OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 4

1932 - 1933

IC
16
B63
v. 4

PROPERTY OF U. S.

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume IV

including

CM 199315 to CM 200704

(1932-1933)

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1944

01945

CONTENTS OF VOLUME IV

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

CM 199315

OCT 22 1932

| | | |
|---|---|---|
| UNITED STATES | ) | PHILIPPINE DEPARTMENT |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Fort Santiago, Manila, P.I., July 20-21, 1932. Dismissal. |
| | ) | |
| Second Lieutenant CHARLES A. LYNCH (O-17773), Coast Artillery Corps. | ) | |

---

OPINION of the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates
ORIGINAL EXAMINATION by WOOLWORTH, 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 Second Lieutenant Charles A. Lynch, Coast Artillery Corps, did, at Manila, P. I., on or about June 18, 1932, assault Mrs. Frederick A. Ward, by unlawfully throwing the contents of a glass containing liquor upon her, the said Mrs. Frederick A. Ward.

Specification 2: In that Second Lieutenant Charles A. Lynch, Coast Artillery Corps, did, at Manila, P. I., on or about June 18, 1932, treacherously and without provocation, strike with his fist and knock down, Major William B. Duty, Philippine Scouts.

Specification 3: In that Second Lieutenant Charles A. Lynch, Coast Artillery Corps, did, at Manila, P. I., on or about June 18, 1932, treacherously

and without provocation, strike with his fist and knock down, Second Lieutenant Frederick L. Anderson, Air Corps.

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

Specification 1: In that Second Lieutenant Charles A. Lynch, Coast Artillery Corps, was, at Manila, P. I., on or about June 18, 1932, drunk and disorderly.

Specification 2: (Finding of not guilty.)

Upon arraignment the accused entered a special plea as to Specification 2, Charge I, his counsel stating it as follows:

"It is clear they intended to charge a simple assault in the second specification as in the first one. It was all right in the first specification and they used the words that should go with a simple assault charge. They make a departure from the regular form in the second specification, putting in words that make his act very vague. He is entitled to know the form of the charge against him. If it is simple assault, why not charge it as such? The accused suggests that the specification be amended."

The same plea was entered in regard to Specification 3 of Charge I. The court overruled the plea as to each specification. The accused then pleaded not guilty to all specifications and charges. He was found not guilty of Specification 2, Charge II (false sworn statement to an Inspector General), but guilty of all other specifications and charges. 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 special pleas entered by the accused were properly overruled. The specifications clearly and precisely state military offenses, there is no apparent error in names, dates, places, etc., nor other obvious error, and the court, therefore, would not have

been justified in amending the specifications.

4. Such evidence as relates only to Specification 2 of Charge II, of which the accused was found not guilty, will not be considered in this opinion.

5. In order to obtain a picture of the situation which brought about the trial of the accused, it should be stated that the undisputed evidence discloses that the accused arrived at Manila, Philippine Islands, on the 17th of June, 1932, on the transport from Hawaii; that the later hours of that day constituted what was known as "Transport Night" at the Army and Navy Club in Manila; and that the offenses are alleged to have taken place there in the early hours of the morning of June 18, 1932.

Evidence as to Specification 1, Charge I.

Major William B. Duty, Philippine Scouts (Air Corps), testified that about 1:00 or 1:30 o'clock on the morning of June 18, 1932, he and Captain Doherty, Air Corps, Captain Ward, Philippine Scouts, Mrs. Ward, and Mrs. Witman were sitting around a "chow bench" in a corridor of the Army and Navy Club at Manila, occupying a settee and chairs around the bench (R. 8). Witness and Captain Doherty had joined the others about twenty minutes before accused appeared (R. 12). Captain Ward, Mrs. Witman and Mrs. Ward were seated on the settee (R. 9) and witness and Captain Doherty in chairs on the other side of the chow bench. The accused entered the room and came up to the party and then sat down on the arm of the settee for a minute or so, finally taking a seat on the settee to the left of Captain Ward. Almost immediately thereafter Captain Ward brushed some cigarette ashes from his clothing, but witness did not know whether the ashes were from Captain Ward's cigarette or from a cigarette of the accused, although he did not remember seeing accused with a cigarette (R. 9). About this time accused nudged Captain Ward with his elbow, whereupon Captain Ward stood up and made a remark to the effect that "there isn't room enough for both of us here. I will move over to another seat", which he did, passing to the rear of Captain Doherty and witness and occupying a chair at the opposite end of the chow bench from accused. Almost immediately after Captain Ward had seated himself, accused picked up a glass

half full of "Captain Ward's drink" and threw it in the direction of Captain and Mrs. Ward, most of the contents falling on Mrs. Ward (R. 10). All the members of the party were sober, but, in the opinion of witness, the accused was drunk, as he staggered and had all the appearances of being drunk. Witness thought accused was probably so intoxicated that he did not know what he was doing (R. 11,18). Witness and Captain Doherty at the time of the occurrence had ordered one drink and consumed about half of it when accused came up (R. 12). Witness did not know at the time that relations between Captain Ward and accused were strained when the former left the settee, as witness and Captain Doherty were discussing the recent arrivals on the transport and were not paying particular attention to what was going on (R. 9,13-15). He did not know at whom accused threw the drink but stated it could have been either at Captain Ward or Mrs. Ward. Most of the liquid fell on Mrs. Ward (R. 15). Witness did not hear any profanity or cursing, nor did he hear Captain Ward use the expression "God damn" toward the accused or call him a "bastard", but he did notice that accused appeared to be angry after Captain Ward moved from his position on the settee and occupied the vacant chair at the end of the bench. Accused's attitude changed and he looked toward Captain Ward with a sort of a scowl on his face (R. 16,17). All of the officers present were in civilian clothing (R. 18).

Captain Frederick A. Ward, Philippine Scouts (Quartermaster Corps), testified that he was a member of the party described by Major Duty, that between 1:00 and 1:30 the accused came in and stood in front of the party and then sat down on the arm of the couch next to witness, and that in sitting down accused fell against witness and spilled some cigarette ashes on his coat. Witness thereupon said to accused: "Look what you are doing", or something to that effect, whereupon accused arose and then sat down again and pushed against witness with his elbow. Witness moved slightly over on the couch and accused crowded in beside him and continued to push him, whereupon witness said: "Apparently there isn't room for both of us on this couch" and arose and moved around the chow bench and sat in a chair some distance away. Within a few seconds of the time witness took his new seat facing toward accused, the latter threw the contents of a glass containing some "Scotch and soda" in the general direction of witness, the greater part of the liquid falling

on Mrs. Ward. In the opinion of witness, accused was drunk at the time he joined the party and, so far as witness knew, no member of the party invited him to join it (R. 26,27). Witness stated that all the other members of the party were sober (R. 28). In the opinion of witness the accused's action in spilling cigarette ashes upon him was not intentional but was because of his drunkenness, which was also the cause of accused's nudging witness to such an extent that he resented it and occupied another seat. He did not understand why accused threw the liquor, but believed that the liquor was thrown at him and not at Mrs. Ward, who had done nothing to arouse his resentment. Witness had had some drinks during the day, but did not think his recollection of events was cloudy. He denied that he cursed the accused or initiated the charges against him. So far as witness knows, no member of the party asked accused to join it, nor did he or Mrs. Ward know the accused at the time he did join the party (R. 33).

Captain James S. Doherty, Air Corps, testified that, at the time described in the testimony of Major Duty, he and Major Duty saw Captain Ward, Mrs. Ward and another lady now known to him sitting on a settee, and at Captain Ward's invitation they joined the party. About five minutes later accused joined the party. Witness did not invite him to join it nor did he hear any other member of the party invite him. While witness was engaged in conversation with Major Duty, he saw some ashes spilled on Captain Ward's blouse, upon which Captain Ward arose and brushed off the ashes, and some words passed between Captain Ward and accused. He did not hear what was said by Captain Ward but noted that accused resented it. Witness could not state whether accused deliberately threw the contents of a glass on Captain Ward or whether this resulted from accused arising to change seats, Captain Ward at the time being seated about the center of the settee. Due to a bilious attack, witness during the day had perhaps one Martini cocktail and one-half of a glass of Scotch whisky and soda, and was sober, as were also Major Duty and Captain Ward. The condition of Mrs. Ward and Mrs. Witman was not known to witness, but accused, in his judgment, was very drunk (R. 41-43).

Mrs. Frederick A. Ward, wife of Captain Ward, testified that she was present at the time and place described by Major Duty; that

accused, dressed in civilian clothes, came into the room and then came over, staggering, and put his hand on the arm of the chair, or leaned his body against the chair, to get his balance, and in doing so knocked cigarette ashes upon Captain Ward's suit, witness not knowing whether it was Captain Ward's cigarette or a cigarette held by the accused; that accused stood up for a second or two, or tried to stand up, and then sat down in the seat beside Captain Ward, who said to him, "If you want to sit here, all right". Captain Ward then got up and went around the other side. Captain Ward had not been sitting in his new seat more than fifteen or twenty seconds when accused picked up the glass that had been Captain Ward's and threw the balance of the drink at Captain Ward, although most of it went on witness and Mrs. Witman. Accused was drunk, but witness and all the other members of the party were sober. Mrs. Ward stated that she did not see anyone provoke accused in such a way as to cause him to throw liquor nor did she hear any member of the party use any profane or vulgar language toward accused while they were all seated around the chow bench (R. 34-36,39,40).

Second Lieutenant Frederick L. Anderson, jr., Air Corps, testified that as he was passing through the Army and Navy Club he saw accused sitting in a little alcove and stopped to say "hello" to him, and after he had been there just a few seconds he saw accused throw a glass of liquor "in the general direction to his right" and that the liquor hit either Captain Ward or some lady, or possibly both. He did not hear Captain Ward say anything to accused just prior to the episode involving the throwing of the contents of the glass. The witness did not have an opportunity to observe the condition of the members of the party prior to the drink-throwing episode but did converse with Major Duty and Captain Doherty shortly afterwards and they were sober then, while in his opinion accused was drunk. He did not think that accused knew what he was doing (R. 19-22,76).

Mrs. Clark C. Witman, testifying for the defense, stated that on the night of June 17-18, 1932, she was at the Army and Navy Club with Captain and Mrs. Ward as their guest, and that later Major Duty and Captain Doherty joined them at Captain Ward's invitation; that accused, whom she had not seen prior to that night, joined the party about half an hour later; that when she first saw him he was standing at the end of the settee next to Captain Ward looking very

lonesome and that she thought he had just got off the transport and did not know anyone, so she said "hello", shook hands with him and held her hand there a few minutes and accused sat down on the settee. She stated that at the time Captain Ward and she were sitting on the settee, and just before accused joined them, Captain Ward had passed some unpleasant remark which she could not remember. At the time accused sat down the very end of his cigarette brushed Captain Ward's hand and Captain Ward jumped up and said, "God-damn it! Why don't you watch what you are doing", and then crossed over and sat in a chair on the other side of the settee. Conversation continued for about ten minutes although she could not remember its subject as she was wondering if there was to be any unpleasantness. She next heard Captain Ward say to the accused, "God-damn it, there is not room on this party for both of us, so you shove off". At that accused "picked his drink up as if without thinking and he snapped it at Captain Ward, or in that direction". Witness leaned forward at that time and the liquor hit her on the side of the face. A few drops may have splashed on Mrs. Ward but none on Captain Ward (R. 60-62). Witness was convinced that when she first saw accused that night he was sober and she did not think he was drunk when he threw the liquor, his reaction to Captain Ward's remark being the same reaction she would have had (R. 64-65). Recalled the next day as a witness for the defense, Mrs. Witman testified that prior to the throwing of the liquor Captain Ward made certain remarks to accused, that she could not recall the first remark, but she knows that one word in that remark was "bastard". The next remark was "God-damn it! Why don't you watch what you are doing". The third one was "God-damn it, there is not room on this party for both of us, so you shove off". She feared that trouble would result from Captain Ward's remarks and his attitude and expressions and the way he flounced out of the settee and over to the chair. The witness stated that all the remarks testified to by her were made prior to the throwing of the liquor by the accused (R. 99-101).

Second Lieutenant Frederick L. Anderson, jr., Air Corps, recalled as a witness for the court, testified that when Captain Ward, after the liquor-throwing incident, told accused to get out of there he used the word "cad" or "cur"; that as witness recollected the expression, Captain Ward's words were, "You get out of here,

you dirty cad, or cur", but that he did not hear the words "bastard" or "God-damn" spoken (R. 78). Upon reexamination by the defense, he expressed the opinion that the word used by Captain Ward could not have been "bastard", that he was pretty sure it was not that word, but that he was not absolutely sure. Being specifically asked by a member of the court if it was possible that he had misunderstood cur or cad for bastard, the witness replied, "I do not believe it, sir. In my opinion it was one of those two words", and, upon further examination by the defense, said that it was possible that the word "bastard" was used, but that he did not believe it was used (R. 80-81).

Captain Frederick A. Ward, Philippine Scouts (Quartermaster Corps), recalled as a witness for the court, stated that he did not think there was anything in his words or actions at which the accused could have properly taken offense; that, to the best of his recollection, after the contents of the glass were thrown, he told accused to "shove off and get out of here"; that he did not use the word "cad" nor the word "cur" nor the word "bastard". He further testified that when accused approached the settee witness was sitting on Mrs. Witman's left (in other words, between Mrs. Witman and accused), but that he did not see Mrs. Witman extend her hand to accused nor hear her ask him to sit down (R. 81-83).

Second Lieutenant Charles C. Cloud, 60th Coast Artillery, a witness for the defense, testified that he saw accused at the Army and Navy Club on Transport Night at about two o'clock in the morning and talked to him, and that accused talked in a rational manner although he showed the effects of having been drinking (R. 106,107).

Second Lieutenant Clifton L. MacLachlan, 59th Coast Artillery, a witness for the defense, testified that he saw accused at about a quarter of two o'clock of the morning of June 18th and had a little conversation with him, and that accused talked "just as intelligently as one usually talks", but that he supposed accused had had a few drinks. However, he appeared in good possession of his faculties. This must have been before the disturbance as witness did not hear about it until several days later (R. 108).

The prosectuion and the defense stipulated that if Second Lieutenant Ford L. Fair, Air Corps, were present he would testify in substance that he was at the Army and Navy Club between one and two o'clock of the morning of June 18, 1932, that he was not a member of the party described in the previous testimony and that he did not introduce the accused to the members of that party.

The only other material testimony affecting Specification 1 of Charge I is that given by accused himself. In order that his story of all the events of the evening may be presented as a whole, so much of his testimony as relates to his drunkenness and to the assault upon Mrs. Ward will be included hereafter in the statement of his testimony as to the other offenses.

Evidence as to Specifications 2 and 3, Charge I.

Major William B. Duty, Philippine Scouts (Air Corps), testified that immediately following the incident of the throwing of the liquor Captain Doherty stood up and placed himself generally between Captain Ward and accused, that witness stood up and said to accused, "All right fellow, let's get out of here", and that accused went out of the room with him, passing through the small corridor into the larger corridor where he and accused talked "for approximately a minute". Witness suggested to accused that to avoid trouble he go home and accused assented to that suggestion, and then "without warning or provocation" struck witness in his face, knocking him to the floor. At the time of this battery the arms of witness were down by his side. Witness fell to the floor on his hands and knees in a dazed condition, his nose bleeding badly from a cut. He heard someone say, "Come on, you know me, let's get out of here", and turning around he saw accused waving his arms in the air, striking out wildly, and saw three or four men attempting to pin his arms to his side. Accused was taken to the ladies' entrance and placed in a car and left the club (R. 10,11). On cross-examination, witness stated that he did not strike accused nor did he see anyone else strike him, nor did he see accused strike anyone other than himself (R. 16). Upon being recalled as a witness for the court, Major Duty testified that when he suggested to accused that he go home and not have any trouble in the club, accused said "All right", and that witness was about to turn and leave him and rejoin the party when accused struck him between the eyes without warning or pro-

vocation, cutting his nose, causing it to bleed, and knocking him to the floor. He repeated that while he was still dazed from the blow and half-faced toward where accused had been he heard someone say to accused, "Let's get out of here. You know me. Let's get out of here", and that he then saw accused striking out in the air with his fists and waving his arms, and saw three or four strange men attempting to pin his arms to his side and move him towards the ladies' entrance of the club. At the time the blow was struck witness saw no one in the immediate vicinity and did not see accused strike Lieutenant Anderson. Neither did he see Captain Ward strike accused at any time during the evening. He did not take any part in the attempt to get accused out of the club (R. 72-74).

Second Lieutenant Frederick L. Anderson, jr., Air Corps, testified that after accused threw the glass of liquor, Major Duty took hold of accused's arm and said, "Better get out of here before there is trouble", or something to that effect, and that accused and Major Duty went out into the hall. After they entered the hall, accused suddenly hit Major Duty, knocking him down, and witness then went to accused and asked him if he knew him, to which accused replied, "Yes, Andy, I do". Witness then said, "You better get out of here before there is trouble", and started to walk out with him and accused suddenly hit him in the same manner that he had hit Major Duty and knocked him down. Witness got up, took hold of accused's arm and said, "Better get out of here", and accused hit him again. After the second blow witness "swung" at accused and some officer behind him held witness' arm while three or four people took hold of accused and rushed him out of the door and into a car. Witness and accused were at the Military Academy together, but witness did not know accused very well (R. 20). When Major Duty and accused were walking toward the door, Major Duty did not offer any violence toward accused although he had hold of his arm. At that time accused was not apparently resisting or offering any resistance to going out with Major Duty and witness did not hear or see any warning that accused was going to strike Major Duty. When accused struck witness, he had not offered any violence to him and was acting just as a friend, nor had he said anything that would give offense. In the opinion of witness, accused was so drunk that he did not know what he was

doing when he struck witness (R. 21,22). Recalled as a witness for the court, Lieutenant Anderson repeated the testimony as summarized above (R. 77) and reiterated that he had seen accused strike Major Duty. He did not see Captain Ward hit accused at any time nor did he see any act or hear anything said by Major Duty which would provoke the assault upon him by accused (R. 79).

Captain Frederick A. Ward, Philippine Scouts (Quartermaster Corps), testified that after accused threw the liquor at him he stood up and Captain Doherty intervened, thinking that witness was "going after" accused, and that he had some conversation with Captain Doherty to convince him that he had no such intention. In the meantime, accused went out in the hall with Major Duty. A little later, witness went to the entrance of the hall and saw Major Duty lying on the floor and accused standing there. About this time a considerable number of men in civilian clothes endeavored to get accused to leave the club and accused was struggling with them (R. 27). The only disturbance that witness saw in the corridor after accused left the room with Major Duty was accused struggling in the corridor and also on the porch as witness with Mrs. Ward and Mrs. Witman left the club. Among the officers who were in or near the struggling group was Lieutenant Anderson of the Air Corps (R. 28). Witness did not hit accused at any time during the evening, nor did he see accused hit anyone (R. 30,32). Recalled as a witness for the court, Captain Ward reiterated that he did not see accused strike Major Duty. He stated that he did not take any part in the melee in the corridor nor did he strike accused there; neither did he see accused strike anyone, but there was a scuffle going on and accused was waving his arms. Witness did not see Lieutenant Anderson on the floor (R. 83,84).

Captain Archibald L. Parmelee, 91st Coast Artillery, a witness for the defense, testified that, about 1:20 o'clock of the morning of June 18th, he saw accused wandering around, and he did not appear to be in the best of condition, so witness decided to take him back to the transport and see that he got to bed. About twenty or thirty minutes later, when witness decided to leave and was going through the club to look for accused, he came upon a party of men in the ladies' lobby and there was a discussion going on involving accused and other gentlemen. A fight was going on and he saw blows struck.

Captain Doherty came up and witness and some of the other men were trying to act as peacemakers. Captain Ward, who seemed to be the most impassioned and aggrieved person, was present. The fight continued and degenerated into a kind of brawl, the peacemakers at times getting into it and getting the participants separated and then the fighting would start again. Finally witness and Captain Cole got accused away to one side and accused agreed to go with them. They started out the ladies' entrance and as they got to the doorway accused murmurred that he wanted to apologize and witness said, "All right" (R. 49,50). As accused turned to carry out his intention some person unknown to witness charged accused and struck him, and the fight started up again and there was a general melee. Witness does not know whether Captain Ward struck accused at that time, but he did see him strike accused once after accused had gotten away from the group. Witness had gone over to remonstrate with the persons forming the group and they wanted to know who accused was, and when he told them, Captain Ward said, "Oh, he is, is he", and lunged forward and struck accused. In the opinion of witness, who saw at least two individuals strike accused, he was struck by a number of persons because he had some gashes on his face and his face was bloody all over as a result of the fight. Captain Doherty had an injured finger with fresh blood on it which he showed to accused and to Captain Cole immediately after the fracas in the club house (R. 50,51). It was the opinion of witness that accused was not particularly trying to keep the fight going and that, had he been permitted to apologize, there would have been no further trouble. On cross-examination, in response to the question whether accused was drunk, witness stated "the impression I got was he had been drinking a good deal", and upon examination by the court he stated that accused "talked thick, kind of mumbled his talk". Witness stated, however, that accused talked rationally to him, was very docile, and was not belligerant to witness at all (R. 53,55). According to witness' recollection most of the injuries received by accused occurred after he started back to apologize (R. 57). Questioned as to whether he considered accused responsible for his acts that evening, witness stated that accused gave the impression that he had had a great deal to drink and was not going to have any enjoyment out of the rest of the evening, and witness thought that it was his duty as a senior officer to take accused to the boat (R. 58). During the fight in the hall following accused's statement that he wanted to go back

and apologize, two or three groups of men fell over plants which were set in the hall (R. 59). Recalled as a witness for the defense, Captain Parmelee testified that he was positive in his identification of Captain Ward, this statement being material in view of Captain Ward's testimony that he had not struck accused at any time during the evening (R. 114).

Captain James S. Doherty, Air Corps, testified that he saw nothing of the disturbance in the corridor and that he himself did not hit anybody that evening, nor did he see anybody hit accused (R. 42,43).

Captain J. M. Cole, 59th Coast Artillery, a witness for the defense, testified that about two o'clock in the morning he saw the disturbance in the club, that there were quite a number of officers in the vicinity apparently fighting with each other and that no one appeared to know what it was all about; that just one group were engaged in this fighting, that they separated at times and got off in little separate groups and then would join up again and all start fighting. Witness would characterize the affair as a "free for all". He was unable to state whether accused was one of those engaged in the fight. The only person he knew in the fight was Captain Doherty, who was trying to stop it (R. 110). Earlier in the evening accused had been pointed out to witness by Captain Parmelee but witness did not see his face and was unable to state whether accused was drunk or sober at that time. Both witness and Captain Parmelee endeavored to stop the fight, his own impression being that the efforts of the persons engaged in the fight were in the direction of getting one person out of the corridor. In the words of the witness, "it seemed to me that everybody was trying to stop the fight and take somebody out". Witness did not know accused but is positive he was in this fight and he supposes that Captain Parmelee was trying to take accused out of the fight and to the boat (R. 110, 111). After accused was taken from the club he had a bloody face. Witness drove to the boat with Captain Parmelee and accused, and his impression was that accused was drunk. He acted like a drunken man but witness did not know how much he had been hit in the fighting, so whether his actions were the result of the beating or the result of liquor witness was unable to state (R. 112-113).

Mrs. Clark C. Witman testified that after the drink-throwing episode, two men whom she did not recognize came along and took hold of accused, one on each side, and walked away with him; that Captain Ward started to follow but that she persuaded him not to, and about the same time Major Duty went out into the corridor with Captain Doherty behind him. After some conversation with Mrs. Ward, witness heard some commotion in the hall and walked out there just in time to see Captain Ward striking accused in the back at least twice, and possibly three times. She went over and took hold of Captain Ward and asked him to please come into the other room. She took him into the room where they had been sitting and begged him not to have any fight. She then went out into the corridor and asked Captain Cole to get her a car, and either Captain Cole or Mrs. Ward did call a car. When the car came and they went out to get into it, a group of men were fighting on the side porch to the left of the ladies' entrance, and as she got to the door accused came in and looked as if a "bunch of gangsters" had been beating him up. He was bleeding, but witness could not tell where he was bleeding because he was so completely covered with blood (R. 62,63). Recalled as a witness for the defense, Mrs. Witman testified again that she saw Captain Ward strike accused in the back, this affair taking place in the main hall of the club. When she first went out into the hall after the commotion started, she saw Major Duty apparently uninjured and the second time she went out Major Duty's nose was bleeding and she would have noted that fact if it had been bleeding when she first went out. She was therefore sure that he had not been hit prior to the general fight (R. 103,104). At the time she saw two men take accused from the table, immediately following the throwing of the liquor, she did not recognize them, but since then she believes that one of them was Captain Parmelee (R. 104).

Testimony of the accused.

The accused at his own request was sworn as a witness to "testify in his own behalf". The only question asked the accused by his counsel was as to his identity. Counsel then turned him over to the prosecution for examination, stating that the defense had concluded its examination and was putting the accused "before the court for any questions that may be asked by the trial judge advocate or the court". Defense counsel stated that accused had "taken the

stand to testify in regard to all specifications and charges". The prosecution announced that it did not desire to cross-examine and the court thereupon proceeded with the examination of accused. The procedure is unusual. On direct examination, accused did not testify in reference to any of the offenses charged against him and all his testimony was elicited by questions propounded by the court and in part by the prosecution. At no time during the original appearance of accused on the stand or his subsequent resumption of the witness stand, at the request of the court, did the defense counsel ask him any questions.

The accused's version of the occurrences of the night of June 17-18, 1932, as first stated to the court, was as follows:

> "I left the transport that night and went to the Army and Navy Club. I stayed there practically the whole evening until about one thirty when I happened to pass this party and at the present moment I do not remember just which one of the party spoke to me, but they called me by name and Mrs. Witman asked me to sit down. If I flicked ashes on Captain Ward I do not recall that and I am sure I would have apologized if I had. I sat down by Mrs. Witman and Captain Ward jumped up remarking, 'God-damn you! You dirty bastard!' I resented that and told him so. He went over to the next seat adjacent to Mrs. Ward. From there he continued his insulting remarks and I did nothing until he jumped up and said, 'God-damn you! You better get out of here!' It appeared to me that I had done nothing to Captain Ward and being unable to reach him, I threw the contents of the liquor glass at him. His cursing was the chief cause of that and some very insulting language. I believe Captain Cole and Captain Parmelee came along then and we went out into the hall. Captain Parmelee and Captain Cole and I were conversing in the hall when I am sure that I was struck and knocked over a flower pot and from that time on I do not remember anything. I do not remember getting on the transport. I remember the next morning

> having my eye cut badly and my eye was black. My nose was very sore and there was a large contusion on my left jaw and I called a medical officer to examine me six or seven days after that and my jaw was still sore. As to striking Major Duty or Lieutenant Anderson afterward, I do not think I struck them. If I did I do not remember it. At no time do I remember striking anyone and I have no recollection of anyone striking me after I fell over this flower pot and having been struck by Captain Ward." (R. 65-66).

In response to further questioning, he stated in reference to his sobriety that he had been drinking that evening and had visited many parties; that the morning after the events his memory was not clear as to what had happened although he did remember most of the incidents at the Ward party relative to the insults made and the liquor being thrown. He stated that it seemed to him that Captain Ward was to his left rear when he struck him, and he could just faintly see who it was. He said he did not recall having struck Major Duty or Lieutenant Anderson. Upon being asked whether he knew any of the people in the party when he first came to the party he replied, "Well, I had more or less known Captain Doherty. His daughter was on the transport coming over and she said she would like to have me meet her father". He stated that Mrs. Witman asked him by name to join the party and that he had not known Mrs. Witman before that time. Upon being asked specifically whether she called him Mr. Lynch, he said that he could not recall whether she did or not; that she asked him to sit down but whether she used his name he could not recall (R. 67,68). Asked by the prosecution the direct question whether between one and two o'clock on the morning of June 18th he was drunk or sober, he stated that he could not say as to the first part because he remembered some things that happened prior to being knocked over the flower pot; that he did have quite a few drinks. He stated that he did not think he was in full control of his faculties when he threw the contents of the liquor glass at Captain Ward, but that the provocation was sufficient to warrant anyone throwing something at Captain Ward. He stated that the insulting language and the fact that Captain Ward called him a bastard and the ensuing sarcastic remarks would have angered and incensed anyone and incited the same act. In

reference to the sarcastic remarks, he stated that Captain Ward objected seriously to his sitting down by Mrs. Witman and said to him, "God-damn you, I am not letting any so and so sit down with Mrs. Witman", or words to that effect, the accused not remembering the exact words (R. 69-70).

On the second day of the trial the law member announced "the court would like to recall the accused if he desires to take the stand", whereupon accused resumed the witness stand. This second examination of him was conducted by the prosecution and most of it was conducted with the view to impeaching his testimony given the prior day. The questions propounded were aimed at establishing that accused, during the investigation conducted by the department inspector in reference to the disturbance at the club, had made statements inconsistent with those made when he took the stand as a witness at his trial. In substance he testified that in his statement to the department inspector he stated that he only saw one woman in the Ward party but there may have been two; that he did not pay much attention to them and that he knew the men in the party were officers. He further stated that the inspector asked him who invited him to join the party and that he responded, "Well, during the whole evening, sir, no one was actually inviting anybody. I spoke to Lieutenant Fair and sat down to talk with him". Accused was permitted to explain his answers to the two questions just recited and stated in reference to the first one that the woman at the party whom he thought to be Captain Ward's wife was actually Mrs. Witman; that she was sitting on the couch with Captain Ward and "he assumed the attitude of a marital position and I thought that was Mrs. Ward"; that he did not see the real Mrs. Ward very well and that he did not know either one of the women at the time. In reference to the second question, he stated:

> "I still contend that Lieutenant Fair was there at the time I joined that party and also Mrs. Witman asked me to sit down and I merely said 'hello' to him. He spoke a few words and I took the seat. I believe I was talking to him at the time Mrs. Witman asked me to sit down." (R. 88-91).

Accused further stated that at no time during the investigation conducted by the department inspector had he stated that Captain

Ward had "God-damned" him or called him a bastard, but that his failure to do so was because he did not understand the nature of the investigation and did not think it was proper to give any testimony pertaining to his defense until the proper time when the case might develop (R. 93,94). Questioned as to the discrepancy in his testimony that he had been invited to join the party by Mrs. Witman and his statement to the investigating officer that he had been invited by Lieutenant Fair, he explained that he considered the matter "self-explanatory" in that Lieutenant Fair and Mrs. Witman were talking to him almost simultaneously, that Lieutenant Fair was the only person at that party whom he had known previously, and to whom he had addressed remarks (R. 94).

Evidence as to Specification 1, Charge II.

The evidence above summarized covering the offenses alleged in Charge I and its three specifications conclusively establishes the guilt of the accused of Specification 1 of Charge II, and of Charge II. Further discussion thereof is unnecessary.

6. The discrepancies and contradictions in the testimony given at the trial and summarized above cannot be reconciled. It is impossible to avoid one of two possible conclusions. One is that substantially all the people who testified at the trial and who were present at the Army and Navy Club at the time the alleged offenses were committed by the accused were so much under the influence of liquor as to have no clear impression of what took place nor any clear remembrance of the incidents. The other conclusion is that many of the witnesses deliberately committed perjury at the trial. Among many contradictions that may be noted is the fact that almost all the witnesses for the prosecution and the defense stated that the accused was drunk, whereas Mrs. Witman testified that he was sober. Another contradiction is accused's insistence that Lieutenant Fair was a member of the party and that he himself became a member as a result of stopping to speak to Lieutenant Fair, whereas the stipulated testimony of Lieutenant Fair clearly establishes that he was not a member of the Ward party and that he did not introduce accused to members of that party. Still another contradiction is the testimony of Major Duty, Lieutenant Anderson and Captain Ward that accused and Major Duty left the

vicinity of the chow bench together immediately after the drink-throwing episode, whereas Mrs. Witman testified that two men whom she did not recognize took the accused out into the hall immediately after that episode, although at the time of the trial she believed that Captain Parmelee was one of those men. Although Captain Doherty testified that he knew nothing of the disturbance in the corridor, Captain Parmelee and Captain Cole, both witnesses for the defense, testified that Captain Doherty was in the corridor attempting to put a stop to the fight, and after the fight he showed Captain Parmelee an injured finger with fresh blood on it. Another contradiction which cannot be explained is the testimony of all the members of the party, except Mrs. Witman, that they heard no insulting language used by Captain Ward toward the accused, and the testimony of Mrs. Witman and the accused that Captain Ward was unjustifiably insulting and coarse in his remarks toward the accused, thus causing the accused to throw the liquor at Captain Ward. Still another contradiction is the testimony of Captain Ward that he did not strike the accused, while both Mrs. Witman and Captain Parmelee testified positively that they saw him strike accused several times.

Whatever the condition of the members of the Ward party and of other witnesses to the occurrences, the following facts are conclusively established by the evidence and stand substantially unquestioned by the defense: (a) the accused committed a technical assault upon Mrs. Frederick A. Ward by wrongfully causing the contents of a glass partially full of alcoholic liquor to fall upon her during the commission of an assault upon Captain Ward; (b) the accused, without provocation, struck Major Duty with his fist and knocked him down; (c) the accused, without provocation, struck Lieutenant Anderson with his fist and knocked him down; (d) the accused was drunk and disorderly, his disorderly conduct consisting of the actions stated immediately above. All of these acts of the accused constitute military offenses.

There remains to be considered the question whether the evidence establishes beyond reasonable doubt that accused's attacks upon Major Duty and Lieutenant Anderson were treacherous as alleged in Specifications 2 and 3 of Charge I, the word "treacherously" evidently being used in those specifications to allege aggravating circumstances. We are of opinion that the evidence fails to establish

"treachery", even giving that word the broadest meaning which it can have in connection with the text of the specifications. In our opinion there can be no treachery that is not intentional. The drunken condition of accused as exemplified by his actions indicates affirmatively what was stated as the opinion of several witnesses for the prosecution, that the accused did not know what he was doing. The attack upon Lieutenant Anderson is particularly probative of the fact that accused was unconscious of his actions. Lieutenant Anderson was at the United States Military Academy with accused, knew him, and shortly before accused's attack upon him had been greeted by accused by the familiar name of "Andy". At the time of accused's attack upon Lieutenant Anderson the latter was doing exactly what common decency and custom dictated that he should do; in other words, he was endeavoring by persuasion and without violence to induce accused to leave the club in order that there might be no further trouble. Lieutenant Anderson was not a member of the Ward party, had no part in the incidents which caused accused to believe that he had been insulted, and in no way could have aroused accused's animosity. Accused's attack upon him could not have been made with any mental consciousness of what he was doing. We are of opinion that so much of the findings of guilty as to Specifications 2 and 3 of Charge I as includes findings that the assaults were made "treacherously" are not sustained by the evidence.

7. Charge I and its three specifications are laid under Article of War 95; in other words, the Charge by necessary inference alleges that the accused in committing the offenses stated in the specifications was guilty of conduct unbecoming an officer and a gentleman and that the accused's acts establish that he is morally unfit and a person with whom other officers cannot associate without loss of self-respect. So far as Specification 1 of Charge I is concerned, it is clear from the evidence that accused's technical assault upon Mrs. Ward was not such an assault as to constitute conduct unbecoming an officer and a gentleman. There is not a scintilla of evidence that the assault upon Mrs. Ward was anything else than an accident. The intentional assault in connection with that incident was an assault upon Captain Ward, of which accused does not stand charged, although the evidence is sufficient to have supported such a charge. The accidental assault upon Mrs. Ward is

an offense, but being an accident it does not constitute such immoral or dishonorable conduct as to be a violation of the 95th Article of War.

It must also be concluded that the findings of guilty of Specifications 2 and 3 of Charge I, with the word "treacherously" stricken from each specification, do not find offenses under the 95th Article of War. It cannot be said that an assault and battery in itself constitutes a violation of the 95th Article. Even though an assault be without provocation, the person committing the assault may think that there is provocation and, while provocation is not a defense to a charge of assault, it may be an extenuation thereof. We are, therefore, of opinion that the assaults proved do not of themselves establish that the accused is morally unworthy to remain in the Army and that the record of trial is consequently not legally sufficient to sustain a finding of guilty of the 95th Article of War.

8. It is evident that the testimony introduced on behalf of accused tended merely to extenuate his actions on the night in question. In line with this policy of the defense, an attempt was made through the testimony of Mrs. Witman to establish that Captain Ward had been in similar controversies on prior occasions (R. 99-100) The law member of the court sustained the prosecution's objection to the admission of testimony of that nature. We are of opinion that the ruling of the law member was correct. The testimony was clearly inadmissible for the purpose of impeaching the testimony of Captain Ward. It had no substantial value to establish that Captain Ward incited accused's acts of violence by provoking words or speeches because, even though on other occasions he may have provoked controversies, that fact does not tend to establish that he provoked the controversy in this case.

9. All the offenses alleged in the three specifications of Charge I were integral parts of the disorderly conduct alleged in Specification 1 of Charge II, and the charge of disorderly conduct in Specification 1 of Charge II could not have been sustained without proof of one or more of the offenses charged in Charge I. All of the incidents included in the three specifications of Charge I took place within a space of a very few minutes, and the whole

matter, including the drunkenness, was, in the language of the Manual, "substantially one transaction" and should have been charged as such. Counsel for the defense, in his summing up, stated that an injustice was being done the accused and that Specifications 2 and 3 of Charge I were "dressed up in highly condemnatory language" with the specific intent of bringing them under the 95th Article of War, but he did not expressly or impliedly claim that the department commander had so adopted the unreasonable multiplication of charges and the unusual language of some of the specifications as to be in legal effect the prosecutor in the case and therefore ineligible to act upon the charges. We find no indication in the record that the department commander was so personally interested in the prosecution of this case and in the number and character of charges preferred as to make him ineligible to act.

10. We have considered a brief and a letter submitted on behalf of the accused by John D. Casto, Esq., of Washington, D. C. We find nothing therein to cause us to alter the conclusions expressed above. Mr. Casto's argument on the merits is based on assumed facts, many of which are not established by the evidence. We have also considered a memorandum submitted on behalf of the accused by Mr. G. C. Lynch, of Washington, D. C., brother of the accused, pointing out certain alleged discrepancies in the testimony. The claimed discrepancies between the statements of the witnesses as given at the preliminary investigation conducted within a day or two after the alleged offenses and the testimony given by the same witnesses at the trial are such as would normally be expected, especially under the circumstances shown in this case, and do not affect the proof of the unquestionable guilt of the accused.

11. At the time of trial accused was 26 years and 9 months of age, and his service is shown by the official Army Register as follows:

> "Cadet M.A. 2 July 23 to 23 June 24 and from 1 July 25; 2 lt. of Inf. 13 June 29; trfd to C.A.C. 6 Oct. 31."

12. 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 opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its specifications as involves the finding of guilty of Specification 1 and the findings of guilty of Specifications 2 and 3 except in so far as they involve findings that the assaults alleged in said Specifications 2 and 3 were committed "treacherously", all in violation of the 96th Article of War, legally sufficient to support the findings of guilty of Charge II and Specification 1 thereof, and legally sufficient to support the sentence. Dismissal is authorized for violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., OCT 22 1932 - To the Secretary of War.

1. The record of trial and the accompanying papers in the case of Second Lieutenant Charles A. Lynch, O-17773, Coast Artillery Corps, together with the foregoing opinion of the Board of Review, are submitted herewith pursuant to Article of War 50½, for the action of the President.

2. The Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence but that as the technical assault upon Mrs. Ward, alleged in Specification 1 of Charge I, was an accidental incident to an assault upon Captain Ward, an offense for which the accused was not brought to trial, and as the element of treachery alleged in Specifications 2 and 3 of Charge I was not proven, the three assaults proved under Charge I do not demonstrate that the accused is guilty of such immoral or dishonorable conduct as to render him morally unfit to retain his commission in the Army, and that, consequently, the assaults proved are not violations of the 95th Article of War, but are violations of the 96th Article of War as being acts of a nature to bring discredit upon the military service. I concur in the opinion of the Board of Review that the evidence is not legally sufficient to support the findings that the assaults alleged in Specifications 2 and 3 of Charge I were committed "treacherously", but I am constrained to disagree with the opinion of the Board of Review that the assaults were not violations of Article of War 95.

3. The evidence establishes that on June 17, 1932, an Army transport arrived in Manila. That evening there was a general celebration, termed "Transport Night", at the Army and Navy Club. About 1:00 o'clock in the morning of June 18th, a party consisting of five persons were seated on a settee and some chairs around a "chow bench", some of the members of the party drinking various liquors. The members of the party were Major William B. Duty, Philippine Scouts (Air Corps), Captain Frederick A. Ward, Philippine Scouts (Quartermaster Corps), Captain James S. Doherty, Air Corps, Mrs. Frederick A. Ward, wife of Captain Ward, and Mrs. Clark C. Witman. While this party was seated around the chow bench, accused appeared in the doorway and then came over to the place where the group was seated. He was unknown to any member of the party. Mrs. Witman, testifying for the defense, stated that she saw him standing in the doorway, that he looked lone-

some, and that she assumed that he had just arrived on the transport and said "hello" to him and asked him to sit down. All the other members of the group testified that they did not themselves ask accused to join the group, nor did they hear anyone else ask him. Accused seated himself on the settee next to Captain Ward. Mrs. Witman and Mrs. Ward were also seated on the settee beyond Captain Ward, Mrs. Witman being next to Captain Ward. As accused took his seat, some cigarette ashes were spilled upon Captain Ward's coat, evidently as a result of accused's awkward or drunken action. Captain Ward resented this and told accused to look what he was doing, whereupon accused arose from the seat and then sat down again, either accidentally or intentionally nudging Captain Ward with his elbow. Captain Ward then made some remarks about there not being room enough for both of them, arose from his seat, and passed around to an empty chair at the other end of the chow bench. It is impossible to determine what remarks were actually made by Captain Ward to accused at the time of his occurrence. All the members of the party except Mrs. Witman and the accused testified that there was nothing objectionable or insulting in the remarks. Mrs. Witman and accused testified that Captain Ward addressed to the accused remarks which included the term "God-damn" and also called accused a "bastard". Second Lieutenant Frederick L. Anderson, Jr., Air Corps, who stopped at the chow bench to speak to accused just at the time of these occurrences, stated that immediately after the liquor was thrown he heard Captain Ward apply to accused some such designation as "cur" or "cad", but did not hear him call accused a bastard and that he did not believe that the word "bastard" was used. In any event, almost immediately after Captain Ward took his seat at the opposite end of the chow bench, the accused picked up a glass partially filled with Scotch whisky and soda, it being a glass from which Captain Ward had been drinking, and threw the contents towards Captain Ward, some of the contents falling upon Mrs. Ward and Mrs. Witman. This act in itself indicates that Captain Ward's actions and language were considered by accused to have been highly insulting, and lends considerable weight to his claim, and the statement of Mrs. Witman, that Captain Ward did direct at him extremely insulting language.

Immediately after the liquor was thrown, the members of the party arose from their seats and Major Duty, saying to the accused, "All right fellow, let's get out of here", walked with the accused out into the main hallway of the club and suggested that he go home in order to avoid trouble, to which suggestion the accused apparently assented. Almost at once, however, accused struck Major Duty between the eyes without warning, Major Duty falling to the floor partially dazed. At

this time Lieutenant Anderson, who had known accused at the Military Academy, went to accused and asked him if he knew him, to which accused replied, "Yes, Andy, I do", whereupon Lieutenant Anderson suggested to the accused that he go home before anything more happened. Lieutenant Anderson turned to walk out with accused when accused without warning struck him and knocked him down. Lieutenant Anderson arose, took hold of accused's arm, and said, "Better get out of here", whereupon accused hit him again. At this second blow, Lieutenant Anderson struck at accused, but several men intervened, took hold of the accused and tried to force him out of the club. A general melee resulted, all of it apparently being caused by the efforts of several persons to eject accused from the club, or at least to take him outside and put him in an automobile for the purpose of sending him back to the transport. The testimony as to what actually happened is conflicting. Captain Archibald L. Parmelee, 91st Coast Artillery, came upon the scene after the fracas had started and his impression was that most of the participants were trying to act as peacemakers. However, he states that Captain Ward, who seemed to be the most impassioned, struck the accused, although Captain Ward denied that at any time during the evening did he strike accused. Mrs. Witman also testified that she saw Captain Ward strike accused in the back at least twice. Among those taking part as peacemakers, according to Captain Parmelee, was Captain Doherty, although Captain Doherty stated that he saw nothing of the disturbance in the corridor and that he himself did not hit anybody that evening nor did he see anybody hit the accused. On the other hand, Captain Parmelee stated that after the disturbance was over, Captain Doherty showed to him and Captain J. M. Cole, 59th Coast Artillery, an injured finger with fresh blood on it, which bears out Captain Parmelee's testimony that Captain Doherty was attempting to put a stop to the disturbance. Accused admitted throwing the liquor at Captain Ward, but claimed that it was the natural resentment caused by Captain Ward's insults to him. He also stated that the following morning his recollection of what had occurred the previous night was not clear, but that he did remember what had happened at the Ward party relative to the insults and to the liquor being thrown. He did not remember striking Major Duty or Lieutenant Anderson and did not believe that he had struck them, although he did not deny that he had done so. In reference to his sobriety, accused stated that he had been drinking that evening and had visited many parties, and that he did not think he was in full control of his faculties when he threw the contents of the liquor glass at Captain Ward. Even at the trial, accused was under the impression that his original entry into the party was due to

the fact that Lieutenant Ford L. Fair, Air Corps, was with the party. However, none of the witnesses mentioned Lieutenant Fair as being present and it was stipulated that Lieutenant Fair, if present at the trial, would testify that he was not a member of the Ward party and that he did not introduce the accused to the members of that party.

All members of the Ward party except Mrs. Witman testified that the accused was drunk, Major Duty expressing his opinion that accused was probably so intoxicated that he did not know what he was doing. This opinion was also expressed by Lieutenant Anderson. Captain Parmelee, who saw the accused wandering around the club about half an hour before the fight in the corridor, decided at that time that accused had had so much to drink that he should go back to the transport and decided to take him back but did not act immediately upon that decision. When he finally decided to leave and take accused with him, the fight had already started. On the other hand, Second Lieutenant Charles C. Cloud, 60th Coast Artillery, and Second Lieutenant Clifton L. MacLachlan, 59th Coast Artillery, each testified that he saw and talked to the accused apparently shortly before accused joined the Ward party, and that although he showed evidence of having been drinking, he talked rationally and was in possession of his faculties. Mrs. Witman also testified that the accused was not drunk.

Despite the unexplainable contradictions in the testimony of the various witnesses, the evidence establishes beyond doubt that accused was drunk and disorderly at the Army and Navy Club in Manila in the early morning hours of June 18, 1932; that he committed an assault upon Mrs. Frederick A. Ward by throwing part of the contents of a glass containing liquor upon her while attempting to throw it upon Captain Ward; and that, without apparent provocation, he struck and knocked down both Major William B. Duty and Lieutenant Frederick L. Anderson. These assaults took place in the Army and Navy Club and resulted in a general melee and the forcible ejection of accused by persons not members of the Ward party. Accused was drunk, but his drunkenness was voluntary, and therefore he was responsible for his acts. He himself testified in regard to what happened while the party was seated around the chow bench, and admitted that he threw the liquor at Captain Ward, claiming that he did so because he had been called vile names.

4. I cannot indorse the conclusions of the Board of Review that these assaults, committed at the place and under the circumstances shown by the evidence, were not violations of the 95th Article of War. To hold otherwise would, in my opinion, be placing an undue limitation upon the meaning of this Article and the acts constituting offenses thereunder, and would establish an undesirable and unwarranted precedent. The evidence conclusively shows that accused made a violent assault without provocation upon two officers. He has been convicted of drunkenness of a gross character, characterized by peculiarly shameful conduct and a disgraceful exhibition of himself involving an unseemly altercation and brawl with military persons in the presence of ladies in an officers' club. While it is unfortunate that the charge of being drunk and disorderly was not properly alleged under the 95th Article of War, I think that the misconduct alleged under Charge I constitutes a violation of that Article of War and fully justifies the sentence of dismissal.

5. In general, when the facts are not in dispute, the question as to whether such facts constitute conduct unbecoming an officer and a gentleman is a military question, the answer to which can be found only in the history of the service and its traditions. In his consideration of the 95th Article of War, Winthrop cites an authority as follows:

> "Decisions of courts-martial, when confirmed, show more clearly than any legal work can do what is the opinion of military men, who sit to try such cases, * * * in a great measure as a court of honor."

The conduct denounced by the 95th Article of War cannot be measured by the same legal yard stick that applies when the accused is charged with murder, larceny or other felonies, and the interests of the service demand that this Article be construed and maintained so as to preserve in the commissioned personnel of the military service a due regard for its honorable traditions and the reasonable demands of society over and beyond the criminal law. That is to say, that the determination by an impartial court that the particular conduct of which an accused is found guilty is unbecoming an officer and a gentleman should be overruled only when it is obvious from the evidence

that the court and the reviewing authority have wrongly evaluated the evidence or erroneously appraised the conduct. In this case the record does not disclose that the court or the reviewing authority committed either such error. The court was composed of officers of rank, experience and knowledge of traditions of the service who, by their finding, determined that the conduct of which the accused was found guilty is such as is contemplated by the 95th Article of War.

