligence and the manner of his performance of his duties, that his general reputation in the organization had been good (R. 36, 38) and that there had been no rumors of immoral practices or acts on his part until "after this case came up" (R. 36); that Sergeant McCray, by whom the report was made to the Company Commander, was hostile toward accused and had threatened to get even with him (R. 39), and that Wudyka had threatened that he and Sergeant McCray would have the accused "where he belonged inside of a few days, and would have him on the spot" (R. 34).

In rebuttal, Corporal William F. Morris, Company G, 2nd Infantry, was asked: "Corporal Morris, did you have any dealings or relations with the accused during June of 1929?" The defense objected and the trial judge advocate in reply to the objection argued in part:

"The witness now on the stand is put there to show that the accused has had traits along the line he is charged with in the charges and specifications upon which he is now being tried. The charge, or the statement that is desired to be brought out by the witness

is something that is beyond any statute of limitations; that is two years. I believe the witness is permitted to tell what he knows happened between himself and the accused in June of 1929, and to show the character of the accused is not as rosy as made out by the Defense witness for his character."

The objection was, however, sustained (R. 42-43).

Later in the examination (R. 44), the witness was asked: "Corporal Morris, in your dealings with the accused, would you or would you not say as to his moral character, good or bad?" An objection by the defense was overruled and the examination of the witness continued (R. 44-47):

"Q. In your opinion, is or is not the accused, in your own mind, good or bad?

A. I couldn't say, Sir.

Q. Do you, of your own knowledge, know of any acts during the time you have known the accused, to be such that were not honorable intentions?

A. The instance I made the statement was the only one, Sir.

Q. From that instance that you made the statement of, which cannot be brought before the Court, what is your interpretations of the accused's intentions at that time?

A. I didn't have any.

THE DEFENSE: We object, if this answer is going to bring out any specific instance.

THE PROSECUTION: We will leave that rest.

Q. Corporal Morris, do you or do you not feel in your own mind that the accused, has any traits of character, as to, --well, we will say sexual relations between men? What is your own idea?

A. Do I have to answer that?

Q. From your experience, can you answer it?

A. No, sir.

Q. Can you answer that question, Corporal, in your own opinion?

A. I have my doubts, Sir. I have my doubts in regard to it.

MAJOR TOM FOX (LAW MEMBER) In regard to what?

A. In regard to the sexual relations between men.

Q. What are they, good or bad?

- A. I wouldn't say either one specifically. I say I have my doubts they were perfectly good.
- Q. At any time since you have known the accused, has he made any improper advances toward you?"

An objection here interposed by the defense was sustained.

The examination by the court was in part as follows:

- *FIRST LT. EDMUND B. SEEBREE: What is the reputation of the accused in his organization; is it good or bad?
- A. It has been rather shady, Sir, in the last five or six months.
- Q. It has been shady?
- A. Yes, sir.
- Q. What, in general, do you mean by that? What do people say about him?
- A. Well, that he has peculiar ways, Sir.
- MAJOR FOX (LAW MEMBER) Come right out and say what you mean.
- A. There has been rumors, Sir, for the last four or five months that the accused has had sexual relations with men in the organization.
- FIRST LT. EDMUND B. SEEBREE: In other words, what you are trying to tell is what his reputation is in the Company; that he is a moral pervert; is that right?
- A. Yes, sir.
- SECOND LT. RALPH E. HUMBOLD: Have you known that all along for the last five months, or have you just known it recently?
- A. I have not known it at all, Sir. I have heard rumors for the last five months.
- Q. Heard rumors in the Company?
- A. Just rumors, yes, sir.
- CAPTAIN CLINTON W. BALL: Who did you hear these rumors from; do you remember?
- A. Well, particularly from Private Wudyka.
- Q. How did he put them out; what kind of language?
- A. Very plain language.
- Q. What was your reaction to the way he put these rumors out?
- A. Nothing more than to cause -- well, to cause a little -- I don't know just how to express it.
- Q. Let me put it clearer. Do you remember what Wudyka said?

- A. I don't remember the exact words, Sir. But he made remarks that the accused had had relations with him.
- Q. He made them five months ago?
- A. Approximately five months, Sir.
- Q. How long have you known Wudyka?
- A. Approximately two years, Sir.
- Q. What was his reputation?
- A. It has been excellent so far as I know, Sir. I have never heard anything against him."

The Assistant Trial Judge Advocate then examined the witness as follows:

- "Q. After you heard that rumor, were you inclined to believe it?
- A. Yes, sir.
- Q. Why?
- A. The incident that was not brought up in Court; that I made the statement in regard to." (R. 47)

In the examination above recorded the prosecution undertook to rebut the evidence of accused's good character by offering the opinion of one witness (Corporal Morris) as to the character of the accused based upon some specific act of accused with regard to himself. Although the specific act was not testified to in detail, from the argument of the trial judge advocate (R. 42) and the examination of the witness there appears more than a suspicion of some former similar act which forms the basis of the opinion of the witness which the prosecution offered.

The witness Morris testified further that the reputation of accused was that he was a moral pervert. This reputation was based on rumors current within the organization during the past four or five months; which rumors witness had heard from Private Wudyka, the pathic named in Specification 1, Charge I.

Although no effort had been made to impeach the witness Wudyka, Corporal Morris was asked "what was his (Wudyka's) reputation," to which he replied: "It has been excellent so far as I know, Sir. I have never heard anything against him." (R. 47)

4. The single question of law presented by this record is whether or not the admission of the testimony above outlined was error prejudicial to the substantial rights of the accused.

The determination of this question involves consideration of separate aspects of the testimony offered in rebuttal by the prosecution: (1) the effect of the introduction of evidence of a prior

similar act; (2) the effect of an expression of opinion as to character by a witness called to rebut evidence of good character, the opinion being based on some former act of accused towards the witness; (3) the effect of introducing testimony to sustain an unimpeached witness for the prosecution; and (4) the effect of receiving testimony as to rumors in rebutting evidence of accused's good character.

The rule of law as to the introduction of evidence of prior similar acts in rebuttal of proof of good character has been thus stated:

"When a defendant has voluntarily put his character in issue, it is not competent nor relevant to the issue, to admit in rebuttal on the part of the prosecution evidence of a series of independent facts, each forming a constituent offense."

(Wharton's Criminal Evidence, 10th Ed. p. 243.)

It has been held that:

"To receive evidence of like offenses to those charged in the indictment under which the accused is on trial is neither competent, fair, nor just, where no question of intent is in issue, and no connection between such offenses and those charged is proved."

(Grantillo v. U. S., 3 F. (2d) 117.)

"That the doing of one act is in itself no evidence that the same or a like act was again done by the same person has been so often judicially repeated that it is commonplace."

(Dyer v. U.S., 186 Fed. 614.)

The following quotation from the opinion in Dyer v. U. S., supra, is a clear statement of the law on this subject:

"One of the leading cases on the subject of the admission of such testimony is State v. La Page, 57 N.H. 245, 24 Am. Rep. 69. In that case the controlling legal propositions are stated in the opinion of Cushing, C.J., on page 289 of 57 N.H., as follows:

'(1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant's bad character by showing particular acts. (3) It is not permitted to show in the prisoner a tendency or

disposition to commit a crime with which he is charged. (4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing on the issue on trial other than such as is expressed in the foregoing three propositions.'

In the same case, on page 290 of 57 N.H., there is a quotation from Wharton's American Criminal Law, as follows:

'It is here, however, that the fundamental distinction begins, for, while particular acts may be proved to show malice or scienter, it is inadmissible to prove either in this or any other way that the defendant had a tendency to the crime charged. Thus in England it has been held that upon the trial of a person charged with an unnatural crime it was not permitted to prove that the defendant had admitted that he had a tendency to such practices.'

And again, on page 291 of 57 N.H., the court quotes with approval from Lord Campbell, in Regina v. Oddy, 2 Den. Cr. C. 264, as follows:

'I am of the opinion that the evidence objected to was as admissible under the first two counts as it was under the third, for it was evidence which went to show that the prisoner was a very bad man and a likely person to commit such offenses as those charged in the indictment. But the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first. Evidence which was received in the case does not tend to show that the prisoner knew that these particular goods were stolen at the time he received them. The rule which has prevailed in the case of indictments for uttering forged bank notes of allowing evidence to be given of the uttering of other forged notes to different persons has gone great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of the opinion that the evidence admitted in this case with regard to the scienter was improperly admitted, as it afforded no ground for any legitimate inference in respect of it. The conviction therefore must be quashed.'

In *Kansas v. Adams*, 20 Kan. 311, in the opinion of Mr. Justice Brewer, it is said:

'The rule of law applicable to questions of this kind is well settled. It is clear that the commission of one offense cannot be proved on the trial of a party for another merely for the purpose of inducing the jury to believe that he is guilty of the latter, because he committed the former. You cannot prejudice a defendant before a jury by proof of general bad character, or particular acts of crime other than the one for which he is being tried.'

In the instant case the prosecution offered to prove by Corporal Morris that accused had been guilty of some former misconduct with him. Although the court refused to receive this testimony the argument of the trial judge advocate and the frequent references of the witness to the affair must have left in the minds of the members of the court the impression that the accused was addicted to immoral practices of the kind for which he was then on trial and was therefore probably guilty on this occasion. The receipt by the court of this testimony was error.

Proof of character is not accomplished by testimony of the witness' opinion of accused, the rule being thus stated:

"A witness called to speak as to character cannot give the result of his own personal experience and observation, or express his own opinion, but he is confined to evidence of general reputation in the community where the defendant resides or does business. Such a witness, so confined to general reputation, may be examined for the purpose of testing his opportunities of ascertaining that reputation."

(Wharton's Criminal Evidence, 10th Ed. p. 239.)

"Mere opinions of witnesses as to defendant's character for peace and quiet from their personal knowledge are not admissible."

(Ala. App. *Terry v. State*, 74 So. 756.)

In the instant case the testimony of Corporal Morris as to his opinion of the accused based, as it was, upon some specific act of the accused with regard to himself was improper and should have been excluded by the court. The reputation of the accused as to a specific trait of character could not be proved by the opinion of the witness as to that

trait of character, nor by proof of prior acts of accused.

As to the effect of introducing character testimony to support the character of an unimpeached witness, the rule has been thus stated:

"It is well settled that the introduction of character testimony to support the character of an unimpeached witness is reversible error."

(Ford v. U. S., 3 F. (2d) 104;
Harris v. U. S., 16 F. (2d) 117;
Bolling v. U. S., 18 F. (2d) 863;
C. M. 190259 - Sheffield;
C. M. 195687 - Stansbury.)

In the instant case no impeachment of Wudyka was undertaken by the defense, but Captain Ball, a member of the court, asked Corporal Morris what the reputation of Wudyka was. The witness replied: "It has been excellent so far as I know, Sir. I have never heard anything against him." This question and answer could have no other effect than to increase the credibility of Wudyka and make more probable the truth of his account of the events of which he testified and the truth of the rumors he is shown to have spread.

After an accused has put his character in issue it is permitted for the prosecution to undertake to rebut that proof of good character by proving that the reputation of the accused in the community is bad, but,

"Mere rumors are of course not reputation. A reputation involves the notion of a general estimate of the community as a whole - not what a few persons say, nor what many say, but what the community actually believes."

(Greenleaf on Evidence, 16th Ed. p. 586.)

"Reputation, being the community's opinion, is distinguished from mere rumor * * *. Reputation implies the definite and final formation of opinion by the community; while rumor implies merely a report that is not yet finally credited."

(Wignore on Evidence, 2nd Ed. sec. 1611.)

It has been held that evidence of defendant's good character by general reputation cannot be rebutted by evidence of particular acts of misconduct or crime or by rumors and reports in the country. McCarty vs. People, 51 Ill. 231.

In the instant case Corporal Morris, in rebuttal, testified that he had heard rumors, spread largely by Wudyka, about immoral acts of accused with men of the company, these rumors being current for the past four or five months. Sergeant Hamrick of the same company denied that he had heard of any rumors or reports of this nature prior to June 14, 1931, when Wudyka reported to him the acts alleged in Specification 1, Charge I.

Receipt of this testimony as to the story spread by Wudyka, in rebuttal of the good character of accused, was clearly an error prejudicial to the rights of the accused.

The proof as to Specification 1, Charge I, in the instant case, resting as it does on the very unsatisfactory testimony of Wudyka, is far from compelling, and the admission of the testimony above outlined, which should have been excluded, adversely affected the substantial rights of the accused.

The uncontradicted testimony of Private Pitsch as to the Specification of Charge II is clear as to the acts of February 1, 1930, but the time which had elapsed between the act charged and the trial, and the friendship of the witness with Wudyka robs it of compelling force; and the nature of the offense alleged is such that the erroneous admission of the rebuttal testimony outlined above cannot have failed to affect injuriously the substantial rights of the accused in the court's consideration of this specification.

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

G. H. C. C. C., Judge Advocate.

R. H. H. H., Judge Advocate.

M. H. H. H., Judge Advocate.

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

Military Justice
C.M.No. 196426

NOV 5 1931

UNITED STATES	)	PANAMA CANAL DEPARTMENT
)	
v.	)	Trial by G. C. M., convened at
	)	Fort De Lesseps, Canal Zone,
Captain WILLIAM R. FLEMING	)	July 16 and 17, 1931.
(08643), 14th Infantry.	)	Dismissal.