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

6. 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 which ever views may be approved.

Blanton Winship,
Major General,
The Judge Advocate General.

8 Incls.
Incl. 1 - Record of trial.
2 - Opinion of Board of Review.
3 - Draft of letter to Pres. with recommendation of Board of Review.
4 - Draft of letter to Pres. with recommendation Judge Advocate General.
5 - Draft of action by Board of Review.
6 - Draft of action by Judge Advocate General.
7 - Brief by civilian counsel.
8 - Memorandum argument by brother of accused.

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

Completely men
# 91

CM 199337

SEP 29 1932

| | | |
|---|---|---|
| UNITED STATES | ) | SIXTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Fort Wayne, Michigan, August 26, 1932. Dishonorable discharge, suspended, and confinement for one (1) year. Fort Wayne, Michigan. |
| Private DAVID E. HUNT (6682558), Company B, 16th Infantry. | ) | |

OPINION of the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates
ORIGINAL EXAMINATION by WALSH, 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 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 David E. Hunt, Company B, 16th Infantry, did, at Fort Jay, New York, on or about June 10, 1931, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Wayne, Detroit, Michigan, on or about July 29, 1932.

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 and six months. The reviewing authority approved the sentence

but reduced the period of confinement to one year, directed its execution, suspended the execution of the dishonorable discharge, and designated Fort Wayne, Michigan, as the place of confinement. The sentence was published in General Court-Martial Orders No. 234, Headquarters Sixth Corps Area, September 12, 1932.

3. In view of the conclusions hereinafter reached, the only question that need be considered at this time is whether or not the court before which this case was tried was legally constituted. If not, its proceedings were void.

4. The court was appointed by paragraph 1, Special Orders No. 143, Headquarters Sixth Corps Area, June 16, 1932, and Colonel Charles E. Morton, United States Army, Retired, was detailed as law member thereof. The record in this case shows that the trial was held on August 26, 1932. It names Colonel Morton among the absent members, and indicates the reason for his absence by the word "(Retired)". This officer had in fact been relieved from active duty effective August 15, 1932, by paragraph 7, Special Orders No. 168, War Department, July 18, 1932, reading in material part as follows:

> "7. By direction of the President, each of the following named retired officers of the U. S. Army is relieved from assignment and duty in connection with recruiting at the station indicated after his name and from further active duty, to take effect August 15, 1932, and will proceed to his home:
>
> * * * *
>
> Colonel Charles E. Morton, Detroit, Michigan.
>
> * * * *."

5. The 8th Article of War provides that "the authority appointing a general court-martial shall detail as one of the members thereof a law member * * *". That this provision is mandatory and that a general court upon which no law member has been detailed is not legally constituted and that its proceedings are consequently void is well settled by decisions of the Board of Review and The Judge Advocate General. CM 197461, Hull; 197609, Massacar; 197610, Mulkern; and cases therein cited. It is also well settled that a general court upon which a law member was originally detailed becomes illegally constituted when and if the law member is relieved without a new law member being detailed in his place. CM 166057, Dunn; 187098, Henshaw; 187201, Bokoski; and cases therein cited.

In this case a law member was originally detailed on the court. The question arises whether or not the War Department order quoted above, relieving him "from further active duty" effective eleven days prior to the trial of this case, had the effect of rendering the officer in question ineligible to serve further as a member of the court. If the War Department order did have that effect, since no new law member was detailed, it would follow from the decisions cited above that the court became illegally constituted and that its proceedings in this case were a nullity.

The 4th Article of War makes "all officers in the military service of the United States" competent to serve on courts-martial. It has been repeatedly held that retired officers are "in the military service of the United States" and are, therefore, eligible to sit as members of courts-martial. United States v. Tyler, 105 U.S. 244-246; Kahn, et al. v. Anderson, 255 U.S. 1-7; McRae v. Henkes, 273 Fed. 108, 258 U.S. 624; Dig. Ops. JAG Jan.-June, 1921, p. 55; 1922, p. 118. It follows that Colonel Morton, who was on active duty at the time he was detailed as law member, was eligible for such detail. But did his relief from active duty render him ineliglble? Since the 4th Article of War makes "all officers in the military service of the United States" eligible, and retired officers, as seen above, are held to be "in the service of the United States", and since the 4th Article of War contains no specific provision that an officer otherwise eligible must be on active duty, it would seem, if we consider only the wording of this Article, that retired officers not in an active duty status may legally serve on courts-martial. However, the 4th Article of War must be read and construed in conjunction with the Act of Congress of April 23, 1904, which Act was later incorporated in the United States Code (annotated), section 991, p. 175, Title 10, Army, which, in material part, is as follows:

> "991. Duties to which retired officers may be assigned generally. The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting, for service in connection with the Organized Militia in the several States and Territories upon the request of the Governor thereof, as military attaches, upon courts-martial, courts of inquiry and boards, and to staff duties not involving service with troops."

To construe the 4th Article of War as permitting retired officers not on active duty to be members of courts-martial might easily lead to

incongruous results, for, under the provisions of the Act of April 23, 1904, quoted above, a retired officer, in time of peace, may not be ordered to active duty without his own consent. Consequently, if detailed as a member of a court-martial without having been assigned to active duty, he could not be compelled to serve without his consent. Moreover, in Kahn, et al. v. Anderson, supra, and in McRae v. Henkes, supra, it appears to have been taken for granted and not questioned that to be eligible to serve on a court-martial a retired officer must be on active duty.

In view of the foregoing, the Board of Review is of opinion that the order relieving Colonel Morton from active duty had the effect of making him ineligible to sit as a member of the court and was tantamount to leaving the court without a law member. In other words, from a legal standpoint, the situation, in so far as concerns the constitution of the court, is not materially different from what it would be had Colonel Morton been discharged or dismissed from the Army on August 15, 1932.

6. This case should be distinguished from the Dawson case (CM 193913) which has been followed in CM 193896, Smith, and CM 193897, Vandervort. In the Dawson case it was held that an order transferring a member of a court-martial beyond the jurisdiction of the convening authority does not of itself relieve the transferred officer from his membership on the court. In that case the member might at any time, either with or without his consent, be ordered back to sit on the court. In the instant case, as seen above, Colonel Morton may not, without his consent, be ordered to sit on the court to which he was detailed.

7. For the reasons hereinabove stated, the Board of Review is of opinion that when this case was tried the court was without a law member eligible to sit in any case and was, therefore, illegally constituted, and that, in consequence, its proceedings in this case were void ab initio. The Board therefore finds that the record is legally insufficient to support either the findings or the sentence.

E. C. McNeil, Judge Advocate.

R. Brennan, Judge Advocate.

Mark E. Guerin, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., SEP 29 1932 - To the Secretary of War.

1. The record of trial by general court-martial in the case of Private David E. Hunt (6682558), Company B, 16th Infantry, is forwarded herewith, as is also the opinion of the Board of Review based upon its examination of the record. The case is one requiring the action of the President under Article of War 50½.

2. I concur in the opinion of the Board of Review and, for the reasons therein stated, recommend that the proceedings, findings and sentence of the court be vacated as void ab initio, that accused be released from the confinement adjudged by the sentence in this case, and that all rights, privileges and property of which he has been deprived by virtue of the sentence be restored. The proceedings in this case being a nullity, there has been no trial in a legal sense and the accused may be brought to trial before another court-martial upon the same charge and specification.

3. Inclosed herewith is a draft of a letter for your signature transmitting the record to the President for his action, together with a form of executive action designed to carry into effect the recommendations hereinabove made should they 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 let. for sig. of Secy. of War.
Incl. 4-Draft of executive action.

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

Military Justice
CM 199369

NOV 15 1932

| | |
|---|---|
| UNITED STATES) | PANAMA CANAL DEPARTMENT |
| vs. | Trial by G.C.M., convened at Fort Davis, Canal Zone, August 25, 1932. Dishonorable discharge and confinement for twenty (20) years. Penitentiary. |
| Private ROBERT DAVIS (6358315), Company M, 14th Infantry. | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD, 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 specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Robert Davis, Company M, 14th Infantry, did, at Fort Davis, Canal Zone, on or about July 4, 1932, unlawfully enter the building occupied jointly as quarters by Major Thomas F. Taylor, 14th Infantry, and Captain Stanley F. Griswold, 14th Infantry, with intent to commit a criminal offense, to wit, rape, therein.

Specification 2: In that Private Robert Davis, Company M, 14th Infantry, did, at Fort Davis, Canal Zone, on or about July 4, 1932, with intent to commit a felony, viz, rape, commit an assault on Martha Taylor, a female child 6½ years of age, by wrongfully, willfully and feloniously placing an arm around her body and fondling the private and other parts of her person while having his penis exposed.

He pleaded not guilty to, and was found guilty of, the charge and specifications. Evidence of one previous conviction by Summary Court for failing to take venereal prophylactic 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 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record pursuant to the provisions of Article of War 50½.

3. Both the entry of the building and the assault are alleged to have been made by accused with intent to commit rape. The accused was 24 years of age at the time of the alleged offenses. Martha Taylor's age was not established at the trial but she was alleged to be 6½ years old in the specification and is described in the record as a "small child" (R.16) and a "little girl." (R.9). She was present in court as a witness and this fact affords material evidence to sustain the finding by the court that she was six and one-half years of age.

The testimony introduced by the prosecution to establish the entry and the assault was given by Martha Taylor, the little girl alleged to have been assaulted, and by Vivian McKenzie, the colored cook in Martha's home, the quarters of the father, Major T.F. Taylor, located at Fort Davis, Canal Zone. The building in which the assault was made consisted of two sets of quarters, the first floor set being occupied by Captain Stanley Griswold and the second floor set by Major Taylor. Martha testified that she first saw accused on her way home from the playground (R.18); that he followed her into the house and asked her if Captain Rustmeyer lived there; that she told him Captain Griswold lived down stairs and that she lived up stairs (R.18-19); that he put his arm around her and his hand on her private parts outside of her panties (R.17-18). The following questions and answers appear in the record of her testimony:

Q. Did he get his hand under your panties?
A. No.
Q. Just on your panties?
A. Yes.
Q. Did he tear your clothes, or attempt to take them off?
A. No.
Q. Were you frightened?
A. No.

Q. Did he hurt you?
A. No.
* * *
Q. * * * Did you stay there, or did you go somewhere?
A. I stayed there.
Q. You didn't go up any of the steps?
A. No.
Q. When Vivian came out, did you start to go upstairs then?
A. I stayed down.
Q. Did you walk away from him?
A. No.
Q. You stayed right there until Vivian came down?
A. Yes; then, when he went out, I went upstairs.
* * *
Q. He didn't take off any of your clothes, did he?
A. No.
Q. And he didn't hurt you in any way?
A. No.
Q. He didn't frighten you?
A. No. (R.20-21)

Vivian McKenzie testified that while preparing supper for the children she heard the voices of Martha and a man coming from down stairs; that after hearing Martha say "this is Griswold's quarters," (R.8) she came to the stair-case and saw Martha standing on the first tread of the stairs; accused was standing in front of her with his arm around her in an attempt to kiss her (R.9). Witness further testified "I saw him put his hand under Martha Taylor's dress. * * * I saw this man with his pants open going toward Martha, and Martha kept backing up the staircase. I went down stairs and I said, 'What are you doing here?' He said, 'I'm looking for Capt Rustmeyer.' I said, 'You know full well Captain Rustmeyer isn't living here'; and he said, 'I beg your pardon, ma'am.' I said, 'Well, I saw what you did to that little girl.' He said, 'I beg your pardon, ma'am.' I told him that I saw what he did to the little girl, and that I was going to let Major Taylor know about it, and he said, 'I beg your pardon, ma'am' and started fixing his pants and went out through the door" (R.9). In response to a question witness said that accused had his private parts exposed, so that she could see them (R.10).

On cross-examination, she testified she did not see the accused kiss Martha (R.11); that he did not attempt to hold her when she started up the stairs (R.11) and that her clothing was not torn or removed in any way (R.11-12).

Martha's parents returned soon after the incident occurred.

Major Taylor, the father, testified that he and Mrs. Taylor left the children in charge of Vivian McKenzie at their quarters "sometime around 5:00 o'clock in the afternoon" and returned "somewhere in the vicinity of 7:00 o'clock." After being advised of the occurrence, he began to question Martha who "had all the indications, when I was questioning her, as if I expected to punish her; that is, she acted to me in a lot of ways as if she was afraid to answer, to tell me just exactly what had happened, until I assured her that I was not going to do anything to her." He further testified that Martha was not unduly excited - "just a little evasive in the beginning," and that she then had her dinner and went to bed (R.22).

4. The first question presented by the record is whether or not there is any substantial evidence to sustain the finding of the court that, at the time and place alleged in Specification 2 of the Charge, accused had the intent to rape the child, that is, to penetrate her sexual organs with his. This is a question of law which must necessarily be considered by the Board of Review and does not involve determining the weight of evidence or passing upon the credibility of witnesses. Intent being a mental process can only be inferred, in cases such as this, from the character and degree of the violence applied, the language, threats, demonstrations, and entire conduct of the accused, the place, time, and other circumstances of the attempt, etc. See Winthrop, 2nd Ed., page 688. In other words, evidence as to intent is usually purely circumstantial and, under the rules of law, is not substantial evidence upon which a finding can be made unless it is such as to exclude every reasonable hypothesis except the one of accused's guilt. CM 195705, Tyson and cases cited. Considering the evidence in this case in view of the principles stated above it is clear that the evidence is consistent with a reasonable hypothesis that accused, rather than intending to force his penis into the sexual organs of the child, was attempting to excite a sexual reaction in himself by means of fondling the child's body, a perversion which is far from uncommon.

According to the testimony the incident occurred between 5 and 7 o'clock in the afternoon of July 4, 1932, while it was still daylight (R.22,26). The assault took place in the entrance to the quarters of Major Taylor, the father of the child, in a building consisting of two sets of quarters, both of which were occupied. The assault moreover took place at a time when in all probability there would be persons in both sets of quarters who would easily be attracted by the

cries of pain which would inevitably be evoked if an adult man should attempt to force an entrance into the sexual organs of a child less than 7 years of age. The circumstances of time and place are inconsistent with the theory that accused had the intent ascribed to him in the specification and of which he was found guilty. The principle applicable to the facts of this case is well stated in Robat v. State (91 Tex. Cr. Rep. 468; 239 S.W. Rep. 966) as follows:

> "It is essential that a specific intent to commit rape be established by the testimony, and it must go beyond the mere possibility of such intent. * * * The fact that the conduct attributed to the appellant was atrocious and merited punishment cannot take the place of proof establishing the elements of an assault with intent to rape." (Underscoring supplied).

See also State v. Wilson (228 Pac. Rep. 803) for a review of decisions of many jurisdictions on this point.

It therefore follows and the Board holds that the record of trial is not legally sufficient to support the finding of guilty of Specification 2, except in so far as it involves a finding of guilty of assault and battery, aggravated by the indecent conduct of the accused and the tender years of the child. We feel it necessary to emphasize the fact that the holding expressed above is limited to the unusual facts of this case. Had the time and place of the assault and the actions of the accused been different than they were, the evidence might well have been so substantial as to support findings of guilty of assault with intent to commit rape.

5. The conclusions expressed above necessarily require a determination as to whether accused was properly convicted, under Specification 1 of the Charge, of housebreaking, which is defined as unlawfully entering another's building with intent to commit a criminal offense therein. M.C.M. 1928, page 169. Under the laws of the Canal Zone assaults and batteries are criminal offenses punishable as such. The act of accused in entering the building with intent to assault the child therefore constitutes housebreaking and the record of trial is legally sufficient to support the finding of guilty of that offense.

6. The sole question remaining to be considered is whether or not the record of trial is legally sufficient to support the sentence of confinement for 20 years. The Executive Order limiting punishment prescribes a limit of punishment for assault and battery of confinement at hard labor for not to exceed six months and forfeiture of not to exceed two-thirds of the soldier's pay per month for a like period. It is evident, since the Executive Order does not permit the imposition of dishonorable discharge, that the assaults and batteries referred to in that order do not include indecent assaults on women and children, but only simple assaults such as are apt to occur among groups of men in post or cantonment, and we so hold. CM 188606, Paparis. The offense of which accused stands properly convicted, under Specification 2 of the Charge, is therefore not covered by the Executive Order. Indecent assaults upon children are recognized as differing from assaults and batteries and are condemned and made punishable by the laws of many, if not most, of the States of the United States; for example, they are punishable by the laws of Illinois by confinement in a penitentiary for a period of from one to 20 years, by the laws of Michigan by imprisonment for not more than 10 years, by the laws of Connecticut by imprisonment for not more than 10 years, by the laws of Maine by imprisonment for not less than one or more than 10 years, and by the laws of Ohio by imprisonment in the penitentiary for not more than 10 years. The Executive Order provides that offenses not provided for remain punishable as authorized by statute or by custom of the service. We find no federal statute of general application which denounces such assaults as the one involved in this case, nor do we find in the Code of the District of Columbia any statute which, in specific terms, denounces such an offense. But Section 37, Title 6, of that Code denounces several acts of cruelty to children, among them the abuse or otherwise willful maltreatment of any child under the age of 18 years. The offense of which the accused stands legally convicted under Specification 2 of the Charge is analogous to abuse or willful maltreatment of a child even if in fact it does not constitute abuse or willful maltreatment as those terms are used in the statute. Congress has prescribed that persons in the District of Columbia who violate the section referred to may be punished by a fine of not more than $250 or by imprisonment for a term of not exceeding two years or both. It is the custom of the service, where no limit of punishment for an offense is specifically prescribed in the Executive Order, to follow Congressional expression of what constitutes appropriate punishment. We therefore hold that the maximum confinement which may be

imposed under Specification 2 is two years; and that so much of the sentence in this case as provides for confinement in excess of 12 years is unauthorized.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I, but only so much of the finding of guilty of Specification 1 of the Charge as involves a finding of guilty of unlawfully entering the building described in the Specification with intent to commit a criminal offense, to wit, assault and battery, therein; legally sufficient to support only so much of the finding of guilty of Specification 2 as involves a finding of guilty of assault and battery on Martha Taylor, a female child of 6½ years of age, the assault being aggravated by the indecent conduct of the accused and the tender years of the child, in violation of the 96th Article of War 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 12 years. Penitentiary confinement is authorized by Article of War 42 and Sections 55 and 401, Title 6, of the Code of the District of Columbia.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Oct. 6, 1932

CM 199391

| | | |
|---|---|---|
| UNITED STATES | ) | SECOND DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Fort Sam Houston, Texas, |
| Sergeant OTTO KLIMA | ) | August 5 and 27, 1932. Reduc- |
| (6461105), Company K, | ) | tion to grade of private, con- |
| 23d Infantry. | ) | finement for six (6) months, |
| | ) | and forfeiture of $14 per month |
| | ) | for like period. Fort Sam |
| | ) | Houston. |

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 as approved by the reviewing authority.

2. In Smith v. Whitney (116 U.S. 167, 183) the United States Supreme Court said:

> "Under every system of military law for the government of either land or naval forces, the jurisdiction of courts martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business."

The principle applies equally to noncommissioned officers. In cases where the specifications allege conduct such as that charged in the instant case, it is peculiarly for the court-martial to determine whether the evidence establishes the offense; in other words, whether the conduct charged and the evidence in support thereof show a breach

of that part of Article of War 96 which denounces "all disorders and neglects to the prejudice of good order and military discipline" and "all conduct of a nature to bring discredit upon the military service", and the approved findings of the court in that respect may not properly be disturbed by The Judge Advocate General or the Board of Review where there is substantial evidence to support the findings and no error was committed during the trial which injuriously affected the substantial rights of the accused.

We are of opinion that the allegations of the specification sufficiently set forth conduct of a nature to bring discredit upon the military service and that there is substantial evidence in the record to sustain the findings of the court as to Specification 1 of the Charge. It is the traditional duty of officers and non-commissioned officers to be solicitous of the welfare of enlisted men of the lower grades. Had a civilian acted as the evidence shows and as the court found that Sergeant Klima acted, he would undoubtedly be the subject of disapproving comment by those aware of the facts. Such actions are even more discreditable on the part of officers and noncommissioned officers of the Army.

E. C. McGrew, Judge Advocate.

T. Romeman, Judge Advocate.

Mark E. Guering, Judge Advocate.

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

CM 199440

OCT 24 1932

| | | |
|---|---|---|
| UNITED STATES | ) | FOURTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Fort Benning, Georgia, September 6 and 22, 1932. |
| Captain STUART D. CAMPBELL (O-7756), Quartermaster Corps. | ) | |

OPINION of the BOARD OF REVIEW
McNEIL, BRENNAN and GUERIN, Judge Advocates.

1. The record of trial in the case of the officer named above, having been examined in The Judge Advocate General's Office and there found legally insufficient to support the sentence as published by the reviewing authority in General Court-Martial Orders No. 213, Headquarters Fourth Corps Area, October 5, 1932, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused in this case was found guilty of two specifications involving frauds upon the government (AW 94) and five specifications involving false official statements (AW 95) and was sentenced to be dismissed the service. The reviewing authority under date of October 5, 1932, signed the following action:

> "In the foregoing case of Captain Stuart D. Campbell, O-7756, Quartermaster Corps, the sentence is approved, but, owing to the previous excellent service of this officer and the recommendation for clemency, attached to the record, signed by five of the eight members of the court who sat at the trial of this case, the trial judge advocate, the defense and assistant defense counsel, so much of the sentence as is in excess of forfeiture of $50.00 per month for six months is remitted. As thus commuted the sentence will be duly executed."

The proceedings, including the sentence adjudged and the action quoted above, were published in General Court-Martial Orders No. 213, Headquarters Fourth Corps Area, October 5, 1932.

3. By his action the reviewing authority undertook to commute the sentence. This he had no power to do. Except "when empowered by the President so to do", no authority inferior to the President has power to commute a sentence. This principle is so long and so firmly established as to require no discussion. AW 47; AW 50; Winthrop (Reprint), p. 472; Davis, p. 210; M.C.M., 1928, par. 87 b, p. 77; id. 1921, par. 384, p. 320; id. 1917, par. 384, p. 186; id. 1908 (corrected to 1910), p. 68; id. 1908, p. 67; id. 1905, p. 65; id. 1901, p. 63; id. 1898, p. 58; id. 1895, p. 68; Dig. JAG, 1912, p. 176; Cps. JAG, 1918, p. 116; CM 148677, Flanagan, Oct. 22, 1921. The reviewing authority has not been empowered by the President to commute the sentence in this case.

Since the reviewing authority was without power to commute the sentence, it follows that so much of his action as purports to commute is clearly a nullity. The question then arises whether or not the first clause of the action, the words "The sentence is approved", may be separated from the rest of the action and construed as a valid approval of the sentence. The Board of Review is of opinion that both as a matter of strict law and in fairness to the accused this may not be done. All the language of the action following the four opening words last above quoted clearly indicates that the reviewing authority considered that the accused should not be dismissed. He had power only to approve without qualification or to disapprove the sentence of dismissal. Reading the entire action, as must be done in any fair endeavor to ascertain the true intent of the reviewing authority, it is clear that he has taken neither of the only two actions he had power to take. It follows that the whole purported action is a nullity and that, consequently, the general court-martial order promulgating this void action is also void. The Board is, therefore, of opinion that the action of the reviewing authority and the general court-martial order should be vacated and that the record of trial should be returned to the reviewing authority for proper action upon the sentence, either approving or disapproving it. Until a valid action upon the sentence shall have been taken by the reviewing authority, it is

considered that the record will not be complete and that, consequently, any consideration of the sufficiency of the record to support the sentence adjudged, when and if approved by the reviewing authority, would, at this time, be premature.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

Continuation on page (51)

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

FEB 15 1933

CM 199440

| | | |
|---|---|---|
| UNITED STATES | ) | FOURTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Fort Benning, Georgia, |
| Captain STUART D. CAMPBELL | ) | September 6 and 22, 1932. |
| (0-7756), Quartermaster | ) | Dismissal. |
| Corps. | ) | |

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and WILLIAMS, Judge Advocates
ORIGINAL EXAMINATION by WALSH, 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 94th Article of War.

Specification 1: In that Captain Stuart D. Campbell, Quartermaster Corps, did, at Fort Benning, Georgia, on or about, to wit: from June 6, 1932, to June 20, 1932, knowingly and wilfully misappropriate labor of one L. B. Hodges, a civilian employed by the United States Government, of the value of about $78.67, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain Stuart D. Campbell, Quartermaster Corps, did, at Fort Benning, Georgia, on or about, to wit: from June 17, 1932, to June 30, 1932, knowingly and wilfully misappropriate labor of one H. M. Kelly, a civilian employed by the

United States Government, of the value of about $60.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Captain Stuart D. Campbell, Quartermaster Corps, did, at Fort Benning, Georgia, on or about July 7, 1932, with intent to deceive the Commandant, The Infantry School, Fort Benning, Georgia, officially state in writing to the Quartermaster, Fort Benning, Georgia, reporting on the construction of a fishing van or truck, relative to the source of labor and personnel performing the same, utilized by the said Campbell to aid him in the construction, at Fort Benning, Georgia, of said fishing van or truck, the property of said Campbell, in substance, that viz: "A number of civilian employees did assist me in their spare time, at no expense to the Government, mostly in the giving of advice", which said statement was known by said Campbell to be untrue, in that he well knew at the time that viz: one L. B. Hodges, a civilian employed by the United States Government, had been engaged at the direction and under the supervision of said Campbell in performing labor in, about and upon the construction of said fishing van or truck from to wit: June 6, 1932, to June 20, 1932, at an expense to the Government of, to wit: $78.67.

Specification 2: In that Captain Stuart D. Campbell, Quartermaster Corps, did, at Fort Benning, Georgia, on or about July 7, 1932, with intent to deceive the Commandant, The Infantry School, Fort Benning, Georgia, officially state in writing to the Quartermaster, Fort Benning, Georgia, reporting on the construction of a fishing van or truck, relative to the source of labor and personnel

performing the same, utilized by the said Campbell to aid him in the construction, at Fort Benning, Georgia, of said fishing van or truck, the property of said Campbell, in substance, that viz: "At no time was any civilians, engineer, fireman, or otherwise connected with the railroad, aiding me in this construction", which said statement was known by said Campbell to be untrue, in that he well knew at the time that viz: one L. B. Hodges, a civilian employed by the United States Government as blacksmith, Transportation Branch, Quartermaster Corps, Fort Benning, Georgia, had been engaged at the direction and under the supervision of said Campbell in performing labor in, about and upon the construction of said fishing van or truck from to wit: June 6, 1932, to June 20, 1932.

Specification 3: In that Captain Stuart D. Campbell, Quartermaster Corps, did, at Fort Benning, Georgia, on or about July 7, 1932, with intent to deceive the Commandant, The Infantry School, Fort Benning, Georgia, officially state in writing to the Quartermaster, Fort Benning, Georgia, reporting on the construction of a fishing van or truck, relative to the source of labor and personnel performing the same, utilized by the said Campbell to aid him in the construction, at Fort Benning, Georgia, of said fishing van or truck, the property of said Campbell, in substance, that viz: "A number of civilian employees did assist me in their spare time, at no expense to the Government, mostly in the giving of advice", which said statement was known by said Campbell to be untrue, in that he well knew at the time, that viz: one H. M. Kelly, a civilian employed by the United States Government, had been engaged at the direction and under the supervision of said Campbell in performing labor, in, about and upon the construction of said fishing van or truck, from

to wit: June 17, 1932, to June 30, 1932, at an expense to the government of, to wit: $60.00.

Specification 4: In that Captain Stuart D. Campbell, Quartermaster Corps, did, at Fort Benning, Georgia, on or about July 7, 1932, with intent to deceive the Commandant, The Infantry School, Fort Benning, Georgia, officially state in writing to the Quartermaster, Fort Benning, Georgia, reporting on the construction of a fishing van or truck, relative to the source of labor and personnel performing the same, utilized by the said Campbell to aid him in the construction, at Fort Benning, Georgia, of said fishing van or truck, the property of said Campbell, in substance, that viz: "At no time was any civilians, engineer, fireman or otherwise connected with the railroad, aiding me in this construction", which said statement was known by said Campbell to be untrue in that he well knew at the time that viz: one H. M. Kelly, a civilian employed by the United States Government as a car repairer, Transportation Branch, Quartermaster Corps, Fort Benning, Georgia, had been engaged at the direction and under the supervision of said Campbell in performing labor in, about and upon the construction of said fishing van or truck, from to wit: June 17, 1932, to June 30, 1932.

Specification 5: In that Captain Stuart D. Campbell, Quartermaster Corps, did, at Fort Benning, Georgia, on or about July 7, 1932, with intent to deceive the Commandant, The Infantry School, Fort Benning, Georgia, officially state in writing to the Quartermaster, Fort Benning, Georgia, reporting on the construction of a fishing van or truck, relative to the source of labor and personnel performing the same, utilized by the said Campbell to aid him in the construction, at Fort Benning, Georgia, of a

> certain fishing van or truck, the property of said Campbell, in substance, that viz: "Mr. Kelly, a civilian carpenter, working at the Round House, did come at my request on two or three occasions to Fire Station No. 2, to advise me in regard to the installation of bunks, etc., purchased from the Williams Lumber Company, who did practically all of the carpenter work", which said statement was known by the said Campbell to be untrue, in that he well knew at the time, that viz: said H. M. Kelly had worked in, about and upon the construction of said fishing van or truck, at Fire Station No. 2, from to wit: June 20, 1932, to June 30, 1932.

He 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. Five of the eight members of the court and the trial judge advocate recommended that the sentence of dismissal be modified so as to allow accused to retire for physical disability, the total loss of one eye, giving as their reasons (1) accused's long and distinguished military record both in peace and war, (2) his excellent character and enviable reputation as testified to by officers of distinction, and (3) the possibility that at the time of the offense accused was not in his normal mental state due to worry as to his continuance in the Army, to marital difficulties, and to worry and pain caused by the loss of the sight of his eye.

The reviewing authority approved the sentence, "remitted" so much thereof as exceeded a forfeiture of $50 per month for six months, "as thus commuted" ordered execution of the sentence, published a general court-martial order promulgating the proceedings, and forwarded the record of trial to The Judge Advocate General in whose office it was examined and found legally insufficient to support the sentence as modified by the reviewing authority, the basis for such finding being that the reviewing authority had no power to commute a sentence of dismissal and that his action, therefore, was a nullity. Thereupon, the record of

trial was examined by the Board of Review which submitted its opinion to The Judge Advocate General, who transmitted it, with his recommendations, to the Secretary of War for the action of the President. All of the foregoing proceedings in the office of The Judge Advocate General were taken in accordance with the provisions of Article of War 50½. In accordance with the opinion of the Board of Review and the recommendation of The Judge Advocate General, the President on October 29, 1932, vacated the action of the reviewing authority and the general court-martial order publishing such action as null and void by reason of the fact that they purported to commute the sentence of dismissal, and remanded the record of trial to the reviewing authority for proper action upon the sentence "either approving or disapproving it". Thereupon, the reviewing authority took supplemental action as follows:

> "In the foregoing case of Captain Stuart D. Campbell, O-7756, Quartermaster Corps, the sentence is approved and the record of trial is forwarded for action under the forty-eighth Article of War. Owing to the previous excellent service of this officer and the fact that he made full restitution to the government after his dismissal had been announced by the trial court and the recommendations for clemency, signed by five of the eight members of the trial court and by the accused's immediate Commanding Officer, it is believed that the sentence should be mitigated. I therefore recommend that the sentence be commuted to a forfeiture of $50.00 per month for six months",

and forwarded the record of trial for action under the 48th Article of War.

3. Certain undisputed facts established by the evidence may be summarized as follows: The accused, Captain Stuart D. Campbell, Quartermaster Corps, was during the months of May, June and July, 1932, stationed at Fort Benning, Georgia. He was Transportation Officer and as such his duties included the operation and maintenance

of the post railroad and the railroad roundhouse located on the reservation, and supervision of the personnel, both civilian and military, on duty in connection with the operation and maintenance of the railroad (R. 18,26-28,108). He was also, during the period in question, the Post Fire Marshal (R. 108). During the latter part of May, 1932, accused approached F. A. Whitaker, master mechanic, a civilian employee of the Quartermaster, on duty at the roundhouse, and outlined to him a plan for the construction of a van which he contemplated building upon the chassis of a Ford truck. The plan involved a body containing bunks and an ice box, and accused drew upon the floor of the roundhouse a diagram indicating the length and width of the body and the location of the doors (R. 18). On June 3, 1932, the Ford chassis was delivered at the roundhouse (R. 19,110), where Loyd B. Hodges, blacksmith, and Henry M. Kelley, carpenter, both civilian employees of the Quartermaster and on duty at the roundhouse, worked upon the truck in accordance with the plan outlined to Whitaker (R. 19,20,29-31,33, 34,111,112). Certain welding of door frames and placing of angle bows was done, and about June 20th accused had the chassis removed to Fire Station No. 2 (R. 21,34,110,111), where the carpenter, Kelley, worked upon the truck until June 30, 1932 (R. 21,34,112). During the entire period of construction accused inspected the work practically every day and saw both Kelley and Hodges working on the truck during the regular working hours (R. 20,30,33,34,110,112, 113). Accused certified on time slips as to the presence for duty of these two employees for the period in question (R. 55-56), and they were paid their full regular salary from government funds (R. 31,35,51-53,112; Exs 1,2). On July 7, 1932, Colonel J. DeCamp Hall, Quartermaster Corps, Post Quartermaster, Fort Benning, Georgia, was instructed by the executive officer at post headquarters to investigate and report the facts connected with the construction of a van which was then at Fire Station No. 2 (R. 65). He found that the van was the property of accused and upon inquiry was informed by accused that he had constructed the van himself, with the exception of some welding which was done at the roundhouse (R. 66). He also stated to Colonel Hall that several men had assisted him by giving advice, and that the men at the fire station had worked during their idle time (R. 66,105). Accused was directed by Colonel

Hall to submit a statement in writing (R. 66,113), which statement (Ex. 3) is dated July 7, 1932, bears the signature "Campbell", and is addressed to "Quartermaster, Fort Benning, Georgia". The following extracts appear therein:

> "A number of civilian employees did assist me in their spare time at no expense to the Government, mostly in the giving of advice."
>
> "At no time was any civilians, engineer, fireman, or otherwise, connected with the railroad, aiding me in this construction."
>
> "Mr. Kelly, a civilian carpenter, working at the Roundhouse, did come at my request on two or three occasions to Fire Station No. 2, to advise me in regard to the installation of bunks, etc. purchased from the Williams Lumber Company, who did practically all of the carpenter work."

Subsequently, on July 12, 1932, accused paid to the Post Finance Officer $60.20 to cover the salary of Kelley for the period he worked on the van (R. 53,108,109).

4. The evidence for the prosecution, not stated above, is briefly as follows: T. A. Whitaker testified that the Ford chassis was brought to the roundhouse on June 3d and work was begun upon it on Monday, June 6, 1932. On this date, while Loyd B. Hodges, the blacksmith, was at work upon the chassis, accused arrived and gave Hodges "orders and directions" (R. 19,20). Hodges continued working on the truck during the regular work hours of the day until June 20, 1932 (R. 20), and performed no official duties except "two or three little odd jobs" consuming about thirty minutes (R. 21). The regular shop hours at this time were from 6:30 a.m. to 3:00 p.m. Accused inspected the work on the chassis practically every day, remaining at the roundhouse ninety-five per cent of the time, with the exception of one day on which he did not appear at all (R. 20, 23,118). About "three or four days" before Monday, June 20, 1932, the date the truck was moved to Fire Station No. 2, Henry M. Kelley, the carpenter, began work upon the van, and after its removal went

every morning to the fire station. For the ten day period following June 20th, Kelley performed no services at the roundhouse (R. 21). The official duties of Hodges and Kelley were entirely in connection with the maintenance of the post railroad (R. 26,28). Private Albert Levesque, Infantry School Detachment, a painter, on duty at the roundhouse, also worked on this truck during the month and did not perform his customary duties for the government during this period (R. 22). "Sometime after the first of July" accused gave witness a check for $5.00 with instructions to give it to Levesque and "tell him if anybody asked him how long he worked on the truck to say only about five days" (R. 117).

Loyd B. Hodges, blacksmith, testified that he has been employed with the railroad at the roundhouse at Fort Benning for ten years (R. 29), and that his rate of pay is $183.00 per month (R. 32). During the latter part of May, 1932, Mr. Whitaker called witness and showed him some drawings "on the floor" in connection with a truck Captain Campbell wished to have built (R. 29). Witness began work upon the truck on June 4, 1932, and continued until June 18, 1932 (R. 30), going to Fire Station No. 2 "one time" after the truck was removed to that location (R. 32). During this period he worked "approximately thirteen" days, and accused never made any statement to him that he was not to work on this chassis during regular working hours (R. 31). He "cut the chassis in two and extended it out twenty-five inches and welded it back together" (R. 30). He also did "cutting and welding, fastening and shaping the bows, windows and door frames and fenders". During this period of thirteen days he did "very little" work in connection with his duties at the roundhouse except that there might have been "a chisel to dress maybe, which would take five or ten minutes", and he would do that (R. 31). Accused visited the roundhouse to inspect this work "about once a day", usually staying about thirty minutes (R. 30), and instructed witness "what he wanted done on the truck" (R. 31). Over this entire period witness did the work described during the regular working hours and did not on any occasion work on this chassis "outside those hours" (R. 30,31).

Henry M. Kelley, carpenter, testified that during the month of June, 1932, he was a car repairer at the roundhouse, Fort Benning, Georgia, and was paid at a rate of seventy cents per hour (R. 33). Accused spoke to witness about helping him out on the truck "before the chassis was ever delivered to the roundhouse" (R. 37). He began work on the truck on June 17, 1932, while the chassis was at the roundhouse and continued until "the last day of June, 1932" (R. 33,34). While the truck was at the roundhouse and also after it was removed to Fire Station No. 2, it was in the open where anybody could see it (R. 36). Witness performed this labor on the truck during the regular working hours and did none of this work "outside those hours". Accused inspected the work "possibly once a day" and never informed witness that he was not to work on the truck during regular hours. During the period in question witness "did all the woodwork". He "put the floor in it" and "put the lattice on it and the sides and the top". The lattice was of wood and was "fastened to steel bows". When witness started work the truck did not have a body on it and there was "very little wood on it, if any" (R. 34,35). Witness had "taken a course in architectural drawing" and advised accused about the work on the truck and gave him the benefit of his experience (R. 36).

Private 1st Class Albert Levesque testified that he was on duty during the month of June, 1932, with the Railroad Transportation at the roundhouse, Fort Benning, Georgia. On June 20, 1932, accused directed him to "drive his car to Fire Station No. 2", and for the period following that witness "done some painting on his truck" (R. 40). Accused would inspect the work on the truck "around four o'clock", and sometimes "while Mr. Kelley was working on his truck" he inspected the work about noon. Witness worked on the truck "from the 20th to the 10th, except one day" when he was on kitchen police; he "worked in the morning and afternoon" until "about four o'clock - sometimes four thirty". The work he performed on the truck had nothing to do with his regular duties (R. 41,42). He had a conversation with accused at the roundhouse and "he told me that if anybody asked me how long I worked on that truck, to tell them three or four days". Mr. Whitaker gave witness

a five dollar check which he had received from accused (R. 41). Accused might have stated that the five dollars was "for the three or four days you worked overtime" and witness might have misunderstood him (R. 42).

Colonel J. DeCamp Hall, Quartermaster Corps, Post Quartermaster at Fort Benning, Georgia, testified that he assumed the duties of quartermaster on June 18th but reported on June 4, 1932 and "stopped a few days with Captain Campbell" (R. 70). On Saturday, June 5, 1932, accused took him all over the post, and repeated the trip on Monday morning (R. 72). They visited the roundhouse but he does not remember seeing the van. On June 20th he made his rounds alone and "first saw the van at Fire Station No. 2" (R. 73). Witness stated that unless he actually saw the work being carried on, he would not know what was being done because there was no "routine channel by which you might have known what work was being carried on so that this construction work might have come to your attention" (R. 74). On July 7, 1932, he called accused to his office and told him that he "was ordered to investigate the building of his van", and accused "replied that he had anticipated my investigation, as he had already heard that I had been at the fire station". Accused then "exhibited" a number of paid bills and assured witness that "no Government material had been used in the van, and that the van had been constructed by him, with the exception of some welding to the bows and door frames that he had done at the roundhouse, and that several men had assisted him with advice, and that the men at the fire station had worked during their idle time" (R. 66). The accused was very much upset over the affair and talked "quite freely, and his conversation was very clear". Witness understood he said what he thought to be the truth (R. 71). Witness then stated to accused, "Captain, would you mind giving me a written statement as to what you have told me", and in the course of twenty or thirty minutes he returned and handed witness the letter (Ex. 3) (R. 66). What he stated in his written statement was "about the same as he told it *** verbally" (R. 71). After receiving the letter on July 7th, he continued his investigation (R. 67) and did not find the circumstances exactly as set forth

in the letter. He was at first deceived by his letter (R. 69).

5. The evidence for the defense is substantially as follows: The accused was sworn as a witness in his own behalf and testified that he is a naturalized American citizen of British parentage. He attended the first officers' training camp at Fort Sheridan, Illinois, and was sent to France in September, 1917, joining the First Division as a first lieutenant of Infantry and remaining with it until he was wounded at Soissons. He commanded Company A of General Pershing's Composite Regiment, and led the allied parades in Paris, London and Washington. He was later commissioned in the Regular Army and returned to Germany with the 15th Infantry. Subsequently, he was connected with the Graves Registration Service both in France and Russia, and afterwards attended the French Quartermaster School. He married a French woman, but after returning to the United States she was unable to adjust herself to American people and their modes of living, which resulted in a separation and her return to France. He gave her their home, paid her lawyer's fee, and made her an allowance of $75.00 a month, but she found that she could not get a divorce in France so she returned to the United States. Through her attorneys, she was making demands which he could not meet and threatened to come to Benning and tell the commandant that he was not treating her properly. On the morning of July 7th, just before writing the letter to Colonel Hall, he had again been informed that counsel for his wife was demanding immediate payment of sums which he could not meet. Sometime before this he had been sent a copy of the "Army and Navy Register" showing his name checked in red as one of the 2000 officers to be eliminated under pending legislation. This caused him a great deal of grief and he decided to build the van and go to "Santiago", the home of his sister. In February his left eye had been badly injured, and on July 5, 1932, while at his quarters, something in his eye "bursted" and afterwards he "couldn't see anything". He did not have the eye treated and tried to "conceal" the injury. On the morning of July 7th, he was "almost frantic" but did not want to go on sick report because

he had no hospital record other than being wounded in action. It was on the afternoon of this day, July 7th, that the investigation of Colonel Hall took place and the letter (Ex. 3) was prepared and submitted by him (R. 98-105). Colonel Hall called him into his office and told him he "had been ordered to investigate" (R. 105,113) the building of his van and asked him if he had "used any government material" and if "any civilian, engineer, or fireman" had worked upon the van. He exhibited his paid bills to Colonel Hall and stated that he "had a certain fellow down at the roundhouse that had helped *** on the carpenter work", and that "several soldiers" had assisted him at the roundhouse and at Fire Station No. 2 (R. 105). At the request of Colonel Hall, he then prepared the written statement (Ex. 3) covering what he had said. At the time he was in a "confused mental condition", and "only through the fortitude one gets in battle and intensive disciplinary training" did he keep on his feet (R. 114). He was not nervous about what he had done because he "didn't think about it that way". Colonel Hall's investigation did not cause him "any nervousness" except that he regretted causing him any trouble (R. 116), and "the last thing in the world" he ever thought of was deceiving him (R. 106). He had no idea that his letter "was going forward" (R. 113) although he expected "to hear more of it" (R. 116). His stenographer did remark that the letter was "disjoined", but if he had tried to dictate another he "would have been in the hospital" (R. 113). He believed Colonel Hall "already knew the siutation" because he had told him about the van and showed it to him, and he did not intend to "hide anything from him" (R. 105,106). The Commandant, General King, was Chief of Staff of the First Division, a man he loved and respected, and he "couldn't lie to him". He was proud of the van and intended to show it to General King and Colonel Hall when it was finished (R. 107). He admitted that he knew both Hodges and Kelley had worked on the van during regular government hours and that they both had received their pay for the time in question from government funds (R. 112-114), but that he "originally intended" to pay for this labor (R. 109), and added that a number of officers had visited the van during the period of construction and several indicated a desire to build one similar to it, and "they knew I was going to pay for it by my own statement". He did not realize that he could not use government labor and reimburse the government for it (R. 106). When he stated in his letter to Colonel Hall that "a number of civilian employees did assist me in their spare time, at no expense to the government, mostly

in the giving of advice", he did not consider the men he "meant to pay" (R. 112). He added "it would be asinine for me to state that Mr. Hodges had assisted me at no expense to the government because I knew he had not" (R. 113). When he stated in the letter, "Mr. Kelley, a civilian carpenter, working at the roundhouse, did come at my request, on two or three occasions to Fire Station No. 2 to advise me in regard to installation of bunks, etc.", he had Kelley and Hodges confused, and Hodges was the man that he had in mind coming to the fire station (R. 114) and "there is no question" about that statement in the letter being untrue because he "was not thinking about him at that time" (R. 115). He did give a check for five dollars to Mr. Whitaker with instructions to give it to Levesque and at the time "told him just exactly what I told Levesque; that it was for the four or five days he worked overtime for me" (R. 115). He paid the Finance Officer for the time Kelley worked, as he had "originally intended", but did not pay for Hodges because Colonel Hall told him not to pay "another cent". Every man who worked on the van was paid; he gave three dollars to the man who installed the electric wiring for overtime, and two dollars to the man who checked up the brakes (R. 109). (It also appears that he presented a radio to the Fire Department to repay the men there for the services rendered by them (R. 50)).

Mrs. Clara M. Zehrbach, Columbus, Georgia, testified that on July 7, 1932, she was accused's stenographer; that she had known him for about two and one-half years, and was associated with him daily. For several days prior to July 7th, she had noticed that he looked like he was worried about something (R. 88). He performed his usual duties but had not carried on in a connected way. She often asked him if there was "something bothering him" and he replied "No", but she felt that he was worrying about something "he didn't feel free to discuss". When he dictated the letter (Ex. 3), he seemed "a little bit agitated, a little bit nervous" and his dictation was not as connected as it had always been. She called his attention to this after she wrote the letter but he said "it was all right", that Colonel Hall only

wanted it for his personal use and only requested "a brief outline". Accused made no changes in the letter, it was typed exactly as dictated, and he said that he did not wish to read it over and rewrite it (R. 89-90).

Captain Clough F. Gee, Quartermaster Corps, testified that he has been intimately associated with accused at Fort Benning, Georgia, for approximately two years, and that his general character is good. Accused impressed him as "being a very straight-forward, to-the-point kind of officer", although he sometimes made up his mind a little readily. For about six months prior to July 7th accused seemed worried about something "other than his job", but witness did not know what it was. He would order out transportation even though the limit on drivers and trucks had been reached, and would make "snappy decisions" which caused witness to believe that he did not give sufficient thought and care to details. He was not "the same officer" he had been (R. 85-86).

Captain Carl H. Jabelonsky, Quartermaster Corps, testified that he has known accused for about two and one-half years at Fort Benning, Georgia; has had daily contact with him (R. 98), and his general character is "most excellent" (R. 98).

The defense introduced the proceedings of a board of officers (Ex. C), which met at Fort Benning, Georgia, on August 15, 1932, to inquire as to an injury sustained by accused. The following is quoted from the findings of the board:

> "1. That Captain Stuart D. Campbell, Q.M.C., Fort Benning, Georgia, sustained an injury to his left eye about 10:30 P.M., February 3, 1932, while driving an automobile on the Columbus-Fort Benning Road, within the Military Reservation, and toward the post of Fort Benning, Georgia.
>
> * * *
>
> "6. *** that this injury appeared to him to occur just as he passed another car, which was traveling toward Columbus, Georgia, and appeared to

be caused by a blow from some object which he could not locate; That he halted his car alongside the road until the acute pain subsided somewhat, at which time he noticed a peculiar discharge from the eye, and then proceeded to his quarters; that for several days his eye was inflamed and bloodshot, causing friends and subordinates to remark on it, but finally cleared up.

"7. That there was a recurrence of this severe pain and discharge from his eye on or about July 5, 1932, while seated at his desk, and following the subsidence of the acute pain, Captain Campbell discovered himself unable to see from the left eye.

"8. That Captain Campbell's left eye was organically sound and well on January 7, 1932, the date of his annual physical examination; that on August 6, 1932, Captain Campbell's left eye was blind and that this blindness has continued to the present time; that at various times subsequent to January 7, 1932, and prior to August 6, 1932, Captain Campbell's left eye was the seat of a recurrent inflammatory process; that this present blindness of Captain Campbell's left eye is due to a traumatic cataract, with complete synechia, the latter secondary to an iritis, but which might well have followed an injury to the eye.

"9. That in the opinion of the Board Captain Campbell sustained his injury 'IN LINE OF DUTY' and 'NOT THE RESULT OF HIS OWN MISCONDUCT'".

Major General Frank Parker testified by deposition (Ex. A) that the accused was a lieutenant, doing company duty, when he took command of the 18th Infantry in December, 1917, and he has known him quite well since then. Because of accused's soldierly appearance and behavior, he placed him in command of a company early in 1918 and recommended that he be promoted to captain. Accused commanded the company to the entire satisfaction of witness until he was wounded during the second battle of the Marne in July, 1918, since which time witness has met him only

on certain social occasions. The following is quoted from General Parker's deposition:

> "During this time, Captain Campbell's character was that of an upstanding, energetic, efficient and courageous officer. I know nothing of this officer except what is worthy of praise. His service during this time was performed in accord with the high standards of the First Regular Division, A. E. F. He was wounded in the battle which was the turning point of the war. The roll which the First Regular Division played in that battle, and the roll which the 18th Infantry played in that division are matters of history. This asset of service should be carefully considered in connection with any liability which Captain Campbell's service has since undergone."

In a letter to the accused, which is copied into the record (R. 95), General Parker stated, "I am handing this in on Monday for your Croix de Guerre", and quoted his recommendation as follows:

> "Displayed the highest quality of courage at the head of his men in the Sector of Villers-Tournelle from April 24 to June 2, 1918, and in the offensive south of Soissons, which commenced on July 18, 1918. He was severely wounded while valiantly heading his company in attack."

Lieutenant Colonel Charles A. Hunt, Infantry, testified that he has known accused since about October, 1917, and was accused's battalion commander from February to July, 1918, during which period accused commanded a company of the 18th Infantry in the front line in the Toul and Cantigny sectors. The accused participated in the attack at Soissons and was wounded during the action of the second day and suffered a second wound while being evacuated. He did not return to the regiment until January, 1919. Because of his outstanding record, he was selected to command the company picked from the First Brigade for the Pershing Composite Regiment (R. 12-14).

Witness also testified:

> "During all this service under me I feel that I know Captain Campbell very intimately. I knew him under the stress of battle conditions, the relaxations of rest periods, and the relaxations of post-armistice. I found him to be an absolutely honest officer, absolutely reliable, dependable, and a very efficient company commander. He was one of the highest type of officers in the First Division, and one of those who made the record of the First Division what it was in the World War. He was an outstanding officer in that class. I would be very glad to have Captain Campbell serve under me, now or in the future." (R. 14.)

Major B. R. Legg, Infantry, testified that he has known accused for about thirteen years. He knew him very intimately during the war and he was an officer of the very highest type with the highest reputation for courage on the battlefield. Witness has known accused during the past year and a half at Fort Benning and his opinion of him has been "just the same". He would especially desire to have accused serve with him on troop duty (R. 87,88).

The defense offerred in evidence the indorsement of Major General Campbell King, dated August 23, 1932, forwarding the charges, which reads in part:

> "3. While trial is deemed necessary, it is thought that under the circumstances of this case, in view of Captain Campbell's long and faithful service and his excellent war record as a gallant officer, he should not be dismissed from the service, if found guilty of the offenses charged. Accordingly, it is recommended that the charges be amended as to the Article of War under which laid so that conviction thereof does not entail mandatory dismissal, as is now the case with the charge laid under the 95th Article of War." (R. 96,97.)

The defense also introduced the efficiency reports covering accused's service from November, 1919, to June, 1932, of which one was superior, eight excellent, and twelve satisfactory (Ex. B).

6. We have not summarized in this review the testimony of certain witnesses, which is sufficiently covered in the statement of undisputed facts, paragraph 3 above, or is otherwise unimportant. The omitted witnesses are Stephen A. Tyler (R. 37-39), Private Arthur L. Allen (R. 43-46), Private John O. McArthur (R. 47-50), Captain Arthur J. Perry, Finance Department (R. 50-54), and B. C. Markey (R. 54-60), all for the prosecution, and the stipulation of Captain E. W. Lewis, Quartermaster Corps, offered by the defense (R. 90).

7. The only question of law arising in this case is whether the misappropriation of the labor of government employees is made punishable by the 94th Article of War. The pertinent part of that highly penal statute declares that

> "Any person subject to military law *** who steals, embezzles, knowingly and willfully misappropriates, *** any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States furnished and intended for the military service thereof *** shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties."

The accused is not charged with the misappropriation of any property described in the enumerated list. To say that the general words "other property" following the specifically named kinds of property embrace labor would be to depart from a well known rule of statutory construction. By the rule of construction known as the "ejusdem generis", where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The word "other" following an enumeration of particular kinds of property is therefore to be read

as "other such like" and to include only others of like kind or character. Western Dredging and Improvement Co. v. Heldmaier, 111 Fed. 123. This rule has been held especially applicable to penal statutes. In the case of United States v. Salen, 235 U.S. 237, on page 249, the court said:

> "Such an interpretation would give an exceedingly liberal construction to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which standing alone might have a wide and comprehensive import will, when joined with those defining specific - acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class. Cf. Virginia v. Tennessee, 148 U.S. 503,519; United States v. Chase, 135 U.S. 255,258; Neal v. Clark, 95 U.S. 704,708."

Accordingly, the Board of Review is of the opinion that misappropriation or misapplication of the services of government employees is not made punishable by the 94th Article of War.

Though the offenses alleged in Specifications 1 and 2 of Charge I were improperly laid under the 94th Article of War, the misappropriation of the services of Hodges and Kelley, both employees of the government, by having them perform labor on the private truck or van of the accused during the hours they were paid by the government to render service for the United States, is clearly an offense to the prejudice of good order and military discipline and conduct of a nature to bring discredit upon the military service in violation of the 96th Article of War.

8. Under Charge II, alleging violation of the 95th Article of War, that is, conduct unbecoming an officer and a gentleman, there are five specifications alleging false official statements by accused. The record of trial discloses that in fact accused

made but one statement, which statement is false in several particulars. Under these circumstances, there should have been but one specification under the charge, which specification should have set out the substance of accused's statement and alleged the particulars in which that statement was knowingly false and made with the intention to deceive. However, as the sentence of dismissal is mandatory upon conviction of one specification properly laid under the 95th Article of War, no rights of the accused were prejudiced by the unnecessary multiplication of specifications in this case. The specifications allege that accused made the false statements in writing "with intent to deceive the Commandant, The Infantry School". The letter containing the false statements was addressed to the Quartermaster, but the evidence shows that it was written immediately after accused had made a verbal explanation concerning the construction of the van to Colonel Hall, who told accused that he "was ordered to investigate the building of his van". The normal source of such an order to the quartermaster would be from post headquarters and the report of investigation would be submitted there. The natural result of a false report to Colonel Hall under these circumstances would be to deceive the Commandant, who was the post commander. The accused made no objection to the form of specification, and the question merits no further discussion. That the statements made were false as alleged and calculated to deceive is clear.

9. Accompanying the record of trial is a recommendation, signed by five of the eight members of the court-martial which tried the accused, recommending that the sentence of dismissal adjudged by the court be modified so as to permit the accused to retire for physical disability. There are also forwarded with the record recommendations for clemency submitted by General C. P. Summerall, Retired, Major General Campbell King, Commandant of the Infantry School, Major General Edward L. King, the reviewing authority, contained in his action of November 28, 1932, and from Mr. Stephen J. McTague, a lawyer with offices at 67 Wall Street, New York City, who served under the accused in France. In addition, Major General Frank Parker, under whom accused served

during the operations of the First Division, discussed the matter with the members of the Board of Review and strongly urged that accused's excellent war record should be taken into consideration and that the sentence should be commuted. The Board of Review does not ordinarily consider recommendations for clemency unless the record of trial itself requires that consideration be given to that subject. As the recommendation for clemency, signed by certain members of the court, is properly attached to the record of trial as required by the Manual for Courts-Martial and as the action of the reviewing authority itself recommends clemency, it is proper for the Board of Review to consider that matter. In the instant case, accused has been properly convicted of conduct unbecoming an officer and a gentleman. In our opinion, if a mandatory sentence of dismissal based on conviction is confirmed, it should never be commuted. The standards of the Army should not be less rigid than those of the Congress. The Board, therefore, is of opinion that commutation of the sentence should not be considered.

However, the record of trial itself does present a serious question as to whether or not the sentence should be carried into execution. When the reviewing authority first acted upon the record of trial, he approved the sentence but commuted it to a forfeiture of $50 per month for six months, and published a general court-martial order promulgating the proceedings and his action thereon. The attempt of the reviewing authority to commute the sentence was without authority of law and the action of the reviewing authority and the general court-martial order publishing such action were vacated by the President, who remanded the record of trial to the reviewing authority for appropriate action upon the sentence, either approving or disapproving it. The reviewing authority, although he had previously attempted to commute the sentence, did not disapprove it but approved it, and in his action recommended that the sentence be commuted. In view of the fact that a high officer of the Army by his previous action notified the accused that the sentence of dismissal would not be carried into execution, and the accused necessarily reposed confidence in the validity of that action, it would seem in a sense unjust,

even though the action of the reviewing authority was a nullity, for the Government now to execute a sentence more severe than that first approved by the reviewing authority. In view of the proceedings in this case, execution of the sentence will appear harsh and unjust and might properly arouse criticism, both within and without the Army, which would do infinitely more harm than retention of this officer in the service. The Board believes that serious consideration should be given to the disapproval of the sentence, no reason being stated in the action of the President for such disapproval.

10. The official Army Register indicates that the accused received a Silver Star Citation. His statement of service appears as follows:

> "1 lt. Inf. Sec. O.R.C. 15 Aug. 17; accepted 15 Aug. 17; active duty 15 Aug. 17; capt. of Inf. U.S.A. 26 Mar. 19; accepted 30 Mar. 19; vacated 12 Oct. 20 - Capt. of Inf. 1 July 20; accepted 12 Oct. 20; trfd. to Q.M.C. 10 Mar. 21."

11. The court was legally constituted. Except as discussed above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 of guilty of Charge I and the two specifications thereunder as finds the accused guilty of those specifications in violation of the 96th Article of War, and legally sufficient to support the findings of guilty of Charge II and its specifications, and the sentence. A sentence of dismissal is mandatory on conviction of violation of the 95th Article of War and authorized for violation of the 96th Article of War. For the reasons set forth in paragraph 9 above, the Board of Review recommends that the sentence be disapproved.

E. C. McNeil, Judge Advocate.
G. T. McDonald, Judge Advocate.
Charles R. Williams, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., FEB 15 1933 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain Stuart D. Campbell (O-7756), Quartermaster Corps, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review and, for the reasons therein stated, recommend that the sentence not be commuted.

3. This case has several most unusual features. It is entirely clear that the written statement submitted by the accused to Colonel Hall was not a full and frank statement concerning the government employees who worked on the construction of his van. However, Captain Campbell claims that he always intended to pay for the services of Hodges and Kelley, the two civilians who did most of the work, and that therefore he did not consider them when he dictated the statement which he submitted. He also explains that he confused these two men and that when he stated that Kelley came to the firehouse on two or three occasions "to advise me in regard to the installation of bunks, etc.", he had Hodges in mind because he well knew that Kelley worked at the firehouse for some days. The evidence indicates that Captain Campbell was in a condition of nervous instability at the time he made the statement to Colonel Hall. He was having marital troubles and that very morning his wife, through her attorneys, had demanded payments which he could not meet and threatened to report him to the Commandant. He was fearful of being eliminated from the service through the then proposed reduction of commissioned officers. He was suffering great physical pain on account of the loss of an eye only two days before. In view of these circumstances, I am unable to say that his lack of truthfulness and frankness may not have been due to personal difficulties and pathological conditions. For this reason, and because of Captain Campbell's excellent record in combat, the recommendation for clemency by a majority of the court, and because it would be in a sense unjust to now carry the sentence of dismissal into effect in view of the first action of the reviewing authority in publishing in orders his vain attempt to commute the sentence to forfeiture of pay, I concur in the recommendation of the Board of Review that the sentence be disapproved.

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. Bd. of Rev.
Incl. 3-Draft of let. for sig. Secy. of War.
Incl. 4-Form of executive action.

Never acted upon by the Pres.
Officer retired for physical disability.

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

OCT 2 5 1932

CM 199463

| | | |
|---|---|---|
| UNITED STATES | ) | FIRST DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Madison Barracks, New York, |
| Private ESTLE A. BURRIS | ) | October 3, 1932. Dishonorable |
| (6800832), Headquarters, | ) | discharge and confinement for |
| Headquarters Battery and | ) | six (6) months. Disciplinary |
| Combat Train, 2d Battalion, | ) | Barracks. |
| 7th Field Artillery. | ) | |

---

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 has been examined by the Board of Review.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Estle A. Burris, Headquarters, Headquarters Battery and Combat Train, 2d Battalion, 7th Field Artillery, did, at Pine Camp, New York, on or about August 10, 1932, feloniously take, steal, and carry away one blanket, woolen O.D., value about Two Dollars and Fifty Cents ($2.50), the property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence,

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 50½.

3. The evidence shows that on the date alleged in the specification, First Sergeant William Casey, Battery D, 7th Field Artillery, saw accused walking along a line of automobiles parked in the rear of the battery stables at Pine Camp, New York, with something under his arm. His actions aroused Sergeant Casey's suspicions so he followed accused to a truck parked in or near the line of automobiles, and asked him what he had. Thereupon accused produced a blanket which he stated, in reply to questions, that he had obtained from "a maroon-colored car". Accused and Sergeant Casey walked along the line of automobiles and accused pointed out the maroon-colored car from which he said he had taken the blanket (R. 4,5). Sergeant Casey did not see accused take the blanket from the car nor could he identify the blanket, and he could only describe it as an olive drab blanket (R. 10). Sergeant Casey took it to Battalion Headquarters and turned it over to a clerk, directing him to report the matter to the Sergeant Major. Sergeant Casey did not believe there was an officer present in headquarters when he delivered the blanket to the clerk (R. 5). There is in the record no further testimony shown to apply to this blanket found in accused's possession and which he admitted taking from a car which was one of many in a line of automobiles parked in the rear of the battery stables.

Captain Marion L. Young, 7th Field Artillery, a witness for the prosecution, testified that on the date stated in the specification, Sergeant Casey gave him a blanket. This blanket was identified by the witness and introduced in evidence. It had on it the battery number of Private 1st Class Emory W. Fedora, Battery F, 7th Field Artillery (R. 7,8). Private Fedora identified the blanket produced by Captain Young as one that had been duly issued to him for use in the military service (R. 8,9). The blanket introduced in evidence and identified by Captain Young and Private Fedora had been left by the latter in his automobile on the morning of August 10, 1932, and was missing from the automobile at 11 o'clock that morning when Private Fedora returned from the target range. Accused saw the blanket that same morning in Captain Young's possession (R. 8). Private Fedora's automobile was a Ford roadster, brown and white in color (R. 8). Sergeant Casey described the color "maroon" as being "a kind of brownish color", and, upon being asked whether it was not red, said

"Well, a sort of brownish red". The car pointed out to him by accused as the one from which accused had taken the blanket was described by Sergeant Casey as being either a Ford or Chevrolet roadster (R. 10).

4. The evidence briefly summarized above indicates that two different blankets were in the possession of Sergeant Casey on the morning of August 10th. One of these blankets, obtained from the accused and which accused admitted having taken from an automobile, was turned over by Sergeant Casey to a clerk in Battalion Headquarters, with instructions that the matter be reported to the Sergeant Major. The other blanket, the source of which is not disclosed, was delivered by Sergeant Casey to Captain Young and this blanket was proved to have been a blanket belonging to the United States, furnished and intended for the military service thereof, which disappeared from Private Fedora's automobile, as above stated. There is no competent evidence to establish that this blanket was ever in the possession of the accused. There is no evidence of any kind to establish that the blanket taken from accused was the property of the United States. The evidence therefore fails to establish the allegation that accused stole a blanket, the property of the United States, furnished and intended for the military service thereof.

5. For the reasons hereinabove stated, the Board of Review holds the record not legally sufficient to support the findings and sentence.

E. C. McCarty, Judge Advocate.

Rosenman, Judge Advocate.

Mark E. Lyons, Judge Advocate.

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

CM 199465 JAN 21 1933

| | |
|---|---|
| UNITED STATES<br><br>v.<br><br>Second Lieutenant HERBERT C. LICHTENBERGER (0-16677), Air Corps. | EIGHTH CORPS AREA<br><br>Trial by G.C.M., convened at Fort Sam Houston, Texas, August 15-20, 1932. Dismissal and confinement for ten (10) years. |

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD 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. The accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Second Lieutenant Herbert C. Lichtenberger, Air Corps, United States Army, did, at Schertz, Texas, on or about February 15, 1932, by force and violence, with a pistol and by putting them in fear, feloniously, unlawfully and willfully take, steal and carry away from the presence and custody of Herbert P. Thulemeyer and Clarabelle Thulemeyer the sum of about Six Hundred and Forty-eight Dollars and fifty cents ($648.50), in United States Currency, the property of the Schertz State Bank, of the value of about Six Hundred and Forty-eight Dollars and fifty cents ($648.50), with intent to deprive the said Schertz State Bank of the same.

Specification 2: In that Second Lieutenant Herbert C. Lichtenberger, Air Corps, United States Army, did, at Schertz, Texas, on or about February 15,

> 1932, with intent to do him bodily harm, commit an assault on one W. W. Lehr, by shooting at him, the said W. W. Lehr, with a dangerous weapon, to-wit, a pistol.

He pleaded not guilty to, and was found guilty of, the Charge and both specifications. No evidence of previous convictions was introduced. Prior to proceeding to findings on the Charge and specifications, the court made findings (R. 901) that the accused was in proper mental condition at that time to undergo trial and was at the time of the commission of the alleged offenses so far free from mental defect, mental disease or mental derangement as to be able, concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right. He was sentenced to be dismissed the service and to be confined at hard labor for a period of ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The accused, before pleading to the general issue, entered a special plea to the jurisdiction of the court on the ground that the convening authority was the real accuser in the case (R. 12,13). Four witnesses were examined on the question raised by the special plea and then the accused made a motion for a continuance until Major General Edwin B. Winans, Brigadier General Charles H. Danforth, and Major Thomas J. Hanley, jr., could be subpoenaed as witnesses (R. 72,73). The motion for a continuance was denied and the special plea to the jurisdiction overruled.

The accused then made a motion for a continuance on the ground (1) that he was under indictment in the 25th Judicial District Court of the State of Texas for the same offense and that said court had not relinquished jurisdiction which had attached before the military assumed jurisdiction of the case, and (2) that the wife of the accused, who was a material witness in the case, was absent and her testimony could not be procured and presented to the court unless a continuance should be granted (R. 93,106). This motion was denied.

4. In reference to the plea to the jurisdiction and the motion for a continuance in connection therewith, it is unnecessary to state the testimony given by the officers called by the defense to substantiate its claim that the Corps Area Commander is the accuser. The principal witness on this matter was Colonel George P. Tyner, General Staff Corps, Chief of Staff of the Eighth Corps Area. His testimony disclosed that immediately after the date

of the offense charged, accused was apprehended and turned over to the civil authorities, this latter action, of course, being in compliance with the provisions of Article of War 74; that in May, 1932, it came to the attention of the witness that the State court had continued the trial of accused for six months and released accused on bail; and that he brought this matter to the attention of the Corps Area Commander, who directed him, in effect, to have the matter looked into and any necessary action taken. This action of the Corps Area Commander was in accord with his duty and does not render him an accuser in this case. "Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. Thus a division commander may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring such charges as the facts may warrant, and may refer such charges for trial as in other cases." Par. 5, M.C.M., 1928. Conceding in its entirety the claim of the defense that the Corps Area Commander directed that the alleged offense of accused be investigated and, if the facts warranted such action, that appropriate charges be preferred, it is clear that such action on the part of the Corps Area Commander was a proper exercise of his duty in the premises and that, unless he were animated by personal bias or hostility, his action failed to make him an accuser. The defense expressly stated that it did not believe nor charge that the Corps Area Commander had any personal animus in the matter (R. 76,81). Under the circumstances, and as already stated, the refusal of the court to grant a continuance in connection with the plea to the jurisdiction was a proper exercise of its discretion. and its action on the plea was correct.

The second motion for a continuance was also properly denied for the following reasons: The exercise of jurisdiction by courts of the State of Texas did not prevent the military courts from taking jurisdiction of an offense growing out of the same acts or omissions when such acts or omissions constitute an offense against the military law (M.C.M., p. 53); the accused had been released on bond by the civil authorities and his case had been continued until the November term of court; the District Attorney for the District wherein the case against the accused was pending had no objection to the trial by court-martial (R. 65); and the trial judge advocate offered in open court to stipulate that the wife of the accused if present in court would testify as stated in the motion for continuance (R. 127).

5. The evidence introduced by both the prosecution and the defense, summarized as briefly as possible for the purpose of this opinion, is substantially as follows:

Mr. Herbert P. Thulemeyer, Schertz, Texas, a witness for the prosecution, testified that he is the cashier of the Schertz State Bank, and that at about 1:45 o'clock on the afternoon of February 15, 1932, while he was in the bank, his wife called his attention to a new Pontiac automobile that had backed up on the west side of the bank in front of a window of the bank, in a narrow side street (R. 181,182). At about that time a man (later identified as accused) with a revolver in his hand, an automatic pistol sticking in his belt in front, and a scarf or handkerchief hanging on his face from his nose down, stepped into the door and said, "This is a stick-up. Throw up your hands" (R. 182). He then compelled witness to admit him to the space, within the "fixtures", occupied by the witness and his assistant and containing the vault, cashier's counter, and similar banking equipment. (This space, as is usual in banks, is separate from the space used by customers in their ordinary transactions and is entered by means of a door leading from the customers' room (R. 181-183; Pros. Ex. No. 1)). After entering the cashier's space, the masked man (accused), using the revolver to enforce his commands, directed witness and his assistant, who is also his wife, to enter the vault, the door of which was open (R. 184,191,192,206,214,217). Accused followed witness and his wife into the vault, standing about two feet inside the door (R. 183,217), and asked "where is the money", to which witness replied, "There is some on the floor, some on the shelves and some in the safe" (R. 183). At this time accused was facing witness (R. 183) and witness was further back in the vault facing in such way as to be able to see out into the lobby (R. 192,217). Accused then said to witness, "Go out there and wait on that customer", but witness could see that there was no one in the bank and so told accused (R. 183,192), who thereupon backed out of the vault, still holding his revolver close to witness, and went to the cash drawer at the cashier's window, followed by witness and his wife (R. 184). Accused compelled the witness' wife to open the cash drawer and then, remarking "I hate to do this but I need the money", reached into the drawer with his left hand and removed cash in the amount of $648.50, which belonged to the Schertz State Bank (R. 188), the amount being made up of three $50 bills, a number of $20 and $10 bills and some fifty-cent pieces. Among the $10 bills was "one old size ten", that is, one of the type in use in this country up to the year 1928 or 1929 (R. 185,190,191). Accused remarked he did not want the nickels and quarters, and he

overlooked the $5 and $1 bills which were in the cash drawer but concealed by the sliding change tray (R. 184,185). During these proceedings the mask slipped down from accused's face, hanging around his neck, and witness had a "good look" at accused (R. 186). When the mask fell off his face, accused asked witness if he knew him and, when witness replied "no", accused stated he was "Pretty Boy" (a man of this nickname has recently received newspaper publicity as a participant in a serious crime in Oklahoma), and asked witness why there was not more money on hand, witness replying that he came at the wrong time, that there was more money around the first of the month (R. 187). Accused replaced the mask after it dropped from his face (R. 199). Accused then asked witness how long it would take him to get out of the vault and upon being told it would take about an hour, said that he did not want to cause witness to suffocate or to kill him, if witness would get down on the floor and stay there until accused got out of the building (R. 186,195). Witness and his wife lay down on the floor under the counter and accused backed off until he reached the door leading out to the customers' room, where he took his mask off and stepped through the door (R. 186). While witness was still on the floor and as accused went through the door to the customers' room, witness heard the front screen door of the bank slam and heard a shot fired. He heard accused say something to "the man that came in" but did not hear what was said, and then heard the door slam again and "knew" that accused had gone (R. 188). Throughout the robbery witness and his wife, under threat of the revolver, held their hands up in the air (R. 183,184,214). Witness would not have permitted accused to take the money if it had not been for the fact that accused was armed (R. 215). After accused departed, witness arose from the floor and went out into the customers' room, finding there a Mr. W. W. Lehr. He also found that there was a hole in a "sign" (undescribed but introduced in evidence as Pros. Ex. No. 3) and that "back of the hole" he found a bullet lying on the floor. The sign was hanging on the wall about five feet ten inches above the floor, and had no hole in it immediately preceding the robbery (R. 188, 191).

Much of the witness' testimony identifying accused as the man who robbed the bank was elicited on cross-examination by the defense and the statements bearing on identity are scattered throughout the testimony. The witness testified that his business requires close examination and memory of faces and that there is no question in his mind that the accused is the man that faced him in the bank; that he had good opportunity to observe the face and clothing of the robber and that he will never forget the face; that accused is the man who robbed the bank, and that he had learned that accused is Second Lieutenant Herbert C. Lichtenberger then in court (R. 215,216,205,197,188). The robber wore a light slouch hat, a bluish-grey overcoat, and a light suit. An overcoat shown to the witness in court is the same overcoat worn by the robber, having one button missing. Witness noted at the time of the robbery a button missing from the overcoat worn by the robber, and the overcoat shown in court does not merely look like the same overcoat but is the same overcoat (R. 207,209,210). A 38 caliber firearm (not otherwise described in the record) shown to witness by the trial judge advocate appeared to witness to be the "same gun" that the robber used during the robbery, that gun also being of 38 caliber (R. 208,209). A pair of trousers shown to witness by the trial judge advocate was identified positively as the same trousers worn by the robber (R. 208,210). This clothing was all shown to witness two days after the robbery, at which time he was told that they had been taken from Lieutenant Lichtenberger, but his identification of them is from his memory because he knew the clothes, and not from what anyone else had told him (R. 211). Witness denied that he had stated on the night of accused's apprehension that he could not identify accused, explaining that what he had said in a conversation with some friends was that he "had not identified him", and that his wife had made a similar statement at that time (R. 196). On the day of the robbery witness described the robber to Captain James A. Mollison, Air Corps, as being a small man about five feet eight inches in height, wearing a blue-grey overcoat and slouch hat, and a light suit of clothes, and driving a new Pontiac sedan; he did not tell Captain Mollison that the robber was a "dark complected" man (R. 203,204).

The examination of the witness by defense counsel had two main objects in view, one to weaken witness' identification of accused as the man who committed the robbery, and the other to bring forth facts and opinions tending to establish that at the time of the robbery accused was not mentally responsible for his actions. That part of the testimony relative to identification is disposed of in the preceding paragraph. With respect to the mental responsibility of the accused, the witness testified that at the time of the robbery he was close enough to the robber to smell liquor had there been any on the robber's breath, that he did not smell any liquor, that the robber did not act at any time like an intoxicated man, and that in the opinion of the witness he had full possession of his faculties (R. 187,198). Witness does not believe it possible for a man to have been drinking whisky and to be within a few feet of him without his noticing the fact (R. 217). Witness did not make any particular effort to ascertain whether or not the robber had been drinking (R. 198,199). During the robbery the robber (accused) talked constantly but not in a "rattle brain style" (R. 193). Defense asked questions based upon the theory that accused deliberately removed the mask from his face during the robbery, giving witness an opportunity to study his features and be able to identify him later, thus seeking to lay a foundation for the main defense in the case, namely, that accused was not mentally responsible for his actions. In response to these questions, witness testified that accused did not remove the mask from his face during the robbery but that the mask fell from accused's face by accident and that he immediately replaced it; that he did not voluntarily remove the mask until he stepped out of the cashier's room into the customers' room (R. 192,193,199). Questioned as to whether witness thought accused's actions, conduct and demeanor were unusual and whether he did not think it unusual and peculiar that a man would stare him in the face and ask him if he had ever seen him before, give him the name "Pretty Boy", and thus give witness "that means of identification there for about a minute", witness stated that he believed that if he had recognized accused he would have been killed (R. 199,200,203). Asked a direct question by defense as to whether, in view of the robber's conduct, actions and demeanor, witness thought he was sane or insane, the witness replied, "He was sane" (R. 204). Defense questioned witness

as to whether or not he had told one of defense counsel that he believed the robber was insane because he removed his mask and because of his conversation and actions. To this witness replied he had not made that statement but that when he found out that the robber was a United States Army officer he said that he must be insane (R. 204).

Mrs. H. P. (Clarabelle) Thulemeyer, Schertz, Texas, wife of the witness whose testimony is summarized above, identified the accused as Lieutenant Lichtenberger and testified that on February 15, 1932, she was at work in the Schertz State Bank and, happening to glance out of the window, noticed a car backing up on the sidewalk. She thought this unusual, so continued to look at the car and then noticed a person in the car take off his hat and tie a white rag or a white handkerchief around his head (R. 219-221). She said to her husband, "It looks like we are going to have a hold-up", whereupon he stepped to the window and looked outside; about this time a man stepped through the door, pulled a white rag over his face and announced, "This is a stick-up, throw up your hands" (R. 221). The balance of witness' testimony is substantially the same as the testimony given by her husband and summarized in the preceding paragraphs. Repetition thereof would be useless. The witness was positive in her identification of the accused as the robber (R. 227), and stated that the reason she did not identify him the day of his apprehension was that she wanted to make sure of her identification before making such a serious charge (R. 236,255,260,265). Witness believed that at the time of the robbery accused was not drunk and was a perfectly normal man, making this statement in response to a question by the defense (R. 256). Explaining a remark made by her to the effect that being an Army officer accused "must be crazy to do such a thing", witness testified that she did not make that remark because of his actions during the robbery but because of the mere fact that he was an officer of the United States Army engaged in such a crime, and stated that she would never think an Army officer would rob a bank (R. 257,272).

Mr. Werner W. Lehr, Honolulu, Territory of Hawaii, testified by deposition in substance as follows: That about 1:45 o'clock

on the afternoon of February 15, 1932, he entered the State Bank at Schertz, Texas, for the purpose of cashing a check; that on entering the bank he particularly noticed a new-looking blue colored sedan with motor running backed into the alleyway on the west side of the bank, his particular attention being called to the car because it resembled the car of a friend for whom he was looking; that as he opened the screen door of the bank, he noticed no one in the bank but upon taking a step or two heard a report or crash followed by the noise of glass falling from a framed sign hanging on the wall on his left; that he turned to his right, from which direction he thought the shot was fired, and saw, standing about three feet away, a man with a large blue-steel revolver lying in the palms of his hands. Witness took a step toward this man, who was looking straight at him, placed his left hand on the man's shoulder and said, "You damn fool, what do you mean?" Witness and the man both turned and looked at the broken glass sign and, after a moment of silence, the man replied, "My God! I could have shot you", and immediately turned and left the bank. Up until that time witness had had no idea of what had taken place in the bank, but seeing no one in the bank called "hello" several times and, receiving no reply, walked to the door leading into the cashier's room. As he approached the door looking through the scroll work of the counter screen, witness saw Mr. and Mrs. Thulemeyer crouched under the bank counter. Mrs. Thulemeyer recognized witness and said to him, "Mr. Lehr, we have just been robbed". Witness immediately recognized the situation, asked for a gun and upon being told there was none, ran out of the bank and saw a blue sedan racing west about five hundred feet distant, this being the same car he had seen parked in the alleyway when he entered the bank. After an unsuccessful effort to get a gun, witness pursued the fleeing car in his own car. By the time witness had reached the main highway, he had lost sight of the fleeing car, but continued on the highway to Converse without seeing the car.

Testifying more in detail as to what occurred in the bank, witness stated that the individual in the bank, who had the revolver and who fired the shot, was of blond complexion about five feet nine inches in height, weighing about 150 pounds and apparently from 34 to 36 years of age, was neatly dressed in a light colored suit and wearing a light soft felt hat, and was not wearing a

mask; that the shot was fired toward witness, the bullet passing in line with witness' face about six inches therefrom and striking the wall about three feet to his left. The man who had the revolver was calm, did not stagger, and was clear and distinct in his speech. After the shot had been fired, witness' first impression was that the man was drunk, but he later concluded that he appeared to be under the influence of "dope" rather than liquor. The man did not appear to be perfectly normal but witness could not state whether he was sane or insane.

Mr. Cornelius Walker, Schertz, Texas, a witness for the prosecution, testified that he is a laborer living at Schertz, Texas, and knows the accused, "Mr. Lichtenberger"; that about 1:30 o'clock on the afternoon of February 15, 1932, he was at home and that about fifteen minutes to two o'clock of the same afternoon he was passing the Schertz State Bank (R. 277,290,291). Just before reaching the bank, he saw a new Pontiac sedan with 1931 license plates and with motor running parked in the alley alongside the bank, the front of the car being toward the south, that is, toward the street which passes east and west in front of the bank. His attention was drawn to the car because it had 1931 license plates. The left side door of the car, that is, the door next to the steering wheel, was open (R. 276-281,291,292,298,301). As witness was about to pass the bank door, a Ford coupe was driven up in front of the bank. There were two men in the car, one of whom alighted and entered the bank. Witness decreased his pace to allow the man to enter, and then as witness passed the plate glass window of the bank he noticed accused coming out of the cashier's cage with a blue-steel revolver in his hand (R. 280, 281,284). Accused was not masked but had a white handkerchief or cloth around his neck. He was wearing a "dark grey" overcoat. Witness had "a good look" at the face of the man who came out of the cashier's cage, and is sure accused is the man. He looked at him closely that day and again at Seguin, and observed him during the present trial (R. 282,283). Accused fired a shot toward the man who had just entered the bank and then came out of the bank "not running but walking *** his hands in his overcoat pocket" and with a pistol in his hand (witness demonstrated physically to the court the manner in which accused carried the pistol so that

it could be seen even though accused's hands were in his pockets but the record does not disclose the exact picture given by the witness). He got into the Pontiac and drove away with the door of the car open, going west along the road leading away from Schertz (R. 281,289,296).

On cross-examination witness described the overcoat worn by accused as dark blue and again referred to it as dark grey, also stating it to be blue with a grey stripe (R. 288,294). Upon redirect examination the prosecution exhibited an overcoat to witness, after witness stated that he would recognize the overcoat worn by accused, whereupon witness stated that the overcoat shown to him in the court room was the overcoat worn by accused and that he would call it a dark blue overcoat (R. 304,305). It appears from the cross-examination that the overcoat shown witness had a button missing, but it is not otherwise identified as the overcoat identified by the first witness, Mr. Thulemeyer (R. 305).

Mr. Eugene Kneupper, Selma, Texas, a witness for the prosecution, testified that he resides in Selma, Texas, and knows the accused, Lieutenant Lichtenberger; that at about 2:00 o'clock on the afternoon of February 15, 1932, witness was driving a truck for James W. Francis, and was on the road that leads into the east gate of Randolph Field. While witness was about twenty or thirty feet from the gate, a blue Pontiac sedan, "one of the new 8's" bearing a 1931 license plate, passed witness at the rate of about fifty or sixty miles an hour, the witness then driving at about thirty miles an hour. The driver of the Pontiac, who could not be identified by witness, turned into the Field at a rate of about thirty-five or forty miles an hour, the car skidding on all four wheels when it turned to enter the gate (R. 310-314,318,319).

Prior to the introduction of Mr. Kneupper as a witness, prosecution and defense agreed that a sketch on a blackboard in the court room represented certain roads in the vicinity of Randolph Field (R. 309). The testimony of Mr. Kneupper summarized above was accompanied by certain physical references to the chart on the blackboard. These references are not understandable from the record but the Board of Review, under the circumstances, may take judicial notice of the situation of Randolph Field and of highways and towns in the vicinity thereof. A main highway leading from San Antonio toward the northeast

passes through the town of Converse, and then along the north boundary of Randolph Field through the town of Schertz, which is approximately two miles northeast of the Field. Just west of the town of Schertz is a stream, which the road crosses, and just to the west of this stream there is a gravel road extending generally toward the southeast and passing the former east gate of Randolph Field, which gate, according to the record, has been closed since the events involved in this case.

First Lieutenant Carl J. Crane, Air Corps, a witness for the prosecution, testified that on February 15, 1932, he was an instructor in the Academic Department, Randolph Field, and accused was his assistant; that at 2:20 o'clock on the afternoon of that date accused was scheduled to conduct a class at the school but that he did not appear for duty until 2:22 o'clock, at which time he appeared in uniform but still adjusting his uniform and apparently intoxicated, witness reaching the conclusion that accused was intoxicated from his manner of speech and from the "happy, elated expression on his face" and the fact that he was slightly unsteady on his feet. Accused's hair was more or less disheveled, giving him the appearance of an intoxicated man, and his deportment, the condition of his uniform and the expression on his face were different from what witness had customarily noted in those respects. Witness' best memory was that accused was just completing putting on and adjusting his Sam Browne belt as he reported to take his class, and from the entire attitude, appearance and conduct of accused, witness formed the opinion that he was intoxicated, although he was close enough to have smelled liquor on accused's breath but did not smell any. Witness decided that accused was not in condition to take the class and ordered him to go to his quarters, witness himself conducting the class in place of accused (R. 322-328).

Mr. S. R. Bridgewater, San Antonio, Texas, a witness for the prosecution, testified that he is a salesman for the Goad Motor Company of San Antonio, Texas, which company is the distributor for Pontiac automobiles in forty-seven counties, comprising the San Antonio territory; that he had sold to accused a 1932 model Pontiac four-door sedan, which car was delivered to accused February 9, 1932,

and that only one other car of this type had been sold in the forty-seven counties included in the territory, the other car having been sold to a Mr. Patty, who was an inmate of the tubercular hospital at Kerrville, Texas; that between 2:00 and 3:00 o'clock on the afternoon of February 15, 1932, witness, accompanied by a Mr. Bender, sales manager of the Goad Motor Company, called at accused's quarters in accordance with an engagement made early that morning for the purpose of settling the matter of payment for the Pontiac car (R. 330-332,365); that witness and Mr. Bender drove to accused's quarters in a 1932 model Pontiac sedan, which was green in color, that of the accused being blue (R. 334,347); that accused, dressed in uniform, came out and sat in the car with witness and Mr. Bender and they discussed, among other things, payments due from accused; that accused told witness that he had talked with the cashier of the South San Antonio Bank and found that the check he had given witness in the amount of $438 was not good and remarked to witness, "I believe I will just pay you in cash"; that as a result of the conversation accused gave witness a check for $538 and another for $100, neither of which was honored at the bank, and as a result witness went to Randolph Field on the following day, February 16th, and repossessed the car because of accused's failure to make satisfactory payments (R. 332-335,338,340,341,345). During the course of the conversation, accused remarked to witness in effect that he had better be careful about driving around in a green Pontiac because the bank at Schertz had been robbed by somebody who was driving a 1932 model green Pontiac sedan; that this was the first news witness had of the robbery (R. 334,347,348). During the conversation, which terminated before 3:00 o'clock (R. 332), witness noticed the smell of whisky on accused's breath and he appeared to be excited and a little embarrassed because of having given a bad check, but gave no indications of being drunk or insane (R. 333,337,343,345). On February 9, 1932, when the Pontiac sedan was delivered to accused, it carried the dealer's license plates but the next day witness obtained individual 1932 license plates for accused and delivered them to him, taking back the dealer's plates. These 1932 license plates obtained for and delivered to accused on February 10th, were on the car, fastened with one bolt each, when the car was repossessed by witness on February 16th (R. 363-365). When witness, on February 16th, took back the

Pontiac which had been sold to the accused, accused took out of the car a set of 1931 license plates, a revolver and a piece of clothing which witness did not see (R. 335). Witness had seen the same revolver five or six days before when he found it in a Ford car which accused had turned in as part payment for the Pontiac and which witness a day later returned to accused. The revolver had notches cut in the handle, seven in number according to the witness' recollection, and a revolver shown to him in court by the prosecution also had seven notches cut in the handle (R. 345, 346,347).

Mr. C. J. Bender, San Antonio, Texas, a witness for the prosecution, testified that he is sales manager of the Goad Motor Company and knows the accused, and that on the afternoon of Monday, February 15, 1932, he accompanied Mr. Bridgewater to Randolph Field to interview accused with reference to closing the deal on the new blue Pontiac V-8, which had been sold to accused (R. 350). The testimony of Mr. Bender was substantially the same as the testimony of Mr. Bridgewater and a statement of most of it would be a needless repetition. Mr. Bender testified that at the time the car was sold to accused the territory in which the Goad Motor Company was distributor covered thirty-five counties (R. 350). This statement of the distribution area is inconsistent with that of Mr. Bridgewater, who testified generally that the distribution territory comprised forty-seven counties. During the discussion with accused, which is related above in the statement of Mr. Bridgewater's testimony, witness sat in the back seat of the automobile with accused but did not smell any whisky on his breath (R. 352,355). Accused did not have any appearance of drunkenness, and during the conversation displayed a knowledge of automobiles which surprised witness. According to the witness, "he was very well versed on automobiles and was very interesting" and his talk was rational (R. 352,353).

Mr. William Christoff, San Antonio, Texas, testified that he is a sergeant of the San Antonio, Texas, Motor Police, and knows the accused; that about 2:00 o'clock on the afternoon of February 15, 1932, a call came to police headquarters and that as a result the chief of police called witness and another police officer,

Johnnie Shannon, told them a bank in Schertz had been robbed by a tall man with a grey suit of clothes and a black mustache, and ordered them out to guard the roads and to stop every car that came by and to look for a Pontiac, the type of Pontiac not being stated (R. 367,371,374). Witness and Shannon immediately left headquarters and went out on the east Houston road - W. W. White road, taking up a position at a crossroads about seven miles from San Antonio and about fifteen miles from Randolph Field. Witness and his companion stopped several old Pontiacs and about 3:00 o'clock witness saw a new Pontiac coming up the street, the driver voluntarily stopping before he reached witness and saying to him, "Hello Sergeant" (R. 367). Accused was the driver of the car and witness had never seen him before that time. After greeting witness, accused gave him and his companion each a cigar and asked, "What is the excitement?" Upon being told that the police officers were looking for a man in a Pontiac who had just robbed a bank, accused, who was in uniform, laughed and said, "Well, I have got a new Pontiac. I hope you don't think it is me". Accused told witness he was instructor at Randolph Field and, although witness for a moment thought that the Pontiac in which the accused was driving was the car he was looking for, he realized that accused was an Army officer and respected the uniform enough so that he did not believe that accused could be the man involved in the bank robbery. Witness and accused conversed a few moments and accused said, "Well, if you won't arrest a drunken man, I will show you a good motor", the witness replying, "Lieutenant, I don't think you are drunk by no ways". Thereupon, accused got out of the car, raised the hood and discussed the motor of the car at great length during a period estimated by witness at twenty or thirty minutes. In the language of the witness, "I thought I knew something about an automobile but I didn't. He told me, explained that motor to me from one end to the other" (R. 368,373, 369). Witness did not smell any liquor on accused although they were standing side by side for a considerable period of time, nor did accused act like a drunken man nor a crazy man nor was he abnormal in any way. Had accused been drunk or acted suspiciously in any way, witness would have arrested him despite the fact that he was an Army officer and taken him to headquarters. During most of the conversation witness was smoking the cigar given him

by accused but does not remember whether or not accused was smoking. If accused was in fact smoking, it would be difficult to tell whether or not he had been drinking as the odor of the cigar would be the only thing that could be smelled (R. 369,373, 370,372). Witness explained that he was the first police officer to leave the station after the report of the robbery had been received, and that he would probably have gotten a better description of the bank robber if he had stayed longer (R. 377).

Master Sergeant S. J. Maloukis, D.E.M.L., a witness for the prosecution, testified that he knows accused; that on February 16, 1932, witness accompanied (First) Lieutenant (Robert W.) Douglass (jr.) (Air Corps) and Sheriff Hauser to accused's quarters, to which they were admitted by accused (R. 379,409); that witness' commanding officer, "Colonel Connally" (Lieutenant Colonel William J. Connolly, Infantry), Provost Marshal, accompanied the others but did not enter the house, remaining seated in the automobile (R. 406). In accused's quarters witness found $500 in currency, there being three $50 bills, ten $20 bills, and fifteen $10 bills, one of the $10 bills being of the "old issue *** one of the large bills". Accused told witness where the money could be found (R. 379,384,385). Upon being asked if he owned a gun, accused delivered to witness a 38 caliber blue-steel Colt revolver, No. 96116 (R. 393,400,406,397,399). Prosecution exhibited to witness a "pistol" which, according to prosecution's statement, made without objection by the defense, "was introduced in the early part of this trial, subject to being identified", and witness, after examining it, testified that its serial number was 96116 and that it was the same gun delivered to witness by accused (R. 399,400). Witness further testified that he did not remember having warned accused "as to his rights during the investigation" nor that anyone else warned accused (R. 406-409); that accused was not under arrest at the time, nor had he been put under any restraint by Sheriff Hauser or himself, but that witness would not have permitted accused to leave his quarters had he attempted to do so (R. 400,401). The Board of Review here takes judicial notice of the fact that First Lieutenant Robert W. Douglass, Air Corps, who was present during the interview with accused, is superior in rank to accused.

The testimony summarized above was received by the court over strenuous and repeated objection by the defense, the ground of objection being in substance that the alleged search of accused's quarters was illegal (R. 382), that accused was in fact under arrest (R. 385), and that accused's conduct in telling where the $500 could be found and surrendering the revolver amounted to a confession of guilt made under restraint and in the presence of a superior officer, and that as accused was not warned of his right to refuse to answer questions or to make a statement, such confession, under the circumstances, was not voluntary and was not admissible in evidence (R. 385,386,388,390, 394,402,403,410,411). These objections will be discussed hereafter.

First Lieutenant Robert W. Douglass, jr., Air Corps, a witness for the prosecution, testified that he is aide-de-camp to (Brigadier) General (Charles H.) Danforth (Air Corps), commander of the Air Corps Training Center, and knows accused; that on February 16, 1932, General Danforth instructed him to accompany Colonel Connolly and Sergeant Maloukis to accused's quarters, witness to act as General Danforth's representative to protect the accused during the investigation (R. 414,418,419); that he went to accused's quarters in company with Colonel Connolly, Albert Hauser, Sheriff of Bexar County, and Sergeant Maloukis, and found accused on the front porch reading a paper. Accused was told that the party wished to talk with him and also asked if he would go inside, to which request accused acceded, and all (with the possible exception of Colonel Connolly) entered accused's quarters (R. 414,415,420). Witness was unable to remember whether or not Colonel Connolly, Provost Marshal of Fort Sam Houston, entered the house, stating, "He either went in the house or stayed in the car outside of the quarters" (R. 415,420). After entering the house accused was asked if he had a pistol, whereupon he voluntarily took a pistol from a closet in the living room and gave it to Sheriff Hauser, who turned it over to Sergeant Maloukis (R. 415,416,418). Accused was not under arrest at the time and so far as witness was concerned was not under suspicion, and if accused had attempted to leave his quarters witness would have permitted him to do so (R. 417,419). Witness is

superior in rank to accused. Neither witness nor anyone else in his presence warned accused that he did not have to make a statement (R. 420).

Defense made unsuccessful objection to the admission of, and moved to strike out, witness' testimony on substantially the same argument advanced against the admission of Sergeant Maloukis' testimony (R. 416,421-431). These objections will be considered hereafter.

Prosecution offered in evidence as Prosecution's Exhibit No. 5 a caliber 38 Colt revolver No. 96116. Defense, although it admitted the revolver was the one obtained by Sergeant Maloukis from accused, objected to its being received in evidence because it had not been identified as the revolver used by the person who robbed the bank. The objection was properly overruled and the revolver admitted in evidence (R. 433,434).

Captain James A Mollison, Air Corps, a witness for the prosecution, testified that he is Provost Marshal of Randolph Field, and knows accused; that on February 17, 1932, at the direction of the commanding officer of Randolph Field, Major (Frederick L.) Martin (Air Corps), he went to accused's quarters to obtain certain articles of clothing (R. 435,437,438); that accused was not in his quarters (R. 439) but witness found there several ladies of the post who were attending Mrs. Lichtenberger, and asked them if he could have the clothing. Witness heard Mrs. Lichtenberger, who was in bed in an adjoining room, give her consent and direct the ladies to go to a closet off the living room and give the clothing to witness (R. 438,439). As a result he obtained an overcoat and a suit of clothes, both of which he identified in court, and also a blue cap, but was unable to find any soft slouch felt hat, although a search of the quarters was made by the ladies who were there, as well as himself (R. 436,437). Witness took the clothing to the commanding officer's office, delivered them to Deputy Sheriff Zinkler of Guadalupe County, and obtained a receipt for them (R. 436).

Defense moved to strike witness' testimony from the record on the ground that the search of accused's quarters was in violation of accused's constitutional rights and that the wife of the accused could not give a legal consent to such search. The motion was properly overruled because the quarters searched were public quarters on a military reservation and were subject to search upon reasonable grounds. Dig. Ops. JAG 1912-1930, sec. 1304 (2).