OPINION of the BOARD OF REVIEW
MONEIL, BRENNAN and GUERIN, 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain William R. Fleming, 14th Infantry, was at Colon, Republic of Panama, on or about June 20, 1931, drunk and disorderly in uniform in various public places, to wit, at or near the Tropic Bar, at or near Bilgray's Cafe, at or near the Hotel Carlton, at or near the Colon Police Station, and at or near Fort De Lesseps.

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 be dismissed the service". The day following (July 18, 1931) nine of the eleven officers who sat on the court signed a "Petition for Clemency" requesting commutation of the sentence to reduction of 400 files on the promotion list and restriction to post limits for three months. The reviewing authority approved the sentence and forwarded the record for action under the 43th Article of War.

3. The accused neither testified nor made an unsworn statement and no evidence was introduced in his behalf. In the testimony given by the witnesses for the prosecution there are some discrepancies relating chiefly to the hours at which the various incidents described occurred; but there is little or no contradiction concerning the essential facts in the case, which are hereinafter summarized.

4. On the afternoon of June 20, 1931, First Lieutenant Rafael L. Salzmann of the Military Police Company at Fort De Lesseps, saw the accused in white uniform, without a cap (R. 57), leaning against a wall outside the Tropic Bar in Colon, drunk. According to Lieutenant Salzmann, accused's knees were sagging, his posture was helpless, his lower lip was hanging loose, his eyes were bleary and vague, and he gave the impression of being absolutely helpless and unable to stand without leaning against the wall. Lieutenant Salzmann asked him to go to his home at Fort Davis. A civilian present said he would take care of the accused, and, since Lieutenant Salzmann had another officer in charge, he left accused with the civilian. This civilian also was drunk, but not so drunk as the accused (R. 58). Lieutenant Salzmann testified that this was about 3:55 o'clock (R. 57). After taking the other officer, whom he had in charge, to Fort De Lesseps in his car, Lieutenant Salzmann returned to the Tropic Bar where he met Lieutenant George E. Young, also of the Military Police Detachment (R. 58), who informed him that the accused had departed in a taxicab and, presumably, had gone home (R. 59).

On that same afternoon the attention of Lieutenant Colonel Malcolm T. Andruss, Coast Artillery Corps, was attracted by a gathering of some eight or ten persons collected around the accused in the vicinity of the Tropic Bar. The accused was "haranguing there" and was said by bystanders to be drunk. He was dressed in white uniform, but was not wearing a cap. He appeared to be getting into an automobile, so Colonel Andruss went on about his business. A few minutes later Colonel Andruss returned and noticed that the gathering was still there and accused "was still arguing". However, as Lieutenant Young of the Military Police was then with accused and was conducting himself in a dignified manner and "seemed to have the situation well in hand", Colonel Andruss passed on (R. 22, 23). The accused "was evidently under the influence of liquor", was "gesticulating" and was "in a sort of maudlin state" (R. 23). He was "drunk" (R. 24). Colonel Andruss considered the conduct of accused "disorderly" only in that he failed to obey promptly the order or request of the Military Police, Lieutenant Young, to get into an automobile. He did not resist physically and was not in a "combative" mood (R. 27). Among the bystanders were a number of persons in civilian clothing and some soldiers

in uniform (R. 27, 28). Colonel Andruss placed these incidents at about 3:00 o'clock (R. 28); but it is probable that they occurred shortly after accused had been seen by Lieutenant Salzmann.

Lieutenant Young testified that he saw accused on the afternoon in question near the Tropic Bar (R. 10), opposite Bilgray's Cabaret (R. 12), on Tenth Street in Colom, at about 4:00 or 4:15 o'clock (R. 10); but it is apparent that he and Colonel Andruss were referring to the same incident. When Lieutenant Young's attention was attracted by a loud conversation or argument, the accused was standing among four or five persons, "weaving about on his feet". He was wearing a white uniform without a cap (R. 10). Lieutenant Young introduced himself to the accused as a member of the Military Police and was recognized by the accused. He then told the accused that he wished the latter to go home. To this the accused assented and invited all present to accompany him. At the time there were five men with him: four in civilian clothes and one, a soldier, in uniform (R. 11). Two of the men in civilian clothes said they were soldiers (R. 19) and one of these two, claiming to be a member of accused's company, offered to go home with him and take care of him (R. 11). This man was sober (R. 14) and he and the other man who claimed to be a soldier got into a taxicab with the accused and it drove off (R. 12). Accused's breath smelled strongly of liquor (R. 15). He walked and entered the taxicab without assistance (R. 19) and his speech was coherent, but he spoke with a thick tongue (R. 17). He was drunk (R. 14), but not disorderly, and there was no altercation (R. 15).

The driver of the taxicab, Rafael Cotes, testified that it was 3:50 o'clock the afternoon of June 20, 1931, when the accused got into witness' car in front of the Tropic Restaurant and that he was accompanied by two or three other men, none of whom was in uniform. The accused himself was wearing a white uniform but had no cap (R. 77, 80). His car was engaged by some civilian who instructed him to drive the accused to Fort Davis. Witness started for Fort Davis but was directed by one of his passengers to drive to the Carlton Bar, which he did (R. 78). Here his passengers had one round of drinks, some taking beer, one calling for coca cola and the accused having a drink of whiskey (R. 78, 79). From the Carlton the party drove to the Universal Bar where they had drinks as before. Here the accused knocked over a tray and broke the glasses (R. 80). After leaving the Universal Bar, Cotes, at the direction of one of his passengers, drove the party back to the Carlton. He suggested that he had been told to drive to Fort Davis, but one of the occupants of the car answered that he should "take a turn through the suburbs

of the city in order that the captain might get some fresh air". As the car approached the door of the Carlton Bar accused gave the driver contradictory instructions, saying: "Go ahead. Stop. Go ahead. Stop." The driver stopped and at that moment another officer came to the car and, according to Cotes, after talking to the accused, got into the front seat with the driver (R. 81). Just then, as Cotes was starting the engine, the accused seized him by the throat and tore his shirt. Somebody said to pay no attention, that accused "was only joking"; but Cotes got out of the car and refused to drive further. At his request a policeman was called and all concerned went to the police station (R. 82) where Cotes was paid his fare of \$3.00. Thereupon he left the station (R. 83). He testified that accused was drunk and he fixed the time of arrival at the police station as 4:35 o'clock (R. 88).

It appears that the officer to whom Cotes referred as having come to the car and talked to the accused in front of the Carlton Bar, was Second Lieutenant James E. Evans, 2nd Field Artillery. Lieutenant Evans testified that at about 3:00 o'clock on the afternoon of June 20, 1931, he and his wife were sitting in his car which was parked in front of the Carlton Bar, when the waiter who had served them called his attention to the accused. At this time accused was sitting in a taxicab that was standing on the other side of the street a short distance away. Some sort of argument appeared to be going on in the taxicab and Lieutenant Evans went over and spoke to the accused, who recognized him and called him by name (R. 29, 30). At this time the occupants of the taxicab were the driver, the accused, and three other men, one of whom was in uniform (R. 30). The taxicab was a 7-passenger touring car with two drop seats (R. 38) on one of which one of the three men who were with the accused was sitting. Accused and the other two men were sitting in the back seat, the accused being on the same side of the car as the driver who sat alone in the front seat. The accused had evidently been drinking (R. 39). His breath had an odor of liquor; the blouse of the white uniform he was wearing was partially unbuttoned and "a little bit ruffled" so that he appeared "slightly disheveled" (R. 38, 40); and he seemed to be talking "very volubly" to the driver. His speech was not particularly loud but was more rapid than usual (R. 52). When Lieutenant Evans first saw the accused he thought "some sort of a struggle" was going on in the taxicab. There was no violence, but the man sitting next to the accused had his hand on the latter's arm as though to restrain him and prevent his getting up (R. 51, 52). Accused was slightly profane (R. 52) and at one time referred to the taxicab driver as "a God damned nigger" (R. 53). Lieutenant Evans thought accused was drunk (R. 52). When Lieutenant

Evans reached the taxicab he asked accused what the trouble was and if he could be of any help. Accused answered that there was no trouble and one of the men in civilian clothes said that the argument had arisen over going to Fort Davis and that the accused did not want to go there. Lieutenant Evans then asked the accused if he would like to go to Fort Davis with him, but accused said he did not desire to go home yet. He did not seem argumentative, however. Lieutenant Evans then took the taxicab driver to one side and talked to him for a minute or two, telling him that he believed he could persuade the accused to go home without further argument. Returning to the taxicab the driver got in behind the wheel and as Lieutenant Evans was walking around the front of the car to get in "something took place" which he did not see. The driver then got out of the car again and refused to take his passengers any further saying that he "was tired of being manhandled" (R. 30, 31). He demanded \$3.00, claiming that amount was due him as his fare. The men in the taxicab refused to pay this (R. 32) and said it was excessive. The driver then called a policeman at whose suggestion the driver, the four passengers and Lieutenant Evans went with the policeman to the police station (R. 33). Lieutenant Evans denied being in the taxicab until he got in after the policeman had been called. He testified that he rode in the back seat to the police station and was never in the front seat (R. 100). At the police station one of the men in civilian clothes paid the fare claimed by the driver (R. 34); whereupon the driver and the three men who had been with accused left the station, leaving Lieutenant Evans and the accused there. The accused refused to go home with Lieutenant Evans in another taxicab, but finally agreed to permit Lieutenant Evans to call up accused's wife and ask her to come for him. She told Lieutenant Evans over the telephone that she could not come herself but would send somebody else (R. 35). After a short time Lieutenant Colson of the Military Police Detachment came to the station and made some inquiries as to why the accused and Lieutenant Evans were there (R. 36). Shortly after Lieutenant Colson left the station, Lieutenant Salzmann arrived and appears to have been insistent upon the accused and Lieutenant Evans going to his office. He told accused that he wanted him to go there and see Lieutenant Brewer. To this accused agreed and he and Lieutenant Evans drove with Lieutenant Salzmann to the Provost Marshal's office at Fort De Lesseps (R. 36, 37). In answer to a telephone call from Lieutenant Evans his wife called for him a few minutes later. Lieutenant Salzmann would not agree to let the accused accompany Lieutenant Evans and his wife to Fort Davis, saying that he preferred to have him go with Lieutenant Brewer. Accordingly Lieutenant Evans left Fort De Lesseps with his wife (R. 38). While Lieutenant Evans was at the Provost Marshal's office the accused had some argument with Lieutenant Salzmann

and was "slightly profane" (R. 42), using the terms "damn" and "God damn" quite freely and telling Lieutenant Salzmann that it was "a damned dirty trick" or a "damned dirty shame" to arrest Lieutenant Brewer again (R. 42-44). Lieutenant Evans was with the accused, roughly, from a little after 3:00 o'clock until about 4:30 o'clock (R. 49). He testified that he witnessed no disorder on the part of the accused in front of the Carlton or at the police station or in the military police office (R. 50, 51). On being recalled by the court, Lieutenant Evans testified that at the police station the accused said to witness that he believed he could whip the policeman who had brought them there and added, "Will you let me do it?" (R. 102). Witness laid his hand on accused's arm and persuaded him to keep quiet (R. 103).

The Chief of Police, Harmodio Arosemena, testified that he was at the police station when the accused arrived there on the afternoon in question (R. 70); that the taxicab driver claimed the accused had grabbed him by the neck (R. 71) and owed him \$3.00 but stated that all he wanted was his money and that he had no charge to make against the accused (R. 73, 74). When accused paid the \$3.00 the driver left (R. 73). Later, when Lieutenant Salzmann arrived, witness turned the accused over to him. Witness expressed the opinion that accused "had been drinking". He testified that when he told the accused who he was the accused attended to him and did what he told him to do (R. 74).

Police officer Pablo E. Prado was also present at the police station when accused was there with Lieutenant Evans and fixed the time of their arrival at about 3:30 o'clock in the afternoon (R. 96).

According to the testimony of Lieutenant Salzmann, he arrived at the police station at 4:55 o'clock and found the accused there, still drunk, waving his arms about, and with Lieutenant Evans and the Chief of Police on either side of him, trying to quiet him. Lieutenant Salzmann took the accused in his car to the office of the Provost Marshal at Fort De Lesseps. They were accompanied by Lieutenant Evans (R. 59). At the Provost Marshal's office the accused at times called the witness "all sorts of names" and at others apologized and said that the witness was a "good fellow". He asked what the clerk in the office was doing and remarked that he "could lick twelve like him" (R. 60). Sometimes he used profanity. He asked Lieutenant Salzmann to call up his wife, and when Salzmann declined to do so he said: "I bet you would be skunk enough to call Betty up." A few minutes later accused said that, if his wife came in and Lieutenant

Salzmann did not stand up, he, the accused, "would lick the hell out of" him (R. 60). Accused's conduct was "funny" and at times he made those present laugh (R. 63). At one time he called Lieutenant Salzmann a "cheap son of a bitch". He also made disparaging remarks to another man in the office concerning the military police (R. 63). At about 5:55 o'clock Captain Bell, in response to a telephone request from Lieutenant Salzmann, called at the Provost Marshal's Office and took the accused and Lieutenant Brewer away (R. 60, 62, 63). All told, accused was at the Provost Marshal's Office about 45 or 50 minutes (R. 69).

Corporal Howard W. Bowie testified that he was present when Lieutenant Salzmann came to the Provost Marshal's Office about five o'clock the afternoon of June 20, 1931 (R. 113); that accused's breath was alcoholic (R. 116); that his uniform was dirty and rumpled (R. 113); and that he was drunk. He further testified that accused called Lieutenant Salzmann a skunk and threatened to whip him and called witness a "puny son of a bitch" and said he could whip him (R. 114).