The defense admitted (R. 441,443) that the clothing then in court was the clothing obtained by Captain Mollison from accused's quarters but objected to its admission in evidence as not having been sufficiently identified as the clothing worn by the bank robber (R. 444). This objection was properly overruled and the overcoat and suit received in evidence as Prosecution's Exhibits No. 6 and No. 7, respectively.

Whereupon, the prosecution rested its case.

6. Mr. August W. Dietz, Cibolo, Texas, a witness for the defense, testified that he knew accused "not very well" but well enough to have loaned him an old felt hat sometime prior to February 15, 1932; that Mr. and Mrs. H. P. Thulemeyer, whom he had known for about fourteen years, were at his home about 9:00 o'clock on the evening of February 16, 1932, and they conversed about accused. Mrs. Thulemeyer stated to witness that "she couldn't and wouldn't identify him". Mr. Thulemeyer did not make any remarks about identification of the bank robber nor did he say anything when Mrs. Thulemeyer made the statement quoted above (R. 454-458).

Captain J. A. Mollison, Air Corps, recalled as a witness for the defense, testified that as provost marshal of Randolph Field he visited the bank at Schertz thirty or forty minutes after the robbery occurred with the idea of finding out if some soldier at the Field had been implicated in the robbery; that he talked with Mr. Thulemeyer (apparently also with Mrs. Thulemeyer) and was told that the robber was perhaps five feet ten inches tall, thinner than witness, with a pasty complexion and dark hair, and with a muffler pulled up from around the neck over the nose and covering the lower part of the face. Other people in the bank volunteered the

information that the robber's car was a blue 1929 model Dodge sedan, and Sheriff Saegert of Guadalupe County requested witness to guard the Randolph Field entrances to look for the car. Later Sheriff Hauser came to the Field and told witness that the car had been identified as a blue Pontiac sedan. Witness knew of no car of that type on Randolph Field except the one owned by accused (R. 460-463).

Mrs. Mary Lichtenberger, Chicago, Illinois, a witness for the defense, testified that the accused is her son (R. 464). She knew the brothers of the father of the accused and, in her opinion, they were very nervous and highstrung people. The oldest brother, William, did not get along with people, and people thought he was "crazy about his opinions". The second brother was a railroad man; he was very morose and exclusive; he would come in off his trip, and would stay off by himself and would not have anything to do with anybody. The younger brother was thought to be perfectly all right until his wife died, after which he lived alone, his children all left him because he was very disagreeable and unreasonable, and he died practically a recluse (R. 465-466). The accused's father was "very extreme in his ideas" and was an agnostic. "He believed in it *** read everything for and against it, and studied it day and night". He was just as extreme in his politics (R. 466). He would argue for hours over a point with anybody who differed with him. He fought everybody who did not believe the way he did. Witness was a member of the Roman Catholic Church and the father did not interfere with her raising the children as Catholics, and said later that he was glad his children would be raised Catholics because it was better to have a belief than not to. He said, "I can't believe in it, I hope my children can". The father died in 1909 at the age of forty-four as the result of a railroad accident (R. 467-468,485). Witness' mother, who died at the age of seventy-seven, lived the last six or eight years of her life as a recluse, without even a servant although she had plenty of money, and witness thought her mind was not right (R. 479-480). The accused was a healthy child, although he had pneumonia in Illinois, and they moved to Colorado where his health was better. He was very ill with scarlet fever in 1909, delirious for four or five days, and the doctor did not give any hope for his recovery. He appeared to get over that but

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

later he had pains in his head. He had fallen as a child and bumped his head and witness thought that perhaps the pains were due to that, but it went on, and she took him to specialists but they could not find anything wrong with his head. Still he complained; for days he could not go to school, and at last his ears started to run, but gradually the pains left him and he appeared to get over his trouble (R. 469). Every summer for two or three years, he went to R.O.T.C. at Minneapolis, and then about six years ago he got his appointment and went to Kelly Field (R. 470). Witness felt relieved when the Army examinations found him physically strong and well (R. 485). She did not see him again until he came to Rantoul Field, Illinois, (in 1929) (R. 470). In the meantime he had married. Witness visited him for five or six months at Rantoul Field and remained until he received orders to San Antonio. After that she did not see him for about two and one-half years when she came to San Antonio in May, 1932 (R. 471, 478,483-484). When she visited accused and his wife at Rantoul, they were expecting their baby and he was very much worried about money and how he was to meet their expenses. His wife was not a very strong girl; she had heart trouble and the Army surgeons told her they did not have facilities at the Field hospital to take care of her and advised her to go to a specialist, which she did, but this extra expense was another worry to accused (R. 471,472). The wife was neglected and the hospital authorities never did anything for her. She was at death's door for a week. Accused walked the floor, did not eat, did not sleep, and did not think of anything but what was going on in there at the time. It was a terrible worry and witness knew it was breaking him. She noticed a change come over accused after his wife's experience in the hospital. Before this he was quiet and easy, nothing "phased" him, and he was very agreeable. Afterwards everything bothered him, he was nervous, unstable and complained about things, which was very unusual for him because he was not of that nature at all, but from that time on he was broken. Witness could see that his wife's condition was on his mind. He was working very hard at his school work at the time and this hard work and taking care of his wife and thinking about her was very hard on him (R. 475). Witness stayed with accused until he was ordered to San Antonio, at which time he sent his wife to her home in Virginia and witness went

back to Chicago (R. 478). While at Rantoul, accused told witness of his financial condition and about his marriage and honeymoon. He took leave to get married and had arranged to do some commerical flying to meet his expenses. He bought a new uniform and a car and took a short honeymoon trip. When he returned he was notified that he would leave on the next boat for California. This upset his plans and left him in debt. He has had sickness in his family ever since. He has two daughters, two and one-half and one year old; the second was born by Caesarian operation (R. 476,481). When witness came to San Antonio in May, 1932, she noticed a material change in accused's mental condition since he left home, and after she saw him at Rantoul, Illinois. "His health is breaking, his mind is breaking, everything." His condition is getting worse all the time. He does not talk to anybody and is not friendly, and when witness came to San Antonio he was rather indifferent to her. She laid this indifference to his troubles (R. 482). Witness could say that accused's condition was not normal at the present time, but "a mother hates to say" that her boy is insane and she would have to have a half dozen psychologists' opinions before she could believe it (R. 483).

Rev. F. Drees, Selma, Texas, a witness for the defense, testified that he is a Catholic priest and first met accused about a year before. At that time accused made arrangements to have his baby baptized the next Sunday but he never appeared, and when witness went to his house no one was there. He saw accused the day after he was arrested, and "time and again" since then (R. 488). He was with him when he was released on bond; they drove back through Schertz and accused seemed to have no feeling of shame, but cracked jokes and admired the wonderful sunset. When accused was in the hospital under mental observation, witness told him to give the doctors something to work on, act a little funny, "Do your stunt, jump over the bed", as "they have to observe you", but accused thought that would be dishonorable. On different occasions accused talked like a sane man, then again witness thought he had a "screw loose", and did not have full control of his mental faculties (R. 489-490). Witness formed the opinion that the accused had a "screw loose" because he said it would be dishonorable to act "funny"

in the hospital but he thought absolutely nothing of other things which were more dishonorable (R. 491).

Miss Laura Haecker, Cibolo, Texas, a witness for the defense, testified that she worked as a maid in the household of accused from the 3d of December, 1931, till about August 1, 1932 (R. 492). Before February he "seemed to be like anybody else", but in the first part of February he "acted very queer", and when he came home from work he was very restless and would walk from one room to another and leave the doors open, although the day was cold and the children were in the house. He also played "kind of rough" with the children and bumped their heads together. On the day of the robbery, he left for his duty at about 8:00 o'clock, returned about 9:00 o'clock and did this four or five times before lunch; he appeared to be drinking because he staggered and stumbled over the rugs. When she went to call him for lunch about 12:00 o'clock, he was lying on the bed asleep so she "just left it go". Later he got up and continued walking as before; he seemed "very nervous" (R. 493-495). He also put the two year old girl in bed with the eight months old baby, which seemed peculiar to witness. Accused left the house about 1:00 o'clock and returned about 2:30 o'clock, when she saw him in the baby's room changing his shoes. He still seemed to be nervous and under the influence of intoxicating liquor. About a whole week before this, witness noticed that accused was drinking and she was afraid for the children and herself because he was acting "very queer" (R. 496-498). Accused's wife had been in the hospital during this period but returned home on February 15th (R. 496,498). She could not say from her observation whether accused was sane or insane on February 15th, but he was not acting like a normal man (R. 498).

Warrant Officer John W. Corcoran, Brooks Field, Texas, a witness for the defense, testified that he has known the accused since about June, 1930, and knew him well but that accused passed him many times without seeming to notice him. Witness thought this unusual as he knew accused to be "a sociable fellow". Witness thought that accused acted queerly at times, which made him think that he was in a depressed condition or thinking of something else (R. 502-507).

Private Frank E. Dixon, 52d School Squadron, Air Corps, Randolph Field, Texas, a witness for the defense, testified that he has known the accused for approximately nine months. He saw accused about 10:30 o'clock on the morning of February 15, 1932, at which time he was "dopey looking", and witness smelled liquor on his breath. Accused had his head in his hands when witness walked in and seemed to have something "bearing on his mind"; he did not say "good morning", and asked where to sign the papers, which was unusual (R. 507-510). About 2:30 o'clock the same afternoon, accused came into the supply room and witness thought he was intoxicated; he acted dazed and stumbled against the door sill going out (R. 510-514). Asked by the defense whether, judging from his actions and demeanor, he would say accused was sane or insane, witness answered that he "would say that he was not himself" (R. 516).

Staff Sergeant Otto Ernesto, Headquarters Squadron, Air Corps, Randolph Field, Texas, a witness for the defense, testified that he has known accused about a year. During the first two weeks in February, 1932, he noticed accused seemed to be "kind of peculiar in his way of talking" and rather careless in wearing his uniform. Witness saw him on the morning of February 15th at about 10:00 o'clock and smelled liquor on him; his face was red and he had "a kind of glassy stare in his eyes" (R. 519-520). He saw accused again about 3:00 o'clock that afternoon; at that time his belt was unbuttoned, he smelled of liquor, was unsteady on his feet, seemed worried and looked "rather pale" (R. 521-523). Accused did not act normal but witness would not say that he was insane (R. 522).

First Lieutenant Harold J. Conway, Ordnance Department, Fort Crockett, Texas, a witness for the defense, testified that he has known the accused since October, 1931, and during that period noticed but one queer act of accused when, at a dinner on February 12, 1931, he seemed to be "sort of *** unconscious to what was going on". Ordinarily accused is humorous and witty but on this occasion he was quiet and seemed depressed and worried. Witness would not say that accused was insane but he was "not normal".

Technical Sergeant Clyde W. Doyle, 53d School Squadron, Air Corps, Randolph Field, Texas, a witness for the defense, testified that he has known accused about eight or nine months. About January, 1932, witness noticed a "changed condition" in accused; he became sloppy in his dress, came to work unshaved, was highly nervous and seemed moody (R. 530-533). In response to a question by counsel, witness stated that from January on he thought accused acted like an insane man (R. 548). He formed this conclusion at the time (R. 549).

Second Lieutenant Leo W. DeRosier, Air Corps, Randolph Field, Texas, a witness for the defense, testified that he has known accused about five years. He saw him frequently from the fall of 1929 to the fall of 1931, and found him to be a "brilliant character, well liked, with a cheerful disposition and a carefree nature" (R. 582). From November, 1931, to February, 1932, witness noticed a marked change in his demeanor, - he was morose, worried and seemed to be brooding a great deal. He saw accused on the evening of February 14th and they talked about things generally for about twenty minutes. Accused seemed depressed and under some sort of a nervous strain. After a short time he seemed tired and his head was nodding; he shuffled and dragged his feet, and witness thought he had been drinking. Witness attributed accused's worry to "his financial and domestic troubles" (R. 583-584).

First Lieutenant Carl J. Crane, Air Corps, recalled as a witness for the defense, testified that he has known accused since the beginning of 1931. Until about September, when witness was ordered away on detached service, accused was his assistant in the Academic Department at Brooks Field, and his duty as an instructor was well above average. About November, 1931, he noticed a gradual change in accused's behavior from day to day; there seemed to be a "change taking place in him", which worried witness. He seemed to lose interest in his work (R. 585-586). Class instruction began about February 2d and witness decided to listen to some of accused's lectures, which he did for four or five days before the bank at Schertz was robbed. Accused made some very obvious mistakes in his lectures, which were really material and which witness knew from past experience accused should not have made as he was entirely

familiar with the subject. Some of his errors drew laughter from the class, but still he made no effort to correct the misstatements he had made. He seemed very tired and depressed. Witness was in a quandry to analyze just what was happening to him (R. 587). The next day accused brought to witness a mimeograph sheet of questions he was going to give the students as a quiz. There were several obvious errors in it which witness pointed out and to which accused agreed (R. 591). These mistakes pertained to very simple things, which witness knew accused "knew better than to make" (R. 593). While at Brooks Field, witness had invited accused to collaborate with him on a book on airplanes and engines (R. 589). Witness also noticed that in December, 1931, accused was not keeping up with his church duties, although at Brooks Field he had regularly met him at church services (R. 588). He never noticed that accused came to duty unshaven or in incorrect uniform, nor was there any apparent intoxication at the time he made mistakes in his lectures and academic work (R. 592,593). Witness never before had seen accused in the condition he was in when he sent him to his quarters on the afternoon of February 15, 1932 (R. 592-593). As a result of these observations, and after he learned of the bank robbery, witness concluded that accused "was bordering on some kind of a nervous breakdown at that time" (R. 592).

Second Lieutenant John P. Kenny, Air Corps, Randolph Field, Texas, a witness for the defense, testified that he has known accused about three and one-half years, first at Rockwell Field and then at Randolph Field. When witness first knew him, accused "was always a cheerful person, *** quite a wit, a good fellow among fellows". After arrival at Randolph Field in October, 1931, witness stayed three weeks with accused and found that his entire actions were changed, - he was nervous, irritable and forgetful. Witness knew that accused was pretty badly in debt and that he "seemed worried". Accused's wife was not ill at this time. Witness signed a note with accused for $212, and will have to pay it if the accused does not (R. 595-599).

Accused was sworn as a witness in his own behalf and testified that he is twenty-eight years old (born January 7, 1904), and accepted his commission in the Regular Army on September 7, 1926, his first station being Brooks Field, Texas (R. 601). While stationed at Langley Field, Virginia, he secured a temporary position with an air line from Washington to New York, expecting to pilot airplanes for that line during a leave of absence theretofore authorized, and on the strength of the additional money he expected to earn he was married on June 16, 1928. He bought a new automobile, a new uniform, a wedding and engagement ring, and went on an expensive honeymoon trip to New York City, spending money which he "expected to earn" later. Although he had been granted leave for forty-five days or two months, he found, on returning to Washington to go to work with the commercial company, that his leave had been canceled and he was ordered back to Langley Field at once. He had to give up the civilian position at which he expected to earn about $1400. The debts thus contracted remained unsatisfied in February, 1932. He was then transferred to Riverside, California, for station, then to Rantoul Field, Illinois, in the fall of 1929, to Brooks Field, Texas, in the spring of 1930, and to Randolph Field, Texas, in September, 1931 (R. 601-604,629-630). His wife was not in good health when they were married; she had a weak heart and "her nerves were in very poor condition" (R. 601). At Rantoul, on account of her condition and because the Army hospital was small and not well equipped, it was necessary for her to consult a specialist and to go to a civilian hospital for the birth of their first baby. This caused additional expense which he had not anticipated, and, as he was already in "strained financial circumstances", this, together with the doctor's reports about his wife which "were anything but reassuring", caused him great worry (R. 602). At the birth of the first child, his wife was in labor from Friday night until the following Monday afternoon, and the birth of the second child, at the Station Hospital, Fort Sam Houston, Texas, on July 24, 1931, was by Caesarian operation (R. 603-604). She was again in the Station Hospital from the last day of January until February 15, 1932, for a repair operation. For several months the doctors had refused to operate, saying the chances of success were slight, and "a failure might cause her to become a permanent invalid" (R. 605).

About February 3d or 4th, a few days after the operation, his wife informed him that the surgeon had intimated that the operation was a failure, and that she too felt that it was (R. 606). This news made him feel so depressed and dejected that he decided to take a few drinks to see if it would lighten his grief. Theretofore he had not felt inclined to indulge in liquor. He bought a half-pint bottle of whisky (R. 607) as it had never been his practice to keep liquor in the house, took a few drinks that night and finished the bottle the next day. After seeing his wife again the next day, he was more depressed than ever, and went to San Antonio to get more liquor, but could not find the place where he had bought before, and so drove over on the "west side" where he finally located a place and bought two quarts of whisky from a Mexican. Both of these quart bottles were filled from the same jug. For the balance of the week he drank it "off and on", and rather frequently (R. 607-609,664). On February 14th (Sunday), he had two or three highballs before dinner at noon and two or three more around 3:00 o'clock before he left to go to the hospital to visit his wife. On the way to the hospital in his car, he took several more drinks, and after leaving the hospital took a couple more while waiting for supper. While at the hospital his wife asked him to make arrangements for the Randolph Field ambulance to come for her about 2:00 or 3:00 o'clock next afternoon. That evening after supper he took several drinks but felt so depressed and blue that he went over to Lieutenant DeRosier's quarters. The next morning, February 15th, he distinctly remembers that he waked up, dressed in uniform, and ate breakfast. Thereafter he has a hazy recollection of going to the bathroom and "starting to drink" from the whisky bottle (R. 610-611). The next thing he remembers definitely was waking up the following morning (February 16th) and finding his wife in bed with him. He did not recall her coming home, and was "very much stupified" and "unable to account for the peculiar condition and circumstances that existed at the time". At breakfast he read in the newspaper that the Schertz State Bank had been held up the previous day but it did not impress him very strongly. He went out to his car and noticed on the seat and all over the floor several bills of various denominations, and on the floor of the car a 38 caliber revolver,

which he usually carried in his automobile. He was stunned by the sight, and unable to account for it; coupled with his wife's mysterious appearance in the house, he was very much confused (R. 612). He gathered up the money, counted it, put it in the pocket of the car door, and slipped the pistol under the seat (R. 613). There was exactly $500, all in bills (R. 638). He then drove over to his office where he "racked" his memory but "could remember nothing of what had apparently happened on the previous day" (R. 613). He told no one, not even his wife, of finding the money because his mind was "confused" (R. 655). Sometime later Lieutenant Crane asked him about missing class the day before and, although he had no recollection of it, he admitted he had forgotten it (R. 613). When he got back home about noon on February 16th, after completing his two classes, he took the money out of the car pocket and placed it in a drawer in his desk, but left the gun in the car. He has absolutely no recollection of robbing the Schertz State Bank (R. 617), or of being sent home from his class by Lieutenant Crane (R. 614), or of having any conversation with Mr. Bridgewater and Mr. Bender on the 15th (R. 615), or of any of the other events which are supposed to have happened on the 15th after 8:30 o'clock in the morning (R. 634-639). He does remember a conversation with the two men about 1:00 o'clock on the 16th at his quarters, at which they decided to take the car back, so he went out to get his revolver out of the car, at which time he also found several bills in the car pocket (R. 615,616). They drove off with the Pontiac but told witness that if he would come down to the Goad Motor Company they would return his Ford which was there (R. 617). The finance company had a mortgage on that Ford and he did not turn it in on any other car. He does not remember signing any contract covering the purchase of the Pontiac, but he did give Mr. Bridgewater one check (R. 636-637). About 4:00 o'clock Lieutenant Douglass, Sergeant Maloukis, and Sheriff Hauser came to his quarters and stated they would like to ask him some questions. He invited them into his house. Sergeant Maloukis asked if he had a grey suit, to which he answered that he had "a light tan suit" and showed it to him. Sheriff Hauser asked him if he had a revolver, and he said, "Yes", went to a closet, got the

revolver and handed it to the sheriff (R. 617-619). He then went with them, and with Colonel Connolly and a civilian deputy sheriff who had remained in the car, to the Schertz State Bank. There he saw a gentleman and lady whom he did not recognize, who stared at him but "nothing was said". Then Sergeant Maloukis took him into a back room of the bank and told him that he had been positively identified as the man who held up the bank (R. 619), whereupon he replied, "Sergeant, if I did it, I must have been crazy". They then drove to General Danforth's quarters and then to the guardhouse at Fort Sam Houston. While at the guardhouse, Colonel Connolly informed him that Sergeant Maloukis had been authorized by General Danforth to search his quarters, and suggested that he tell where the money was so that the search would not excite his wife. He gave this information and shortly thereafter he was placed in a cell (R. 620-621). On Wednesday, February 17th, the County Attorney of Guadalupe County, with a couple of deputies, placed handcuffs on him, drove him to the bank at Schertz where the cashier and his wife viewed him again. They then went on to Seguin where he was placed in jail until Friday, when he was brought into court for a preliminary hearing. He remained in jail at Seguin until the 24th when he was released on bond. He was in the hospital at Fort Sam Houston from about March 4 to April 8, 1932 (R. 622-623). During the five weeks he was in the hospital, he was given the regular routine physical examination, including Wassermann test, spinal puncture, etc. He reported to Major Anderson in the psychiatric ward, who saw him but three times and not over an hour and a half "at a liberal estimate" (R. 627-628). Accused first met Mr. J. Franklin Spears, his counsel, in Mr. Anderson's office in the Brady Building, after he came out of the hospital, at which time Mr. Spears asked him if he had any of the whisky he had been drinking "prior to this offense". After accused returned home he succeeded in finding some in a bureau drawer and his wife telephoned Mr. Spears to that effect. That afternoon they took the whisky to Mr. Spears who told them to take it to Herman Nester for analysis, which they did (R. 624-625). He was removed from flying status by War Department orders dated May 13, 1932 (R. 626). His last flight was early in February. He took the usual physical examination in

January and knows of no deficiency found except that he was underweight (R. 648,650). He had seen the bank at Schertz about ten times before the robbery (R. 643) but had never entered the front door (R. 650). He was familiar with the road from Schertz to Randolph Field and has gone over that road repeatedly. The distance was "approximately one mile"; there were two turns to be made, and at forty miles per hour, which "I imagine a man could average", it would take "a little over a minute" to go from Schertz to his quarters by way of the East gate in "that Pontiac" (R. 657). He had drawn "blanks" on other occasions before this but has apparently conducted himself as a gentleman, and has driven his car home without hitting anything. Four or five highballs would do this, but prior to February his use of alcohol was extremely moderate (R. 653-654). Between February 5th and February 15th he was drinking whisky out of two bottles, but did not suffer any mental "blanks" as far as he knows (R. 661). On the morning of the 15th, one of the bottles was empty and the second one was not full. When he took the latter to the chemist he believes the bottle was slightly less than half full. He drank nothing out of it after February 15th (R. 662-663). The maid in his house, Miss Haecker, had access to the bottle which his wife found in a bureau drawer on April 12th, but she does not drink and he does not think she brought any liquor and secreted it there. His wife did not buy any, and therefore he thinks the liquor found on April 12th was the same liquor he drank on February 15th and before. He does not know what became of it during the intervening period of almost two months, or whether anyone might have put anything in it (R. 668-671).

Mr. Herman A. Nester, San Antonio, Texas, a witness for the defense, testified that he is an analytical chemist, and has been engaged in the practice of this profession for around nineteen years. On the 12th of April, 1932, he analyzed some fluid delivered to him by accused and found that "it contained .089 per cent acetone; 45.2 per cent alcohol; 3 per cent gum resin; .123 per cent codeine", which is .59 grain codeine to the ounce of whisky. About 12 ounces of the liquid were delivered to witness and 20 ounces were gone from the bottle. What was left of the liquor analyzed by witness was

identified by him and introduced in evidence (R. 576-580). Witness had never found codeine in alcohol before (R. 581).

First Lieutenant Charles E. Thomas, jr. (R. 790-792), First Lieutenant Bernard A. Bridget (R. 793-795), Second Lieutenant Joseph H. Atkinson (R. 795-797), and Second Lieutenant Archibald M. Kelly (R. 797-800), all of the Air Corps, were called by the defense as character witnesses and each testified in substance that he had known accused for several years and that his general reputation as a peaceful and quiet man was good, as was his reputation for truth and veracity. Lieutenant Thomas testified that he knew, and Lieutenant Atkinson that he had heard, that accused had financial difficulties, and all, except Lieutenant Kelly who was not asked, stated that they believe accused could have borrowed money from his fellow officers or secured their signatures on his note if he were in need of money.

Lieutenant Colonel Sanford W. French, Medical Corps, a witness for the defense, testified that he did not know the accused. He has been an officer in the Medical Corps for twenty-two years and, while not a psychiatrist, has had considerable experience with alcoholics and drug addicts (R. 551-552), but not more than the average medical officer (R. 557). It is "perfectly possible" for a person to be under the influence of intoxicating liquor to such an extent that he would not have control of his mental faculties and yet would be able to move about and talk. Witness has had a number of people tell him that when under the influence of intoxicating liquor they have been able to move about, talk and do things, but afterwards they had absolutely no recollection of what they had done during a certain period of time. He would describe a person in such a state as "mentally unconscious, physically active" (R. 554). His mind would not be working, he would be running around like he was asleep. If a person consumed sufficient whisky so as not to remember what he had done, he would not be mentally capable of forming an intent (R. 556). This condition is what is commonly known as "drawing a blank"; there is no question but what it is possible for a person to get in such a condition, but no one would know it but the person himself and

it would depend on his word, - no one could disprove it (R. 558-572). The main factor is loss of memory; "they may know what they are doing at the time, and the next day *** they have no recollection of it" (R. 574). Witness stated he was not qualified on the question of insanity (R. 576).

Dr. Oscar C. Baird of San Antonio, Texas, a witness for the defense, testified that he went to a medical college in Cincinnati for three years and then spent one winter doing post graduate work in a hospital in Chicago and another in New York. In 1914 he spent several months in Europe in medical clinics (R. 691-692). He is a duly licensed physician in the State of Texas and has practiced his profession for about twenty-nine years (R. 672). He has had rather extensive experience with cases of alcoholism and with persons under the influence of narcotics, and some experience in a psychiatric ward because his wife has been in the State Hospital for three years and he has been around there a great deal and has studied her and other patients (R. 673), but he is not a qualified psychiatrist (R. 704,692). Witness stated that codeine is a derivative of opium, and was of the opinion that a person who drank alcohol or used narcotics to the extent that he was mentally unconscious and physically conscious would be temporarily insane (R. 674). Whisky and codeine combined would more or less neutralize each other, the alcohol would stimulate the mind and modify the effect of the opiate (R. 675,781). Defense counsel asked witness a long and complicated hypothetical question (R. 676-688) which contained the facts testified to before the court concerning the history of accused's family and his own life and conduct to include the bank robbery (which testimony is summarized above in paragraph 5 and the preceding pages of this paragraph), to which witness answered:

> "Covering the family history, which was considered only eccentric in that day, several years ago, I am sure all, except one character, the head trouble, ear trouble, would be put in a ward for observation; we do it today, in that age we did not do it.

"Then the actions of the man on trial, it occurs to me is only repeating what has been done many times, doing what you would expect from a man with a family history like that, even the holdup in the bank was a holdup methodically speaking, of an insane man. No real holdup man would do it that way, he would ask no questions, would make no remarks about his person, would not tell who he was, so I would say, even laying aside the liquor effect and the codeine effect, he has a family history back of him that looks very much like a delicate - would result in a delicate nervous system plus the effect of the codeine and the whiskey. I think it gives us a complete picture of an insane man."

Witness testified that heredity is considered the greatest known factor of insanity (R. 689). The actions of accused in talking to Sergeant Ernesto and Private Dixon when he appeared doped or drunk and did not recognize them, were the actions of an insane man (R. 691). Persons suffering from dementia praecox, primary dementia or delirium tremens might be mentally irresponsible one day and be perfectly lucid the next day (R. 695).

Dr. Hulon E. Calvert, San Antonio, Texas, a witness for the defense, testified that he graduated in 1926 at the University of Texas where he received the degrees of Bachelor of Science and Doctor of Medicine, and has practiced his profession since then. He is a captain and flight surgeon in the Medical Reserve Corps. He has had about three months experience as alienist and psychiatrist at the San Antonio Hospital for Insane, where they had 2400 cases, and six members of the staff would meet three times a week and make diagnoses (R. 706-708). He has never before testified in court as a psychiatrist (R. 731). In reply to the hypothetical question propounded to the preceding witness, Dr. Baird, witness "would say", assuming all the facts stated therein to be true, that the accused was insane on February 15, 1932. After a very careful study of accused's family history, witness thinks he has a "very unstable, nervous system, what we term dementia praecox" (R. 707), and that the system might collapse or there might be

an occurrence of a mental condition as a result of prolonged mental worry or of disease, or of the use of drugs (R. 708,709). Alcohol, when used excessively, causes a dulling of the psychic centers in the brain and lowers the moral judgment of the individual. When first taken it may produce hilarity and a feeling of well-being. A person who is happy and elated over everything and then suddenly becomes morose and melancholy has strong indications of dementia praecox. This means a "demented condition of the young" and usually occurs in individuals under thirty years of age (R. 709). Potential dementia praecox may not develop into the abnormal except under rare conditions, such as a great mental shock, or worry, or where drugs or alcohol are used. Any drug or narcotic or alcohol, when first used, is primarily a stimulant, but then becomes a depressant and after a certain length of time alcohol has a toxic poisoning effect which may affect the cerebral centers (R. 710). Witness stated that if a person with a family background, as disclosed in the hypothetical question, should consume thirty-two ounces of whisky containing 45 per cent alcohol and .59 grain of codeine to the ounce in eleven days, and on the twelfth day take ten drinks of the same whisky, the psychopathic traits of abnormality hidden in his subconsciousness would tend to come out and it would be possible for him to have a lapse of memory for thirty days or longer (R. 712). A person may become temporarily insane from the recent excessive use of alcohol or ardent spirits. One who drinks alcohol sufficiently to become mentally unconscious and physically conscious is temporarily insane, or it might be diagnosed as "a state of amnesia" (R. 713-714). Drunkenness to this degree is temporary insanity (R. 746-747). Persons possessing psychopathic traits may have them brought out by the physical and mental strain of flying or by the use of alcohol or some narcotic, or both (R. 720). A person may have amnesia from narcotics or alcohol or from hereditary instability (R. 724). Witness stated that it was possible for a person in a state of amnesia to make all the preliminary arrangements shown to have been made by the person who robbed the bank and still not remember it, but that those cases are very rare (R. 734). One who has been in a state of amnesia can never recall what happened while

he was in that state (R. 751). Witness thinks the bank robber acted abnormally all through the robbery as outlined in the hypothetical question (R. 737-739), and that he was in a state of amnesia resulting from "a potential dementia praecox makeup" (R. 743). The only consideration witness has given to this case has been based upon the hypothetical question which he received and studied the day before (R. 747,753). The condition of the man as described by the hypothetical question was congenital, that is, due to a nervous condition inherited from his ancestors, and he was potentially in a condition to do an act such as described when subjected to a strain or indulgence in dope or drink; he was that way a year ago and five years ago, and would probably be that way tomorrow if he had family worries and started to drink; he was a dangerous character to have drinking whisky and running at large (R. 747-748).

Dr. Edwin C. Clavin, San Antonio, Texas, a witness for the defense, testified that he is a graduate of the medical school of the University of Pennsylvania, has been practicing medicine for about thirty-nine years, and is a Lieutenant Colonel, Medical Reserve Corps. He never specialized in psychiatry but has testified in court a number of times in mental cases. He heard the hypothetical question propounded to Dr. Baird, and understood it, and, assuming all the facts to be true as stated in the question, he would say the person was insane on the day of the alleged offense (R. 756,757,763), and that his condition was due to an excessive use of liquor and the drug codeine. Witness served for about six years in the City Hospital, San Antonio, where they had charge of the people in the city jail who were suffering from the effects of liquor and drugs, and it was his opinion that a person may be temporarily insane when under the influence of intoxicating liquor (R. 758). Mental instability is a condition that is inherited and in such people "shock will bring out these peculiar psychic symptoms" (R. 759). Witness was of the opinion that, considering the facts mentioned in the hypothetical question, the officer on trial had gone through a great deal of worry, family trouble, drinking of whisky and codeine, which is a drug, and that all these factors unbalanced him

mentally (R. 760). Witness thinks that most criminals are abnormal and that "a majority of the people of the world are a little off" (R. 761-762). He based his answer to the hypothetical question on the unstable personality of the individual described and his having indulged in liquor enough to unbalance him, together with taking the drug (R. 764). He thought the actions of accused in carrying out the robbery were abnormal in that he was told exactly where the money was and he just took some of it out of the drawer and went away, he talked too much, thought someone was in the lobby of the bank when there was no one there, and he did not attempt to get the larger portion of the money which was in the vault (R. 765,766). If the accused had come to witness as a patient he would have gone into his case much further than the hypothetical question went before coming to a conclusion (R. 770). He thinks this is just a case of amnesia brought about by the unbalancing of the individual through the use of drugs and liquor. A person suffering from amnesia can plan and act just the same as before but he will not remember anything of his past nor, after returning to normal, will he remember what happened during the period of his amnesia (R. 772, 774,776,777). Periods of amnesia come on very suddenly and the patient does not remember anything that happened before the amnesia period until after the period is over (R. 781,782). During the amnesia period the patient would not remember any unfinished business he was transacting before the amnesia came over him, and if anyone approached him and mentioned the unfinished business he would not know what he was talking about (R. 784).

7. Lieutenant Colonel Thomas E. Harwood, jr., Medical Corps, a witness for the prosecution in rebuttal, testified that he had charge of the annual physical examination at Randolph Field during December, 1931, and January, 1932, at which was also given the semi-annual physical examination for aviators which is a "severe one"; that accused was examined at that time and no mental defects were found, and the only physical defect reported was an underweight of sixteen pounds which was considered of no significance in his case (R. 801,820). The latter part of February, 1932,

witness recommended that accused be relieved from flying duty because he was under serious charges and witness considered his relief from flying duty to the best interests of the service and the officer (R. 804-805). About 2:00 p.m., February 15, 1932, accused called witness on the telephone, gave his name, and inquired if ambulance service had been arranged to bring his wife, who was a patient at the Base Hospital, back to the post. Witness positively recognized accused's voice over the telephone. He talked coherently, rationally and like a sane man, and there was nothing in his conversation to lead witness to believe there was any unusual situation other than he was concerned about the return of his wife to the post (R. 805-807). Witness stated that the psychiatric examination given aviators consists of testing the reflexes and quizzing the man as to his past history (R. 810); the psychiatric nervous system is pretty well looked over (R. 820). In institutions for the insane, the examinations also include the taking of the life history and family history of the patient, an examination of his skull, and tests of his blood and spinal fluid (R. 811). Witness thinks that the influence of liquor tends to release the inhibitions that form a great part of the ordinary individual's existence, and he is apt to do things which are repressed under normal conditions (R. 812). A man who uses alcohol to excess and whose mentality is confused but who is able to move around is not insane in any sense of the word. He is temporarily confused mentally and his mental reactions and physical reactions are not normal (R. 813-815). Delirium tremens is classified as temporary psychosis, which denotes some mental condition (R. 818).

Major J. B. Anderson, Medical Corps, was called by the prosecution as its first witness on the merits of the case (R. 134-177); he was also called by the prosecution in rebuttal (R. 871-877). He testified that he was a qualified psychiatrist and had had one year of training in it at St. Elizabeths Hospital, Washington, D. C., under Dr. White, and nineteen years practice in the Army, where several thousand mental and nervous patients have come under his observation. He is now in charge of the Neuropsychiatric Section of the Station Hospital, Fort Sam Houston, Texas, and before coming there was in charge of that section at Walter Reed General Hospital

(R. 135,136,145,153). Witness was the psychiatrist member of a board of medical officers which examined accused, who was constantly under observation from March 2 to April 8, 1932, during which period he was in the hospital. He identified a copy of the report which is copied into the record. One other member of the board, Major L. T. Howard, is also a psychiatrist (R. 135,142-144). The material part of the report, signed by the four members of the board and approved by the commanding officer of the hospital, follows:

> "Lt. Lichtenberger was admitted to this hospital March 2, 1932 By informal transfer from Randolph Field, Texas for observation as to his mental condition.
>
> PHYSICAL EXAMINATION: The physical examination and all laboratory examinations were negative.
>
> A special mental examination was made by the Neuropsychiatric Board of this hospital. This patient showed no symptoms which would indicate that he is suffering from a psychosis. His neuropsychiatric examination was negative.
>
> FINDINGS: L. Observation, nervous and mental disease, none found. L.O.D. Yes.
>
> CONCLUSIONS AND RECOMMENDATIONS: It is the opinion of the Board that this officer is able to perform the duties of his arm and grade, and it is recommended that he be returned to his station and duty." (R. 143.)

Witness interviewed accused four or five times (R. 145), spending about five hours with him. His examination consisted of questioning accused and noticing his reaction (R. 145). He also interviewed accused's wife and a number of his acquaintances who had known him for several years, and obtained his family history and a complete history of accused from infancy. A blood test was made

and also a spinal blood examination (R. 148-150). He made a careful study of the case and he believes that accused has no psychosis or mental disease and that he is sane and mentally responsible for his acts (R. 144). Witness does not think that it is true that when an average person becomes insane to any extent that it "is due to some pressure, some force that is brought to bear upon the nervous system which overthrows it". Asked by the defense if it was not true that "a normal person, we will say, who has been subjected to a lot of worry, to a lot of trouble, a lot of disappointment, that they might become temporarily mentally deranged for a certain period of time and afterwards regain their equilibrium", he answered, "Not by any means" (R. 151-152). Witness does not believe in temporary insanity, sane one week and insane the next. As a result of his examination of accused he formed the opinion that accused had never been insane and that he was sane on February 15, 1932 (R. 153,164). Witness stated that a person who used an excessive quantity of alcohol or drugs would not be normal, would be influenced by it, but he would not be insane unless he had delirium tremens which has a condition known as "psychosis, due to alcohol" (R. 165-176). Persons who become delirious from drugs are not temporarily insane, "they were out of their heads" (R. 170). Codeine will put a person to sleep but will not make him delirious (R. 171). If a man was so drunk from liquor that he did not know what he was doing, he would not be able to do much (R. 172). Delirium tremens will develop suddenly in one who has been drinking excessively, but other psychosis develop gradually (R. 177). On rebuttal, witness testified that he saw accused four or five times for about three hours altogether. Major Howard, who is a psychiatrist, saw accused every day, and they frequently talked over the case (R. 872). Accused's family history was taken into consideration, but it is not true that a person with such a family history would "as a general rule, inherit an unstable nervous system". Heredity is one of the greatest factors in insanity; alcohol and syphilis are others (R. 873). After reading the hypothetical question propounded to Dr. Baird, witness testified that, assuming all the facts stated therein to be true, he considered accused sane at the time of the offense, but that he was

abnormal and under the influence of alcohol (R. 877).

Major Leroy T. Howard, Medical Corps, a witness for the prosecution in rebuttal, testified that he graduated from Georgetown University Medical School with the degree of Doctor of Medicine in 1913, and has been in the Army since October 14, 1916. He was on duty with the Neuropsychiatric Section at Walter Reed General Hospital, Washington, D. C., for about three years, and has been in charge of the Neuropsychiatric Section at the Station Hospital, Fort Sam Houston, Texas, for the greater part of four years. At present he is on duty as a medical officer in the officers' ward (R. 878-879). He knows the accused, who was a patient in his ward in the Station Hospital, Fort Sam Houston, Texas, about March 2, 1932, until about April 9, 1932, He was a member of the medical board which examined accused and signed the proceedings. Accused was given a neuropsychiatric examination, which included a study of his family history and social service history; he was given the Wassermann test, a Kahn test, a spinal puncture and laboratory tests, and no psychosis and no mental or nervous disease was found. As a result of the examination and observations made, witness was of the opinion that accused was sane on February 15, 1932 (R. 882-884). Witness was then asked the same hypothetical question which was propounded to Dr. Baird, to which he replied, "If I were forced to answer, I would say this: This patient, having such a history, that I would preferably reserve my opinion and want further observation of the patient and further information before I would come to a definite conclusion" (R. 884). He also stated that the facts mentioned in the question do not warrant a diagnosis of psychosis and he would say accused was sane but probably intoxicated on February 15, 1932 (R. 885). Witness does not recognize temporary insanity from the excessive use of alcohol or ardent spirits or in any form. By intoxication he means a temporary condition which immediately disappears following the elimination of the drug from the system. He understands pathological drunkenness to be when a person has used alcohol over a prolonged period of time and "who is insane because he manifests a psychosis, he has delusions and hallucinations and an amnesia". When these symptoms persist showing there has been

a pathological condition of the brain, he calls that psychosis. The man was insane during the period when he actually had the delusions and hallucinations, and the fact that he later recovered would not warrant saying he was temporarily insane. In ordinary intoxication there are no delusions or hallucinations but there may be some impairment of memory. The degree of intoxication represents his abnormality (R. 891). Codeine and alcohol are both cerebral depressants and one would fortify the effect of the other. The effect of the drug is the stronger. After a man drinks up to a certain point, the natural result is for him to go to sleep; adding codeine to it, he would go to sleep all the quicker (R. 892-893). An unstable nervous system is generally inherited and when abused as by drink or drugs it may collapse and be overthrown. Frequently people take to drink on account of an unstable nervous system (R. 894,895). Witness stated that in his opinion three or four drinks of liquor with alcohol and codeine contents as shown by the analysis would cause a man to go off somewhere and take a nap (R. 897).

H. P. Dotson, San Antonio, Texas, a witness for the prosecution in rebuttal, testified that he is the vice-president of the Goad Motor Company; he does not know accused personally but around February 9, 1932, his salesmen began negotiations with accused for the sale of a Pontiac car. A used Ford car was turned in to the company, as part of the transaction, upon which they made repairs amounting to $25.90. Two or three days later the Ford was turned over to the Service Finance Company in satisfaction of a lien they had against the car, and the Goad Motor Company lost the $25.90 they had spent in reconditioning it (R. 833,839). It is not the custom of his company to spend $26 on a car that is not theirs (R. 836). (Testimony by the witness concerning a contract signed with the name of accused is not considered since the contract was not made by witness, was not produced or shown to be lost, and witness was not familiar with accused's signature.)

William Christoff of the San Antonio Police Department was recalled by the prosecution in rebuttal and testified that when

accused stopped his Pontiac car beside him about 3:00 o'clock on the afternoon of February 15, 1932, witness "looked all through his automobile" but saw no money on the seats or floor of the car or any pistol, nor even a scrap of paper (R. 841-843). He stood for five or ten minutes with his foot on the running board "leaning inside" the car and made it his business to look around (R. 845). Witness was suspicious of accused until he got out and wanted to explain the automobile; if accused had shown any indication of drunkenness, witness would have arrested him (R. 847).

Master Sergeant S. J. Maloukis, recalled by the prosecution in rebuttal, testified that on February 16, 1932, he was at the Schertz State Bank with accused, Colonel Connolly and Sheriff Hauser (R. 851). Accused "was so nervous and all to pieces, it wouldn't have taken a detective to see he was guilty of the robbery", so witness took him in the back room to ask him some questions, "to find out whether the man was guilty or not" (R. 869-870). No one but he and accused were present in the back room. He asked accused if he was guilty of the robbery and accused "said he was" (R. 851,855). Accused said he was alone when he robbed the bank, that he got $545 (R. 856,862), spent about $45, and had $500 at his quarters (R. 865). He also stated that if he robbed the bank, he must have been either drunk or crazy (R. 869). Witness did not warn accused in any way (R. 870). The defense made strenuous objection to the admissibility of this testimony as they did to Sergeant Maloukis' testimony on direct examination (R. 379-401), chiefly on the ground that accused was under arrest and that he was not warned of his rights. These objections will be discussed hereafter.

8. We have omitted, as unnecessary for the consideration of the record, testimony of certain witnesses which relates only to the motions for continuances and the plea to the jurisdiction of the court. We have also omitted certain testimony for the prosecution given by Major F. L. Martin, Air Corps, and Mr. A. C. Linne, County Attorney, Guadalupe County, Texas. Their testimony

was merely an identification of the revolver and clothing introduced in evidence as having been articles taken from the possession of accused. As defense counsel admitted that fact, statement of the evidence is unnecessary.

9. The fact that accused was the man who robbed the bank at the time and place alleged in Specification 1 of the Charge and was the man who, either intentionally or carelessly, committed the assault alleged in Specification 2 of the Charge, is conclusively established not only by the positive testimony of three witnesses for the prosecution but by a chain of circumstances which leaves no ground for doubt. In addition to the positive identification of accused as the man who robbed the bank, the evidence establishes, among other facts, that accused owned an automobile of distinctive type and color, the only one distributed in that immediate vicinity, and identic with the one used by the bank robber, had in his possession $500 in bank bills of exactly the same denominations and peculiarities as those taken from the bank, and also had in his possession clothing which was identified by witnesses as being the same as the clothing worn by the bank robber. Accused's identity as the bank robber is so clearly established that, in fact, the defense did not seriously contend that he was not the robber, the main contention of the defense being that on the date of the robbery accused was either in a state of amnesia or temporarily insane, or so drunk as to be legally incapable of forming an intent to commit a crime. The defense expressly stated that accused was not insane at the date of the trial (R. 160), and in a brief filed by one of the civilian counsel for accused, which brief will be discussed later, counsel states that as the trial progressed the primary question became "Was the accused suffering from amnesia at the time of the offense?" No discussion of the evidence in support of Specification 1 of the Charge is needed, the only question in that respect being whether or not accused was legally responsible for his actions. But as to Specification 2 of the Charge, laying aside for the moment the question of legal responsibility, some discussion of the evidence is required. At the conclusion of the case for the prosecution, defense moved for an acquittal as to Specification 2

on the ground that the person assaulted had testified that accused appeared "dopey" and not in entire possession of his faculties, on the ground that the identity of accused as the person who fired the shot was not clearly established by the evidence, and on the main ground that the evidence was not sufficient to exclude the reasonable possibility that the discharge of the pistol was an accident and therefore that the intent to commit the serious assault charged was not established (R. 447,448,450-453).

Our consideration of the felonious assault omits, for the present, consideration of accused's mental responsibility and is confined solely to a determination as to whether or not, assuming his mental responsibility, the government has established beyond a reasonable doubt that accused, with intent to do bodily harm, committed an assault on W. W. Lehr by shooting at him with a dangerous weapon, namely, a pistol. In our opinion, the evidence does not establish intent so conclusively as to exclude a reasonable hypothesis that the action of accused in discharging the pistol was an involuntary muscular reaction caused by the nervous shock of seeing a man enter the bank just as accused was about to flee successfully from the scene of his crime, and that the fact that the bullet passed near Mr. Lehr was an accident rather than the result of design. This theory is strengthened by Mr. Lehr's testimony that immediately after the shot was fired accused was approximately three feet away. It is incredible that an officer of the Army with several years experience could have failed to hit his target at so short a range. It also appears that the respective positions of accused and Mr. Lehr were such that an accidental discharge of a revolver held by accused, unless it were pointed at the floor at the time, would almost inevitably send the bullet in Mr. Lehr's direction. These facts, considered in connection with accused's words and actions immediately after the shot was fired, raise a serious doubt that his act was intentional or in fulfillment of the bank robbery. The doctrine that a person engaged in the commission of a felony is presumed to have the intent to do any act necessary to the accomplishment of his purpose is not applicable in this case for the reason that the robbery had been completely consummated at the time of the alleged felonious assault, and therefore the government must prove

the specific intent involved in the assault charged in order to obtain a valid finding of guilty. In our opinion the evidence fails to establish the intent, and the finding of guilty of Specification 2 of the Charge should be vacated.

In view of the foregoing, the main question presented by the evidence in this case may be stated as follows: Was accused's mental condition such that, at the time of the robbery, he was legally capable of forming the criminal intent involved in the offense? It was incumbent upon the prosecution to establish this element of the offense, as well as all others, beyond a reasonable doubt. The prosecution, not content to rest upon the presumption of sanity (which applies to all persons accused of crime until some proof of insanity arises) unnecessarily called a psychiatrist at the commencement of the case to fortify the presumption. There was nothing in his testimony, nor in the testimony of other witnesses for the prosecution, to raise a question as to accused's mental condition, such question as was presented being the result of evidence and arguments presented on behalf of accused. It becomes necessary to examine the entire testimony to determine whether any reasonable doubt exists as to accused's mental responsibility.