Corporal Jack Ray also was present and saw the accused at the Provost Marshal's Office (R. 118). He testified that accused was throwing his arms about and making "slurring remarks" and that he called Lieutenant Salzmann a skunk and threatened to whip him. He also made disparaging and vulgar remarks about the military police (R. 119). He referred once to Lieutenant Salzmann as an "old bald headed son of a bitch". Accused's white uniform was very dirty and wrinkled (R. 120), and he was staggering and drunk (R. 121).

Sergeant Albert W. Harber was also present at the Provost Marshal's Office on the occasion in question, heard accused talking loudly and, from his appearance, formed the opinion that he was drunk (R. 124).

5. The evidence establishes beyond doubt that accused, on the afternoon of June 20, 1931, at the various public places named in the specification, was so conspicuously drunk in uniform as to attract the attention of many persons including officers and enlisted men of the Army and civilians. As to his alleged disorderly conduct, or at least as to its degree, the evidence is not so clear. When first observed by Lieutenant Salzmann he was leaning against a wall outside the Tropic Bar obviously drunk; but there is no evidence of disorderly conduct at that time. When observed by Colonel Andruss and Lieutenant Young, a few minutes later near the Tropic Bar and across the street from Bilgray's Cafe, he was so patently drunk as to attract the notice of a number of persons, to draw a small crowd and to cause comment among

civilians; but his actions do not appear to have been particularly disorderly. According to Colonel Andruss he was gesticulating and arguing and was in "a sort of maudlin state". It is significant that when accused was first seen by Colonel Andruss, although no other officer appears to have been with him, his conduct was not such as to cause Colonel Andruss to interfere or even to speak to him; and when Colonel Andruss returned a few minutes later and saw Lieutenant Young with the accused, he considered him disorderly only in that he failed to comply promptly with Lieutenant Young's order or request that he enter an automobile. Lieutenant Young describes the accused at this time as "weaving about on his feet" in a gathering of some four or five persons among whom a loud conversation or argument was going on. Lieutenant Young testified that the accused was drunk but was not disorderly. He appears to have acquiesced readily in the Lieutenant's suggestion or request that he get into a taxicab and go home; and from the fact that he invited all present to accompany him, it would seem that he was in a good-natured mood.

There is no evidence of any disorderly conduct when he visited the Carlton Bar. Accused's conduct while under the influence of liquor, in going with supposedly enlisted men to a public bar and there drinking with them, was unmilitary but nothing took place which could be called disorderly. It is not clear whether at this time he had two or three companions. At any rate two of them claimed to be enlisted men and one had shortly before volunteered to take the accused home and take care of him and Lieutenant Young had left the accused with him. These men were sober and it appears that none of them drank strong liquor with the accused.

When seen by Lieutenant Evans in a taxicab near the Carlton Bar the accused was arguing with his companions about going to his home at Fort Davis. He objected to going and apparently wanted to leave the cab, while his companions were trying to persuade him to go home and one of them had his hand on accused's arm seemingly in an effort to keep him from getting out of his seat. He was talking more rapidly than usual but not very loudly and he made use of some profanity, but of no more offensive character than is often used by exemplary officers and others who are generally regarded as gentlemen. Lieutenant Evans testified that he witnessed no disorder on the part of the accused. The driver of the taxicab testified that, as the party in his car approached the Carlton Bar, the accused gave him contradictory instructions and a little later reached forward and grabbed his throat, tearing the front of his shirt. Although Lieutenant Evans was present at the time he did not see this incident. It does not appear from the testimony of Lieutenant Evans that accused showed any anger. It seems clear

that the taxicab driver was not injured and when he received the fare claimed by him he declined to make any charge or complaint against the accused. He testified that, at the time accused seized his throat, somebody in the cab told him to pay no attention, that accused was only joking. It is to be noted that the cab driver is the only witness who described this incident and, considering his testimony as a whole together with the testimony of Lieutenant Evans, who described the condition of accused at about the same time, it appears not improbable that accused intended no injury and, in his intoxicated condition, was merely trying to be playful.

At the police station it is true that accused remarked to Lieutenant Evans that he believed he could whip the policeman who had accompanied them to the station and asked Lieutenant Evans' permission to do so; but there is no evidence that he attempted any violence or in fact that he seriously contemplated an attack upon anyone. He promptly did what the Chief of Police told him to do and there is nothing in the testimony of any of the witnesses who were present at the police station, with the possible exception of Lieutenant Salzmann, to indicate any disorderly conduct there, beyond the fact that, as Lieutenant Evans states, accused was talking too much and used a considerable amount of profanity. Lieutenant Salzmann testified that when he entered the police station Lieutenant Evans and the Chief of Police were on either side of the accused endeavoring to quiet him; but in this Lieutenant Salzmann is not corroborated by either Lieutenant Evans or the Chief of Police. Lieutenant Evans testified that he witnessed no disorderly conduct on the part of accused while at the police station. It must be remembered too that the accused was not there by his own choice. He had gone there only at the insistence of the cab driver and the policeman who had been called on account of the dispute over the cab fare. It is not to be wondered at, under the circumstances, if accused showed some irritation, especially since he was under the influence of liquor at the time.

The accused went to the Provost Marshal's Office at Fort De Lesseps only because Lieutenant Salzmann insisted upon his doing so, notwithstanding the fact that Lieutenant Evans was with the accused who was then, apparently, in a tractable frame of mind and was waiting for a car from Fort Davis to take him and Lieutenant Evans home, and notwithstanding the further fact that the police authorities had no charge or complaint against the accused. This insistence of Lieutenant Salzmann as well as his attitude after he, the accused, and Lieutenant Evans had reached the Provost Marshal's Office, was well calculated to irritate and annoy the accused and to provoke disorderly conduct on his part. There is evidence that while being detained

by Lieutenant Salzmann at the Provost Marshal's Office, the accused did use profane and even disgustingly vulgar and abusive language; but beyond this no particularly disorderly conduct is shown. In fact it appears probable that, though irritated and excited, accused was not exceedingly angry and that he had no intention of assaulting anyone. Certainly he made no assault. As Lieutenant Salzmann says, he was quite apologetic at times and was even "funny", making those present laugh.

6. Although accused is alleged to have been drunk and disorderly at several places, his condition and conduct at all these places are parts of one transaction and constitute one offense.

The specification is laid under the 95th Article of War which denounces "conduct unbecoming an officer and a gentleman" and makes it mandatory upon the court, upon finding an officer or cadet guilty of such conduct, to adjudge just one sentence, namely, dismissal. The court-martial is allowed no discretion as to punishment under this Article. In the first instance it was for the court, next it was for the reviewing authority, and now it is for the President, as confirming authority, to determine whether or not it has been proved beyond reasonable doubt that accused's condition and actions on the afternoon in question, under all the circumstances shown, amount to the reprehensible and disgraceful conduct contemplated by the 95th Article of War.

The Manual for Courts-Martial (Section 151, page 186), referring to the conduct denounced by the 95th Article of War and citing Winthrop as authority, contains the following:

"The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or 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."

In Colonel Winthrop's discussion of "conduct unbecoming an officer and a 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 unbecoming 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." (Reprint, p. 711)

* * *

"The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behavior complained of, or rather his worthiness, morally, to remain in it after and in view of such behavior, is perhaps the most reliable test of his amenability to trial and punishment under this Article." (Reprint, p. 712)

Colonel Winthrop quotes General McClellan in G.O. 111, Army of the Potomac, 1862, as follows:

"These words, ('conduct unbecoming,' &c.,) imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self respect." (Reprint, p. 712)

From the authorities quoted above it appears that no conduct can constitute a violation of the 95th Article of War unless it be such as to involve moral turpitude on the part of the officer concerned, such as to stamp him as one morally unfit to remain an officer of the Army and as one with whom his brother officers cannot associate without loss of self respect. In the opinion of the Board of Review the evidence in this case falls far short of proving that the conduct of the accused on the occasion in question brands him as being so lacking in moral fibre as to be unfit to remain in the service or as to make it impossible for other officers to associate with him without loss of self respect. Acts prosecuted and punished under the

95th Article of War are, as a rule, or a clearly dishonorable character, such as acts of fraud or dishonesty, knowingly making a false official statement, opening and reading another's letters without authority, giving worthless checks, and the like. However, the Manual for Courts-Martial (Sec. 151) mentions among instances of violation of this Article "being grossly drunk and conspicuously disorderly in a public place"; and Colonel Winthrop cites "drunkenness of a gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Reprint, p. 717).

It is not considered by the Board of Review that the evidence shows accused guilty of any "peculiarly shameful conduct or disgraceful exhibition of himself". What constitutes "being grossly drunk" or "drunkenness of a gross character" or what amounts to being "conspicuously disorderly" is difficult to define. In this case the accused was obviously drunk and in the presence of military inferiors. Also, he appears to have been somewhat boisterous and, to this extent, disorderly. The evidence, however, shows that he talked coherently and was able to walk and to get into an automobile without assistance, and, with the possible exception of the incident of seizing the cab driver's throat, that he indulged in no violence. 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 Board is not unmindful of the fact that it was primarily for the court to determine whether or not accused's proved conduct was of the character contemplated and denounced by the 95th Article of War; and great weight should be accorded the finding of the court on this issue. The weight to be given such finding in this case, however, is greatly lessened by the fact that immediately after the court had, by a two-thirds majority, found the accused guilty of violation of the 95th Article of War, thus in effect holding him morally unfit to remain an officer of the Army, nine of the eleven members of the court joined in a "Petition for Clemency", requesting that the sentence be commuted to a reduction of 400 files on the promotion list and a restriction to post limits for three months. Thus it appears that the nine signers of this petition, notwithstanding the court's finding that accused had violated the 95th Article of War, did not believe him to be morally unfit to remain an officer and to associate with other officers. The petition for clemency was based upon the following:

(1) all the disorders of a disgraceful nature occurred after a commissioned member of the Provost Marshal's Office had observed the accused in a drunken condition but had allowed him to depart in company with

an unknown civilian upon the latter's statement that he would take care of the accused, and the signers of the petition believed that, had the officer of the Provost Marshal's Office taken charge of the accused or turned him over to a reliable party, the actions of accused which resulted in his sentence of dismissal would not have occurred; (2) accused had World War service both in this country and overseas, extending from his graduation from the United States Military Academy in August 1917 to May 1920; (3) accused's service in the Panama Canal Department from the date of his arrival, January 15, 1931, to the date of his offense, had been very efficient; and (4) the record of his service from the date of his graduation from the Military Academy up to the present time had been one of uniform excellence.

7. Since it is within the power of the President as confirming authority to approve only so much of the findings as involves a finding of guilty of the specification in violation of the 96th Article of War and to commute the sentence, it is deemed appropriate to invite attention to certain occurrences prior to the trial as shown by the accompanying papers, including the department judge advocate's review of the record of trial. These occurrences may be summarized as follows:

The department inspector, Colonel Raymond W. Briggs, I.G.D., after a full investigation of the conduct which subsequently led to the trial of the accused, recommended that the accused be not tried but that disciplinary action be taken under the 104th Article of War. This recommendation was disapproved by the department commander. Thereupon Colonel Briggs preferred charges under the 96th Article of War. The department commander then directed that the charges be disposed of by no authority inferior to himself. Thereupon the charges under the 96th Article of War were investigated, as provided by the 70th Article of War and the Manual for Courts-Martial, by another officer, who recommended that the accused be reprimanded under the 104th Article of War. Accused's regimental commander, Lieutenant Colonel James B. Woolnough, concurred in this recommendation, stating that the accused had expressed his willingness to submit to any punishment that might be imposed upon him under the 104th Article of War. The department judge advocate recommended trial for violation of the 96th Article of War, but the department commander directed that the charges be amended to allege a violation of the 95th Article of War, which was done. Accordingly, the accused was tried for a violation of this Article.

The circumstances outlined above, which brought about the trial for "conduct unbecoming an officer and a gentleman", together with the above mentioned "Petition for Clemency" by nine members of

the court, serves to fortify the Board of Review in its opinion that the evidence in this case does not establish beyond reasonable doubt that accused was guilty of the character of conduct contemplated by the 95th Article of War.

8. Attached to and bound with the record of trial is a "Petition for Clemency", addressed to the reviewing authority, signed by the accused and dated July 18, 1931. It is based principally upon accused's record of efficiency as evidenced chiefly by his efficiency reports. Among the papers accompanying the record of trial is another "Petition for Clemency", signed by the accused, dated July 31, 1931, and addressed to The President, through The Judge Advocate General, for the Board of Review, and an addition thereto dated August 6, 1931. All of these communications have been given careful consideration by the Board of Review. In them the accused raises a few legal questions requiring comment.

He raises the point that the charges were not reinvestigated after they had been amended at Headquarters, Panama Canal Department, by adding to the specification as originally prepared the words "at or near the Colon Police Station, and at or near Fort De Lesseps", and by laying the charge under the 95th instead of the 96th Article of War. The 70th Article of War requires "a thorough and impartial investigation" of charges before reference thereof for trial. The investigation of the charges in this case as originally drawn included a thorough and impartial investigation of the subject-matter of the charges as amended. A new investigation would have been but a waste of time and effort, serving no useful purpose and was not required. The changing of the charge from the 96th to the 95th Article of War was authorized and did not preclude the court from finding the accused guilty under the former rather than the latter Article.