We will consider first the defense's hypothesis that accused was in a state of amnesia during the robbery. The only direct evidence to substantiate the assertion that, during a period extending from the time accused had breakfast on February 15th until he waked on the morning of February 16th, he was in a state of amnesia, is the testimony of accused that he remembered nothing that transpired during that period. This assertion is circumstantially supported, in part, by the testimony of Private Dixon and by the opinion evidence of Dr. Calvert and Dr. Clavin, which testimony is summarized above. According to the testimony of medical men summoned by the defense as expert witnesses, the determination of the question whether or not a condition of amnesia has existed depends primarily upon the word of the victim, and secondarily, upon circumstances tending to confirm or disprove the claim. Dr. Clavin, testifying for the defense, stated that

"a man who is suffering from amnesia *** won't remember his past at all; he will plan and go on just the same, he will plan and do things and carry them out *** but he won't know anything about his past", and that persons suffering from amnesia, after they return to normal, will not remember the events of the period during which they were living in the state of amnesia. This testimony is unquestioned by other expert opinion in the case. Applying the test thus established to the acts of accused, it is evident that accused was not in a state of amnesia at the time of the robbery and for the remainder of the day. The undisputed evidence establishes that he remembered, among other things, where he lived and how to go there from Schertz, that his wife was in the hospital and arrangements had to be made to bring her home that day, that he had to conduct a class at the school at 2:20 o'clock in the afternoon, that he had to appear in uniform for that duty, and that he had a check of several hundred dollars outstanding as part payment on his new car. This vivid recollection of both normal and unusual events of his ordinary life cannot be reconciled with a state of mind in which the past is wiped out as completely as if it had never existed. Whatever accused's mental condition may have been, we find no ground for the belief that he was in a state of amnesia on February 15, 1932, nor any ground to doubt that, so far as amnesia is concerned, accused's mind was entirely normal.

We next come to the question whether or not the whole evidence raises a reasonable doubt that accused was so far free from the effects of alcoholic liquors and of drugs as to be legally capable of forming the criminal intent involved. There is no evidence in the record which establishes even approximately the amount of whisky consumed by accused the morning of the robbery. He states he remembers taking two or three drinks of whisky, which defense claims contained .59 grain of codeine to the ounce. The servant at his quarters stated that he appeared to be drunk because he staggered and stumbled over the rugs and she found him asleep at 12:00 o'clock noon when she called him for luncheon. However, she states that he got up later and walked from one room to another, appearing to be very nervous.

The medical witnesses agree, in effect, that a man may consume so much alcoholic liquor as to be "mentally unconscious, physically active", as stated by one of the defense witnesses. Is there any basis in the evidence for a belief that accused, at the time of the robbery, was in or near any such condition? In our opinion, there is none. There is evidence from apparently unprejudiced witnesses that there was an odor of whisky on accused's breath at approximately 3;00 o'clock on the afternoon of the robbery. We believe that this positive evidence is entitled to more weight as establishing the fact that accused had been drinking than the negative evidence of equally unprejudiced witnesses that they noticed no odor of liquor, but it is inconceivable that a person who was so drunk as to be unconscious of what he was doing could possibly have such complete, coordinated control not only of his acts but of his conversation and his thoughts as is established by the evidence in this case. This control is particularly well illustrated by accused's immediate mental reaction when the mask he was wearing during the robbery unexpectedly slipped down and revealed his features. Apparently without hesitation, he asked questions to determine that the Thulemeyers did not recognize him, and, upon being assured of that fact, announced that he was "Pretty Boy", a notorious bank robber in the southwest, thus tending to throw the search for the robber in the direction of that man. Furthermore, the robbery was so timed that in the absence of some unexpected delay accused could get back to his quarters, telephone the hospital, change into uniform, and be in his class within a period of approximately thirty or thirty-five minutes from the time he entered the bank. Had it not been for the fact, probably not known to accused, that the color and type of his car were unique in that vicinity, his plans would have established an almost perfect alibi if some suspicion had been directed toward him. Moreover, the two representatives of the Goad Motor Company had a conversation lasting approximately half an hour with him within an hour of the time he robbed the bank, and they both testified unqualifiedly that he was rational in every respect and displayed a remarkable knowledge of automobile motors. Testimony to the same effect was given by the police officer who had a long conversation with him around 3:00 o'clock in the

afternoon, and who stated, in effect, that up to the time he talked to accused he thought he knew something about an automobile but that, to use his own language, "I didn't. He told me". We find nothing in the evidence tending to establish that accused was materially under the influence of liquor, or raising a reasonable doubt as to his mental responsibility for his acts in so far as that responsibility might be affected by the use of intoxicating liquor or drugs.

The final question to be considered, therefore, is whether or not the accused was, as claimed by the defense, temporarily insane when he committed the offense. The medical witnesses for the prosecution testified that in their opinion accused was sane at the time of the robbery. The medical witnesses for the defense, with one exception, testified that in their opinion accused was temporarily insane, expressing the opinion, in effect, that a person who drinks alcohol or uses narcotics to the extent that he is mentally unconscious and physically conscious is temporarily insane. One witness for the defense stated that accused had a potential dementia praecox makeup and that, in his opinion, based upon consideration of accused's family history and the facts assumed in the hypothetical question, accused was insane on February 15th. It is to be noted that none of the witnesses expressed any belief that accused was insane at the time of trial, nor at any definite period prior to the trial, and defense counsel expressly disclaimed that accused was insane at the time of trial. The medical witnesses for the prosecution all expressed the opinion that the condition resulting from excessive use of alcohol is not insanity, except where delirium tremens occurs, in which case there is a temporary psychosis. One medical witness for the prosecution stated that, assuming all the facts stated in the hypothetical question to be true, he would prefer to reserve his opinion and have further observation of accused and further information before coming to a definite conclusion. He stated, however, that the facts mentioned in the hypothetical question did not warrant a diagnosis of psychosis and he was of the opinion that accused was sane but probably intoxicated on the day of the robbery. The defense

witnesses did not define what they meant by the term "insane", but it appears from their statements that a person who drinks liquor until he is mentally unconscious, although able to move about, is "insane" as they used the term. We do not understand insanity, as a legal proposition, in that sense. The Supreme Court of the United States, in discussing mental responsibility for crime, stated the question in regard to insanity as follows:

> "*** can the jury properly return a verdict of guilty of the offense charged if *** they have a reasonable doubt whether *** the accused was mentally competent to distinguish between right and wrong or to understand the nature of the act he was committing?" Davis v. United States, 160 U.S. 469, 478.

In the same case the court, stating the proposition that a person cannot be said to be actuated by malice aforethought unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of his act, adopting the language used in Commonwealth v. Rogers, 7 Met. (Mass.) 500, said:

> "*** if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent and is not punishable for criminal acts."

The test of mental responsibility laid down in the Davis case is, in substance, the test applied in the administration of military justice. It presupposes a mental defect, such as imbecility or idiocy, or an actual disease of the mind, and excludes, so far as the question of sanity is concerned, temporary impairment of the faculties caused by excessive use of alcoholic beverages or drugs. The only evidence which, in our opinion, tends in the slightest degree to cast any doubt on accused's sanity is the evidence relating to what appears to have been a noticeable change in his

spirits and actions during several weeks immediately preceding the offense. If there were any evidence in the record, or any ground for belief, that at any time subsequent to the date of the offense accused was suffering from any mental disease, we might be inclined to believe that he was at least in the initial stages of such disease at the time of the offense, but the record is bare of any such evidence, and has affirmative evidence to the contrary. There is nothing which makes us suspect that on February 15, 1932, accused was unable to distinguish right from wrong or was unable to adhere to the right. The record presents ample evidence which tends to explain accused's apparent depression prior to the robbery. He himself states that he was worried about the condition of his wife and about his indebtedness which had existed since the time of his marriage in the year 1928, and other witnesses called by the defense testified that accused was worried about his debts. These facts furnish a natural explanation for accused's depression and also tend to establish a motive for the crime.

10. One of the civilian counsel for accused, Mr. Charles W. Anderson of San Antonio, Texas, has submitted a brief for consideration in connection with the record of trial. Each of its twenty paragraphs alleges errors of law during the trial, some of which were the subject of objection at the time and others of which are raised for the first time in the brief. Some of the paragraphs of the brief contain more than one assignment of error and some, to a certain extent, cover the same legal principles as others, although from a different viewpoint. It is therefore impracticable to discuss the paragraphs of the brief in their numerical order. In connection with some of the claimed errors we take into consideration the fact that at the trial accused was represented by the regularly appointed defense counsel, an officer of twenty-four years commissioned service, and also by three individual counsel, one of whom was an officer who was retired in the grade of lieutenant colonel after more than thirty years active service in the Regular Army, of which twenty-eight years were commissioned service, and the other two of whom were civilian members of the Bar of the State of Texas. The Board of Review

does not follow the strict rule of the civil courts that errors may not be availed of on appeal unless they were pointed out to the trial court. In the administration of military justice we search the record to determine whether substantial error has occurred, but in making this determination in respect to failure of the defense to object to procedure or evidence, or otherwise to assert its rights, the qualifications of defense counsel are necessarily considered in order to reach a conclusion as to whether or not such action or failure to act was equivalent to a waiver or a consent. When counsel are experienced or actively engaged in the practice of law, a more rigid rule as to objections is applied in examining a record to determine whether or not real or alleged errors of procedure or in the admission or rejection of testimony have injuriously affected the substantial rights of the accused. The 37th Article of War prohibits the disapproval of a finding or sentence unless it appears from an examination of the entire proceedings that the substantial rights of an accused have in fact been injuriously affected, and we follow this statutory rule. We also note the fact that the date of trial in this case was agreed upon by the prosecution and counsel for accused several weeks prior to the commencement of the trial, and counsel for defense were informed that any depositions they might desire to take should be submitted to the trial judge advocate (R. 74).

In paragraphs 1 and 2 of the brief it is claimed, in effect, that the evidence establishes that the corps area commander, the officer who appointed the court, was in fact the accuser and that, therefore, the court erred in not granting a continuance until the attendance as witnesses of that officer and the commanding officers of the Air Corps Training Center and of Randolph Field could be secured, and in not sustaining the plea to the jurisdiction of the court. We believe that these contentions have been adequately covered in paragraph 4 above, but it is not out of place to state again that as the defense expressly disclaimed that the officer appointing the court was actuated by personal bias or hostility, his action in approving the investigation of the allegations against accused and the preferring of charges was in accord with his official duties and could not make him an accuser in the case.

In fact, we are of opinion that it was his duty to take cognizance of the situation and that the action taken was proper. In view of the unquestioned and unimpeached testimony of the corps area chief of staff, as briefly outlined in paragraph 4 above, and of defense's admission that the corps area commander was not animated by bias or hostility, we are satisfied that no evidence that could have been expected from the corps area commander, or the other officers whose testimony was desired, would tend to indicate that the corps area commander was ineligible to appoint the court. We conclude that there was no error in respect to the action of the court on the motion for a continuance or on the plea to the jurisdiction.

In paragraph 3 of the brief, it is claimed that the court erred in not granting a continuance to enable the defense to obtain the presence of accused's wife as a witness or, in the alternative, to obtain her testimony by deposition, and also that the court erred in not continuing the case because of the fact that a criminal court of the State of Texas had taken jurisdiction of the offense committed against the State of Texas, and had not finally disposed of the case. The fact that criminal proceedings had been started in a State court is entirely immaterial so long as the State did not retain physical custody of accused. His act was an offense against the laws of the United States as well as against the laws of the State of Texas. He had been released from confinement by the State authorities and had returned to his military station where he was subject to military control. There is no principle of law or of comity which, under the circumstances, requires that the Federal government suspend proceedings until the State has finally acted. The refusal to grant a continuance to obtain the testimony of accused's wife was, in our opinion, a sound exercise of the discretion granted to courts-martial in the premises. Defense counsel admittedly had had ample warning that Mrs. Lichtenberger desired to escape the nervous strain of the trial of her husband and was contemplating going to Virginia (R. 108,109,110-112). They took no steps whatever to obtain process to insure her presence, nor did they attempt to obtain her testimony by deposition before she finally departed. There

was a lack of reasonable diligence in this respect which alone might have justified the court in refusing the continuance. But in addition to this element, the prosecution offered to stipulate that if Mrs. Lichtenberger were present in court she would testify to the facts which the defense contended in the motion she would testify, the prosecution thus volunteering to deprive itself of the privilege of cross-examination. The refusal of defense to accept the offer of the prosecution unless the stipulation should concede the truth of the expected testimony was unreasonable and affords no ground for questioning the action of the court in refusing to grant the continuance.

In paragraphs 4, 6 and 11 of the brief, it is claimed, among other things, that the court erred in receiving in evidence the revolver and clothing found in accused's possession on the ground that they had not been sufficiently identified as articles used by the robber. We find no error in the admission of these articles. The revolver was identified as being in all respects similar to that used in the robbery and the clothing was positively identified as that worn by the robber. It is also contended that Sergeant Maloukis' description of the money found in accused's quarters was not admissible since the money found was not offered in evidence "and hence not identified as money taken from the bank". We find no error in the admission of the testimony. It established circumstances which were proper for consideration by the court in connection with all other facts in the case.

In paragraph 5 of the brief, it is claimed the court erred in refusing to allow counsel for accused to examine Cornelius Walker, a negro witness to the alleged assault, "concerning his having been coached". We find nothing in the record to indicate that the defense was hampered in any way in its attempt to impeach the witness and counsel's brief makes no page reference to the record on that point. In any event, our conclusion that the government has failed to establish the necessary intent as to Specification 2 makes this a moot question.

In paragraphs 7, 8, 10, 14 and 15 of the brief, it is claimed that the court erred in receiving the testimony of Lieutenant

Douglass and Sergeant Maloukis and in refusing to strike out such testimony because it is not shown that accused's statements were voluntarily made, nor that he had been warned of his rights to decline to answer questions, and because accused was under arrest. Accused is an officer of more than six years commissioned service. It is his unqualified duty to know that in an investigation of an offense a suspected or accused person may decline to make a statement or to answer questions. The failure of Lieutenant Douglass, who in fact was not conducting an investigation, to warn accused is, therefore, not to be considered. We conclusively presume that accused was cognizant of his rights. There is nothing in the record to sustain the contention that accused's statements, as detailed by the witnesses, and presumably his actions, were not voluntary, that is, that they were induced by duress. Lieutenant Douglass' rank was so nearly the same as that of accused as to preclude any idea that accused was overawed by Lieutenant Douglass' presence. In fact, the latter officer was apparently a passive spectator and took no part in the questioning of accused. While Sergeant Maloukis, in response to a question, stated that if accused had attempted to leave the quarters he would have prevented it, Lieutenant Douglass, who was the senior officer present, stated that he would have permitted accused to leave. The record affirmatively establishes that accused's actions and remarks were entirely voluntary.

In paragraphs 4, 8, 10, 11, 14 and 15, it is contended that the revolver and clothing obtained from accused's quarters were obtained by an unreasonable search in violation of the provisions of the Fourth Amendment to the Constitution and were not properly received in evidence, nor was testimony relative thereto properly received. As has been stated in paragraph 5 above, public quarters on military reservations are subject to search when it appears to the commanding officer that reasonable grounds exist for such search. For this reason alone, the contention is untenable, but in addition to this the evidence establishes that no search was made.

In the 9th paragraph of the brief, it is claimed, in effect, that the court erred in preventing defense from questioning

Sergeant Maloukis along lines which would impeach Mrs. Thulemeyer's testimony as to the identity of accused as the bank robber. The ruling of the court was clearly incorrect. However, the identity of accused is so unquestionably established by other evidence and by admissions of accused himself that the error is not material and accused's substantial rights were not injuriously affected thereby.

In paragraph 12 of the brief, it is claimed that the court erred in not permitting a lay witness to give his opinion as to the sanity or insanity of accused after such witness had testified to the facts upon which the opinion would be based. In our opinion the weight of authority is that the witness should have been permitted to express the opinion. However, several other lay witnesses called for the defense were permitted to express their opinions on that point and as the opinion of the witness referred to would have been merely cumulative and, being the opinion of a nonexpert, would have been of comparatively little weight, we are of opinion that the court's ruling, if it was an error, was not a material error.

In paragraph 13 of the brief, it is claimed that the court erred in not allowing the defense to introduce evidence on the effect of flying in airplanes and the effect of carbon monoxide on an unstable nervous system. During the argument on the objection, defense admitted that it was not intended to establish the fact that carbon monoxide had had a deleterious effect upon accused, but that "it might" have had such effect. We believe the ruling of the court was proper in view of the statement by the defense that it intended to prove by the witness then under examination "that in his opinion practically all these aviators are nutty *** and people in the United States Army take cognizance of it". This grotesque theory, in our opinion, warranted the court in excluding evidence as to possible effects of carbon monoxide on accused's nervous system, the question being not possible effects but whether or not there was any actual effect, a question which could only be determined by physical examination.

In paragraph 17 of the brief, it is claimed that the court erred in not stopping the trial "and appointing <u>its</u> <u>own</u> medical

board" when Major Howard, as a prosecution witness in rebuttal, testifying in response to the hypothetical question propounded to the medical witnesses for the defense, stated that, assuming the truth of all the facts in the question, he would preferably reserve his opinion and want further observation of a patient before coming to a definite conclusion as to sanity. However, Major Howard stated that, assuming all the facts in the question to be true, they do not warrant a diagnosis of psychosis, and assuming the truth of the facts he would say accused was sane but "probably intoxicated". The testimony of Major Howard, in fact, afforded less reason for continuance of the trial and further mental examination of the accused than the testimony of witnesses called by the defense. In view of the fact that accused during the month of April was examined by a board of three officers, two of whom were qualified psychiatrists, that these officers found no evidence of mental disease at that time nor any indication of mental disease at the time of the commission of the offense, and reached the conclusion that accused was sane, and the further fact that the report of this board had been introduced in evidence, and that two of the members of the board testified in respect to the sanity of the accused, no reason is seen why the court should have asked for examination by another board of officers. Both the prosecution and defense were prepared to try out the issue of sanity in court, and actually did so. Nothing in the evidence suggests that further examination of accused would accomplish any useful purpose, particularly in view of the fact that defense stated that at the time of the trial accused was sane. We find no error in this respect.

The most serious error claimed in the brief is that claimed in paragraph 18 thereof as follows:

> "18. The court erred in evidencing resentment and displeasure at the defense attempt to place each member on a voir dire examination:
>
> a. As the trial progressed the primary issue became, 'Was the accused suffering from amnesia at the time of the offense?'
>
> b. The questions asked the medical experts indicated that at least two members believed amnesia to be an invention of

culprits to escape punishment and had no actual existence in fact. Transcript of record, Page 743 et seq. and Page 775, line 21.

c. Under these circumstances said members of the court were unqualified to sit since they were asked to decide whether or not accused was suffering from a mental disease which, to them, did not exist.

d. A voir dire examination of the members of the court would have disclosed this disqualifying impediment.

e. Such said members were automatically votes for conviction from the outset of the trial and hence the requirement of convincing two thirds of the court of the accused's guilt was not met."

At the commencement of the trial, the defense stated that it desired to enter an objection to the competency of the "entire court upon the ground that they are biased and prejudiced", and requested permission to "place that one body upon their voir dire examination". This procedure was properly disapproved by the court, whereupon defense proceeded to the challenge of individual members. The first member so challenged was duly sworn as provided in paragraphs 58 and 95 of the Manual for Courts-Martial, the defense announcing that the ground for challenge was "bias and prejudice, and having previously formed an opinion" (R. 6). The officer so examined under oath disclaimed any particular knowledge of the alleged offense, stated that he had never expressed an opinion as to the guilt or innocence of the accused or as to what should be done with him, stated that he had not formed an opinion as to accused's guilt or innocence, and felt that he could sit upon the court and give accused a fair trial. After this testimony had been adduced, defense continued with two questions designed to indicate that the member would be prejudiced and biased because he was an officer of the United States Army and the accused is also an officer charged with a serious offense. At this point some member of the court objected to the procedure, stating that "in a military court, the officer's

mere statement that he had formed no opinion of the case and is unbiased, is a sufficient statement to qualify him to sit on the court", in which statement the trial judge advocate concurred. It is unnecessary to state that the statement of the member of the court and the concurrence therewith of the trial judge advocate indicated a complete misconception of the law and regulations on the subject. The defense, speaking through Mr. Spears, stated: "May it please the court, I don't want to get in bad. I will apologize for anything I have said", and then added that many times in his experience a man who has ordinarily felt that he could give a fair trial disclosed upon his voir dire examination that he had unconsciously formed an opinion, and that he meant no harm in asking the questions referred to. Subsequently, the defense withdrew its challenge and challenged another officer peremptorily, exercised no further challenge for cause, and stated that it had no further challenge for cause and was satisfied with the court as it then existed (R. 7-11). The incident described above was unfortunate and the error should have been corrected by the court of its own motion. However, counsel for accused do not and cannot claim that they were ignorant of their right to examine members of the court on their voir dire for the purpose of testing their competency. The fact that they exercised the right establishes that they knew of its existence. In view of the long experience of the military counsel and the fact that the two civilian counsel are duly licensed to practice law in the State of Texas, we are of opinion that defense's failure to assert its rights or to interpose any other challenges for cause was a conscious, deliberate act. This conclusion is strengthened by the fact that the ground of bias, prejudice and opinion on the part of the one member challenged had been thoroughly covered in his examination, and the objection to the procedure made by a member of the court, as stated above, did not occur until, by two questions, defense attempted to establish a proposition which, if true, would disqualify every officer of the United States Army from sitting as a member of a court-martial in a case where the accused was also an officer charged with a serious offense. Inasmuch as the defense did not assert its right to proceed, nor interpose any other challenges for cause, that matter was finally disposed of when the defense accepted the court as it then stood, subject, of course, to the fact that a subsequent

showing of bias would afford ground for further challenge. In paragraph 18 of the brief it is, in effect, asserted that ground for further challenge was disclosed by questions asked of medical witnesses for the defense by two members of the court, it being claimed that the questions indicated that the two members "believed amnesia to be an invention of culprits to escape punishment and had no actual existence in fact". We have carefully examined the record in this connection and do not find that it indicates that the members were biased or had any such conviction. The medical witnesses, who were being examined, in many cases did not give answers responsive to the questions put to them and their discussion of amnesia was far from clear. It was but natural that in developing this subject very pointed questions should be asked in view of the many irresponsive answers which had been given. But, conceding the claim of the defense that there were indications that at least two members of the court had formed definite and unchangeable opinions as to whether or not amnesia can be an actual condition, it is too late now to raise the question, which should have been raised at the time and disposed of according to law and custom. The fact that the question was not raised then indicates that defense counsel were not at the time impressed with any belief that the members were disqualified.

The assignment of error in paragraph 16 of the brief is untenable. The ruling of the court was clearly correct and no discussion is required.

In the 19th paragraph of the brief, it is claimed that the prosecution failed to prove its case in that it failed to introduce any evidence "to prove intent as a separate fact as required in both offenses charged". We agree with this claim in so far as Specification 2 is concerned. We find no ground for the claim in so far as Specification 1 is concerned. Intent almost invariably is established by facts from which intent is inferred. The facts in this case definitely and conclusively establish the intent involved in Specification 1 of the Charge.

The final paragraph of the brief claims that the findings of the court are inconsistent with the statements of the expert

witnesses for reasons stated in the brief and concludes that on the testimony of expert witnesses for the prosecution as well as for the defense, accused was either intoxicated or temporarily insane at the time of the commission of the offense and legally incapable of forming a criminal intent. This assignment of error is completely covered in our discussion of accused's mental responsibility. However, in view of the claim made by defense, we point out that a court is not bound by the opinions of expert witnesses. It uses them, as it uses all other testimony, as a means of determining the facts.

11. The defense in asking for a continuance because of the absence of accused's wife (R. 93-106), whom they declared a vital and material witness for the defendant, read into the record (R. 98-106) a statement of the facts which they expected to prove by her. The trial judge advocate offered to stipulate that Mrs. Lichtenberger, if present, would testify as stated in the motion. The defense refused to stipulate unless the prosecution would stipulate that her testimony, as set forth, was true. This was refused. The statement of her expected testimony, therefore, was not evidence in the case, but is nevertheless set forth below for future consideration in connection with clemency.

It was stated that Mrs. Herbert C. Lichtenberger was expected to testify that she has known accused for four years and been married to him for three years and nine months, and that she knows his nature, disposition, inherent qualities and state of mind. During the last year she had noticed signs of mental deterioration and lack of responsibility in accused, and during December, 1931, and January, 1932, these changes became very noticeable. When driving the car, accused took delight in scaring pedestrians by driving up close behind them (R. 98); and one night while crossing a bridge he scared a Mexican in this manner so that he jumped into the creek at which accused laughed. Accused also had a habit when dancing of deliberately bumping into other people or poking them with his elbow, seeming to take delight in antagonizing them. He seemed to take delight in hurting little children, or hurting their feelings and was amused to see them pucker up and cry. He started to write a book on airplanes and engines and was very

enthusiastic about it on some days and absolutely uninterested on others, and when asked about it would become angry and go away and sulk. At times he was very depressed and irritable without interest in anything; at other times he was interested in everything, and these changes were frequent and seemed to be without any basis (R. 99). At times he seemed to enjoy guests and was very hospitable; at other times he was very rude and just sat and read the newspaper. Ordinarily he was devoted to his wife and children but at times they seemed to irritate him to such an extent that he would leave the house and not return for hours (R. 99-100). During the Christmas holidays in 1931, and for some weeks thereafter, he would break down and cry like a child, and when questioned would say that he was very depressed and blue, that everyone else in the world seemed to be happy while they were constantly having trouble and sickness. On February 1, 1932, she had an operation, and about February 4th she told accused that she thought her operation was unsuccessful and this information affected him deeply and made him depressed and melancholy (R. 100). The next day she noticed that he had been drinking liquor and was very depressed and downhearted. Thereafter she noticed on each visit to the hospital that he had a strong odor of whisky on his breath, his conversation became more incoherent and his depression more obvious; he appeared to have no interest in anything. On February 14th she informed him that the doctor had decided to let her go home the next day, but he did not appear the slightest bit interested, was constantly gazing out of the window and had a far-away expression on his face (R. 101). When she arrived home, he was not there and the maid informed her that he had been acting queerly all day and drinking heavily. About 4:00 o'clock he appeared and came to the door of her room but did not enter; he appeared dazed and had a wild look in his eyes which frightened her. She kept calling him but he ignored her and went into a back room (R. 102). Then he went out of the house and sat in the car talking to two men. When finally she got accused into her room, she saw that he had been drinking heavily, his eyes were glassy and he had an expression on his face which she had never seen before. His conversation was incoherent and his answers to questions were

irrelevant. He declined to eat dinner, saying he was not hungry, and fifteen minutes later he said he was hungry and would go to a restaurant and eat although there was plenty of food in the house. He seemed unmindful of facts as they existed. That evening he read till about 2:00 a.m. and then came to bed without saying a word to her (R. 103). His conduct was such that she talked to a friend about consulting Captain Finter, his immediate superior, but this was prevented by accused's arrest on February 16th. His conduct, actions and demeanor over a period of several months definitely led witness to believe that on February 15, 1932, accused was insane, did not know right from wrong, and was not responsible for his acts (R. 104).

12. At the time of trial accused was 28 7/12 years of age. His service is shown by the official Army Register as follows:

> "2 lt. Inf. O.R.C. 12 Jan. 25; accepted 21 Jan. 25; active duty 14 June 25 to 28 June 25 and from 17 July 25 to 30 Aug. 25 and from 17 July 26 to 30 Aug. 26.- 2 lt. A.C. 30 June 26; accepted 7 Sept. 26."

13. 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 opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 2, but is legally sufficient to support the findings of guilty of Specification 1 and of the Charge, and legally sufficient to support the sentence. Penitentiary confinement for the offense of which accused stands convicted is authorized by section 284 of the Criminal Code (USC 18; 463).

[illegible], Judge Advocate.

[illegible], Judge Advocate.

[illegible], Judge Advocate.

To The Judge Advocate General.

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

CM 199641

DEC 2 1932

| | | |
|---|---|---|
| UNITED STATES | ) | FIRST CAVALRY DIVISION |
| v. | ) | Trial by G.C.M., convened at Fort Bliss, Texas, Oct. 1 and 24, 1932. Dishonorable discharge and confinement for seven (7) years. Disciplinary Barracks. |
| Private GEORGE D. DAVIS (6241727), Troop A, 8th Cavalry. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD 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. Accused was tried on the following charges and specifications:

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

Specification: In that Private George D. Davis, Troop A, 8th Cavalry, did, at Fort Bliss, Texas, on or about the 15th day of May, 1932, absent himself without leave and did remain absent without leave until he surrendered himself at Jefferson Barracks, Missouri, on or about the 22d day of May, 1932.

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

Specification 1: In that Private George D. Davis, Troop A, 8th Cavalry, did, at Fort Bliss, Texas, on or about the 14th day of May, 1932, with intent to defraud, obtain the Post Exchange credit card of Private Floyd Jenkins, and did forge the name of Private Jenkins to the Post Exchange credit card and thereby obtain fraudulently merchandise from the Post Exchange amounting to approximately ten ($10.00) dollars.

Specification 2: (Finding of Not Guilty.)

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

Specification: In that Private George D. Davis, Troop A, 8th Cavalry, did, at Fort Bliss, Texas, on or about the 13th day of May, 1932, with intent to defraud, unlawfully pretended that he had been granted three ($3.00) dollars additional credit at the Post Exchange, well knowing such pretenses to be false as he was allowed only seven ($7.00) dollars credit each month at the Post Exchange.

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

Specification: In that Private George D. Davis, Troop A, 8th Cavalry, did at Fort Bliss, Texas, on or about September 5, 1932, in testimony before Major H.J.M. Smith, Inspector General's Department, in an official investigation of the death of Corporal Rufus H. Berry, Battery A, 82d Field Artillery, make under oath statements in answer to questions by Major Smith, which said questions and statements were in substance as follows:

"Q. Davis, on the Evening of Saturday, September 3d, 1932, did you witness any trouble between Corporal Berry, Battery A, 82nd Field Artillery, then a Garrison Prisoner in the Post Stockade and Prisoner Gonzales?

A. No sir.

Q. After supper what did you do?

A. The first thing I did was smoke a cigarette. I was sitting by the window of the north wing of the stockade opposite the door of the latrine. While I was sitting there I saw a bunch of prisoners standing around a man on the ground and I got up and went over there and it was a Corporal. I do not know his name.

Q. Did you hear any words between Corporal Berry and Prisoner Gonzales?

A. No sir.

Q. Before supper did you see any fight between Corporal Berry and Prisoner Gonzales?
A. No sir.
Q. Did you hear any words between them?
A. No sir.
Q. Are you positive Davis, that you did not see any signs of a fight between Corporal Berry and Prisoner Gonzales?
A. Yes sir",

which statements he did not then believe to be true.

He pleaded not guilty to all charges and specifications and was found not guilty of Specification 2 of Charge II, but guilty of all other charges and specifications. Evidence of one previous conviction by summary court-martial for absence without leave for a period of nine days 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 years. The findings and sentence were not announced at the conclusion of the trial. 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 of trial under the provisions of Article of War 50½.

3. The several questions of law presented by the record are stated and discussed separately below. An extended statement of testimony bearing on the various specifications is unnecessary.

4. a. The first question presented by the record is whether or not there is substantial competent evidence to sustain the findings of guilty of Charge I and its Specification. The specification is defective in that it does not specifically allege that accused absented himself from his station for the entire period May 15 to May 22, 1932. However, the statement that accused surrendered himself at Jefferson Barracks, Missouri, is an allegation that part, if not all, of the alleged absence was from the station of the accused's organization, and the competent evidence introduced establishes that the entire period of absence was from accused's station. The substantial rights of the accused were not injuriously affected by the defective specification. Competent evidence was introduced to establish the commencement of the accused's absence without leave. There was no competent evidence to establish the date of termination of that absence, the only evidence on that point being an entry in the

morning report of Troop A, 8th Cavalry, as follows:

> "May, 1932
> 24th. Pvt Davis, AWOL. to surrendered
> to Mil.Auth. Jefferson Bks. Mo.
> LLD. 22nd. MR."

This entry is clearly not within the official personal knowledge of the accused's organization commander, is hearsay, and, if objected to by the defense, could not properly have been considered by the court, except in so far as it establishes that on May 24, 1932, the accused was still absent without leave from his station. However, the defense stated that there was no objection to the introduction of the extract copy of the morning report purporting to show the date and place of termination of accused's absence and, inasmuch as the entry tended to establish that the actual absence without leave was materially less than accused's absence from his station and thus was beneficial to accused, the statement by the defense that there was no objection to its introduction may be treated as a stipulation that accused did surrender at Jefferson Barracks on May 22, 1932. The record of trial is therefore legally sufficient to support the findings of guilty of Charge I and its Specification.

b. The next question presented is whether or not the record is legally sufficient to support the findings of guilty of Charge II and Specification 1 thereunder. The Charge and Specification are erroneously laid under the 93d instead of the 96th Article of War. The specification clearly and unequivocally alleges the offense of obtaining property under false pretenses, the specific property alleged to have been obtained being described as "merchandise", which word means goods, wares, commodities, or anything usually bought or sold in commerce. There is no evidence in the record that accused obtained any merchandise as alleged in the specification, the evidence establishing that he obtained from the post exchange "canteen checks" (officially designated "credit checks" or "credit coupons") to the value of $10 (R. 37-39). While "canteen checks" may be used for the purpose of obtaining merchandise, they are not themselves merchandise. In fact their sale is prevented by the provisions of paragraph 39, AR 210-65, June 29, 1929, which states that they "will be honored at the exchange only when presented by the enlisted man whose name appears on the book", that is, by the enlisted men to whom the credit checks were authorized to be issued and to whom they were issued. It follows that the record of trial is not legally sufficient to support the findings of guilty of Charge II and Specification 1 thereof.

c. The next question presented by the record is as to its legal sufficiency to support the findings of guilty of Charge III and its Specification. This specification is defective in several particulars. It does not name or describe the person to whom the alleged unlawful pretense was made. It does not allege any facts showing the specific intent of the accused, that is, the specific fraud involved, nor does it allege what person or organization he intended to defraud, nor does it contain any allegation that he succeeded in defrauding any person or organization. The evidence at the trial establishes, however, that as a result of accused's fraudulent pretense he obtained $3 worth of post exchange credit coupons. There is no evidence that he used these coupons to obtain merchandise.

In view of the evidence introduced to support the specification the question presented is whether or not the defects in the specification may be cured by the evidence. In the opinion of the Board of Review the specification is so fatally defective that it cannot be cured by the evidence introduced in support thereof. Evidence may only be availed of to supply some element erroneously omitted from a specification where knowledge of the omitted element may reasonably be imputed to the accused because of its necessarily implied inclusion in the pleading. See par. 87 b (p. 74) M.C.M., 1928; par. 158 a, M.C.M., 1921. To hold otherwise would permit punishment for an offense not charged and for which accused was not brought to trial. A specification must be sufficiently complete and unambiguous to inform the accused of the offense charged against him, thus enabling him intelligently to plead to the specification and to prepare his defense. The specification here under consideration completely fails to inform the accused of the offense attempted to be charged. The specification as drafted, except for the last fourteen words thereof, follows the form ordinarily used to charge the offense of obtaining money or property by false pretenses and the proof established that he did obtain credit coupons, which to some extent are equivalent to cash, by means of the false pretenses. But the studied omission of an allegation that accused obtained money or property by means of the false pretense negatives the idea that it was intended to charge that he did in fact do so. However, the staff judge advocate in his review apparently considers that the offense is a violation of the statutory offense "swindling" denounced by the Acts of 1858 of the State of Texas (Art. 1545, p. 1188, Penal Code, Complete Texas Statutes, 1928), and made a part of the Federal criminal law by section 289 of the Federal Penal Code of 1910. The offense of "swindling" is defined as follows:

> "'Swindling' is the acquisition of any personal or movable property, money or instrument of writing conveying or

> securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same."

It is clear that the specification does not reasonably advise the accused that he is charged with a breach of that statute and it was therefore impossible for him to anticipate that he must meet such evidence as might properly be offered to establish a breach of that statute. We hold that so many elements are omitted from the specification that the substantial rights of the accused were injuriously affected by the error of pleading, that the defective specification is not susceptible of cure by means of evidence, and that the record is therefore not legally sufficient to support the findings of guilty of Charge III and its Specification.

5. The record of trial is legally sufficient to support the findings of guilty of the Additional Charge and the Specification thereunder.

6. The trial judge advocate did not certify that he personally recorded the findings and sentence but the record bears physical evidence of that fact and in any event the validity of the record is not affected.

7. The maximum punishment authorized for the offenses of which the accused stands properly convicted is:

a. For the absence without leave proved: confinement at hard labor for twenty-one days.

b. For false swearing: dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years.

Because of the fact that the sentence involves forfeiture of all pay and allowances due or to become due, the substitutions provided in paragraph 104 c, M.C.M., 1928, may not be availed of to increase the normal term of confinement authorized for the offenses proven under Charge I and the Additional Charge.

8. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of

Charge II and Specification 1 thereof, Charge III and its Specification, and so much of the sentence as provides for confinement at hard labor for a period exceeding three years and twenty-one days.

E. C. Weller Jr., Judge Advocate.

C. McDonald, Judge Advocate.

R. S. Newman, Judge Advocate.

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

CM 199672

| | | |
|---|---|---|
| UNITED STATES | ) | FIRST CAVALRY DIVISION |
| v. | ) | Trial by G.C.M., convened at Fort Bliss, Texas, November 7 and 8, 1932. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks. |
| Private KENNETH B. SOUTHERN (6488618), Battery B, 82d Field Artillery. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD 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 charges and specifications:

CHARGE I: Violation of the 93d 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 Private Kenneth B. Southern, Battery B, 82d Field Artillery, did at El Paso, Texas, on or about October 5, 1932, feloniously have in his possession one liberty bond, 4th issue, value $100.00, the property of Sergeant William M. Wolter, Quartermaster Detachment, Fort Bliss, Texas, then lately before feloniously stolen, taken and carried away; he the said Private Kenneth B. Southern, then well knowing the said liberty bond to have been so feloniously stolen, taken and carried away.

He pleaded not guilty to all charges and specifications and was found not guilty of Charge I and Specifications 1 and 2 thereunder but guilty of Charge II and its Specification. No evidence of previous

convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two 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 of trial under the provisions of Article of War 50½.

3. The record of trial presents three questions which may be stated as follows:

a. Is so much of the finding of guilty of the Specification of Charge II as finds that accused possessed the stolen property "feloniously" valid?

b. If the answer to a be in the negative, does the record of trial warrant modification of the finding of guilty and approval of the finding as modified?

c. Is the sentence legal?

4. a. The first two questions will be considered together. No statute of the United States nor of the State of Texas has been found which denounces as an offense the alleged misconduct of the accused (possession of stolen property), nor is the offense charged against him an offense at common law. We therefore hold that the wrongful possession by the accused of the stolen property was not felonious and that the offense charged, of which the accused stands convicted, is purely a military offense. The possession was, however, knowingly wrongful and, under the circumstances shown, was of a nature to bring discredit upon the military service. The word "felonious" is of broad meaning and imports, among other elements, knowing and intentional wrongdoing. The knowingly wrongful possession by accused of the stolen property, as shown by the evidence, is therefore necessarily included in the felonious possession charged, and the finding of guilty of the specification may legally be modified accordingly.

b. The Executive order limiting punishments does not list the offense involved herein nor any clearly analogous offense. However, the offense is closely related to those denounced in section 288 of the Federal Penal Code of 1910 (USC 18:467), that is, the buying, receiving or concealing, in the places described in section 272 of the Penal Code (USC 18:451), stolen property known to have been stolen. That statute authorizes confinement for three years for the

acts thereby made criminal. The sentence of two years' confinement imposed in this case is held to be valid.

5. 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 the Specification of Charge II as involves a finding that accused did, at the time and place alleged, wrongfully and knowingly have in his possession the stolen property described in the specification, then well knowing that such property had been stolen, taken and carried away from the named owner thereof, and legally sufficient to support the sentence.

W. M. Chief, Judge Advocate.

A. H. McDonald, Judge Advocate.

T. H. Newman, Judge Advocate.

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

CM 199690

| | | |
|---|---|---|
| UNITED STATES | ) | THIRD CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Langley Field, Virginia, |
| Private DONALD R. LEE | ) | November 15, 1932. Confinement |
| (6541732), Headquarters | ) | for six (6) months and for- |
| Company, 7th Infantry. | ) | feiture of $14 per month. |
| | ) | Langley Field, Virginia. |

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and BRENNAN, Judge Advocates
ORIGINAL EXAMINATION by WALSH, 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 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 Donald E. Lee, Hq. Co. (then corporal), 7th Infantry, did, at Vancouver Barracks, Washington, on or about March 12, 1932, desert the service of the United States and did remain absent in desertion until he surrendered himself at Langley Field, Virginia, on or about September 22, 1932.

He pleaded not guilty to the Specification, and to the Charge "Not guilty of violation of the 58th Article of War, but guilty of violation of the 61st Article of War". He was found of the Specification guilty, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without

leave", of the excepted words not guilty and of the substituted words guilty, and of the Charge not guilty, but guilty of violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to confinement at hard labor for six months and forfeiture of $14 per month for a like period. The reviewing authority approved the sentence, ordered it executed, and designated Langley Field, Virginia, as the place of confinement. The sentence was published in General Court-Martial Orders No. 187, Headquarters Third Corps Area, November 23, 1932.

3. The record of trial discloses that Captain John P. Richter, Air Corps, the officer signing the charges as accuser, sat as a member of the court throughout the trial of the accused, notwithstanding the provision of Article of War 8 that "no officer shall be eligible to sit as a member of such court when he is the accuser". Before the arraignment of the accused, the assistant trial judge advocate asked that Captain Richter be excused from sitting as a member of the court inasmuch as he had signed the charges (R. 2); whereupon, the following discussion took place:

> "Law Member: Do you, Captain Richter, know anything about this case?
> Captain Richter: I do not.
> Law Member: Captain Richter will not be excused."

Thereafter, when the accused was offered an opportunity to challenge, no challenge was interposed to Captain Richter as a member of the court (R. 2).

Captain Richter as the officer preferring the charges made oath before a duly qualified officer that he had investigated the matters set forth in the Specification and Charge and that the same were true in fact to the best of his knowledge and belief (R. 3). "An officer who has signed and sworn to the charges in a particular case is necessarily an accuser in that case". Par. 60, M.C.M., 1928. It thus appearing that Captain Richter was legally ineligible to sit as a member of the court, it follows that the court which tried the accused was not legally constituted, was without jurisdiction to try the accused, and the proceedings are null and void ab initio. CM 152893, Pentecost.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

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

Dec 22, 1932

Military Justice

C. M. No. 199786

| | |
|---|---|
| UNITED STATES ) | FOURTH CORPS AREA |
| ) | |
| vs. ) | Trial by G.C.M., convened at |
| ) | Fort McPherson, Georgia, |
| ) | December 5, 1932. Confine- |
| General Prisoner JAMES B. ) | ment for two (2) years. |
| KINGSTON. ) | Penitentiary. |

---

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

---

1. The record of trial in the case of the general prisoner named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

2. Penitentiary confinement is authorized for the offense of which accused stands convicted, but he may not lawfully be confined in a penitentiary until he has served the existing sentences to confinement heretofore adjudged against him or until the unexecuted portions thereof shall have been remitted. AW 42; Sec. 276, Act of March 4, 1909 (USC 18:455); par. 94, MCM 1928.

W. A. McNeil, Jr., Judge Advocate.

A. H. McDonald, Judge Advocate.

R. S. Brennan, Judge Advocate.

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

Dec. 16, 1932

CM 199737

| | | |
|---|---|---|
| UNITED STATES | ) | SIXTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Jefferson Barracks, Missouri, November 18, 1932. Dishonorable discharge and confinement for six (6) months. Jefferson Barracks, Missouri. |
| Private RAYMOND C. TAFT (6797708), Headquarters Company, 6th Infantry. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD 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, and found legally sufficient to support the sentence.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Raymond C. Taft, Headquarters Company, 6th Infantry, did, at Jefferson Barracks, Missouri, on or about the 21st day of October, 1932, feloniously take, steal and carry away 11 United States Army Motion Picture coupon books, of the value of about $1.60 each, property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction by general court-martial for converting to his own use a Ford automobile, property of another soldier, 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 Jefferson Barracks, Missouri, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The substantial question presented by the record of trial is whether or not the property described in the specification is property of the United States, furnished and intended for the military service thereof. The United States Army Motion Picture Service is a welfare activity under supervision and regulation of the War Department. Its funds and other property, including coupon books, are purchased from profits accruing from the exhibition of motion pictures and are not public funds, although they are quasi-public in their nature in the same manner as are post exchange funds and company funds, that is, they are held by the government through its officers for the benefit of the Army personnel. Dig. Ops. JAG, 1912-1930, sec. 1715; AR 210-390, May 29, 1929; Op. JAG, 241.3, Feb. 25, 1932. It follows that the government has a special property in the funds and property of the Motion Picture Service, which special property warrants the allegation that the coupon books are property of the United States. However, such property does not fall within the description of the property defined in the ninth clause of the 94th Article of War, which denounces the theft of property of the United States "furnished or intended for the military service thereof". Par. 150 i, M.C.M., 1928.

4. Although the United States has such a special property in the funds and property of the Army Motion Picture Service as to permit alleging ownership thereof in the United States, such pleading is objectionable as a matter of policy for reasons which it is not necessary to state for the purpose of this holding. The existing practice of alleging ownership of money and property pertaining to quasi-public funds in the organization to which the fund pertains, such as a designated post exchange or company fund, should not be departed from. In the instant case, ownership should have been stated to be in the United States Army Motion Picture Service. See AR 210-390, May 29, 1929.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support so much of the finding of guilty of the Specification as finds that the property described therein was furnished and intended for the military service

of the United States, and legally insufficient to support the finding of guilty of a violation of the 94th Article of War, but legally sufficient to support a finding of guilty of the 93d Article of War, and legally sufficient to support the sentence.

E. C. Mette, Judge Advocate.
C. H. McDonald, Judge Advocate.
R. S. Newman, Judge Advocate.

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

CM 199811

| | | |
|---|---|---|
| UNITED STATES | ) | THIRD CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Fort Hoyle, Maryland, December |
| Private First Class | ) | 6, 1932. Dishonorable dis- |
| RICHARD L. MADISON | ) | charge and confinement for |
| (6312854), Band, 6th | ) | one (1) year. Disciplinary |
| Field Artillery. | ) | Barracks. |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and WILLIAMS, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, 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 93d Article of War.

Specification 1: In that Private 1st Class, Specialist 4th Class, Richard L. Madison, Band 6th Field Artillery, did, at Fort Hoyle, Md., between April 12, 1932, and October 13, 1932, feloniously take, steal and carry away nineteen (19) U.S.A.M.P. coupon books of the value of two dollars and forty cents ($2.40) each, to the total value of forty-five dollars and sixty cents ($45.60), the property of Captain John H. Fye, 6th Field Artillery.

Specification 2: In that Private 1st Class, Specialist 4th Class, Richard L. Madison, Band, 6th Field Artillery, did, at Fort Hoyle, Md., between April 1, 1931, and October 13, 1932, feloniously embezzle by fraudulently converting to his own use six (6) Barber Tickets, of the value of $6.60, the property of the Post Barber, Fort Hoyle, Maryland, entrusted

to him for safe-keeping and sale to members of the Band, 6th Field Artillery, by the Post Exchange Officer, Fort Hoyle, Maryland.

He pleaded not guilty to, and was found guilty of, the Charge and both specifications. No evidence of previous convictions was introduced. He was sentenced to reduction to the grade of private, dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement 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 50½.

3. The evidence as to embezzlement of the barber tickets is clear and convincing, and therefore the findings of guilty of the Charge and Specification 2 thereunder are legally sufficient.

4. The principal question presented by the record of trial as to Specification 1 is whether the evidence as to the taking of the coupon books, which accused admitted taking, shows a trespass, an essential element of the crime of larceny.

The material evidence bearing upon this point shows that since December, 1930, accused has been the band clerk (R. 6), and, as such, was intrusted by the commanding officer of the Band with the custody, care and control of the U.S.A.M.P. coupon books. Due to a change in the price of books, all outstanding books were called in on April 12, 1932, and thirty new books were issued to the Band and receipted for by the organization commander, who turned them over to accused without instructions and without taking a receipt for them (R. 7-12). Accused kept the books in the orderly room in a locked desk drawer and possessed the only key (R. 6). The procedure in handling the books appears to have been for accused to issue the books to such members of the organization as desired them, to take signed receipts for the books thus sold, and to place appropriate charges on the monthly collection sheet. No restriction was placed on accused as to the number of books one man could sign for (R. 10). The organization commander testified that he expected accused to account for the books "at any time" (R. 26), but he made no check of the books from April 12 to October 13, 1932, when a shortage of nineteen books was reported by accused (R. 10). At that time accused had only four books and signed receipts for seven others (R. 7), and said, "I took them" (R. 6). An audit of all moving picture accounts had been

ordered for the following Monday (R. 11). The organization clerks very frequently brought the monthly collection sheets to the recreation officer, paid either with cash or check for the books sold, and received new ones in the number paid for. The band and a majority of the batteries did this. A shortage could exist in an organization after such monthly settlement as new books were issued only to cover the cash paid in (R. 10,16,19-20). Accused testified that he had kept up the practice of converting the books to his own use for six or eight months; some of the books he used and some of them he sold (R. 30).

5. The evidence clearly shows that the accused was in lawful possession of the moving picture coupon books which had been turned over to him by the organization commander. He (accused) kept them in a locked drawer to which he alone had a key; he issued them to members of the organization, made the charges on the collection sheet, settled with the recreation officer and obtained new books for those sold, all without instructions from his commanding officer, or without any check by him for six months at least and possibly longer. To say, under these circumstances, that the accused had custody only rather than possession would be a judicial fiat which the Board is not willing to make. Nor is there any evidence that at the time of obtaining possession of the books the accused had the intent to convert them to his own use or that any fraud or trick was present which would make the taking larceny. There being no trespass, either actual or constructive, against possession shown by the evidence in the present record, the conviction of larceny cannot be sustained. See CM 197396, Christopher; CM 198485, Wood. See also the following cases holding that the wrongful conversion by a soldier of clothing or similar property issued to him, is embezzlement and not larceny because no trespass was committed in acquiring possession of the property: CM 136974, Thomas (blanket); CM 172328, Dipardo (raincoat, breeches, leggins, hat); CM 193135, Cavanaugh (glove).

6. For the reasons hereinabove stated, the Board of Review holds the record of trial not legally sufficient to support the finding of guilty of Specification 1, but legally sufficient to support the findings of guilty of Specification 2 and the Charge, 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. M. McCrey, Judge Advocate.

C. H. MacDonald, Judge Advocate.

Charles R. Williams, Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Feb. 14, 1933

CM 199838

| | | |
|---|---|---|
| UNITED STATES | ) | NINTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | March Field, California, |
| Private JESSE FRIEDMAN | ) | December 5, 1932. Dishonorable |
| (R-43630), Battery E, | ) | discharge, suspended, and con- |
| 3d Field Artillery. | ) | finement for one (1) year. |
| | ) | Disciplinary Barracks. |

---

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and WILLIAMS, 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 as approved by the reviewing authority.

2. The record of trial shows that Major Lloyd N. Keesling, Air Corps, the president and law member of the court, was challenged for cause by the defense "as having certain knowledge of the case which should not be considered prior to the presentation of the prosecution or the defense", but it contains no evidence to sustain the challenge. Major Keesling made no statement and the challenge was not sustained.

In a certificate attached to the record of trial, Major Keesling states:

> "When the trial judge advocate asked (R 4) if any member of the court had formed an opinion of any material facts or had any other reason to believe himself disqualified or was aware of any fact which he thought might cause him to be challenged, and requested that such member so announce in order that he might be excused or challenged, Major Keesling, law member and president of the court, remained silent, which silence was understood to mean that

he had formed no opinion, knew no material fact, and was not aware of any fact which he thought might cause him to be challenged.

"Thereafter, when the defense challenged Major Keesling on account of his 'having certain knowledge of the case which should not be considered prior to the presentation of the prosecution or the defense', and the court was closed, Major Keesling did not withdraw, but did nothing more while the court was in closed session than to confirm what in fact his silence implied when he did not respond to the query of the trial judge advocate referred to above, that is, he merely told the court while in closed session what was implied by his silence. He did not participate in the deliberations of the court while in closed session, nor did he vote on the challenge, which was by secret written ballot, of the other members of the court."

Although there is no requirement of statute that the challenged member withdraw when the court closes to consider his eligibility, it is a practice of long standing which should be followed. However, the failure to exclude the challenged member during the court's deliberation on the challenge does not invalidate the proceedings unless it appears some injury has been done to the accused's substantial rights. In this case the court's ruling in not sustaining the challenge was proper. It is not apparent from the record that any substantial right of the accused was injuriously affected by the failure of Major Keesling to withdraw during the court's deliberation on the challenge, and therefore this procedural irregularity does not invalidate the proceedings. CM 111624, McClure; 126974, Millick; 139027, Thatcher; 154752, Reynolds; 171109, Chitwood; 186755, Keller; Winthrop, Reprint 1920, pp. 211-212.

G. McCarey, Judge Advocate.

C. H. McDonald, Judge Advocate.

Charles R. Williams Judge Advocate.

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

CM 199841

MAR 13 1933

| | | |
|---|---|---|
| UNITED STATES | ) | SIXTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Fort Sheridan, Illinois, December 9, 1932. Dishonorable discharge and confinement for six (6) months. Fort Sheridan, Illinois. |
| Private JOHN B. MIOTKE (6804891), Battery D, 3d Field Artillery. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private John B. Miotke, Battery D, 3d Field Artillery, did, at Fort Sheridan, Illinois, on or about November 18, 1932, knowingly and wilfully misappropriate one woolen shirt, value about $2.46, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and Specification, 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. Evidence of three previous convictions by summary court-martial was introduced, two for absence without leave and one for failure to take prophylactic treatment as required by standing orders. The reviewing authority approved the sentence,

designated Fort Sheridan, Illinois, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The accused was charged with and convicted of knowingly and wilfully misappropriating one woolen shirt, property of the United States, furnished and intended for the military service. The evidence clearly establishes larceny of the shirt. The question is therefore presented whether the findings of guilty may be sustained, or stated in other words, whether misappropriation of government property as denounced in the ninth subparagraph of Article of War 94 is an offense necessarily included in the offense of larceny.

4. The evidence briefly summarized establishes the following facts: A woolen shirt belonging to the United States was, on November 18, 1932, issued to Private Arris H. Corey, Battery D, 3d Field Artillery, and placed by him in his foot locker. Accused was the only one seen in the squadroom at the time (R. 7,8,11). Later the same day, Corey missed the shirt. He did not lend any of his clothes to the accused or to anyone else (R. 8,9). On November 21st, the shirt was found in the guardhouse in a box or shelf assigned to accused (R. 22,27). An attempt had been made to obliterate Corey's battery number which he had marked on the shirt at the time of receipt thereof (R. 10,13). Accused testified that he took the shirt but intended to return it as soon as he was released from the guardhouse, which would be in twenty-five days (R. 33,34).

5. The wrongful taking of the shirt was charged as alleged in the specification on the theory, as stated in the review of the staff judge advocate, that misappropriation is a comprehensive offense which "might be sustained on facts that would sustain a conviction of larceny, or on facts that would sustain embezzlement but not larceny, or on facts that would sustain conversion only".

The 94th Article of War declares that

> "Any person subject to military law who *** steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or

> wrongfully or knowingly sells or disposes of any *** clothing *** or other property of the United States furnished or intended for the military service thereof *** shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties."

The words describing each of these crimes must be given effect. The words "knowingly and wilfully misappropriates" were intended to include acts not covered by the previous words "steals" and "embezzles", as for example, where a quartermaster uses, to build a floor in the basement of the quarters assigned to him, cement which had been intended by the government to be used in building a road in another part of the post. To give the words "knowingly and wilfully misappropriates" the same meaning as the word "steals" or the word "embezzles" is to eliminate these words from the statute. This cannot be done. Wilful misappropriation of property was an offense unknown to the common law. A careful search of state and federal statutes fails to disclose a single instance where an act of misappropriating property is denounced as an offense where it is not predicated upon some sort of rightful custody, management, care, control, supervision or possession of the property in the person charged. "Misappropriating means devote to an unauthorized purpose". Par. 150 i, M.C.M. One cannot misappropriate that over which he has no control or supervision. Neither can one devote property to a purpose where he exercises no lawful authority respecting such property. The term is usually, if not exclusively, used in statutes denouncing fraudulent deals by bankers, brokers, factors, agents, trustees, officers and others who fraudulently misapply property over which they exercise some supervision and control. The evidence therefore fails to establish the allegation that the accused misappropriated the shirt, in violation of the 94th Article of War.

6. By the conclusion that the evidence fails to sustain the finding of guilty of knowingly and wilfully misappropriating the property, we are brought to consideration of the further question of law presented by the record whether the proved wrongful taking

of the property is an offense included in the specification alleging misappropriation.

On December 4, 1925, The Judge Advocate General, in replying to a request for an advance decision in CM 170613, Williams, wherein the court by exceptions and substitutions found the accused guilty of larceny of blankets instead of embezzlement as charged, stated:

> "2. It is not necessary to discuss the evidence further than to say that it clearly shows that the accused was not the agent of any one in respect of the property in question and that it was not entru ted to him by any one. The evidence was clear that the accused, while at the clothing warehouse drawing clothing for his battery, came within reach of the overcoats and blankets in question and without any claim of right or authority surreptitiously seized and carried them away and later conveyed them to Raleigh, where he was apprehended in the act of selling them to the proprietor of a store.
>
> "3. In the administration of military justice the offenses of embezzlement and larceny have always been considered so distinct and separate that upon a trial for an alleged commission of one an accused cannot properly be convicted of the other by way of exception and substitution of terms in the charges. In the opinion of this office the action of the court in finding as it did was not authorized by established precedent and was contrary to the rules of pleading and practice, to the effect that an accused cannot properly be convicted of an offense which is not set out or included in the charges upon which he is tried.
>
> "4. It is, therefore, recommended that the sentence be disapproved and that the accused in this case be brought to trial upon charges correctly alleging larceny of the property involved in this case."

The principle above enunciated was followed in CM 172328, Dipardo, in which a conviction of larceny was reversed by the Board of Review

because "no trespass was proved to have been committed by the accused in acquiring possession of the property in question", and in CM 183793, Snyder, in which a finding of guilty of embezzlement on a trial for larceny was held unauthorized and illegal. The prior cases of CM 143532, Sutula, and CM 147022, Murphy, in which, on trial for larceny, substituted findings of guilty of misappropriation were upheld by the Board of Review without opinion, have not been followed since the Williams case in 1925, above referred to, and were expressly overruled in CM 197396, Christopher, in which the Board of Review stated that the words "feloniously take, steal and carry away indivisibly signify and contain the inexpugnable element of a taking of the property in question by the accused, and do not impliedly include the appropriation thereof by him, either fraudulent or wrongful". In its opinion in that case, the Board also said:

> "*** the conviction for an offense included in the accusation is limited to one necessarily included therein or to an attempt to commit the offense charged, under R.S. 1035, as the statute has been construed by the Federal Supreme Court in Sparf v. U.S., 156 U.S. 51, 63. On the question of the averment requisites in the offense of misappropriation of property now under consideration, an instructive case is that of Evans v. U.S., 153 U.S. 584, 587, involving the sufficiency of an indictment for wilful misapplication of national bank funds, under R.S. 5209, wherein the Supreme Court said:
>
> > 'The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. United States v. Cook, 17 Wall. 168, 174; United States v. Cruikshank, 92 U.S. 542, 558. "The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." United States v. Carll,

105 U.S. 611.

'Even in the cases of misdemeanors, the indictment must be free from all ambiguity and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates.'"

The reason for holding that on a trial for larceny an accused may not legally be convicted of embezzlement is because the two crimes are separate and distinct, larceny requiring that possession of the property be obtained by the thief by trespass whereas embezzlement, as defined by the Supreme Court in Moore v. United States, 160 U.S. 268, is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. This basic distinction applies with equal force to the crimes of larceny and misappropriation, which latter is closely related to embezzlement. Accordingly, the Board of Review is of opinion that the proved wrongful taking of the property is an offense not included in the specification, but is an entirely different offense.

7. For the foregoing reasons the Board of Review holds the record of trial not legally sufficient to support the findings of guilty and the sentence.

E. M. Lee, Judge Advocate.

C. H. McDonald, Judge Advocate.

Theodore Hall, Judge Advocate.

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

JAN 13 1933

CM 199858

| | | |
|---|---|---|
| UNITED STATES | ) | SIXTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Selfridge Field, Michigan, December 12, 1932. Dishonorable discharge, suspended, and confinement for six (6) months. Selfridge Field, Michigan. |
| Private RAYMOND C. RICHARDS (6768961), 27th Pursuit Squadron, Air Corps. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and BRENNAN, 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 as approved by the reviewing authority.

2. Captain Rowland C. W. Blessley, Air Corps, was accused's immediate commanding officer at the time he absented himself without leave. He sat as a member of the court-martial which tried the accused. There is nothing in the record of trial to indicate that he was an accuser in the case. In accordance with regulations, and in strict pursuance of his duty, he made an entry in the morning report of the 27th Pursuit Squadron recording accused's change of status on August 2d from duty to absent without leave. The charges upon which accused was tried were signed and sworn to by a non-commissioned officer who was not a member of Captain Blessley's command. Article of War 8, providing for the appointment of general courts-martial, states that "no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution". "An accuser either originates the charge or adopts and becomes responsible for it." Par. 5, M.C.M., 1928. Captain Blessley did not administratively drop accused from the rolls of his organization as a deserter, nor prefer the charges, and there is no warrant for assuming that he is an accuser, even if it be assumed

that the administrative act of dropping a man as a deserter makes the officer taking such action an accuser within the meaning of Article of War 8, a proposition the correctness of which we do not concede. The Board of Review takes judicial notice of matters that are of common knowledge in the Army. Among the facts so noted is that officers who have administratively dropped enlisted men as deserters have subsequently recommended that the charge of desertion so entered on the records of the organization be set aside as having been erroneously made, and that this procedure, as shown by the records of this office, is of daily occurrence. If the dropping of a man as a deserter constitutes the officer taking such action an accuser in a subsequent trial for the offense, then even though an officer does everything in his power to have the charge of desertion set aside and to prevent trial, he must be held to be an accuser. We find no authority for such a construction of the word "accuser" as used in the Articles of War and the Manual for Courts-Martial, and such construction is inconsistent with the authoritative definition quoted earlier in this paragraph, and with prior holdings of the Board of Review.

Accused and his counsel were charged with knowledge that Captain Blessley was in command of the 27th Pursuit Squadron on the day accused absented himself without leave. His position as commanding officer rendered him liable to challenge for cause if accused considered such action desirable. Accused's failure to exercise his right to challenge for cause or peremptorily was a waiver of all known grounds of challenge and therefore no presumption can be indulged in that Captain Blessley was disqualified by reason of prejudice or otherwise.

3. Among the papers accompanying the record of trial is the report of investigation of accused's unauthorized absence required by paragraph 6 d, AR 615-300, March 16, 1932. The report is signed by Captain Blessley, dated September 20, 1932, approximately one and a half months later than the commencement of accused's unauthorized absence, and is made on a mimeographed blank form. Such a report is required to be prepared in every case of absence without leave of an enlisted man irrespective of whether or not the man subsequently may be dropped as a deserter. The form used by Captain Blessley is objectionable in that its mimeographed parts apparently are framed on the assumption that every absence without leave is a

desertion. The final paragraph of the report signed by Captain Blessley is as follows:

> "After careful consideration of all facts presented, it is my opinion evidence of soldier's intent to desert is present and that the probable cause or motives for his desertion are as follows:
> Unknown."

All of this paragraph except the word "Unknown" is mimeographed. The opinion expressed by Captain Blessley that "evidence of soldier's intent to desert is present" is not supported by the remainder of the report nor is it consistent with Captain Blessley's failure to drop accused as a deserter. However, on the face of the report it appears that Captain Blessley stated over his signature that evidence of desertion was present. That opinion, of course, could not make him an accuser in the trial of the accused. It might afford ground for challenge for cause.

Our consideration of the papers accompanying the record of trial in this case was impelled by the memoranda submitting the case to the Board of Review. It is not to be understood as a determination that the Board of Review has any lawful authority to hold a record of trial legally insufficient to support the sentence unless the record of trial itself is insufficient irrespective of what may appear in the accompanying papers. That question is not presented nor decided in this case.

E. M. Lee, Judge Advocate.

A. W. McDonald, Judge Advocate.

R. W. Berryman, Judge Advocate.

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

CM 199918

| | | |
|---|---|---|
| UNITED STATES | ) | SEVENTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Fort Leavenworth, Kansas, |
| Captain WALLACE F. SAFFORD | ) | December 14, 16 and 17, 1932. |
| (0-8597), Cavalry (DOL). | ) | Dismissal. |

---

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates.

---

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

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

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

Specification 1: In that Captain Wallace F. Safford, Cavalry (DOL), did, at Fort Leavenworth, Kansas, on or about October 20, 1931, wrongfully induce Major J.J.B. Williams, F.A., Captain H.L.P. King, S.C., and Captain Clinton Rush, Infantry, to sign jointly and severally as accommodation co-makers a promissory note then and there executed by the aforesaid Captain Safford with his wife, Marjorie B. Safford, as co-maker, in the sum of $1000 payable to the Morris Plan Company of Kansas City, Mo., by then and there representing that he, the said Captain Safford, would pay, when due, the assumed obligation in accord with a collateral agreement to deposit $20 each week for 50 weeks on an assigned investment certificate, beginning

from the date of the note, October 20, 1931; he, the said Captain Safford, then well knowing that he had no reasonable prospect of making such deposits until all were paid; and, further, that he did, on or about May 10, 1932, and continuously thereafter, default on the installment deposits due and falling due under said agreement, whereby, the said Major Williams, Captain King and Captain Rush became chargeable, jointly and severally, to pay the said Morris Plan Company of Kansas City, Mo., the entire unpaid balance of $498.75 due on said note by reason of his default.

Specification 2: In that Captain Wallace F. Safford, Cavalry (DOL), did, at Fort Leavenworth, Kansas, on or about November 25, 1931, wrongfully and dishonorably pretend to Major Frank A. Heywood, Q.M.C., that he, the said Captain Safford, was attempting to refund his entire outstanding obligations by the execution of a promissory note in the sum of $1008.00, and did wrongfully and dishonorably pretend to Captain James Taylor, Inf., that the proceeds from such note would cover all of his other indebtedness and by means of such wrongful and dishonorable pretenses did induce the said Major Heywood and Captain Taylor to endorse, jointly and severally as accommodation endorsers, a note in the sum of $1008.00, executed by the said Captain Safford and by his wife, Marjorie B. Safford, dated November 25, 1931, payable to the Federal Services Finance Corporation of Washington, D. C., in eighteen monthly installments at $56.00 per month, first payment due and payable on January 1, 1932, he, the said Captain Safford, then well knowing that such pretenses were false and further that he, the said Captain Safford, on or about June 1, 1932, and continuously thereafter, did default on payments due and falling due, whereby the said Major Heywood and Captain Taylor became

liable, jointly and severally as endorsers to pay the Federal Services Finance Corporation the unpaid balance of about $728.00 due on said note by reason of his default.

Specification 3: In that Captain Wallace F. Safford, Cavalry (DOL), did, at Fort Leavenworth, Kansas, on or about December 3, 1931, wrongfully induce Captain William Sackville, C.A.C., and Captain James T. Coghlan, Infantry (DOL), to sign jointly and severally, as accommodation co-makers, a promissory note then and there executed by the aforesaid Captain Safford, with his wife, Marjorie B. Safford, as co-maker, in the sum of $1000.00 payable to the Morris Plan Bank of Washington, D. C., by then and there representing that he, the said Captain Safford, would pay, when due, the assumed obligation in accord with a collateral agreement to make monthly deposits on an assigned deposit account, in the sum of $84.00 for eleven months and $76.00 for one month, beginning with the 9th of January, 1932; he, the said Captain Safford, well knowing that he was then substantially insolvent and had no reasonable prospect of meeting all of the obligations when due; and further that on or about May 9, 1932, and continuously thereafter, he did default in the installment deposits due and falling due under said agreement; whereby the said Captain Sackville and Captain Coghlan became jointly and severally obligated to pay the balance of $664.00 remaining due on said note by reason of his default.

Specification 4: In that Captain Wallace F. Safford, Cavalry (DOL), did, at Fort Leavenworth, Kansas, on or about December 1, 1931, wrongfully and dishonorably pretend in substance to Major Charles H. Cunningham, C.E., and Captain John T. Bissell, F.A., that the proceeds of a note in the sum of

$800.00, would cover the total extent of his other indebtedness, and by means of such wrongful and dishonorable pretenses, did induce the said Major Cunningham and Captain Bissell to sign as accommodation co-makers, a note in the sum of $800.00 dated January 19, 1932, payable to the Peoples Finance and Thrift Company of San Diego, Cal., and executed by him, the said Captain Safford, with his wife, Marjorie B. Safford, as co-maker; he, the said Captain Safford then well knowing that such pretenses were false; and further that he did, on or about March 6, April 6 and June 6, 1932, and continuously thereafter, default in his payments due and falling due on said note, whereby the said Major Cunningham and Captain Bissell became jointly and severally liable to pay to the said Peoples Finance and Thrift Company the unpaid balance of $720.00 due on said note by reason of his default.

Specification 5: (Disapproved by reviewing authority.)

Specification 6: (Disapproved by reviewing authority.)

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Captain Wallace F. Safford, Cavalry (DOL), having at Fort Leavenworth, Kansas, on or about April 30, 1932, made and uttered to the Peoples Finance and Thrift Company, San Diego, California, a certain check in words and figures as follows:

The Army National Bank
of Fort Leavenworth, Kansas No.319
83-831 30 April 1932
Pay to the order of The Peoples
Finance and Thrift Company $160.00

One hundred sixty and no/100 dollars.
This check is payable in Eastern Exchange
if desired.
W. F. Safford

in partial payment of a loan to him from said Peoples Finance and Thrift Company, did, at Fort Leavenworth, Kansas, on or about May 10, 1932, wrongfully fail to maintain on deposit in The Army National Bank of Fort Leavenworth, Kansas, funds adequate to honor said check when the same was duly presented for payment thereat in the ordinary course of business.

Specification 3: In that Captain Wallace F. Safford, Cavalry (DOL), having at Fort Leavenworth, Kansas, on or about May 2, 1932, made and uttered to one William J. Kennedy of New York City, a certain check in words and figures as follows:

The Army National Bank
of Fort Leavenworth, Kansas No.331
83-831
Ft.Leavenworth,Kans.,May 2,1932
Pay to the order of Wm. J. Kennedy $154.66/100
One hundred fifty-four & 66/100 dollars
This check is payable in Eastern exchange
if desired.
W. F. Safford

in partial payment of a loan to him from the said William J. Kennedy, did, at Fort Leavenworth, Kansas, on or about May 11, 1932, wrongfully fail to maintain on deposit in The Army National Bank of Fort Leavenworth, Kansas, funds adequate to honor said check when the same was duly presented for payment thereat in the ordinary course of business.

Accused pleaded not guilty to all the charges and specifications. He was found guilty of Charge I and of Specifications 3, 4 and 5

thereunder; guilty of Specification 1 except the words and figures, "$20 each week for 50 weeks", substituting therefor the words and figures "$83.33 per month for 12 months", of the excepted words and figures, not guilty, and of the substituted words and figures, guilty; guilty of Specification 2 except the words and figures, "wrongfully and dishonorably pretend to Major Frank A. Heywood, Q.M.C., that he, the said Captain Safford was attempting to refund his entire outstanding obligations by the execution of a promissory note in the sum of $1008.00 and did", except the words, "such note" (6th line), and except the words, "Major Heywood and" (8th line), and substituting therefor the following words and figures, after the word "from" (6th line) the words and figures, "a promissory note in the sum of $1008.00", and after the word "endorse" (8th line) the words, "with Major Heywood", of the excepted words and figures, not guilty, and of the substituted words and figures, guilty; guilty of Specification 6 except the words "wrongfully and dishonorably induce", substituting therefor the word "request", of the excepted words, not guilty, and of the substituted word, guilty; not guilty of Specification 1, Charge II, but guilty of Charge II and Specifications 2 and 3 thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismised the service. By direction of the court, the findings and the sentence were not announced.

Five of the eight members of the court-martial submitted recommendations for clemency premised upon the accused's past good record and his efforts to clear his indebtedness. One member recommended a reduction on the promotion list of not to exceed three hundred files conditional on the paying of his debts and the contracting of no new debts, two recommended a reduction of five hundred files with the requirement that he liquidate his debts at the rate of $135 per month supervised by his unit commanders and that no new debts be contracted, and two recommended that execution of the sentence be suspended for five years conditional on the payment of his debts under supervision of his unit commanders, and that at the end of five years, if he be free of debt, the sentence be commuted to a reduction of two hundred and fifty files (Ex. 43, pp. 7,8,9). The accused submitted a request for clemency, stating in substance, after a review of his

financial affairs, that the court-martial resulted from one basic condition, his indebtedness, which indebtedness arose mainly as a result of expenses incurred incident to his child's illness, combined with three changes of station within two years; that no person had suffered a monetary loss on account of his debts until his financial condition came to official notice; that he has appreciably reduced his debts and intends to pay all of them; that there was no intent to defraud and he had supplied the inspector with full details regarding his indebtedness. He also invited attention to his past good record extending over fifteen years of commissioned service (Ex. 43, pp. 1-6).

The reviewing authority disapproved the findings of guilty of Specifications 5 and 6, Charge I, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. Such evidence as relates only to Specifications 5 and 6, Charge I, as to which the findings of guilty were disapproved by the reviewing authority, and to Specification 1, Charge II, as to which the court made a finding of not guilty, will not be considered in this review.

4. The offenses alleged in Charge I and the four remaining specifications thereunder are connected with the execution by accused of four promissory notes for approximately $1000 each, dated October 20, November 25, December 3, 1931, and January 19, 1932, the major part of the moneys from each note being used to retire a prior existing loan with the company negotiating the instrument; and Charge II and the two specifications thereunder are based upon the uttering of checks by the accused on April 30 and May 2, 1932, in part payment of loans. On October 20, 1931, accused's indebtedness was $6158.38, consisting of $5460.90 in promissory notes or instruments of like nature, and $697.40 in miscellaneous accounts (Ex. 40). The total indebtedness increased through November and December, 1931, and January, 1932 (Ex. 40), until on May 30, 1932, according to accused's sworn statement, the total was $7437.67 (Ex. 25, p. 2). Required monthly payments on loans varied from a minimum of $467.33 in November, 1931, to a maximum of $571.33 in May, 1932 (Ex. 41). His

total pay in October, 1931, was $276 per month, government quarters being furnished, and continued at this rate until July 1, 1932, when, after all deductions, including premiums on government insurance, it was reduced to $230.64. This amount continued unchanged until the date of trial in December, 1932 (R. 135). The accused had no income in addition to his salary except an indefinite amount derived from training and selling horses, teaching riding, and teaching and translating French and Spanish (Ex. 25, p. 2).

5. The evidence pertaining to the specifications of Charge I will be set forth separately as to each specification.

Specification 1, Charge I.

Captain Henry L. P. King, Signal Corps, Fort Leavenworth, Kansas, testified that on or about October 15, 1931, accused requested him to sign a note for $1000, with Captain Rush, Major J.J.B. Williams and Mrs. Safford as cosigners, accused stating that it had been necessary in 1928 to borrow $2500 due to the illness of his son, and it was now necessary to refund $1000, the former cosigners being anxious to get off the notes. Other financial obligations, as current bills, were not mentioned, but accused stated in substance, as witness understood it, "that the thousand dollars would cover the indebtedness to banks that he owed at that time". He also stated that he was well able to meet the monthly payments, which would be $83 per month, and the obligation would be cleared within a year (R. 18). Witness signed the note (Ex. 23), which was to the Morris Plan Company of Kansas City, Missouri. He heard nothing further about the note until April 19, 1932, when the bank notified him that accused was delinquent on the March and April payments and called upon him to meet the unpaid installments of $84.50 and $83. He telephoned accused, who said he had met the payments (R. 10), which witness verified. At this time accused assured witness that he could meet future payments. On June 6th, Major Lindner, the special inspector, called his attention to the fact that accused was in financial difficulties and on June 16th, accompanied by Captain Rush, he went to the bank and learned that $502.06 was still due on the note, and that the May and June payments were in arrears. Witness paid the bank $166.25, which equaled one-third of the obligation (R. 20), and has not been reimbursed. On cross-examination, he stated that as

he remembered it he "asked the accused if he owed any other money to banks, if he had borrowed any other money, and he replied in the negative", and that accused made a direct statement that the $1000 would clear him (R. 21).

Major J. J. Bethurum Williams, Field Artillery, Fort Leavenworth, Kansas, testified that during October, 1931, accused approached him and asked him to sign a note for $1000 to replace Major Briscoe who was on a note of accused's and did not want to sign a renewal. He refused (R. 23). Accused again approached him and "seemed to be in such distress" that witness agreed to sign the note if it was signed by two other acceptable indorsers. Later he signed the note after it was indorsed by Captain King and Captain Rush. Accused made no positive statement as to the extent of his indebtedness other than this $1000 (R. 24,26), but assured him he would "absolutely" take care of the payments of about $83 per month (R. 27). Witness has paid $166.25, his part of the note, to the Morris Plan Bank and has not been reimbursed (R. 25), but he did receive a letter from accused saying that he regretted very much that witness had had to pay part of the note and that he would eventually repay him (R. 33).

Captain Clinton Rush, Infantry, Fort Benjamin Harrison, Indiana, testified by deposition (Ex. 1) that accused requested him to become a cosigner on a note for $1000, stating that he desired all his outstanding accounts in one institution. On October 20, 1931, he, together with Major Williams and Captain King, signed the note, which was payable to the Morris Plan Company of Kansas City, Missouri. Accused agreed to repay the loan at the rate of $83 per month. Accused later defaulted and witness, on June 11, 1932, paid his share of the loan, $166.25, to the Morris Plan Bank.

Mr. Clarence E. Barnickel, attorney for the Morris Plan Company, Kansas City, Missouri, testified by deposition (Ex. 2) that accused applied for and received a $1000 loan from the Morris Plan Company on October 20, 1931, calling for repayment fifty-two weeks later at the rate of $83 monthly, with Henry L. P. King, Clinton Rush, and J. J. Williams as cosigners. The accused made six payments and defaulted in the payment due May 10, 1932, leaving $502 unpaid, which was paid by the three cosigners in June, 1932, at $166.25 each. Part

of the $1000 was used to take up $668, the balance due the Morris Plan Company on a prior note. In accused's application for the loan, he listed on the company's form, under heading "Applicant List All Debts": "Army National Bank, $75.00, Emery Bird Thayer, $85.00, Harzfeld's, $89.00, Miscellaneous, small accts., $60.00"; and signed his name below the following certificate: "I certify that all the statements made in this loan application are true and complete and are made for the purpose of obtaining credit" (Ex. 2). The note itself was introduced in evidence and a true copy substituted (Ex. 23; R. 22).

The accused took the stand in his own behalf and denied generally that any comaker of his notes raised the question as to his total indebtedness (R. 104) and stated that he felt no obligation to disclose his financial situation "without their asking" because he felt that he could handle the matter satisfactorily as he had in the past (R. 109-110,143-146). His explanation to those whom he asked to cosign and indorse notes was that he had been in debt a long time, which "indebtedness was augmented largely by the long and severe illness of my son, and also by three changes of station in two years time to points that vary widely in climate and environment" (R. 109). He did not make any statement to Captain Rush about desiring the loan so that he would have all of his indebtedness in one institution (R. 111). The debts totaling $309 listed on his application for the loan represented the amounts he intended to pay with that note in addition to refunding the prior note (R. 120,121). At this time, October 20, 1932, his approximate indebtedness was $6000 on notes and $1000 on merchandise accounts (R. 117-121). After his default, he wrote a letter to Captain King, which was introduced in evidence (Ex. 30; R. 148), acknowledging the debt as a personal debt due to him and stating the letter would serve as a lien on his estate if he died before payment was complete, there being sufficient insurance to cover all obligations. He wrote similar letters to each cosigner or indorser (R. 136-137).

Specification 2, Charge I.

Captain James Taylor, Infantry, Fort Leavenworth, Kansas, testified that in November or December, 1931, accused asked him to indorse a note for about $1000, saying he had some difficulties in the summer

and desired to pool his debts. The question of security was raised and accused offered to deposit with the note a $7000 insurance policy in addition to the signatures of Major Heywood, Mrs. Safford and himself. Witness asked if he had any obligations other than this note and accused answered "No", the object of the note being to pool these obligations. Witness signed the note and no demand has been made upon him for payment (R. 35,36). He did not remember the amount of the monthly payments or the name of the finance company but he received a notice from them (R. 37,38).

Major Frank A. Heywood, Quartermaster Corps, Fort Leavenworth, Kansas, testified that about November 25, 1931, accused requested his indorsement on a $1000 note to the Federal Finance Corporation of Washington, D. C. Accused voluntarily stated that he was indebted to a number of people for expenses incurred in medical treatment for his son and that he deisred to fund all of his indebtedness in a commercial firm and repay them (R. 39,40). Accused made no statement that he had other debts but witness understood that the thousand dollars would cover all his debts (R. 40,42,43). He has not been called on to pay any part of the note (R. 42).

Major William H. Garrison, United States Army, Retired, Vice-President, Federal Services Finance Corporation, Washington, D. C., testified by deposition (Ex. 3; R. 13,43) that his corporation loaned accused $1008 on November 25, 1931, to be repaid at a rate of $56 per month. The note was signed by accused and his wife and indorsed by Captains James Taylor and Frank A. Heywood. A photostat copy of the note is attached to Exhibit 3. An insurance policy on accused's life was assigned as additional security. Of the proceeds of the note $560 was used to retire a balance on a prior note. After making five payments accused defaulted in June, 1932, leaving a balance of $728, which is still unpaid.

Accused testified that he remembered the conversation with Captain Taylor quite well and denied that the question of the total amount of his debts was ever raised, only his ability to meet the monthly payments (R. 112).

Specification 3, Charge I.

Captain James J. Coghlan, 57th Infantry (PS), Fort William McKinley, P.I., testified by deposition (Ex. 4; R. 13,43) that on December 3, 1931, he signed as comaker a $1000 note executed by accused, payable to the Morris Plan Bank, Washington, D. C. Captain William Sackville also signed as comaker. Accused assured him he was fully able to take care of the payments and he need not worry about nonpayment. Witness knew of no other indebtedness of accused, who withheld the information that he was much in debt. Accused defaulted on the May, 1932, payment, leaving an unpaid balance of $644. Witness and Captain Sackville have paid the bank $420, each paying half, and are continuing the monthly payments of $84, the last payment being due on December 9, 1932.

Captain William Sackville, Coast Artillery Corps, Rio de Janeiro, Brazil, testified by deposition (Ex. 5; R. 13,43) that he signed the note as comaker with Captain Coghlan, under the same circumstances and representations, with no knowledge of other financial obligations of accused. Witness has paid part of the loan.

Mr. Willard G. Barker, Vice-President and Cashier, Morris Plan Bank of Washington, D. C., testified by deposition (Ex. 6; R. 14,44) that accused executed a $1000 note to the bank, dated December 3, 1931, Captains Coghlan and Sackville being joint and several makers, to be repaid at the rate of $84 monthly. Accused made four payments and defaulted, leaving an unpaid balance of $664, which Captains Coghlan and Sackville are paying. Of the proceeds of the loan, $580 was used to retire a prior loan. Accused listed on his application for loan as a "full list" of his debts: Morris Plan Bank, Washington, D. C., $580, Harzfeld's, Kansas City, Missouri, $138, Emery Bird Thayer, Kansas City, Missouri, $100, Lewis Investment Company, Kansas City, Missouri, $275, Miscellaneous accounts, Leavenworth, Kansas City, $175.

Accused testified that the list just above, which totals $1268, represented accounts which he intended to pay with the loan. At that time his total indebtedness in notes was approximately $6279, with an additional sum due on merchandise accounts (R. 124).

Specification 4, Charge I.

Captain John T. Bissell, Field Artillery, Fort Leavenworth, Kansas, testified that accused asked him to sign a note for $800 on the Peoples Finance and Thrift Company of San Diego, California, explaining that his son's illness several years before had put him around $2000 in debt, which he had reduced to some $800 (R. 44-46). Accused stated that this note would clean up all of his indebtedness and that he owed no more money than what witness was signing for (R. 47,50). Witness asked if this was the total amount of his indebtedness and accused said "Yes" (R. 51). He indorsed the note and has paid $338.60, his share of the balance in default (R. 45), and has not been reimbursed (R. 46).

Major Charles H. Cunningham, Corps of Engineers, Fort Leavenworth, Kansas, testified that at accused's request he signed the note for $800, described by Captain Bissell. Accused stated that he had had a long struggle with debt but was coming out satisfactorily, and that this note would fund all his indebtedness (R. 52). Witness paid the company $340.80 on October 29, 1932, and has not been reimbursed (R. 53). He was present at a meeting of cosigners at which Captain Safford offered a plan under which he agreed to pay $135 a month toward liquidation of his debts. The plan was not accepted because the interest charges amounted to $75 per month, and the remaining $60 was not considered a practical offer for paying his debts (R. 57).

Mr. J. W. Hayes, Secretary and Treasurer, The Peoples Finance and Thrift Company of San Diego, California, testified by deposition (Ex. 7; R. 14,59) that on February 12, 1932, his company renewed a note of accused for $800, with Major Cunningham and Captain Bissell as comakers, payable $80 monthly; $480 was retained by the company as the unpaid balance on a prior loan. After defaulting on the March and April payments, accused made one payment of $80 on May 5, 1932. His check for $160, received May 4, 1932, to cover the above defaults, was returned unpaid by the bank marked "Insufficient funds". Major Cunningham and Captain Bissell have paid up the note. A true photostatic copy of the note is attached to Exhibit 7.

Accused testified he did not state to Major Cunningham that he was funding all of his indebtedness or how much he owed, and that

Captain Bissell did not ask how much money he owed, and was only concerned about the death insurance clause of the note and his ability to meet the installments (R. 114).

Specifications 2 and 3, Charge II.

Each of these specifications involves the making and uttering of a check by the accused on the Army National Bank at Fort Leavenworth, Kansas, and wrongfully failing to maintain on deposit funds adequate to honor the checks when presented for payment.

As to Specification 2, Mr. J. W. Hayes, secretary and treasurer of the Peoples Finance and Thrift Company, San Diego, California, identified a photostatic copy of a check for $160, dated April 30, 1932, signed W. F. Safford, and payable to his company. The check was to take up two checks of $80 each, previously given by accused as monthly payments on a loan with the company, which had been credited to his account but returned by the bank unpaid. The check for $160 was received by the company, was also returned unpaid by the bank, and has not been honored subsequently. A photostatic copy of the check is attached to the deposition of this witness and was read in evidence with the deposition (Ex. 7; R. 58-59).

Mr. Carl P. Fletcher, bookkeeper, Army National Bank, Fort Leavenworth, Kansas, testified that he recognized the photostatic copy of a check dated April 30, 1932, for $160, drawn by W. F. Safford, payable to the Peoples Finance and Thrift Company, attached to Exhibit 7. On May 10, 1932, when the check was presented, there were insufficient funds on deposit to pay it and he inscribed on the check "Insf" to so signify. The check was returned (R. 85,86).

Mr. George W. Parker, cashier, Army National Bank, Fort Leavenworth, Kansas, testified that accused's bank balance on April 30, 1932, was $112.68; on May 2, 1932, $874.35; on May 4th, $64.53; and on May 10th, $76.38, which amount was not exceeded from May 4th to 11th, on which latter date the account was overdrawn $3.62 (R. 90,91).

As to Specification 3, Mr. William J. Kennedy, 39-41 Park Row, New York, N.Y., testified by deposition (Ex. 22; R. 15,97) and

identified a photostatic copy of a check attached to his deposition as a true copy of a check for $154.66, dated May 2, 1932, payable to him, and signed W. F. Safford, which he received in payment of two protested checks, each for $75, issued by accused to him and postdated to cover money loaned. The check was not honored by the bank (Ex. 22). Mr. Parker recognized the copy of the check for $154.66 and stated that he had protested it on May 11, 1932, because of insufficient funds (R. 91), accused's account on that date being overdrawn $3.62 (R. 92).

Accused testified that both of the above checks were issued in good faith on the strength of a telegram dated April 29, 1932, from his wife who was in New York endeavoring to negotiate financial relief from her people and his. The telegram contained the words "Visit successful", indicating to accused that she had succeeded and that he would have sufficient funds in the bank to cover the checks when presented. After her return, he found that the telegram was misleading but it was then too late to stop the checks (R. 106-107; Ex. 38), and both were returned unpaid (R. 128).

6. In addition to the testimony summarized above as to each specification, the accused testified that in general the conversation he had with officers regarding the indorsement of notes was that he was in debt and the question of general indebtedness was never raised (R. 104). The indorsers never raised the question of the existence of other notes (R. 143). During the investigation at Camp Woodruff, Missouri, by Major Lindner, the special inspector, about June 6, 1932, and at the first comakers' meeting, only one officer claimed to have been told that the note indorsed was the total amount of accused's debts (R. 136). About May, 1930, he appealed to his father to refinance him but he was unable to do so on account of business conditions. Accused offered a contractual agreement to his creditors by memorandum of June 14, 1932, signed by his wife and himself, providing for a trustee to administer his indebtedness until liquidated, allotting $135 per month of his pay and changing the beneficiary of two life insurance policies totaling $8000 to his estate in order to protect the comakers in case of his death (R. 104,105; Ex. 37). The offer was refused, the comakers demanding cash (R. 115). Letters were written to the comakers and indorsers about July, 1932, acknowledging his debt, promising to

repay, and stating the letter would constitute a lien on his estate in case of death (R. 116,148; Ex. 39). From June 3 to December 16, 1932, he paid $1321.70 on his indebtedness (R. 108), including interest, a net reduction of $1083.79 (R. 131). These payments were voluntary and continued after he knew that charges were being prepared (R. 137). His family has lived on an average of $90 per month during the last six months (R. 135). No advantage has been taken of the bankruptcy law, his intention being to pay in full and, if afforded the opportunity, the obligations can be paid off in four years (R. 136-138). Accused freely and voluntarily presented all of his affairs to the special inspector and investigating officer, and assisted in the preparation of the report (R. 109).

Mr. Fred H. Safford, West Roxbury, Massachusetts, accused's father, testified by deposition that during the last two years accused appealed to him several times for financial assistance but due to the depression he could not help him. He did offer his garage business for sale in May, 1930, and in 1931, intending to liquidate accused's debts and then live with him, but he could not find a buyer (Ex. 27).

Lieutenant Colonel J. M. Wainwright (R. 63), Major Harold Thompson (R. 65), Lieutenant Colonel Horace F. Spurgin (R. 98), Lieutenant Colonel Homer M. Groninger (R. 99), and Major N. Butler Briscoe (R. 102) were called as character witnesses for the accused, and testified that the general reputation of accused for truth and veracity was good or excellent.

The depositions of Major Cuthbert P. Stearns (Ex. 28), Lieutenant Colonel Martin C. Wise (Ex. 29), Colonel Julien E. Gaujot (Ex. 30), Major Louis P. Ford (Ex. 31), Lieutenant Colonel William E. Morrison (Ex. 32), Colonel Alvord V. P. Anderson (Ex. 33), Major Roy E. Blount (Ex. 34), Major Paul V. Kane (Ex. 35), and Major John C. F. Tillson, jr. (Ex. 36) were introduced (R. 100). These witnesses stated accused's manner of performing duty as superior, excellent, satisfactory, unknown; his reputation as to truth and veracity as excellent, the highest, enviable, superior, good.

7. As to Specifications 1, 2, 3, and 4 of Charge I, there is adequate competent evidence in the record to support the findings of guilty thereunder. These findings in substance may be briefly stated as follows:

Specification 1. That accused wrongfully induced the officers named to sign his promissory note for $1000 as comakers upon his representation that he would pay the obligation each month as it became due, when he knew at the time of this representation that he had no reasonable prospect of making such payments, and further that he defaulted in payment on and after May 10, 1932, thereby causing his comakers to become liable for the payment of the balance of the note.

Specification 2. That accused wrongfully and dishonorably pretended to Captain Taylor that the proceeds of the promissory note for $1008, payable in eighteen monthly installments, would cover all of his other indebtedness and by means of such wrongful and dishonorable pretenses induced Captain Taylor to indorse the note with Major Heywood, when accused then well knew that such pretenses were false, and further that he defaulted in payment on and after June 1, 1932, thereby causing his indorsers to become liable for the payment of the balance of the note.

Specification 3. That accused wrongfully induced the officers named to sign as comakers his promissory note for $1000 upon his representation that he would pay the obligation each month as it became due, when he knew at the time of this representation that he was then substantially insolvent and had no reasonable prospect of meeting all of the obligations when due, and further that he defaulted in payment on and after May 9, 1932, thereby causing his comakers to become liable for the payment of the balance of the note.

Specification 4. That accused wrongfully and dishonorably pretended in substance to the officers named that the proceeds of a note for $800 would cover the total amount of his other indebtedness and by means of such wrongful and dishonorable pretenses induced the officers to sign the note as comakers, when accused then well knew

that such pretenses were false, and further that he defaulted in his payments on the note on and after March 6, 1932, thereby causing his comakers to become liable for the payment of the balance of the note.

In the nature of the conduct described the allegations of Specification 1 are similar to those of Specification 3, and the allegations of Specification 2 are similar to those of Specification 4.

8. In Specifications 1 and 3, the wrongful conduct alleged is that accused induced the officers to sign his note as comakers upon his assurance that he would pay the obligations as they became due, when he knew at the time that he had no reasonable prospect of making such payments and that he was then "substantially insolvent".

The evidence shows that during the time that payments would become due and payable upon these notes the total pay of the accused was $276 per month, government quarters being furnished, until July 1, 1932, when, after all deductions, including premiums on government insurance, it was reduced to $230.64 and continued at that amount until the date of trial in December, 1932. It is also shown that his indebtedness on October 20, 1931, was $6158.38, of which $5460.90 was in promissory notes and $697.40 in miscellaneous accounts, and that this indebtedness increased through the following months until, according to accused's sworn statement, it reached the sum of $7437.67 on May 30, 1932. To meet this increasing indebtedness on loans alone accused had obligated himself to make monthly payments ranging from a minimum of $467.33 in November, 1931, to a maximum of $571.33 in May, 1932. He had no resources and no income in addition to his Army pay except an indefinite amount derived from training and selling horses, teaching riding, and teaching and translating French and Spanish. In 1930 he had requested financial aid from his father who, because of business conditions, was not able to assist him. Accused's obligations and his income from which they would have to be paid were well known to him at the time he induced the officers to sign his notes as comakers, but they were not disclosed. The foregoing facts, and in particular the fact that he was obligated each month to pay out more than twice his salary, indicate that he was then "substantially insolvent" and that there was no prospect

that he would be able to meet the obligations as they became due. It must necessarily have been obvious to the accused that, had he made full disclosure of his financial affairs to the several officers whom he involved, none of them would, by signing as co-maker without consideration, have undertaken a liability which promised inevitably to result in a demand upon him for payment. The signatures of the comakers were thus obtained by the concealment of facts which should have been disclosed. Under such circumstances the conclusion is unavoidable that the concealment of these facts was wrongful and fraudulent, and that it could not have been either accidental or innocent.

9. In Specifications 2 and 4, the wrongful and dishonorable conduct alleged is, in substance, the representation to each of the officers whom accused induced to sign his notes as accommodation indorsers that the proceeds of the note signed would cover all his other indebtedness, when he well knew that such representations were false. The falsity of such representation is conclusively shown by the recital in paragraph 8, supra, of the evidence as to accused's total indebtedness over the period during which these notes were executed. The representations alleged in these two specifications relate to existing facts which were well known to the accused, and the possibility that he acted innocently or through mistake is wholly excluded.

10. The only question presented in the findings of guilty under Specifications 1, 2, 3, and 4 of Charge I, is whether or not such conduct may properly be considered as "conduct unbecoming an officer and a gentleman", in violation of the 95th Article of War. In a prior case, the Board of Review has held that

> "* * * When an officer with fraudulent intention makes a representation that a certain act will be done when at the time he knows the representation to be false, he is obviously guilty of conduct unbecoming an officer and a gentleman, in violation of A.W. 95, although to constitute criminal fraud in civil practice the false

representation involved must refer to a past or existing fact, not to a future event."
CM 156589, Miller, 1923; Dig. Ops. JAG 1912-30, 1497 (2).

The representations alleged in Specifications 1 and 3 to have been made by the accused refer to certain acts to be done by him in the future, when at the time he made the representations he could not help knowing that his affairs were in such shape that his promises would be impossible of fulfillment, and that these representations were necessarily false. The representations alleged in Specifications 2 and 4 to have been made by him refer to existing facts and it cannot be questioned but that he knew at the time that he made them that these representations were false. It is of no avail for him to say that he meant to pay and thought that he could, for the facts known to him made clear that the default which did occur was bound to occur. An officer of the Army is expected to be that type of a gentleman who is "a man of honor; that is to say, a man of high sense of justice, of an elevated standard of morals and manners and of a corresponding general deportment". Winthrop's Military Law and Precedents, Reprint 1920, p. 711. His offenses are similar to the dishonorable neglect to discharge pecuniary obligations, and to acts of fraud or gross falsity, or cheats, which are listed by Winthrop as violations of this Article. The conduct of the accused was morally unbefitting and unworthy of an officer and a gentleman, as defined by Colonel Winthrop, and, in the opinion of the Board of Review, was conduct unbecoming an officer and a gentleman in violation of the 95th Article of War.

11. In Specifications 2 and 3, Charge II, under Article of War 96, it is alleged that the accused, having made and uttered two checks on The Army National Bank of Fort Leavenworth, Kansas, did wrongfully fail to maintain on deposit adequate funds to honor them when duly presented for payment.

No act of wrongfulness is charged other than that the accused failed to maintain on deposit sufficient funds to meet the checks.

Nothing of value is alleged to have been obtained by him in exchange for either of the checks in question. Neither is any fact alleged or established at the trial which indicates a fraudulent or dishonorable intent on the part of the accused with respect to either of them.

It is a well established rule that a specification must be so drawn as to exclude the possibility of innocence if the facts charged be admitted to be true. In accordance with the precedents of this office, the Board of Review is of opinion that under this rule, neither of the two specifications is sufficient to charge an offense either under the 95th or 96th Article of War. CM 130989, Kiley, and cases cited; 158679, Berry; 195772, Wipprecht.