Accused contends that the department commander's action in directing that no authority inferior to himself should dispose of the charges was unauthorized in so far as its effect was to deprive accused's commanding officer of the power to dispose of the case under the 104th Article of War. It is believed that the right of a superior commanding officer to order his military inferiors not to dispose of a given case, thus reserving disposition thereof to himself, is a necessary attribute of command without which he might become powerless to maintain discipline.

Accused insists that the court committed errors in the admission and exclusion of evidence. These alleged errors have been

carefully considered and none appears to have injuriously affected the substantial rights of the accused.

He contends that altercations between the president of the court and the trial judge advocate were detrimental to his interests. The record does not indicate that such was the case.

He complains of prejudice and animosity towards him on the part of the trial judge advocate. If there was any such prejudice or animosity, which is doubtful to say the least, it does not appear to have injured the accused.

He contends that there is no evidence that he even approached Bilgray's cafe. The evidence shows his condition and conduct near the Tropic Bar and that the Tropic Bar is across the street from Bilgray's cafe.

Accused also complains that repeated mention of his name in the case of Lieutenant Brewer, tried by substantially the same court just before the trial of accused, may have prejudiced the court against him and caused them to prejudge his case. Examination of the record in Lieutenant Brewer's case, on file in this office, discloses that his offense was not connected with that of the accused and that the incidental mention of accused's name during the trial in that case could not have had the effect of prejudicing the court against the accused.

9. At the time of trial accused was 37 years of age. His service is shown by the Official Army Register as follows:

"Capt. of Inf. U.S.A. 23 Aug. 18;
accepted 21 Sept. 18; hon. dis. 15 Mar.
20. — Cadet M.A. 15 June 14; 2lt. of Inf.
30 Aug. 17; 1 lt. 30 Aug. 17; capt. 13 Nov.
20; 1 lt. (Nov. 18, 22); capt. 17 Apr. 27."

10. The court was legally constituted. Except as hereinabove noted, the record of trial discloses no errors or irregularities injuriously affecting the substantial rights of the accused. For the reasons hereinabove indicated, the Board of Review is of opinion that the record of trial is legally sufficient to support only so much of the findings as finds the accused guilty of the specification in violation of the 96th Article of War, and legally sufficient to support the sentence and warrants confirmation thereof. A sentence of dismissal is mandatory for violation of the 95th Article of War and is

authorized for violation of the 96th Article of War, but the President is authorized to extend clemency by commuting the sentence to such lesser punishment as he may deem appropriate under all the circumstances of the case. The Board of Review considers that an appropriate sentence would be that recommended by nine of the eleven members of the trial court, viz: reduction 400 files on the Promotion List and restriction to post limits for three months.

E. P. McVey, Judge Advocate.

R. S. Munn, Judge Advocate.

W. H. Egan, Judge Advocate.

Military Justice
CM 196426

1st Ind.

War Department, J.A.G.O., NOV 5 1931 - To The Secretary of War.

1. The record of trial and accompanying papers in the case of Captain William R. Fleming (O-8643), 14th Infantry, together with the foregoing opinion of the Board of Review, are submitted herewith, pursuant to Article of War 50 $\frac{1}{2}$, for the action of the President.

2. The Board of Review is of the opinion that the record is legally sufficient to support the sentence but that the offense committed was not a violation of Article of War 95, for which dismissal is mandatory, but a violation of Article of War 96 and considers that an appropriate sentence would be the loss of 400 files on the Promotion List and restriction to post limits for three months. In view of the evidence I am constrained to disagree with some of these views.

3. Undisputed evidence in the case of Captain Fleming shows that in the middle of a week-day afternoon, on a business street of Colon and in front of a saloon, this officer was so intoxicated as to cause eight or ten people to gather around him and others passing by and in nearby business places to have their attention directed towards him. Some of these people were enlisted men. The officer was in uniform but without a cap. He was doing much talking and arguing. Lieutenant Colonel Andrus (R. 22) when passing at a distance had his attention called to the officer by reason of his appearance and a passing lady and gentleman said to the witness "That officer is drunk, and they have a crowd around there." Lieutenant Young of the Military Police noted the situation and asked Captain Fleming to go home (R. 11). To this the latter agreed and invited those present to go with him. He and two or three other men, of whom two claimed to be soldiers, then entered a taxicab and drove off. Instead of going home Captain Fleming accompanied his companions to two bars where he drank with them, the Captain taking whiskey. Apparently this drinking was done on the street in the taxicab as the officer directed the driver to "go ahead" after he had upset the waiter's tray and the glasses "fell to the ground" and were broken (R. 80). Due to contradictory orders by the officer as to stopping and proceeding and being uncertain as to where he was to take his passengers, the taxicab driver stopped at the curb

and an argument ensued. Another officer (Lieut. Evans), who was nearby with his wife, had his attention called to Captain Fleming by a waiter and tried to quiet such officer and get him to go home offering to accompany him. At this time, according to the driver, Captain Fleming who sat in the car immediately behind the driver suddenly grasped the latter by the throat. Thereupon the driver refused to drive the party further and demanded payment of \$3 as his fare. When this was refused on the ground that the amount claimed was excessive he called a civil policeman with whom all went to a police station. There through the efforts of Lieutenant Evans the affair was settled by payment of the taxi driver's bill and no police charge was made. Some time later, while Lieutenant Evans and Captain Fleming were waiting at the station for a car to take them to the latter's home, Lieutenant Salzman of the Military Police called at the station and insisted upon taking Captain Fleming to the office of the Provost Marshal at Fort De Lesseps, and from there the accused officer was sent home to Fort Davis. All witnesses agree that Captain Fleming was drunk, talkative, and profane. At the Provost Marshal's office and in the presence of enlisted men and other officers he repeatedly called Lieutenant Salzman a "skunk", called him a "cheap son-of-a-bitch" (R. 67) and in speaking to one of the enlisted men there present referred to such lieutenant as a "bald headed son-of-a-bitch" (R. 120) and said to Corporal Bowie that he, Bowie, was a "puny son-of-a-bitch" and that he could "whip" his "ass" (Bowie, R. 114). He made the same remark as to whipping to Lieutenant Salzman (R. 119) and to Corporal Crowe referred to the Military Police as "the God-damned chicken shit military police" (R. 119). These enlisted men belonged to the military police. Previously the accused officer had referred to the taxicab driver as "a God-damned nigger" (R. 53).

It is clear that Captain Fleming was drunk in uniform on the public business streets of Colon and so drunk as to be unusually talkative and profane and that his condition and actions were apparent to many people and attracted much attention; further that his conduct was continued at the police station and at Fort De Lesseps and at the latter place he grossly insulted a brother officer and made derogatory and insulting remarks about the military police service, this in the presence of three or more enlisted men of that service, and in the presence of several officers.