12. At the time of trial accused was thirty-seven years of age. The statement of his service as contained in the Official Army Register is as follows:

> "Cadet M.A. 1 July 14; 2 lt. of Cav. 30 Aug. 17; 1 lt. (temp.) 30 Aug. 17; 1 lt. 12 Oct. 17; capt. (temp.) 24 June 18 to 16 Mar. 20; capt. 17 Sept. 20; 1 lt. (Nov. 18,22); capt. 5 Nov. 26."

13. 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 opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II and Specifications 2 and 3 thereunder, but is legally sufficient to support the findings of guilty of Charge I and Specifications 1, 2, 3, and 4 thereunder, and legally sufficient to support the sentence, and warrants confirmation thereof. A sentence of dismissal is mandatory on conviction of violation of the 95th Article of War.

E. M. McKey, Judge Advocate.
J. H. McDonald, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

FEB 4 1933

CM 199969

| | | |
|---|---|---|
| UNITED STATES | ) | EIGHTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Fort Sill, Oklahoma, January 9, 1933. Dishonorable discharge (suspended) and confinement for one (1) month. Fort Sill, Oklahoma. |
| Private HENRY O. HARRIS (6227293), Company B, 38th Infantry. | ) | |

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and WILLIAMS, Judge Advocates
ORIGINAL EXAMINATION by WALSH, 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 sentence in part, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Henry O. Harris, Company B, Thirty Eighth Infantry, did, at or near Fort Sill, Oklahoma, on or about November 26, 1932, neglect to take proper prophylaxis treatment after illicit sexual intercourse and did thereby develop a venereal disease, to wit; Gonorrhea, new, acute.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of five convictions by court-martial prior to the present trial 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 month. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated Fort Sill, Oklahoma, as the place of confinement. The sentence was published in General Court-Martial Order No. 15, Headquarters Eighth Corps Area, January 21, 1933.

3. The evidence shows that the accused, a married man, through illicit intercourse contracted a venereal disease and failed to comply with the provisions of paragraph 4, Army Regulations 40-235, December 30, 1924, which direct that after such illicit intercourse the soldier will at once report to the nearest prophylactic station for prescribed treatment. The accused did not testify or introduce any evidence in his own behalf.

4. The only question presented by the record requiring consideration is whether or not the sentence, as approved, is in excess of the maximum limit of punishment fixed by paragraph 104 c, Manual for Courts-Martial, 1928, for the offense of which accused stands convicted. This question was not raised by accused at the trial but is nevertheless considered by the Board of Review.

5. The offense of which the accused stands convicted is a violation of a standing order, an offense not listed in the limits of punishment contained in the Manual for Courts-Martial. However, the first sentence of paragraph 104 c reads:

> "The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed." (Underscoring supplied.)

For the offense of failing to obey the lawful order of a superior officer, the maximum limit of punishment is fixed at confinement at hard labor for six months and forfeiture of two-thirds pay for six months. Without deciding what is the maximum limit for the offense

of failing to obey a standing order, the Board of Review holds that the latter offense is closely related to, although lesser than, the offense of failing to obey the lawful order of a superior officer, and applying the rule of related offenses, the punishment for failing to obey a standing order cannot exceed that stated. Therefore, dishonorable discharge may not be legally adjudged on conviction of disobedience of a standing order.

If, however, evidence be introduced of five or more previous convictions for an offense or offenses committed during accused's current enlistment and within one year next preceding the commission of any offense charged (par. 79 c, M.C.M., 1928), the court may, in addition to the punishment otherwise authorized, adjudge dishonorable discharge and forfeiture of all pay and allowances due or to become due (Sec. B, par. 104 c, M.C.M., 1928).

The only evidence of the five previous convictions hereinbefore mentioned consisted of an extract copy from the service record of Private Henry O. Harris, Company B, 38th Infantry, purporting to contain "previous convictions of the above named soldier during his current enlistment". The second and fifth entries on this document read as follows:

"#2. Summary C.M. #21, Hq., 1st Bn. 38th Infantry, The F.A. School, Fort Sill, Oklahoma, July 4, 1932, 61st Article of War.
Specification: Fail to repair at fixed time to properly appointed place of assembly for guard duty.
Sentence announced and adjudged: July 6, 1932.
Sentence as approved: To forfeit $2.00 of his pay.
Approved: July 7, 1932."

"#5. Summary C.M. #33, Hq. 1st Bn. 38th Infantry, The F.A. School, Fort Sill, Oklahoma, December 5, 1932, 61st Article of War.
Specification: Did, without proper leave, absent himself from Ward #3, Station Hospital, from November 30, 1932, to about Dec. 4, 1932.

Sentence announced and adjudged: December 7, 1932.
Sentence as approved: To forfeit $14.00 of his pay.
Approved: December 7, 1932."

The date of commission of the offense mentioned in the second extract from accused's service record is not specifically shown. However, inasmuch as the current enlistment of accused began on December 5, 1931, with no prior enlistment (R. 10), and the sentence was approved July 7, 1932, it is apparent that the offense must have fallen within the current enlistment and the one year next preceding November 26, 1932, the date of commission of the offense with which he stood charged.

The fifth extract from the service record shows that the offense there referred to was committed on November 30, 1932, subsequent to the offense for which accused stood charged which occurred prior to November 26, 1932. It is therefore not a previous conviction and evidence thereof was erroneously admitted. As but four previous convictions are legally established, the sentence cannot legally exceed the maximum fixed by paragraph 104 c, Manual for Courts-Martial, 1928, that is to say, the sentence could not include dishonorable discharge and forfeiture of all pay and allowances due or to become due, and in view of the fact that the sentence adjudged included only one month confinement, the maximum legal sentence remaining is confinement at hard labor for one month and the appropriate forfeiture of two-thirds pay for that period.

6. The court was legally constituted. Except as above noted, 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 is legally sufficient to support only so much of the sentence, as approved by the reviewing authority, as involves confinement at hard labor for one month and forfeiture of two-thirds of the soldier's pay for one month.

E. M. Ellery, Judge Advocate.
E. C. McDonald, Judge Advocate.
Charles R. Williams, Judge Advocate.

To The Judge Advocate General.

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

CM 199970

| | | |
|---|---|---|
| UNITED STATES | ) | THIRD DIVISION |
| v. | ) | Trial by G.C.M., convened at Fort George Wright, Washington, January 13, 1933. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks. |
| General Prisoner WILLIAM H. THOMPSON. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and WILLIAMS, Judge Advocates
ORIGINAL EXAMINATION by WALSH, Judge Advocate.

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

2. The only question presented by the record is as to the legal sufficiency of the record to support the findings of guilty of the Charge and its Specification alleging that the accused deserted the service of the United States in violation of the 58th Article of War.

In the specification the accused is charged as "General Prisoner William H. Thompson" and he was identified in court as that person. The record of trial contains no proof, either direct or circumstantial, that the dishonorable discharge previously adjudged against the accused had not in fact been executed prior to the alleged desertion. A general prisoner, in whose case the dishonorable discharge has been executed, is no longer in the service and his status is such as to preclude the commission of the offense of desertion. Dig. Ops. JAG, 1912, p. 400. The extract copy of the morning report establishing accused's escape from confinement, which escape is the basis for the charge of desertion, discloses that the entry made against the accused in the morning report charges escape but does not charge desertion. To warrant a finding of guilty upon trial of a general prisoner for desertion, it is incumbent upon the prosecution to establish,

as an element of proof, that the dishonorable discharge has not been executed. CM 199224, Hoppert. We are of the opinion that this the prosecution has failed to do.

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

G. Mulvey, Judge Advocate.

A. McDonald, Judge Advocate.

_____, Judge Advocate.

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

CM 200025

| | | |
|---|---|---|
| UNITED STATES | ) | PANAMA CANAL DEPARTMENT |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Corozal, Canal Zone, December 1, |
| Captain HAMILTON JOHNSTON | ) | 2,5,6,7,8,9,14 and 15, 1932. |
| (0-7391), 33d Infantry. | ) | Dismissal. |

---

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates
ORIGINAL EXAMINATION by WALSH, 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 93d Article of War. (Disapproved by reviewing authority.)

Specification 1: (Embezzlement - disapproved by reviewing authority).

Specification 2: (Embezzlement - disapproved by reviewing authority).

CHARGE II: Violation of the 95th Article of War. (Finding of not guilty.)

Specification 1: (False official statement - finding of not guilty).

Specification 2: (False official statement - finding of not guilty).

Specification 3: (False certificate - finding of not guilty).

Specification 4: (False certificate - finding of not guilty).

Specification 5: (False certificate - finding of not guilty).

CHARGE III: Violation of the 96th Article of War. (Disapproved by reviewing authority.)

Specification 1: (Failure to deposit $200 belonging to company fund - disapproved by reviewing authority).

Specification 2: (Failure to deposit $100 belonging to company fund - disapproved by reviewing authority).

Specification 3: (Failure to deposit $200 belonging to company fund - disapproved by reviewing authority).

Specification 4: (Failure to deposit $200 belonging to company fund - disapproved by reviewing authority).

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

Specification 1: (Procuring soldier to prepare an untrue indorsement for the signature of another officer - finding of not guilty).

Specification 2: In that Captain Hamilton Johnston, 33d Infantry, having, on or about October 17, 1931, made and delivered to Joseph B. Morrison, then Corporal, Headquarters Company, 33d Infantry, his promissory note in writing for the sum of $1,000.00, payable upon demand, and having on or about January 11, 1932, received from said Joseph B. Morrison a demand for the payment of said note, did, at Fort Clayton, Canal Zone, from the receipt of said demand to on or about April 15, 1932, dishonorably fail and neglect to pay any part of said note, and from on or about April 16, 1932, to on or about July 27, 1932, dishonorably fail and neglect to pay the balance of $100.00 then due on said note.

Specification 3: (False official statement - finding of not guilty).

Specification 4: In that Captain Hamilton Johnston, 33d Infantry, knowing that Sergeant Edward R. Allen, Service Company, 33d Infantry, had testified under oath before Major John F. Landis, 33d Infantry, an officer detailed to conduct an investigation, in substance as follows: "I admit having told Lieutenant Chase that an officer had prevailed upon me to write the untrue statement, contained in paragraph f, of the 3d Indorsement of Corporal McBride's application for an extension of foreign service, under date of September 25, 1931", did, at Fort Clayton, Canal Zone, on or about June 17, 1932, wilfully and corruptly advise and attempt to induce said Sergeant Edward R. Allen to retract his said testimony before said Major John F. Landis and to further testify in substance that he had written said untrue statement in said 3d Indorsement by mistake, the said Captain Hamilton Johnston then well knowing that said Sergeant Edward R. Allen had not written the untrue statement in said 3d Indorsement by mistake but in pursuance to an order given by himself to said Sergeant Edward R. Allen.

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

Specification: In that Captain Hamilton Johnston, 33d Infantry, did, at Fort Clayton, Canal Zone, on or about October 17, 1931, wrongfully borrow from an enlisted man, to wit, Joseph B. Morrison, then Corporal, Headquarters Company, 33d Infantry, the sum of one thousand dollars.

He pleaded not guilty to all charges and specifications, and was found of Specification 1, Charge I, guilty except the words and figures "on or about November 30, 1931, feloniously embezzle by fraudulently converting to his own use the sum of $850.00, lawful money of the United States", substituting therefor the words and figures "during the period November 30, 1931, to December 10, 1931, administer his company fund with such lack of system and such carelessness as to

leave in doubt the actual security of the fund", of the excepted words and figures not guilty, of the substituted words and figures guilty; of Specification 2, Charge I, guilty except the words and figures "on or about February 8, 1932, feloniously embezzle by fraudulently converting to his own use the sum of $470.00, lawful money of the United States", substituting therefor the words and figures "during the period January 31, 1932, to February 13, 1932, administer his company fund with such lack of system and such carelessness as to leave in doubt the actual security of the fund", of the excepted words and figures not guilty, of the substituted words and figures guilty; and of Charge I, not guilty but guilty of a violation of the 96th Article of War; of Charge II and all specifications thereunder not guilty; of Charge III and all specifications thereunder guilty; of Specification 1, Additional Charge I, not guilty; of Specification 2, guilty except the word "dishonorably" appearing after the word and figures "April 15, 1932", and the word "dishonorably" appearing after the word and figures "July 27, 1932", of the excepted words not guilty; of Specification 3, not guilty; of Specification 4, guilty except the words "but in pursuance to an order given by himself to said Sergeant Edward R. Allen", of the excepted words not guilty; of Additional Charge I, "As to Specification 2, not guilty, but guilty of a violation of the 96th Article of War; As to Specification 4, guilty"; and of Additional Charge II and the Specification thereunder, guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. Eight of the ten members of the court and the trial judge advocate and his assistant signed a recommendation for clemency asking that the sentence of dismissal be set aside or commuted to a lesser sentence for the reasons that no moral turpitude was involved, that no monetary loss was sustained by anyone, that all indebtedness has been liquidated, and because of the outstanding war record of the accused. Three of the members so signing and the trial judge advocate qualified their recommendation by excepting the statement that no moral turpitude was involved. The reviewing authority disapproved the findings of guilty of Charges I and III and of the specifications under each, approved the sentence and forwarded the record for action under the 48th Article of War.

3. The evidence relating solely to specifications of which the accused was acquitted and to those disapproved by the reviewing authority will not be summarized in this review. But three specifications remain for consideration, of which the Specification of Additional Charge II involves borrowing $1000 from an enlisted man, and Specification 2 of Additional Charge I the failure to repay this loan when due. The fact of the loan is undisputed and the evidence relating to these two offenses will be considered together

and in chronological order. The remaining specification will be considered separately.

Specification 2, Additional Charge I, and
Specification, Additional Charge II.

4. Private Joseph B. Morrison, Infantry, Hawaii, testified by deposition (Ex. 32) that from June to November, 1931, he was stationed at Fort Clayton, Canal Zone, as a corporal in Headquarters Company, 33d Infantry. The accused was his company commander. On October 17, 1931, accused asked witness to loan him $1000, explaining that he had ordered some bonds sold but needed the amount "right away". On the same day witness withdrew $1000, which he had won in the Panama National Lottery on September 20th, from the bank and made the loan in cash, receiving a promissory note signed by accused, reading "I promise to pay to Joseph B. Morrison on demand the sum of one thousand dollars ($1,000.00) with interest as agreed". At the time of this transaction it was understood and agreed between them that full payment of the note would be made "on or before December 1, 1931". Witness requested discharge by purchase and left Panama on November 4, 1931, but before sailing he saw accused on November 2, 1931, and told him his forwarding address would be "Thomson, New York", and accused stated he would communicate with witness "by the first of December". On November 19, 1931, he was discharged at Brooklyn, New York, and reenlisted at Washington, D. C., on February 12, 1932. His abode for the period immediately following his arrival from Panama was as follows: November 19 to December 23, 1931, at Thomson, New York; from then until February 19, 1932, at Schenectady, New York; until March 11, 1932, en route to and at San Francisco, California. In February, 1932, before leaving for San Francisco, he furnished the post office at Thomson, New York, with his forwarding address as "710 Mission Street", San Francisco, which was given to him on reenlistment as the address of the recruiting office in that city, but the number was wrong. No payment was made on the loan by December 1, 1931, as agreed upon, nor was any communication received from accused although mail from other sources continued to be delivered to witness through the Thomson, New York, address until February 12, 1932. Late in December witness sent a telegram from Schenectady to accused demanding payment of the loan and stating that should he not hear from him he would go to Washington about the matter.

No reply was received and in January he "sent a letter to Washington". No communication was received by witness from accused until July 10, 1932, when a check for $900 and a money order for $20.50 were delivered through The Adjutant General's Office. Later in July the remaining $100 was paid by check.

Lieutenant Colonel Edmund A. Buchanan, Inspector General's Department, testified that accused appeared before him in March, 1932; he informed accused of his rights under the 24th Article of War and the subject matter of the investigation (R. 46), and thereafter accused admitted that he borrowed $1000 from Morrison on October 17, 1931, saying that he heard that Morrison had won $3000 in the lottery and that he needed some money because he was in debt about $2500 (R. 359,361). He also stated that he "did not promise to pay this loan on the first of December", but he "might have stated" to Morrison at the time that he "expected some sort of settlement of the estate before the first of the year", and that he believed Morrison was aware of the possibilities of delay in payment of the note at the time he left the Canal Zone. Accused further stated that he did not write Morrison because he had nothing "definite to say to him, but that he did answer Morrison's telegram by a letter the first week in January, informing Morrison that he was unable to pay the loan but was making every effort to do so (R. 362), and that he again wrote him in February stating that he was not yet in a position to pay the note but "that there was no chance of his losing this money". Accused stated no reply was received to either of these letters (R. 363).

Major Godfrey R. Fowler, 33d Infantry, testified that about February 14, 1932, he was directed to make an investigation of a complaint contained in a letter forwarded through Department Headquarters from Morrison stating that accused owed him $1000. He informed accused of his rights under the 24th Article of War and accused freely admitted that he did owe Morrison this amount but that "he expected to pay it" (R. 113,114).

The court received in evidence as exhibits offered by the accused the following documents (R. 398-401):

Exhibit A, an envelope addressed to "Mr. Joseph B. Morrison, 143 Lafayette Street, Schenectady, N.Y.", bearing the return address "Headquarters Panama Canal Department, Quarry Heights, Canal Zone". Postmarks and notations appearing on the envelope show that it was forwarded to "703 Mission St., San Francisco, Cal.", was received at the post office in San Francisco on April 2, 1932, and there stamped "No such number" and "returned to writer unclaimed".

Exhibit B, a letter, mailed in the above envelope, reading as follows:

"Headquarters Panama Canal Department
Office of the Department Commander

AG 201-
(Johnston,Hamilton)Off.
1/11/32.

Quarry Heights, Canal Zone
March 2, 1932.

Mr. Joseph B. Morrison,
148 Lafayette Street,
Schenectady, New York.

Dear Sir:

Your communication of January 11, 1932, and subsequent correspondence in connection therewith addressed to The Adjutant General, concerning a loan of one thousand ($1000.00) dollars to Captain Hamilton Johnston, 33rd Infantry, was referred to these headquarters for appropriate action.

In reply you are advised that Captain Johnston acknowledges the indebtedness and states that he has written you to the effect that he is making every effort to pay you the amount due. You will be further informed at a later date concerning this matter, upon the completion of a full investigation of the facts and circumstances.

Yours truly,
CLARK LYNN,
Lieut.Colonel, A.G.D.,
Asst. Adjutant General."

Exhibit C, an envelope addressed to "Mr. J. B. Morrison, Thompson, New York", and bearing the return address "Capt. H. Johnston, Fort Clayton, C.Z." Postmarks appearing on the envelope show it was sent from Fort Clayton, C.Z., on February 20, 1932, was received at the Thomson, New York, post office on February 27, 1932, and additional notations show it was forwarded to 703 Mission Street, San Francisco, California, received at the post office in San Francisco on March 3, 1932, and there stamped "no such number" and "returned to writer unclaimed".

Exhibit D, a check for $100, dated February 19, 1932, written on The National City Bank of New York, Panama Branch, payable to "J. L. Morrison" and signed "Hamilton Johnston".

Exhibit E, a letter, "purporting to have been signed and mailed by the accused", in the envelope, Exhibit C, reading as follows:

"Ft. Clayton, C.Z.
19 Feb. '32.

Morrison:

After return from maneuvers I was called upon to explain why I had not paid you the money you loaned me. As I have not received any answer to my two letters it seemed strange and surprising that everything was not OK. It has resulted in my personal and official accounts being inspected and I am to be relieved of command of Hq Co. I told you that as soon as this estate was settled I would let you hear from me, etc.

I am enclosing $100.00 on account and will send you $50.00 each month which is all I can spare until I can settle this in full.

Hope this is satisfactory to you.

Sincerely,
Hamilton Johnston
Capt., 33rd Inf."

Specification 4, Additional Charge I.

Sergeant Edward R. Allen, Service Company, 33d Infantry, Fort Clayton, Canal Zone, testified that on or about September 25, 1931, he was a corporal and company clerk in Headquarters Company (R. 257). Accused was his company commander (R. 290) and he was working both for him and for Lieutenant Chase, who was the head of the Personnel Section (R. 292). He identified Exhibit 74 as an application for extension of foreign service tour by Corporal McBride of Headquarters Company, of which he had made out the basic letter and the first and second indorsements (R. 258). Witness knew that McBride had been tried for a "venereal" and did not believe he could get an extension and he explained the situation to accused, who directed him to leave out of paragraph f of the indorsement the fact that the man had been tried (R. 259,285). Since he had been taught to obey all orders given him by his superior officers (R. 291), he made out the application (R. 260), including the second indorsement containing the statement: "Soldier has not been subjected to disciplinary action during current enlistment" (Ex. 74), although that indorsement was for the signature of Lieutenant Chase and was compiled from records under the jurisdiction of the Personnel Adjutant (R. 292). Witness had the application signed by McBride and handed it to accused with the first and second indorsements prepared. Witness knew at the time that the second indorsement was untrue and that it was to be signed by Lieutenant Chase. He did not handle the application again until it came back approved (R. 260, 265). In May, 1932, Lieutenant Chase, then Personnel Adjutant, showed him the second indorsement and asked him how he came to make such a mistake in subparagraph f of the second indorsement as to leave out the fact that the man had been tried. He replied that he had been told to leave that fact out, but did not remember telling Lieutenant Chase that an officer had told him to do it. He probably did tell Lieutenant Chase that some officer in Headquarters Company wanted McBride kept down there, but he did not remember making that statement (R. 261,270,280). He was then called to the office of the commanding officer and questioned by Colonel Coburn, to whom he told the same thing he had told Lieutenant Chase and also that two officers were involved in the matter. In the latter part of May, 1932, he appeared before Major Landis for investigation and he made the same statement there that he had made to Lieutenant Chase and to Colonel Coburn (R. 261-262). A day or two later he signed the statement he

had made before Major Landis. Witness identified the statement at the bottom of page 2 of Exhibit 78 as the one he had then signed, which reads in pertinent part as follows:

> "I admit having told Lieutenant Chase that an officer had prevailed upon me to write the untrue statement contained in paragraph f of the 3d Indorsement of Corporal McBride's application for an extension of foreign service, under date of September 25, 1931. ***." (Error: "3d" obviously should be "2d".)

Major Landis was the third officer, Lieutenant Chase and Colonel Coburn being the others, to whom witness had stated that an officer of Headquarters Company had told him to make the false statement contained in paragraph f of the second indorsement (R. 280).

Prior to the investigation by Major Landis, witness had told accused of his conversation with Lieutenant Chase and Colonel Coburn about the error in the McBride application and what had been said about the officer involved (R. 281-282). On the afternoon of the investigation accused called witness on the phone at the personnel office and told him that Major Landis had shown him witness' testimony. Accused then advised witness to retract his statement that he had made this extension out because he had been told to do so by some officer and to say that the fact that the man had been tried had been left out by him by mistake. Accused told him not to incriminate him (accused), and that witness would probably get out of it without trial or punishment. Accused made no promises to him. He had no further conversation with accused and the latter left for the United States a day or two after the investigation (R. 264-265,276-279). Before the time of the investigation he had heard that accused was going to resign (R. 286), and at the time of the investigation he knew accused was leaving, and had reason to believe that he would never again have any official relations with him (R. 266,282). He had "no particular animosity" against accused at the time he made the statements (R. 274). Witness did not consider that he had made a false statement in the second indorsement, since he had merely typed what

was untrue, but he had made a true statement under oath, and because it was made under oath he had refused to change it when accused had asked him to do so (R. 288-290). He was tried for making the false entry in the second indorsement on McBride's application. He took the stand in his own behalf and testified that he had been told to make the extension out and that some officer in Headquarters Company wanted McBride kept down there. His testimony before that court as to why he made the false statement was the same as in his present testimony. He wanted "to beat the case by remaining silent" but his counsel, Lieutenant Chase, advised him that if he took the stand and told the story he would probably be acquitted. He was acquitted, and he believed it was because of his testimony. Accused was not a witness at his trial (R. 258,266-267,273-278,287,293). Witness received no money from McBride (R. 283-284).

When asked by the prosecution which statement was the more advantageous to him prior to his trial, namely, that he knew the second indorsement to have been erroneous and untrue at the time he made it, or that it was simply an oversight on his part, he stated that the latter would have been more to his advantage, since, had he made that statement, no one but accused could have proved it to be incorrect. He admitted, however, that he had told the first sergeant or the student clerk that he knew McBride had been tried, but he did not believe that they saw the application after it was made out (R. 275,286-287).

Second Lieutenant Richard Chase, 33d Infantry, Fort Clayton, Canal Zone, testified that on or about the 25th day of September, 1931, he was assistant personnel adjutant of the 33d Infantry, and as such had authority to sign for the commanding officer of the 33d Infantry on routine business. He identified a document as the application, with the subsequent indorsements, of James McBride, a corporal of Headquarters Company, for an extension of his tour of foreign service. The document was received in evidence and marked "Exhibit 74" (R. 230-232). The initials "era" over the second indorsement indicate that it was typed by Edward R. Allen, corporal,

and the company clerk for Headquarters Company. The statement in paragraph 2 f of the second indorsement that "Soldier has not been subjected to disciplinary action during current enlistment" proved later to be untrue (R. 233). At the time witness signed this indorsement, he took the statements therein to be true and signed them as such. Witness identified a document as Special Court-Martial Order No. 59, Headquarters Fort Clayton, dated April 18, 1931, and it was received in evidence and marked "Exhibit 75". This document showed that Corporal James McBride was tried and convicted, and that sentence was imposed on April 14, 1931, and subsequently approved (R. 234; Ex. 75). Witness also identified a document as the charge sheet in the case of Corporal James McBride and it was received in evidence and marked "Exhibit 76". The document shows that the charges were signed by accused and sworn to by him on March 11, 1931 (Ex. 76). Witness had no conversation with accused concerning McBride's application, nor with Corporal Allen when he signed the second indorsement (R. 235). He first saw the original application upon his desk in the personnel office but did not know who put it there (R. 236). Accused had no authority to give Sergeant Allen orders about preparing a second indorsement to be signed by witness (R. 245). Sergeant Allen was tried for his connection with Corporal McBride's application and acquitted (R. 246-247).

Upon recross-examination, witness said that as chief of the personnel section he asked Sergeant Allen how he happened to make the mistake in paragraph 2 f, and that Allen took out his handkerchief and wiped his face, and acted nervous. Witness urged him to answer and Allen said, "Well, I was told to do it", but he refused to state who had told him to do it. Thereupon, witness went to see the commanding officer (Colonel Coburn) about the matter. Witness said that he had made a statement before Major Landis three or four days later and that such a statement would be preferable to his present recollection of the matter. He identified this statement included in Exhibit 78 and stated that it was true. In this statement (Ex. 78) it appears that Sergeant Allen, in response to his demand for an explanation, had "replied reluctantly that some officer in the Headquarters Company wanted McBride kept down here", and that when

witness asked Allen if he meant to say that some officer, desiring McBride kept here, and knowing the statement afterwards contained in paragraph f to be untrue, had prevailed upon him to submit that statement, Allen had replied in the affirmative (R. 295-297).

Lieutenant Colonel Edmund A. Buchanan, Inspector General's Department, testified that he questioned accused under oath and took his testimony, and that in the first three or four questions on each day of this investigation he informed accused not only of his rights under the 24th Article of War, but also of the subject matter as to which he was being investigated on that particular day (R. 46). Accused took advantage of his rights under the 24th Article of War "quite a number of times", and, in the opinion of witness, his testimony was "entirely voluntary" (R. 301). In the course of the investigation, about July 11, 1932, accused stated he remembered that McBride, a member of his company, made a written application for an extension, but he recalled no conversation with Sergeant Allen relative to this application, nor did he recall that McBride had been tried prior to his application. He did not find out until June that trial for contracting a venereal disease was a cause for disapproval of an application for extension of tour of service (R. 368-369). Sometime in June, Allen told him that the inspector had found that there was a venereal record against McBride and that he (Allen) was to be tried because the venereal record had not been included in the indorsement to McBride's application, but accused did not remember that Allen had told him why he had omitted it (R. 370). Accused did not recall that Allen had remarked to him that an officer of his company had influenced him to leave out McBride's venereal record. Accused stated that Major Landis read to him parts of Allen's statement, and that he called Allen on the telephone and asked him the date of McBride's application; that about 5:00 o'clock he had talked to Allen over the phone again and that he (accused) had told Allen not to admit anything in the case, to retract his (Allen's) statement about an officer telling him to make out that statement, and to say that he (Allen) had made it out by mistake through error, and that he (accused) was sure there would not be anything else said about it, that Allen would be

believed, would get out of it, and would never be tried (R. 371). Witness put the following question to accused:

> "When, as you have admitted, you directed in substance Allen to retract his statement about an officer telling him to make out that statement and to say that he made it out by mistake through error, was that advising Allen to make a false statement, or not?"

to which accused replied: "The last telephone conversation I had with Allen, I did not direct him to do anything". Accused then further stated that "he (Captain Johnston) merely suggested that he (Allen) do it" (R. 371-372).

5. For the defense, Frederick DeVeber Sill, an engineer employed by the Panama Canal, testified that he and accused were boys together at Cohoes, New York, and attended Albany Academy and Troy Polytechnic Institute together. Witness came to the Canal Zone in 1907 and has not had personal contact with accused since then, but he knew all his family and knows that accused bore an excellent reputation, and was considered a man of sterling character and exceptional ability (R. 406,409-410). Accused's family were the wealthy people of Cohoes, a city of about 25,000; they controlled the Harmony Mill, which when it was built was the largest cotton mill in the world, and witness believes the mills were sold for $30,000,000. Accused's father was Commodore of the Troy Yacht Club and kept his yacht in the Hudson River. Accused is an heir of his grandmother who died about two years ago (R. 406-409).

Major Godfrey R. Fowler, 33d Infantry, testified that he had known accused since 1918, had served with him in three different regiments and regarded him as an excellent officer. He would be willing to have accused in his command (R. 411-412).

Major Thomas S. Smith, 33d Infantry, testified that he has known accused for a year and three months. He rendered an efficiency

report on accused for the time he was a member of his battalion and remembers no rating less than excellent and several were superior. He would very much desire accused in his command (R. 412-414).

The defense also introduced evidence (Ex. G; R. 403) of accused's military record showing the award of the following decorations:

(1) Distinguished Service Cross "for extraordinary heroism in action near Launay, France, July 15, 1918. Lieutenant Johnston with two soldiers attacked a patrol of seven Germans who had captured four American soldiers, killed one of the Germans, and captured the others";
(2) Purple Heart with Oak Leaf Cluster for wounds in action on October 15 and 16, 1918;
(3) Silver Star Citation by the Commanding General, Third Division, "for excellent handling of the men attached to the 2d Battalion, 38th Infantry, on the march from Romagne to Bois de Matamont. While on the march the enemy discovered our movement and laid down a terrific barrage. They were making direct hits on Lieutenant Johnston's column thus making it nearly impossible to control his men. Lieutenant Johnston kept his men intact and led them through the barrage to a place of safety";
(4) Medaille Militaire (French);
(5) Legion d'Honneur, Chevalier (French);
(6) Croix de Guerre with Palm (French);

also letters from Major General U. G. McAlexander, Retired, containing the following:

"Captain Hamilton Johnston was under my command in the 38th U.S. Infantry from some time in May 1918 until some date in August 1918. He served with marked distinction in the Second Battle of the Marne when he was awarded the Distinguished Service Cross for 'Extraordinary

heroism etc.'

"He proved himself to be an excellent officer. He has won the gratitude and respect of all military men";

and from Major P. D. Parkinson, commanding the 2d Battalion, 38th Infantry, stating:

"I have known this officer, Captain Hamilton Johnston, Infantry, for the past eighteen months which were spent in all the battle engagements of the 3d Division. He is an officer of unusual courage, efficiency and ability as a leader under all conditions."

6. As to Specification 2, Additional Charge I, and the Specification, Additional Charge II, it is not disputed that, on October 17, 1931, the accused borrowed $1000 from Corporal Joseph B. Morrison and signed a note promising to repay that amount on demand, and that he did not repay it on December 1, 1931, when Morrison states it was agreed between them it would be repaid, nor in January when Morrison made demand both by telegram to the accused and by letter to the War Department, and that it was not repaid until July, 1932. The court by excepting the word "dishonorably" has reduced the offense of failing to repay the loan from a clear violation of the 95th Article of War to a mere neglect in violation of the 96th Article of War. Borrowing money from an enlisted man by an officer has always been regarded as an offense to the prejudice of good order and military discipline because the practice is likely to result in dispute and controversy, such as did occur in this instance, tending to detract from the dignity and authority of the officer. Likewise a failure to pay a debt when due and promised is a military offense tending to bring discredit on the service. The present offenses, however, are without circumstances of serious aggravation. There was no imposition upon the soldier to obtain the loan; the relation of company commander and soldier was terminated within about two weeks after the making of the loan by Morrison's departure for the United States for discharge; although the debt was not discharged when due, the delay was due

in part to Morrison's act in leaving an incorrect forwarding address resulting in his failure to receive the accused's letter and check for $100; and the entire debt was paid to Morrison's satisfaction in July, 1932. The evidence is legally sufficient to support the findings of guilty of these two specifications, but under the circumstances shown, the Board of Review believes that for these two offenses alone the sentence of dismissal should not be executed.

We come then to the consideration of the remaining offense alleged in Specification 4, Additional Charge I, - wilfully and corruptly advising Sergeant Allen to testify falsely before Major Landis, an officer detailed to conduct an investigation - with the knowledge that the sentence of dismissal, if it is to be executed, must rest upon this offense.

Sergeant Allen testified that in September, 1931, he prepared the application of Corporal McBride for an extension of his tour of duty in Panama, and that the untrue statement, "Soldier has not been subjected to disciplinary punishment during current enlistment", was written into the second indorsement by the express direction of the accused to whom he reported that McBride had been convicted of a violation of the 96th Article of War. McBride was tried by special court-martial in April, 1931, and the charge was signed by the accused. Allen also testified that after the error was discovered in May, 1932, he was called before Major Landis, investigating officer, to whom he told that he had prepared the indorsement at the direction of an officer, and that shortly thereafter accused called him on the phone, said that he had read Allen's testimony and advised him to retract what he had said and to say that he had written the indorsement by mistake; and that accused also told him (Allen) "not to incriminate him" (the accused). Prior to this, Allen had told Lieutenant Chase, the personnel adjutant who had signed the false indorsement, that an officer of Headquarters Company wanted McBride kept in Panama and had induced him to make it out that way, and Allen had also told the commanding officer that "two officers were involved". The accused did not testify before the court, but Colonel Buchanan, Inspector General, testified to admissions made by accused before him at his investigation in July to the following effect:

that he did not recall any conversation with Allen at the time of the preparation of McBride's application, that he did not then recall that McBride had been tried and did not then know that such a conviction would cause disapproval of the application; that he did discuss the matter with Allen after discovery of the error but did not remember that Allen told him how the error occurred; that he did call Allen on the phone and suggest that he change his testimony before Major Landis and say that the second indorsement was a mistake on his part, but that he did not direct Allen to do this.

In connection with this conviction, it is noted that the court returned a finding of not guilty to Specification 1, Additional Charge I, which alleged that the accused wilfully and corruptly procured Allen to write the false indorsement knowing it to be untrue. The findings on these two specifications are not necessarily inconsistent, but indicate that the court was unwilling to convict on the testimony of Allen when denied by the accused, but did so where Allen's testimony was supported by admissions by the accused, who made no denial or explanation before the court. The conviction therefore rests principally on the admissions of the accused as testified to by Colonel Buchanan.

The act of advising a soldier to give false testimony before an investigating officer is an attempt to suborn perjury even though the soldier did not follow the suggestion and give false testimony. Whatever motive influenced the accused does not materially change the nature of his offending, whether he was endeavoring to protect himself, or some other officer, or merely trying to help a soldier of his company who was in trouble. Colonel Winthrop, in his Military Law and Precedents, Reprint 1920, page 714, gives a list of offenses which have been confirmed as violations of the 95th Article of War and includes therein "attempting to suborn testimony to be given before a court-martial". After careful consideration, the Board of Review is of the opinion that the evidence shows a clear departure from that high standard of honor and integrity required in the commissioned personnel of the Army, and is legally sufficient to support the findings of guilty of Specification 4 in violation of the 95th Article of War.

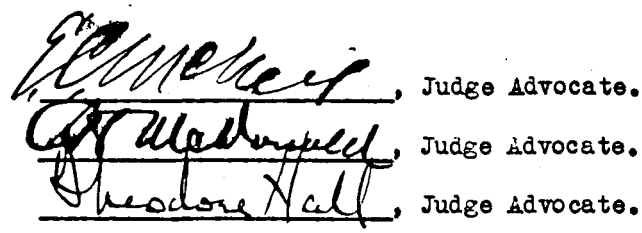
7. A brief by counsel for the accused forwarded with the record has been considered by the Board of Review. Attached to the brief and referred to in it is an affidavit subscribed and sworn to on December 23, 1932, by Major John F. Landis, the investigating officer referred to in Specification 4, Additional Charge I, who was not a witness at the trial. The affidavit contains much hearsay and the conclusions and impressions of Major Landis after the completion of his investigation. The Board of Review deems it only necessary to say that they find nothing material therein which would have been competent and admissible in evidence if offered at the trial. Also attached to the brief is a typed copy of a letter addressed to Captain Johnston and signed by his regimental commander, Colonel H. D. Coburn, which contains an admonition for his conduct in connection with the loan of $1000 from Morrison, and claim is made that this was punishment under the 104th Article of War and constituted a bar to trial for these offenses. The letter states that a copy will be filed with his efficiency report and "it will be clearly understood that this admonition is no bar either in trial or other disciplinary action the Department Commander or War Department may see fit to make". No copy of this admonition is filed with Captain Johnston's efficiency reports in The Adjutant General's Office, no plea in bar was made at the trial, and the staff judge advocate, in his review of the record of trial, states that the letter was never delivered to Captain Johnston because it did not meet with the approval of Department Headquarters. The brief raises no other points which deserve comment.

8. At the time of trial accused was 40 3/12 years of age. His service is shown by the Official Army Register as follows:

> "2 lt. Inf. Sec. O.R.C. 15 Aug. 17; accepted 15 Aug. 17; active duty 15 Aug. 17; vacated 13 Nov. 17.--2 lt. of Inf. 26 Oct. 17; accepted 13 Nov. 17; 1 lt. (temp.) 8 Feb. 18; 1 lt. 8 Aug. 19; capt. 1 July 20."

9. 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 opinion that the record of trial is legally sufficient to support the findings of guilty of Additional Charge I and Specification 4 thereunder in violation of the 95th Article of War, of Specification 2 thereunder as amended in violation of the 96th Article of War, and of Additional Charge II and its 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 on conviction of violation of the 95th Article of War and authorized on conviction of violation of the 96th Article of War.



_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., APR 18 1933 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain Hamilton Johnston, 33d Infantry, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review, and, for the reasons therein stated, recommend that the sentence be confirmed. It appears that Captain Johnston had an exceptional record in combat during the World War, and received several awards for valor from both this country and France, and I believe that every consideration should be shown him on that account. However, it also appears that in 1929, when he was placed in Class B by the Final Classification Board, the Secretary of War, out of consideration of his war record, deferred action on his case and in October, 1931, returned him to Class A. Also, when the present charges arose, his commanding officers, because of his war record, recommended that he be permitted to resign in place of standing trial, and Captain Johnston did submit his resignation but withdrew it before its effective date. I believe that full allowance has been already made to Captain Johnston for his war services and that his present offense, - advising a soldier to give false testimony under oath before an official investigating officer - marks him as morally below the standard which can be tolerated in the commissioned ranks of the Army.

3. Inclosed herewith is a draft of a letter for your signature, transmitting the record to the President for his action, together with a form of executive action designed to carry into effect the recommendation above made should it meet with approval.

Kyle Rucker,
Colonel, ~~J.A.G.D.,~~
Acting The Judge Advocate General.

5 Incls.
Incl. 1-Record of trial.
Incl. 2-Opin. of Bd. of Rev.
Incl. 3-Draft of let. for sig. of Secy. War.
Incl. 4-Form of executive action.
Incl. 5-Brief for accused.

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

MAR. 10 1933

CM 200047

| | | |
|---|---|---|
| UNITED STATES | ) | PHILIPPINE DEPARTMENT |
| v. | ) | Trial by G.C.M., convened at Fort Mills, P.I., December 8, 1932. Dishonorable discharge and confinement for three (3) years as to each accused. Fort Mills, P.I. |
| Private First Class RALEIGH M. PLANTS (R-505710), Battery E, and Private CHARLES E. GIBEAUT (6821498), Battery F, 60th Coast Artillery (AA). | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates
ORIGINAL EXAMINATION by CHEEVER, Judge Advocate.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence as to accused Plants.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private First Class Raleigh M. Plants, Battery E, 60th C.A. (AA), and Private Charles E. Gibeaut, Battery F, 60th C.A. (AA), acting jointly and in pursuance of a common intent, did, at Fort Mills, P.I., on or about November 12, 1932, with intent to do him bodily harm, commit an assault upon Private First Class Jack Joy, Battery E, 60th C.A. (AA) by stabbing him in the chest with a dangerous instrument, to wit, a knife.

Each accused pleaded not guilty to, and was found guilty of, the Charge and Specification, and each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. Evidence of two

previous convictions by summary court-martial of accused Gibeaut for (a) failing to take prophylactic treatment required by standing orders and (b) absence without leave was introduced. The reviewing authority approved the sentence as to each, designated Fort Mills, P.I., as the place of confinement, and forwarded the record under the provisions of Article of War 50½.

3. The first substantial question presented by the record of trial is whether the evidence is legally sufficient to support the findings of guilty as to accused Gibeaut. This is a question of law which must necessarily be considered by the Board of Review and does not involve determining the weight of the evidence or the credibility of witnesses. In order to sustain the conviction of the offense charged, it is essential that the specific intent to do bodily harm be alleged and proved. State v. Gillett, 56 Iowa, 459; McClain on Criminal Law, vol. 1, secs. 259,265; Bishop's Criminal Law, 9th edition, vol. 2, sec. 60. General criminal intent, or "mens rea", must be carefully distinguished from specific intent. General criminal intent need not be proved, except by proof of the act; but where a specific intent is an essential element of an offense as in the instant case, such intent is not to be inferred from acts alone, which, without such specific intent, would not constitute the crime charged. In cases of assault with intent to do bodily harm, a specific intent may be inferred from the nature of the weapon used or the injury inflicted, but in such cases, unless the specific intent is proved, the offense is not made out. McClain on Criminal Law, vol. 1, secs. 123-124, 265; McKnight v. United States, 115 Fed. 972; Par. 126, M.C.M., 1928.

4. The two accused and Joy were drinking beer together at the Army Service Club about 7:00 o'clock on the evening of November 12, 1932; Joy and Plants had a quarrel and a physical encounter; Gibeaut, although present, took no part in the disturbance. Shortly thereafter Joy returned to his barracks (R. 32). About two hours later the two accused met Joy in front of his barracks and, after some conversation between Joy and Plants, they commenced to fight. Gibeaut possibly may have aided Plants when Joy and Plants were on the ground in clinched position by taking hold of Joy and striking him on the head, and just before the fight was stopped, when Plants handed an object to Gibeaut and said "Throw the knife away", he took it and threw it

across the car tracks where the knife was found the next morning. Gibeaut also struck Joy one blow with his fist after Joy and Plants had been separated (R. 19-21). Joy received a cut which the surgeon described as very trivial (R. 16). No witness saw the knife in Plants' hand and Joy did not know that he had been cut until sometime later (R. 21), when Plants stated to Joy in the presence of several others, "I was trying to cut your guts out" (R. 7,21,27).

There is no evidence to the effect that Gibeaut had knowledge of the fact that Plants was carrying a knife or that he intended to use one on Joy. Neither is there any evidence that Gibeaut and Plants had any understanding, mutual plan or design to jointly attack Joy, or that Gibeaut even encouraged Plants before the attack was completed.

5. The review of the staff judge advocate expresses the opinion that the two accused are equally guilty, citing as authority Missouri v. Silas Darling, 115 S.W. 1002 (Mo.); Brown v. State, 28 Ga. 199; Lamb v. People, 96 Ill. 73; Peden v. State, 61 Miss. 268. The case principally relied upon is the leading case of State v. Darling, supra.

The case of State v. Darling is not in point with the instant case for two reasons: First, the defendant there was charged with manslaughter in the fourth degree, a crime in which no specific intent, as distinguished from a general criminal intent, is required; second, the liability of the defendant Darling, as stated by the court, was predicated upon the fact of his having entered into an unlawful design to assault and whip the accused. Furthermore, the rule as announced in State v. Darling, supra, was qualified in State v. Odbur, 295 S.W. 734 (Mo.), in which case the following from Bishop's Criminal Law, 7th edition, vol. 1, page 637, is quoted as the applicable rule:

> "If two combine to fight a third with fists, and death results from the blow inflicted by one, the other is responsible for the homicide. But if one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable."

In Bishop's Criminal Law, 9th edition, vol. 1, page 465, it is said:

> "If while persons are doing what is criminal, another joins them before the crime is completed, he becomes guilty of the whole, because he contributed to the result. Should the offense be one requiring a specific intent, and the charge that he was present abetting the others, his knowledge of their intent must also be shown. If in these cases, there is no mutual understanding of each other's purpose, then each who contributed to the result will be responsible only for what he personally intended."

The Board of Review is of opinion that the above rule is the legal principle applicable as to accused Gibeaut and that the record of trial is legally insufficient to support the findings of guilty as to Gibeaut.

6. The next question presented is whether the evidence is legally sufficient to support a finding of guilty as to Gibeaut of the lesser included offense of assault with intent to do bodily harm (without a dangerous weapon) in violation of the 93d Article of War. Assault with intent to do bodily harm is, of course, more aggravated than ordinary assault and battery, and comprehends offenses such as a serious and determined assault by several persons upon one, or by a large powerful man or a skilled fighter upon a smaller unskilled man, or an aggressive assault planned or persisted in so as to show clearly an intent to do serious harm. CM 193112, Marx. As in other cases of assaults with intent, the intent forms the gist of the offense and must be specifically alleged and satisfactorily proved. Such intent is primarily a question of fact and properly to be determined by the court in the light of all the evidence presented. But there is no evidence that Gibeaut committed an aggravated assault of such a character. Joy was a skilled fighter and had been second in the light-heavy weight class in Hawaii (R. 22), and, except for the slight cut inflicted by Plants, suffered no injury from the fracas. However, the evidence does clearly show that accused Gibeaut at the time and place alleged committed an assault and battery on Joy, a lesser included offense in violation of the 96th Article of

War. The fact that Gibeaut committed the battery by a means other than alleged in the specification does not constitute a fatal variance when the conviction is of a simple assault and battery. People v. Casey, 72 N.Y. 393, 398; Ryan v. State, 52 Ind. 167.

7. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings and sentence as to accused Plants, and legally sufficient to support only so much of the findings of guilty as to accused Gibeaut as involves assault and battery upon Private Jack Joy at the time and place alleged, in violation of the 96th Article of War, and legally sufficient to support only so much of the sentence as to Gibeaut as involves confinement at hard labor for six months and forfeiture of fourteen dollars of his pay per month for a like period.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

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

Board of Review
CM 200161

SEP 5 - 1933

| | | |
|---|---|---|
| UNITED STATES<br><br>v.<br><br>Private 1st Class ARTHUR E. IRVING (6711744), Department Headquarters Detachment (Engineer's Section), Fort Shafter, T.H., and Private RALPH F. MORRIS (6711749), 23d Bombardment Squadron, Luke Field, T.H. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | HAWAIIAN DEPARTMENT<br><br>Trial by G.C.M., convened at Fort Shafter, T.H., December 6-10,12, 1932, and January 10-12, 1933. Sentence as to each accused: Dishonorable discharge and confinement for five (5) years. Penitentiary. |

---

REVIEW by the BOARD OF REVIEW
HILL, BITZING and HALL, Judge Advocates.

---

1. The accused were convicted of the following offenses (summarized):

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

Specification 1: Acting jointly did commit larceny on October 19, 1932, at Honolulu, T.H., of 10 airplane photographs, value $2.00, property of the United States, furnished for the military service thereof.

Specification 2: Acting jointly did sell on October 19, 1932, at Honolulu, T.H., the above mentioned 10 airplane photographs.

Specification 3: Acting jointly did commit larceny on October 22, 1932, at Honolulu, T.H., of certain government property consisting of drawing instruments, equipment, photos, and maps, total value $80.15.

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

Specification 1: Acting jointly on October 19, 1932, did conspire to commit larceny of 10 airplane photographs (Spec. 1, Charge I).

Specification 2: Acting jointly on October 19, 1932, did conspire to sell 10 airplane photographs (Spec. 2, Charge I).

Specification 3: Acting jointly on October 22, 1932, did conspire to commit larceny of government property described in Specification 3, Charge I.

Specification 4: Acting jointly on October 25, 1932, at Honolulu, T.H., obtain certain maps and photos containing information of the National Defense in violation of the Espionage Act (USC 50:31).