4. The Board of Review concludes from the evidence that while Captain Fleming was drunk and somewhat disorderly he was not shown to have been grossly drunk or conspicuously disorderly,

and that his conduct was not "unbecoming an officer and a gentleman" within the meaning of the language of Article of War 95. I cannot indorse such conclusions. 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. It is clear that the officer while in the uniform of his grade was drunk upon a public street in mid-afternoon and in the presence of many people who could not but observe his condition. It is also clear that he was openly associating and drinking with enlisted men, was talkative and profane. In addition to such reprehensible and disgraceful conduct, and in the presence of enlisted men, he grossly insulted a brother officer then in the performance of his duty by the use of the most scurrilous epithets directed towards such officer and likewise applied similar epithets to the enlisted men and the service in which they were engaged. In my opinion such conduct was disorderly, grossly unbecoming in any one and particularly so in the case of an officer and a violation of Article of War 95.

5. The views above expressed are believed to be consistent with Winthrop's definition of the meaning of Article of War 95, which definition is quoted in the opinion of the Board of Review. In pertinent part that definition is as follows:

"The conduct contemplated is * * * 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."

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.

6. The Board of Review is of the opinion that commutation of the sentence would be appropriate. I cannot concur in this opinion. The conduct of this officer has been such as to warrant his dismissal and a lesser penalty would do less than justice for his offense and not be in the best interests of the military service. Due notice has been taken of the recommendation of his brother officers in the Panama Department including nine of the eleven members of the court-martial that convicted him, but such recommen-

dations and the excellence of the officer's military service otherwise, should not be permitted to affect the question of punishment in a case of this character. This officer is 37 years of age and has had fourteen years of service as an officer of the Army in addition to his training at West Point and his open disgrace of himself and of the military service cannot be charged to youth and inexperience.

The efficiency ratings of Captain Fleming disclose that many of his superior officers had a high opinion of his professional qualifications but his excessive use of intoxicating liquors has upon several occasions been officially noted. Sent from the United States to the Army of Occupation in Germany in October, 1919 (his first service abroad) he was repeatedly reported as inefficient; was reported as noticeably intoxicated at a field meet in December, 1920, this in the presence of enlisted men; hospitalization for alcoholism was necessary in February, 1920; and in May, 1920, he was relieved and returned home as undesirable.

While serving at Plattsburg Barracks in 1921, the post commander found it necessary to admonish him for objectionable habits, but failed to specify the nature of such habits. While on duty at West Point in 1927, the Commandant thereof requested the officer's relief on account of drunkenness. After transfer to Panama in January, 1931, his habits as to the use of liquor were such as to cause his regimental commander in March, 1931, to admonish him relative thereto, and there was improvement in the officer's conduct for a time but a second admonition by such regimental commander, and for the same reason, was administered about noon, June 20, 1931, (Report of Inspector, Witnesses, Lt. Col. Woolnough, page 2, Major Paschal, page 2, Captain Fleming, page 6) the day of the intoxication and conduct forming the basis of these charges. Captain Fleming entered upon a drunken spree immediately after receiving such admonition. It thus appears that excessive use of intoxicating liquor has, on two occasions, caused Captain Fleming's commanding officers to request his relief from duty and on at least two occasions admonitions relative to drinking were deemed necessary. His drunkenness of June 20, 1931, immediately after being admonished as to drinking, was but a further and open demonstration of the officer's drinking habits which neither admonition nor any sense of duty or propriety could change. For the good of the service there should be no condonation of the officer's offense and

the sentence adjudged should be carried into effect. Such action is recommended.

7. There is inclosed herewith for your signature a draft of a letter to the President consistent with the foregoing should the views expressed herein meet with your approval. There is also inclosed for your signature a draft of an alternative letter to the President consistent with the views expressed by the Board of Review in its opinion in case those views meet with your approval, and appropriate drafts of action by the President whichever view may be approved.



Blanton Winship,
Major General,
The Judge Advocate General.

8 Incls.

- ✓1. Record of trial.
- ✓2. Op. of Bd. of Rev.
3. Let. to Pres. of Bd.
of Rev.
4. Let. to Pres. of The
J.A.G.
5. Action of Bd. of Rev.
6. Action of J.A.G.
- ✓7. Appeal for clemency.
- ✓8. Addition to Appeal for
clemency.

10 Received A. G. C NOV. 9 1937



to become due, 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 forwarded the record pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. To sustain the conviction in this case it would be necessary for the evidence to show first, that the accused was enlisted at the time and place alleged claiming that he had never been convicted of a felony; second, that he subsequently received pay and allowances under his enlistment; and third, that on or about June 5, 1929, he was convicted of a felony, to wit, breaking, entering and larceny, by the Superior Court of Hampshire County, Massachusetts. The first two points, namely, the enlistment as alleged and the receipt of pay and allowances, are fully established by the evidence and are not in dispute (Ex. A; R. 8, 11). To establish the third point, namely, the alleged conviction, the prosecution, without objection by the defense, introduced (R. 8) as Exhibit B a letter reading as follows:

"CLERK OF THE COURTS,
Northampton,
Massachusetts.

June 24, 1931.

Charles F. Colson,
1st Lieut., Fifth Infantry,
Personnel Adjutant,
Fort Williams, Maine.

Dear Sir:

The receipt of your letter, dated June 20, 1931, is acknowledged.

As to the case of Myron Rodak, indictment No. 1602: John Boj and Myron Rodak both of Hadley in the County of Hampshire, State of Massachusetts, on the third day of April, 1929, broke and entered the cottage of Robert Verrill at Hadley, County of Hampshire, Massachusetts, with intent to commit larceny and stole therefrom a blanket, a pillow, a hunting knife, a paring knife, and a spoon hook, of the value in all of seven dollars, the property of Robert Verrill.

To this indictment Boj and Rodak plead guilty June 5, 1929.

Boj was sentenced to the state prison at Boston for not more than seven nor less than

five years. Rodak was put on probation. Case as to Rodak was placed on file June 19, 1930.

Very truly yours,
Haynes H. Chilson,
Clerk."

This letter does not purport to be a transcript of any record, is not properly authenticated, does not state by what court "Myron Rodak" therein referred to was convicted and does not show that the person signing the letter was the clerk of that court. It cannot even be regarded as secondary evidence and, in the opinion of the Board of Review, is of no probative value. It is true that the accused in his testimony admitted that he was the person referred to in the letter (R. 11), and that he had a "civil court record" (R. 9, 12, 13), and claimed that his real name was Marion Rodak but that he had been known in school as Myron (R. 10-12). He did not, however, admit the truth of the statements contained in the letter. All this, in the opinion of the Board of Review, falls far short of establishing the alleged fact that the accused had been convicted of a felony; and there is no other evidence in the record to prove the allegation.

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

J. P. McChesney, Judge Advocate.

D. P. ..., Judge Advocate.

Mark E. ..., Judge Advocate.