Specification 5: Acting jointly on October 25, 1932, conspire to deliver to a representative of a foreign nation maps and photos described in Specification 4 above, in violation of the Espionage Act (USC 50:32,34).

Specification 6: Acting jointly on October 25, 1932, at Honolulu, T.H., sell to Captain Wheeler, believing him to be acting in the interest of a foreign nation, certain papers, maps and photos to the prejudice of good order and military discipline.

Specification 7: Acting jointly on October 25, 1932, conspire to sell maps and photos described in Specifications 4 and 5 above, to Captain Wheeler, believing him to be acting in the interest of a foreign government, to the prejudice of good order and military discipline.

Specification 8: Acting jointly on October 22, 1932, at Honolulu, T.H., furnish to Mr. Frisen, believing him to be acting in conjunction with an agent of a

foreign nation, for the purpose of selling data pertaining to the national defense.

Specification 9: Acting jointly on October 22, 1932, conspire to furnish to Mr. Frisen the above data of national defense, to the prejudice of good order and military discipline.

Each of the accused 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, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. The record of trial comprises some seven hundred pages but much of the evidence is uncontroverted. There is, however, a sharp conflict in the testimony as to the extent to which the actions of the accused were instigated by the government's undercover man, Frisen. The main defense is that of entrapment.

An effort will be made herein to outline the material evidence as succinctly as possible and in chronological order. Certain testimony must be first set forth as preliminary to the events which happened rapidly between October 16, 1932, when Frisen met the two accused and October 25, 1932, when the accused were placed in arrest.

3. Accused Irving was employed as a draftsman in the office of the Department Engineer at Fort Shafter, T.H. (R. 20), and accused Morris was a draftsman and file clerk in the Operations Office at Luke Field (R. 417). Each was a high class man and had received an excellent education (R. 159,498).

The chief clerk in the Department Engineer's office, Mr. Marek, under whom accused Irving worked (R. 20), testified that in the month of August, 1932, he noted a falling off in Irving's work, that his assignments were not completed, and that he made notes which he tried to conceal (R. 20). Marek reported this matter to his immediate superior, Captain Wood, the Assistant Department Engineer, and the two decided to keep a close watch on Irving. This was done, and Marek

noticed that although Irving was neglecting his assigned work he was much interested in the vital matters of fortifications, triangulation data and other things of the same nature which were not part of his work and were beyond his assignment (R. 21). Accused Irving was overheard by Marek asking other men in the office for the grid location of certain vital elements of fortifications, although these matters were not at all connected with his work (R. 21). About the middle of September, 1932, calls in the same voice for Irving were coming in over Marek's telephone (R. 21). Marek understood these calls to be with reference to photographs. On two occasions Marek saw a private of the Air Corps bring in two packages to Irving that were about the size of Air Corps photographs, but he did not see them (R. 22,32-33). About September 29th, accused Irving received a telephone call in a voice which Marek recognized as the same voice that had called for Irving on previous occasions. After the call, Irving told Marek that the Operations office at Luke Field desired one set of Advanced Geological Survey maps. Marek replied that he could not issue them without an official request and that Irving should call the Operations office and ask them to put in a request for these maps through G-2. Accused did so and a few hours later an official requisition came in requesting two sets of these maps. When the request came in, Irving jumped up from his table and began to collect the sheets and to get them ready for shipment (R. 22). This looked "peculiar" to Marek as Irving never took any interest in issuing maps unless asked to do so. Marek then told Sergeant Becker, his assistant, to watch Irving (R. 23). On October 6th, Marek, upon his return to his office after a short absence, found Irving hunting through the cases containing secret maps (R. 23-24). About this time, the exact date not being established, Marek reported his grounds for suspecting Irving to Major Muir, the Department G-2 (R. 24-50). About October 26th (after the arrest of the accused), Marek made a physical inventory of all secret and confidential maps and found missing two copies of Road, Trail and Beach Landing maps, Island of Oahu, scale 1/62,500, one ammonia print of Battery Randolph, and one tracing showing arcs of fire of existing batteries. He had no information that any maps were missing until that date. At an inventory of property made November 1, 1932, one six-inch protractor, with case, one map measurer, and one tape measure were found missing. The latter articles were not missing at an inventory taken on October 18th (R. 25-26,33). Sergeant Becker, Department Headquarters Detachment, Engineer's Section, Fort Shafter, was Mr. Marek's assistant. On October

6th, while Marek was temporarily out of the office, Becker saw accused Morris come in and Morris and Irving took the Road, Trail and Beach Landing map out of its case and examined it. The two also examined Inclosure Number two, Annex, Engineer's Annex, which showed fixed and proposed fortifications (R. 35). Irving asked Sergeant Becker if the entire island was tied into one system of triangulation, and also asked various questions about coordinates, and for a map of the "Chemical Warfare Layout" at Schofield Barracks. Irving was given the information. On one job on the reservation map, showing reservations on the Island of Oahu, Sergeant Becker noticed Irving making notes in a small black notebook. It was a rush job and on such jobs it was unusual to make notes (R. 36-38).

First Lieutenant Kenneth P. McNaughton, Air Corps, testified that the Aloha set of pictures, to which reference is made herein later, had been made available and sold to military personnel and others for the cost of production (R. 449). Lieutenant McNaughton also testified that early in the summer (1932) accused Morris "got to hanging around" the Photo section office a great deal and it was necessary for him to give his first sergeant instructions to keep Morris out (R. 445).

Major Muir, Assistant Chief of Staff, G-2, Hawaiian Department, testified that he had received a number of reports from Mr. Marek (referred to hereinbefore) and that he had directed Marek to watch Irving and report any suspicious actions (R. 51). Major Muir, upon receiving further reports from Marek, authorized the employment of an agent to get in touch with Irving to find out what he was doing. Roy M. Frisen, civilian employee of the Ordnance Department, was the agent engaged (R. 52). The mission assigned to Frisen, the agent, was

> "to determine whether or not Private Irving had in his possession any secret documents belonging to the government, what he was up to, and if anyone else was involved in any untoward acts"

with him (R. 112).

4. Frisen, the contact man, then a civilian employee of the Ordnance Department, was at one time Hawaiian correspondent for the

International News Service, and was at the time of trial a representative of the International News Photos (R. 110) and an editorial writer for a Japanese newspaper (R. 123). He had known accused Irving for a year or more (R. 110).

Having agreed to contact Irving, Frisen then began to formulate in his mind the best method of approach. Recalling that accused Irving was aware of his connection with the International News Photos of New York, Frisen thought it would give him an entering wedge if he were to prepare a "fake" radiogram purporting to come from the International News Photos commissioning him to provide certain material (R. 112). In furtherance of this plan, Frisen obtained a radio receiving blank which he time-stamped, and a delivery envelope, took them home and prepared the message (R. 113; Ex. 2). Frisen was now ready for his mission.

5. On Sunday morning, October 16th, Frisen drove to the barracks of the Department Headquarters Detachment, found accused Irving and showed him the "fake" radiogram (R. 115). Frisen said he needed some scenic views of Oahu and Irving offered to show him some which he (Irving) had in his foot locker (R. 115). Frisen stood by as Irving took out a scenic set commonly known as the "Aloha" set, which Frisen, although he doubted its suitability for his purpose, agreed to take on consignment (R. 116,118). Accused Irving then said he had an appointment to meet a friend (accused Morris) at the Army and Navy Y.M.C.A. Frisen offered to drive him down. It was then that Frisen met accused Morris (R. 121). Irving and Morris had planned to visit Waikiki; so Frisen took them in his car. At Waikiki Frisen showed the "fake" radiogram to Morris and the three discussed its requirements (R. 121). Morris said it would be impossible to get those single island air photos but that there were other things, and mentioned the G-2 Intelligence Reports and stated that he could get hold of any secret material he wanted either from the Engineer's office or from the G-2 office (R. 122,123).

6. On Wednesday, October 19th, accused Irving by arrangement met Frisen at the Department Headquarters Detachment barracks and the two drove to town to meet Morris at the Y.M.C.A. On the way to town Irving said the secret files had been tightened against him but that he would not sell any secret stuff from the files as he and his pal were not that bad. Frisen agreed with him that it was pretty rotten business to get into unless it was made worth while and Irving said, "Yes, it's

no use handling hot stuff unless there is plenty of dough in it". Frisen then remembering his instructions to provide an opening wondered if Irving wasn't feeling him out as to his scruples in the matter, so he said something about having smuggled gems from Germany and having done some "booze-running" from Cuba, in an endeavor to create the impression that perhaps he was a little crooked at times (R. 124,125). Irving then said that he badly wanted a lot of money for the development of some ideas he had. Frisen admitted that he, too, would like to get some money. Then Irving said that he had some secret "stuff" and could get his hands on a lot more which ought to be worth a lot to someone and suggested that Frisen with his contacts might be able to do something (R. 126). Arriving at the Y.M.C.A. the two men met Morris, who, after some preliminaries, handed Frisen some scenic air photographs and a typewritten sheet (R. 127; Exs. 3a to 3j), for which Frisen paid him $5 (R. 128). The three began discussing international relations. Frisen then told a fictitious story of some friend named Bill, who, though not a citizen of the United States, had been in G-2's office as a soldier and had upon completion of his enlistment carried away information for which he later had received some thousands of dollars and that this friend was now "bumming" around in Hongkong (R. 129). Morris then stated that he had never taken any secret stuff from Luke Field but that he could get anything on short notice if the inducement was great enough. Irving told of a secret water supply map, and that a three-inch shell could cripple the system at one vulnerable point. Irving spoke also of a fire control map that was highly secret, and of a Road Trail and Landing map that was highly secret, both of which he could get. Both Irving and Morris commented on the amazing laxity with which secret files were guarded (R. 129,130). Frisen then suggested that he could cable to his friend in Hongkong and ask him if he could negotiate with someone in the Orient for the sale of the defense plans of Oahu. Irving and Morris agreed that it was a good idea (R. 130).

7. On Saturday, October 22d, Frisen sent a note to Irving suggesting that Irving and Morris meet him at the Y.M.C.A. and to bring anything they could (R. 136). In the meantime a dictaphone had been installed in Frisen's room and arrangements made by G-2 to listen in from an adjoining room (R. 52). The transcript of the notes made by the stenographer who listened in is in evidence as prosecution's

Exhibit No. 44a. At this meeting Frisen produced a purported code radiogram from his fictitious friend Bill, in which Bill stated in effect that he might be able to get more than Frisen's figure ($5000) if the articles were satisfactory. Both Irving and Morris seemed pleased (R. 139). Irving and Morris each then produced certain maps, documents, and air photographs with legends including camouflaged gun positions (R. 140); also a code grid map of Oahu (R. 142), all of which was produced at the trial. The accused then spoke of renting an apartment downtown and needing some money for that purpose. Frisen then gave Morris $10 and Irving $20 (R. 154). Irving remarked that his contribution to the cause (Road and Trail map) was perhaps the most valuable single item concerning defense plans; that this map, together with another map of Oahu which he planned to prepare, showing the gun positions of the defenses together with their fields of fire and ranges, and other pertinent defense information, would alone be worth in excess of the $5000 they had initially requested. He stated that that map showed how an enemy attacking Oahu would land on the beach, what roads, what trails, and where there were no trails, what possible routes could be utilized by an invading force, and that all the enemy would need to know in addition to that would be where they would meet our gun fire and they would have the key to our defenses (R. 144). During this meeting Irving walked to the door leading to the corridor, opened it, peered out, and as he turned and closed the door said something to the effect that "We have sold our souls, no fooling, and we can't be too cautious", and Morris grinned at Frisen, drew his finger across his throat and said, "This is what we would get if we were caught" (R. 153). Going down in the elevator that afternoon, Irving said to Frisen, "We have been getting ready and waiting for a chance like this for a long time and you have given us the chance we have been looking for to get something out of our opportunities" (R. 157).

8. On Sunday, October 23d, Frisen met Irving and Morris by arrangement and helped to move certain of their effects to the new apartment which the two accused had rented (R. 161). After getting into the apartment, Morris brought out a sheaf of photographs and pointed out that they were photographs of landing fields throughout the territory, emergency, auxiliary and regular, both private and military, and showed them to Frisen (R. 162), and there was a general discussion of their future plans (R. 165-168).

9. On Monday, October 24th, Frisen helped Irving move a drawing board, which Irving had obtained on memorandum receipt, to the apartment (R. 167,169). The two found Morris at the apartment who produced a bundle containing a roll of tracing cloth, a roll of tracing paper and other items, and said he could get all he wanted from the Army (R. 170). Irving brought out a small protractor marked "DEPT ENGR" and said it was now his (R. 171). The three had supper in the apartment and there was much discussion of how to assemble the military matter to the best advantage (R. 173-183). Irving thought they would make more money by spreading the material out on several maps. Frisen disagreed with him and finally Irving consented to concentrate his data on one map (R. 176). Morris furnished a set, brown and white, of sections of a map of Oahu and Irving said it was the latest topographical, sectionalized map of the island. It was a United States Coast and Geodetic Survey map (R. 235). Frisen was told by the accused that they had acquired this map by a piece of strategy in that Morris had requisitioned through official channels a set of this advance map for Luke Field use and that Irving assisted in preparing the shipment, and that he made a special container and put in an extra set which was sent through channels and so came to Morris. Morris stated that upon its receipt he had taken this extra set, had rolled it up and placed it in some part of the office in which he worked where it would be unlikely to be discovered; that if it had been found he would say that it had been misplaced, but if it was not found he planned to keep it for possible future personal use (R. 236).

10. On Tuesday, October 25th, Frisen went to the apartment in the afternoon for a few moments, then on the pretext of having work to do left the men there and went to a meeting with Major Muir and others to arrange details for the arrest (R. 251). About 7:00 o'clock in the evening, Frisen again came to the apartment telling the men that he had good news, that he "smelled" money, as he had received instructions to meet the foreign agent, who was to do the negotiating and handle the pay details, at the Waikiki Tavern at 9:00 (R. 252); and that he would bring the agent to the apartment. The two men at first thought it inadvisable for them to meet the foreign agent, so that their identity might remain undisclosed (R. 252), but it was finally agreed that Frisen could bring the agent there (R. 253). Shortly after 9:00 Frisen returned to the apartment with the supposed foreign agent who was in fact Captain Wheeler. After some preliminary negotiating, the two men

produced their material and the supposed foreign agent selected certain items for which he laid down $100 (R. 255-261). At a prearranged signal given by Frisen, Major Muir and others demanded entrance, were admitted, and Irving and Morris were placed in arrest.

11. Among the items furnished Frisen by Irving and Morris in addition to those heretofore mentioned were a vertical mosaic purporting to be the Waimanalo Landing Fields A & B, marked "secret" (R. 206); a contour of Ford Island on which were indicated machine gun positions for the defense of the island (R. 207); vertical photographs of Ford Island showing the extent to which the island was to be improved (R. 211); four sheets containing a list of the coordinates of certain fixed anti-aircraft gun positions on the Island of Oahu (R. 215); a tracing cloth drawing showing the Oahu Railway and Land Company's trackage showing the locations, fields of fire, and maximum ranges of a large amount of armament on the Island of Oahu (R. 216); locations of camp sites and data (R. 226); a black and white reproduction of the Island of Oahu bearing a heading "Airports - Regular, Auxiliary, and Emergency Landing Fields, Oahu" (R. 237); confidential document headed "Coast Defenses of Oahu" containing a list of calibres of guns, ranges and location (R. 240); confidential sheet headed brief summary of Air Corps Unit Defense Plan as revised September 1932; ammonia print titled "Fort DeRussy, Battery Randolph Electric and Water System" (R. 246); and others turned over between October 16, 1932, and October 26, 1932, inclusive. These exhibits were introduced in evidence and later withdrawn. Many of the exhibits were either secret or confidential, were accurate, and had military value; while others were not so accurate, were not confidential, and had no military value (R. 395-406, 410-416,437-442).

12. Each of the accused made a statement to Major Muir before the trial, which statements were introduced in evidence and marked Exhibits 69 and 70. Each accused also took the stand at the trial. In many details their testimony is corroborative of that of the prosecution's witnesses. Concerning their meeting with Frisen on October 19th, Irving testified:

> "Mr. Frisen talked that evening about an hour and a half, a monologue. I can't remember everything that was

said but I gained the impression that he was romancing a great deal. *** I romanced also and I remember that Morris did too. I said many things I would hate to have had to live up to" (R. 513).

Irving also stated at the trial:

"I have previously stated that my object was to trap Frisen. Here on the stand I can't truly say it was to trap Mr. Frisen - it was to find out all I could about him and his associates and to do what seemed right with that information (R. 550). *** On the twenty-second of October I told Morris that I knew what I was doing *** my main reason for not telling him is that Morris is impetuous and he would be liable to give the whole thing away if he knew exactly what was happening" (R. 556).

Morris testified that when on October 22d he received the telephone call from Irving saying that Frisen had received a reply from his friend Bill in Shanghai,

"I remarked *** 'What the hell' and then I said something that I did not like such a proposition. Irving overrode my objection rather strenuously, said he knew what he was doing, ***. Well, I have always been used to making quick decisions and knowing Irving as well as I did I instantly decided to back his play, whatever it was. I figured that there wasn't the remotest possibility that Irving was serious about actually selling government military secrets just for whatever cash he could get out of it *** and I figured that anything he was willing to back up I ought to be willing to. I had enough confidence in the man's character and in my own ability to handle any situation that might arise afterwards, to take a chance on stepping into this game" (R. 594,595).

13. A brief on behalf of the two accused was filed by civilian counsel on August 10th. This brief is mainly directed to the issue of entrapment and has been given careful consideration by the Board of Review.

14. It was argued at the trial that the accused never had committed similar offenses, and would not except for the artful solicitations and suggestions of Frisen have committed the acts for which they were tried. Able and extensive argument was made by both sides on this question respecting both the law on entrapment and the facts of this case. The court-martial was well advised and presumably gave this question serious consideration. The law member was an experienced officer of The Judge Advocate General's Department. By its findings of guilty the court, in effect, has found no entrapment. The appointing authority likewise had the benefit of a careful review of the evidence and the law involved, and with his approval of the findings of guilty the question of whether there was or was not entrapment in this case is closed in so far as the powers of the Board of Review are concerned. (Note to AW 50½, M.C.M., 1928, p. 216; CM 152797.) The latest and most authoritative case on the law of entrapment holds that this issue is one of fact. Sorrells v. United States, 287 U.S. 435. In the face of the testimony of Frisen and the other prosecution witnesses; of the prior activities of the accused testified to by Marek and others; of the fact that the accused so readily and in so short a period of time entered upon the work of acquiring and assembling confidential data of military value; and of the admissions of the accused, the Board of Review is constrained to hold as a matter of law that there is in the record substantial evidence to support the findings of guilty.

15. Civilian counsel in their brief cited a holding by the Board of Review, concurred in by The Judge Advocate General (CM 187319; Dig. Ops. JAG, 1912-1930, par. 1248) that the conviction by a court-martial of a soldier, not engaged in criminal practices, who is incited and lured into the commission of a criminal offense by a military police officer and his assistants, or other agents of the government, is contrary to public policy and that such inducement is fatal to the record. Upon examining that record, it is found that accused in that case had wholly abandoned the project until he was upbraided and urged to commit the acts for which he was later tried; a state of facts easily distinguishable from the present case. At the time of that decision (1929) there was a difference of opinion in the various Federal courts as to whether the issue of entrapment was one of law or fact. Indeed, that difference of opinion was manifest in the Sorrells

case itself (see dissenting opinion of Mr. Justice Roberts) decided in 1932.

It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. Newman v. United States, 299 Fed. 128, 131. If this is true in the ordinary case, how much more ought it to be true in ferreting out those who are willing to sell valuable state and military secrets, the possession of which by a foreign government might, in case of war, threaten the very existence of this country.

16. Action on the record of trial in this case has been delayed at the request of civilian counsel in order to enable them to study the record and to prepare their brief, which was finally submitted on August 10th.

17. Both of the accused were serving in their first enlistments. Irving was 23 years old and Morris 22 years old at the time of the commission of the offenses.

18. 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. Confinement in a penitentiary is authorized by the 42d Article of War for the offense of larceny involved in Specification 3, 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 287 of the Federal Penal Code; and for the offense of obtaining information with respect to the national defense with reason to believe it was to be used to the injury of the United States involved in Specification 4, Charge II, recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by section 1, Title 1, Act of Congress, approved June 15, 1917 (40 Stat. 217, 218); and for the offense of conspiring to deliver secret data relating to the national defense to an agent of a foreign government with intent that it might be used to the injury of the United States, involved in Specification 5, Charge II, recognized as

an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by section 4, Title 1, Act of Congress, approved June 15, 1917 (40 Stat. 219), and by section 37 of the Federal Penal Code.

George S. Hale, Judge Advocate.

H. R. Bitzing, Judge Advocate.

Dissent by [illegible], Judge Advocate.
(Corp. filing)

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

APR 26 1933

CM 200207

| | | |
|---|---|---|
| UNITED STATES | ) | FIRST DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Plattsburg Barracks, New York, March 7 and 8, 1933. Dismissal. |
| | ) | |
| Major OTTMANN W. FREEBORN (0-5180), 26th Infantry. | ) | |

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates
ORIGINAL EXAMINATION by CHEEVER, 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 Charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: (False official statement - finding of not guilty).

Specification 2: (False official statement - finding of not guilty).

Specification 3: (Uttering worthless check - finding of not guilty).

Specification 4: In that Major O. W. Freeborn, 26th Infantry, did, at Plattsburg Barracks, N. Y., on or about January 21, 1933, with intent to deceive Captain R. B. Watkins, Adjutant 26th Infantry, officially report to said Captain Watkins that, he had telegraphed General Motors Acceptance Corporation, Atlanta, Ga., one hundred and sixty dollars ($160.00) on January 12, 1933, which report was known by the said Major Freeborn to be untrue in that the money was actually telegraphed on January 21, 1933.

Specification 5: In that Major O. W. Freeborn, 26th Infantry, did, at Plattsburg Barracks, N. Y., on or about January 21, 1933, with intent to deceive Lieut. Colonel H. H. Pritchett, Executive Officer, 26th Infantry, officially report to said Lieut. Colonel Pritchett that he had telegraphed General Motors Acceptance Corporation, Atlanta, Ga., one hundred and sixty dollars ($160.00) on January 12, 1933, which report was known by the said Major Freeborn to be untrue in that the money was actually telegraphed on January 21, 1933.

Specification 6: In that Major O. W. Freeborn, 26th Infantry, did, at Plattsburg Barracks, N. Y., on or about January 21, 1933, with intent to deceive Lieut. Colonel H. H. Pritchett, Executive Officer, 26th Infantry, officially present as true and genuine a purported receipt from the Western Union Telegraph Company in words and figures as follows:

"RECEIPT FOR TELEGRAPHIC MONEY ORDER Form 73
PLATTSBURG, N.Y. 1/12/1933
RECEIVED FROM O. W. FREEBORN
One Hundred Sixty and no/100 ..... Dollars,
to be paid to General Mtrs Accep Corp Atlanta
Ga subject to the terms and conditions of the
Money Order Service.
THE WESTERN UNION TELEGRAPH COMPANY
By: G.F.W.
Money Order Agent
Charges
Paid $ Chgd."

which purported receipt was known by the said Major Freeborn to be false in that the genuine receipt was actually issued and dated January 21, 1933, by the Western Union Telegraph Company and had been deliberately altered by the said Major Freeborn by changing the date thereof in such manner as to make it appear that said receipt was issued and dated January 12, 1933.

Specification 7: (False official statement - finding of not guilty).

He pleaded not guilty to the Charge and all specifications thereunder, and was found guilty of the Charge and of Specifications 4, 5 and 6, and not guilty of Specifications 1, 2, 3 and 7. 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. Such evidence as relates only to Specifications 1, 2, 3 and 7, of which the accused was found not guilty, will not be considered in this opinion.

4. The circumstances preceding the commission of the three offenses of which the accused was found guilty, all of which are alleged to have occurred on January 21, 1933, may be briefly outlined as they are disclosed in the evidence. Early in November, 1932, Colonel Harry E. Knight, commanding the 26th Infantry and the post of Plattsburg Barracks, called accused into his office and told him that he had received communications from various people indicating that accused was indebted to them and that he "apparently was pretty well involved financially". He told accused that he would be very glad to help him and directed that he submit a letter listing all of his debts, and include a plan to liquidate them (R. 26-27,29). Under date of November 9, 1932, accused submitted a list of his obligations aggregating $774.52, upon which he proposed to make monthly payments of $249.25 from his monthly pay of $397.00. He also mentioned in addition two personal loans amounting to $400, due May 1, 1933, which he expected to pay from outside income on or before April 1, 1933. Included among his obligations was one of $447 upon a contract with the General Motors Company of Atlanta, Georgia, upon which he proposed to pay $80 per month in accordance with the contract (R. 12; Ex. A). The General Motors Acceptance Corporation, Atlanta, Georgia, in a letter to the Commanding General, Second Corps Area, dated December 5, 1932, reported that accused was then in arrears to the amount of $160, $80 of which had become due on November 1st and $80 on December 1st,

and asked assistance in seeing that the account was brought up to date (R. 13; Ex. B). This letter was referred to accused through military channels and he was directed to explain his failure to carry out the payments outlined in his letter of November 9th to the commanding officer. Accused returned the communication by indorsement on December 12, 1932, stating that he had mailed a check for $80 to the General Motors Acceptance Corporation on or about November 2, 1932, which was still outstanding, and that he had stopped payment on it. He offered to issue a new check. The commanding officer being satisfied that this check had been lost, required accused to draw a new check to replace it and forwarded that check through channels (Ex. B). Thereafter a letter (Ex. I) from the creditor corporation addressed to S. G. Talbot, Lieutenant Colonel, A.G.D., Governors Island, New York, dated January 17, 1933, was referred to accused by 2d indorsement (Ex. C), Headquarters Plattsburg Barracks, January 20, 1933, signed by Captain R. B. Watkins, Adjutant. This letter acknowledged the receipt of the check for $80 in place of the one claimed by accused to have been forwarded in November, and reported that the second check had been returned by the bank unpaid on January 4th. The letter further stated that accused was in arrears for the November, December and January payments of $80 each, and asked assistance in seeing that accused mailed at least $160 in certified funds immediately. The indorsement to accused directed that he return the paper by 11:30 a.m., January 21, 1933, and make full explanation of the matter, stating what action he proposed to take to satisfy the overdue obligation (R. 60,63,14-15,24-25; Exs. C,I).

5. Captain R. B. Watkins, a witness for the prosecution, testified that he was Adjutant of the 26th Infantry and that during the morning of January 21, 1933, accused came into his office with some papers in his hand and said: "There is something funny about this, as I wired those people money on January 12th" (R. 18). Witness knew that accused was referring to the General Motors Acceptance Corporation and accused then told him that he had telegraphed them $160 on January 12th (R. 19-20,24). Witness expressed the opinion

that accused was talking to him "unofficially". He had sent the indorsement (Ex. C) to accused that morning and it was the only communication he had placed in accused's box (R. 21). After making the above statement, accused was told to "walk right in and see the Executive Officer" (R. 18). Accused entered the office of the executive officer, Lieutenant Colonel Pritchett, and, a few minutes later, witness went into the office and listened to the conversation in relation to the "General Motors Acceptance Corporation receipt" accused had presented to Colonel Pritchett. Witness then left the office and called the Western Union telegraph office, after which he reported to Colonel Pritchett and was directed to recall accused (R. 22).

Lieutenant Colonel H. H. Pritchett, Executive Officer, 26th Infantry, Plattsburg Barracks, New York, testified that accused came into his office between 11:00 and 11:15 a.m. on January 21, 1933, in connection with official correspondence referred to him, which required return by indorsement not later than 11:30 a.m. on that date. Accused had the letter from the General Motors Acceptance Corporation, dated January 17, 1933 (Ex. I), and said that he did not understand why they were complaining so much about having the check returned marked "Insufficient Funds", since on January 12th, five days before the letter was written, he had wired this corporation $160 (R. 58-60,63-64). In substantiation of what he said, accused presented a Western Union Telegraph Company receipt for the money he had wired, which receipt was identified by witness and received in evidence as Prosecution's Exhibit F. This receipt was dated "1/12/33" when thus presented, and witness was positive it was in the same condition when he examined it in court. There was no question in the mind of witness but that accused was presenting the receipt to him in his official capacity as executive officer of the 26th Infantry (R. 61-63). He returned the receipt to accused and told him to state in his indorsement what he had told witness about the $160 and to attach the receipt, or a copy. Accused then left the office (R. 68). Upon the report by the Adjutant of a telephone conversation (R. 64), witness directed the Adjutant to call accused back to his office. While accused stood before him, witness, with the receipt before him, called the

Western Union (R. 68) and then told accused that it would be necessary for him to keep the receipt for further investigation (R. 64-65). Accused made no objection to leaving the receipt (R. 67). He did not warn accused because the latter had come in on "his own initiative", and they were engaged in an ordinary conversation, "a routine procedure on a file of papers" (R. 66-67).

Grace F. Wells, Western Union telegraph operator, Plattsburg, New York, testified that accused filed a money order for $160 at the Western Union office in Plattsburg at 10:28 a.m. on January 21, 1933. Witness produced a photostatic copy of Western Union money order, dated Plattsburg, N.Y., 1/21/33, payable to General Motors Corporation, 494 Spring St., N.W., Atlanta, Ga., on which appeared the name of O. W. Freeborn as sender. She also produced a photostatic copy of Western Union money order, issued at Atlanta, Ga., No. D 855164, payable to the order of General Motors Acceptance Corporation, dated January 21, 1933, in the amount of $160, and signed by the Treasurer of the Western Union Telegraph Company, Southern Division. The photostatic copies were received in evidence as a part of Exhibit F, but were returned to the company and copies are attached to the record. (It will be noted that while the description of the photostatic copies of these orders states that they are dated "1/21/33" and "January 21st, 1933", respectively, the certified true copy of the former attached to the record is erroneously dated "1/2 1933".) Witness wrote a receipt for the money and gave it to accused who seemed to be in a hurry. She identified "Prosecution's Exhibit F" as the receipt, but stated that the "date looks as though it has been changed, or written over". She made out the receipt on the date the money was given her, her initials were at the bottom of the receipt, and she was "almost positive" that the date, the "21st", was on the receipt when she issued it (R. 70-71). Upon reference to her files, she said that she had no transaction for $160 on January 12, 1933. The figure "12" on the receipt was not in her handwriting and she had not put it there (R. 72), but the rest of the receipt was in her handwriting (R. 73).

Colonel Harry E. Knight, 26th Infantry, Plattsburg, New York, testified that on or about January 23, 1933, he talked with accused concerning delinquencies which had come to his attention. He warned accused in great detail as to his rights under the 24th Article of War, read the Article to him, told him he was being investigated, and, before proceeding to question accused, asked him if he had any questions to ask. Accused said that he understood his rights. Colonel Knight at that time had the alleged receipt from the Western Union Telegraph Company, Exhibit F, and relative to this accused then stated that he had sent the money on January 21st (R. 27-28).

6. At the close of the case for the prosecution the defense moved for an acquittal "on some or all of the Specifications", under the provisions of paragraph 71 d of the Manual for Courts-Martial (R. 92). The motion was argued (R. 92-99) and denied by the court (R. 99).

7. Accused did not testify or make any statement to the court.

For the defense, Major Nelson A. Myll, Medical Department, Plattsburg Barracks, New York, testified that upon the annual physical examination of accused on January 18th (R. 103) pus was found in his urine, indicating the possibility of an infection of the genital urinary tract of both the bladder and the kidney, or above the bladder and the kidney (R. 104-105). Accused had made no complaint at that time (R. 106) and, as far as witness could tell, he did not know there was anything the matter with him before the 18th. He was then told that he had a condition which would require further investigation and treatment, but he was not informed whether it was serious or minor. From that date accused undoubtedly began to worry about what his condition might be, which would affect him mentally (R. 107). Witness was sure the condition existed prior to two weeks before (R. 105,108). Accused was admitted to the hospital on January 25th for further observation and treatment. At the time of the trial, March 7, 1933, accused was not on sick report, but was still under observation and had improved to the extent that the condition was expected to entirely clear up (R. 105).

Captain R. B. Watkins, 26th Infantry, was recalled as a witness for the prosecution and testified that accused was placed in arrest on January 24, 1933, the day before he went to the hospital (R. 111).

8. The foregoing evidence clearly establishes that the accused made to Captain Watkins, the Adjutant, and to Lieutenant Colonel Pritchett, the executive officer, the false statement that he had telegraphed $160 to the General Motors Acceptance Corporation on January 12, 1933, as alleged in Specifications 4 and 5, respectively, whereas it is clearly proven that he had telegraphed $160 to that company less than an hour before he made the statements, and that he had sent no money on January 12th. Although Captain Watkins testified that the report to him by the accused was unofficial, the Board of Review is of opinion that a report made to an adjutant with reference to a communication which the latter had just officially referred to the accused with a request for an explanation, must, under the circumstances here shown, be regarded as an official report to him in his capacity as adjutant.

The receipt which the accused received from the Western Union Telegraph Company at 10:28 a.m. on January 21, 1933 (written 1/21 1933) was altered so that when he presented it to Colonel Pritchett between 11:00 and 11:15 a.m., it read 1/12/1933, the alteration being accomplished by inserting the figure 1 in front of the 2 and by converting the 1 following the 2 into an oblique line separating the numerals representing the day of the month and the year. In view of the short time, about forty minutes, which elapsed from his receipt of the paper at the Western Union office at Plattsburg, at which time he seemed to be in a hurry, until he presented it to Colonel Pritchett at Plattsburg Barracks, and the fact that the obvious alteration conformed to his statement made at the time he presented it that he had telegraphed the money on January 12th, together with the other circumstances, the conclusion is warranted that he made the alteration himself and presented it with intent to deceive Colonel Pritchett.

To knowingly make a false official statement has always been regarded as conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. M.C.M., 1928, p. 186; Winthrop's Military Law and Precedents, Reprint 1920, p. 713. The deliberate alteration

of a writing and presentation of it to a superior officer with intent to deceive him relative to an official matter is similar to, and at least as serious as, knowingly making a false official statement.

9. Objection was made by the defense to the introduction of the altered receipt on the ground that it was the personal property of accused and "was improperly obtained by the Government". The facts are that it was voluntarily presented by the accused to Colonel Pritchett to substantiate his statement that he had wired $160 on January 12th; it was returned to accused by Colonel Pritchett who told him to attach it or a copy to his indorsement returning the complaint which had been referred to him; that immediately thereafter, on receiving from the Adjutant a report of his conversation by telephone with the Western Union office, Colonel Pritchett called accused back, asked to see the receipt, which was given him, and, after telephoning to the Western Union office in the presence of accused, said that he would have to retain the receipt, to which accused made no objection. The Board of Review is of opinion that the two conversations between accused and Colonel Pritchett must be considered as one transaction, and that accused voluntarily produced and turned over the receipt to Colonel Pritchett, who, in view of developments, was without doubt authorized to retain it. Although numerous other objections were made by the defense, they were for the most part of a trivial nature and do not warrant discussion. The record of trial presents no other substantial question of law.

10. At the time of trial accused was 47 8/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

> "(Non-Federal: 1 lt. Co. K, 18 Inf. Pa. N.G. 6 Jan. 16 to 20 June 16 and from 6 Jan. 17 to 12 Apr. 17.) --1 lt. Co. K 18 Inf. Pa. N.G. 21 June 16 to 5 Jan. 17 and from 13 Apr. 17; capt. of Inf. U.S.A. 30 July 18; accepted 4 Oct. 18; vacated 14 Sept. 20.--Capt. of Inf. 1 July 20; accepted 14 Sept. 20; maj. 18 Apr. 32."

11. 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 opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation thereof. A sentence of dismissal is mandatory on conviction of violation of the 95th Article of War.

E. M. Ebert, Judge Advocate.
H. St. McDonald, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

CM 200231

| | | |
|---|---|---|
| UNITED STATES | ) | SECOND CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Governors Island, New York, February 28 and March 1, 1933. Dismissal. |
| | ) | |
| First Lieutenant JOSIAH ROSS (O-16562), 16th Infantry. | ) | |

---

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, 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 93d Article of War.

Specification 1: In that First Lieutenant Josiah Ross, 16th Infantry, being at the time custodian of the Motion Picture Fund, Camp Dix, New Jersey, did, at Camp Dix, New Jersey, and Fort Wadsworth, New York, during the period from about August 2, 1932, to about January 1, 1933, the more exact dates being unknown, feloniously embezzle by fraudulently converting to his own use the sum of $351.82, the property of the United States Motion Picture Service, the said sum of money having come into his possession by virtue of his official position as Custodian of the Motion Picture Fund, Camp Dix, New Jersey.

Specification 2: In that First Lieutenant Josiah Ross, 16th Infantry, did, at Fort Wadsworth, New York, on or about November 29, 1932, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to-wit:

New York, Nov. 29, 1932. No. 226
Corn Exchange Bank Trust Company,
Stapleton Branch,
621 Bay Street, Staten Island, N.Y.
Pay to the Order of Josiah Ross..... $300.00
Three hundred..... dollars
Post Athletic Fund Paul R. Knight, Post Athletic Fund
Ft. Wadsworth,N.Y. Captain, 16th Inf. Post Athletic Officer,
Ft. Wadsworth, N. Y.,

which said check was a writing of a public nature, which might operate to the prejudice of another.

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

Specification: In that First Lieutenant Josiah Ross, 16th Infantry, being at the time Agent Finance Officer, Camp Dix, New Jersey, did, at Camp Dix, New Jersey, on or about September 15, 1932, feloniously embezzle by fraudulently converting to his own use the sum of $110.85, the property of the United States furnished and intended for the military service thereof, entrusted to him the said Lieutenant Ross as such Agent Finance Officer, by his principal Major W. B. Dabney, Finance Officer, Brooklyn, N. Y.

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

Specification: In that First Lieutenant Josiah Ross, 16th Infantry, did, at Governors Island, New York, on or about October 15, 1932, with intent to deceive Colonel Ernest D. Peek, Inspector General's Department, who at that time was engaged in making an official investigation of the accounts of the

said Lieutenant Ross, as Agent Finance Officer, Camp Dix, New Jersey, officially state, under oath, to the said Colonel Peek, that the shortage discovered in the accounts of the said Lieutenant Ross on September 15, 1932, by investigators of the Comptroller General of the United States, was due to a missing voucher, made out to a Reserve Officer, in the amount of approximately $111.00, that the said voucher was discovered between 3 and 4 p.m. September 15, 1932, in his personal file by someone, whom he believed to be Corporal Connell, and that the said voucher had been posted, which statements were false and known by the said Lieutenant Ross to be false in that there was no such missing voucher, and no such voucher was discovered in his personal file by Corporal Connell or any other person, nor was any such voucher posted.

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

Specification: In that First Lieutenant Josiah Ross, 16th Infantry, did, at Columbus, Georgia, on or about December 1, 1932, with intent to defraud, wilfully, unlawfully, and feloniously utter as true and genuine, a certain check in words and figures as follows:

New York, Nov. 29, 1932. No. 226
Corn Exchange Bank Trust Company
Stapleton Branch,
621 Bay Street, Staten Island, N. Y.
Pay to the order of Josiah Ross..... $300.00
Three hundred..... dollars
Post Athletic Fund Paul R. Knight, Post Athletic Fund
Ft. Wadsworth, N.Y. Capt. 16th Inf. Post Athletic Officer,
Ft. Wadsworth, N. Y.,

a writing of a public nature which might operate to the prejudice of another, which said check was, as he, the said Lieutenant Ross, then well knew, falsely made and forged.

He 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 accused was convicted of embezzlement of money from the government and from the Army Motion Picture Service, the forging and uttering of a check drawn on the Post Athletic Fund, and of making a false official statement under oath concerning the embezzlement of government funds. The facts alleged in the specifications and charges are practically undisputed, being established not only by uncontradicted evidence introduced by the prosecution, but also by the accused's confessions and admissions and, in part, by his testimony before the court. The evidence will therefore be stated in narrative form.

4. On June 8, 1932, accused became Agent Finance Officer at Camp Dix, New Jersey, being appointed by Special Orders No. 39, of that headquarters (Ex. A). The records of the Agent Finance Officer and cash in the amount of $567.68 belonging to the United States government were properly transferred to accused by the officer he relieved, First Lieutenant Gaylord Kidwell, Quartermaster Corps (Ex. B; R. 15,16). The duties of the Agent Finance Officer were to receive collections from Quartermaster activities and to make disbursements such as pay rolls and reserve officers' vouchers. The funds were received from his principal, Major W. D. Dabney, Finance Officer at Brooklyn, New York, and were accounted for to him. The disbursements of the office averaged about $75,000 per month (R. 17,18).

On August 2, 1932, accused, in addition to his other duties, was detailed by Special Orders No. 76, Headquarters Camp Dix, New Jersey, in charge of the Camp Theater (Ex. I), and received and receipted for the motion picture funds, coupon books, admission tickets and other accountability of the officer he relieved with the United States Army Motion Picture Service (Ex. J; R. 67). In the performance of his duties, the officer in charge requests and receives a certain number of motion picture coupon books, value

$1.60 each, from The Adjutant General, Washington, D. C., or, as in this case, obtains the books from the officer he relieves, which are then issued to the various organizations and sold to the personnel. A weekly accounting is made to The Adjutant General by showing the books on hand and the number drawn by the various organizations, and by transmitting to The Adjutant General a check on the Motion Picture Fund for the coupon books sold and paid for. Accused receipted to his predecessor for 1590 coupon books, of which 488 were on memorandum receipt to organizations and 12 were represented by a check for $19.20 (R. 69,70; Ex. J).

On September 15, 1932, the accounts of the accused as Agent Finance Officer were audited by Mr. Arnold Bruckner, Investigator, General Accounting Office, Washington, D. C., assisted by two special auditors. This audit showed that there should be on hand cash in the sum of $8729.67, and that there was an actual cash shortage of $110.85. The shortage was made good by accused cashing a check for $100 at the Peoples National Bank and Trust Company, Pemberton, New Jersey, drawn on his personal account at the First National Bank of Columbus, Georgia, and after Bruckner verified the amount ($110.85), accused placed the money in the safe. During the audit one of the enlisted men who worked in the office suggested that a voucher might have been paid and then mislaid resulting in the shortage. The office was searched but no voucher was found (Ex. C (deposition of Bruckner), Ex. D). On September 19, 1932, the First National Bank of Columbus, Georgia, received two post office money orders for $100 each from accused for deposit to his account, which made his balance sufficient to honor his check for $100 cashed at Pemberton, New Jersey, when it arrived on September 20, 1932. Except for this deposit, his balance at the close of business on September 20th would have been $19.18 (Ex. E). After the investigators had left the office, accused stated to his chief clerk, Sergeant Fields, that on the preceding Saturday he had needed money for a trip to Washington and, as the banks were closed and he could not cash a check, he had taken $100 from the safe to use for the trip, charging the amount to himself as Agent Finance Officer (R. 45-47).

On September 25, 1932, accused was relieved as Agent Finance Officer and turned over the records and accounts to Lieutenant Kidwell, the officer relieving him. The funds were properly accounted for and correct and no irregularities have been found in the account since that date (R. 17).

The shortage of $110.85 which had been found in accused's accounts was reported by the Comptroller General to the War Department and an investigation was ordered. Colonel E. D. Peek, Inspector General's Department, Second Corps Area, Governors Island, New York, conducted the investigation, and on October 15, 1932, after being fully advised as to his rights under the 24th Article of War, accused was sworn and voluntarily stated that there was a shortage of $110, and he had obtained $100 from the bank and made up the balance from cash (R. 52-54). Accused further stated that on the same afternoon, after the audit, he was notified by telephone by Corporal Connell or Sergeant Fields, clerks in the Finance Office, that a voucher to a reserve officer of approximately the amount short had been found. He returned to his office, rechecked the cash, and found he was out only thirty cents at that time, and he took out the $110.85 he had previously put in the safe. The voucher had been found between 3:00 and 4:00 o'clock in accused's personal file. He stated that the voucher was then entered in the cash book and his accounts balanced within some thirty cents (R. 55,56). On October 21, 1932, Colonel Peek again questioned accused and, after cautioning him that he was still under oath, read his former statement to him, asked if it was true, and accused replied "Yes" (R. 57). The cash book from the Agent Finance Office at Camp Dix, where all of the paid vouchers are recorded, was then produced and accused was unable to find the record of the voucher, which he said accounted for his shortage, although he looked at the cash book and admitted that the voucher should be recorded there (R. 58). The personnel in the office, Sergeant Lem N. Fields, Corporal George H. Connell, and Private Morris Yurak, searched for but never found the alleged voucher (R. 26,27,43,45,50). Corporal Connell, the bookkeeper whose duty it was to record in the cash book all disbursements made by the accused (R. 32,33), never made entry of a voucher for $111 made out to a reserve officer between September 15 and September

22, 1932, although if there had been such a voucher paid he would have posted it (R. 36). On November 1, 1932, accused identified before Colonel Peek the check for $100 (Ex. 5 of Ex. E), which he had cashed at Pemberton, New Jersey in order to get the funds to make up the shortage (R. 59).

Accused left Camp Dix, New Jersey, September 26th, and reported to his station at Fort Wadsworth, New York, thus requiring that he make a final settlement to The Adjutant General of his motion picture accountability at Camp Dix. On November 4, 1932, he sent a supplementary weekly report of the Motion Picture Service for the week ending September 24, 1932, to The Adjutant General (Ex. K, Exs. 1-5 of Ex. K). This report was $90 in error (Ex. 2 of Ex. K), and on November 18, 1932, accused forwarded a check for $90, drawn on the Motion Picture Fund in the Peoples National Bank and Trust Company of Pemberton, New Jersey, to correct the error (Exs. 2 and 4 of Ex. K). Another supplementary report, dated November 16, 1932, for the week ending September 24th was forwarded to The Adjutant General with a check for $270.40, drawn on the same fund and bank (Exs. 1 and 4 of Ex. K). These two checks terminated accused's final accounting of the fund with The Adjutant General except for 12 coupon books (Ex. 2 of Ex. K). From November 10 through November 24, 1932, the balance of the Motion Picture Fund in the Peoples National Bank and Trust Company was $8.58. (The sum of these two checks less $8.58, the balance in the bank, equals $351.82, the amount accused is charged with embezzling.) On November 25, 1932, $12.80 and $353.30 were deposited in the Motion Picture Fund, the latter amount being accused's personal check drawn on his account in the First National Bank, Columbus, Georgia. The checks sent by accused to The Adjutant General were paid by the Pemberton bank, the check for $90 on November 26, 1932, and the check for $270.40 on November 30, 1932 (Ex. L). (This was made possible because the account was credited with accused's personal check for $353.30 on the Columbus, Georgia, bank, which that bank on November 29, 1932, protested and returned marked "Insufficient funds" (Ex. M). The Pemberton bank received the protested check on December 3, 1932, and wired the accused regarding it, who, several days later, telephoned the bank that he would take care of the matter immediately. On December 6, 1932, the bank

received a letter from accused (Ex. 4 of Ex. L) containing a second check for $353.30, drawn on accused's personal account at the First National Bank of Columbus, Georgia, which check was sent through by the bank and paid (Ex. L). This check was charged to accused's account at Columbus, Georgia, on December 8, 1932 (Ex. M). The day before the Columbus bank protested accused's first check for $353.30, his bank balance was $86.86. On December 1, 1932, there was deposited to his personal account at Columbus, Georgia, $176.63 and $300, the latter being a check payable to and indorsed for deposit only by accused, drawn on the Corn Exchange Bank and Trust Company, Stapleton, Staten Island, New York, on the account of the Post Athletic Fund, Fort Wadsworth, New York, signed Paul R. Knight, Captain, 16th Infantry, Post Athletic Officer (Ex. M). This check was paid on December 3, 1932, by the bank on which drawn and charged to the Post Athletic Fund. On December 9, 1932, the bank notified Captain Knight by telephone of an overdraft on the Athletic Fund (R. 101,102), and as Captain Knight was en route to the Athletic Office to check his fund, he was stopped by the accused who remarked "I know about it" and that he had done it, referring to the check. Captain Knight then checked his withdrawals with the bank by telephone and his check book had no entry for $300 (R. 81,82,83). Accused gave Captain Knight to understand that he signed Knight's name to the $300 check (R. 84). He had no authority to sign the check (R. 85). Accused stated that he had already deposited a check for $150 at the bank (R. 87), and he then gave Captain Knight another check, dated December 9, 1932, for $150 (R. 90; Ex. O). Both checks were drawn on the accused's personal account at Columbus, Georgia, were deposited in the Athletic Fund (Ex. M; R. 92), and both were returned marked "Insufficient funds" (R. 104,105). Accused has since made good the amount of the forged check for $300 together with the bank charges on the returned checks (R. 93).

On December 22, 1932, accused of his own volition went to his commanding officer, Lieutenant Colonel Torrey B. Maghee, and voluntarily stated, with reference to the government funds in his hands as Agent Finance Officer, that at the time the auditors from

the Comptroller General's office came to Camp Dix to inspect his account he was actually short not only $100 but more than $100, and further said, "I took the money from the till and used it". He also said, "I took money from the motion picture fund and put it in the till so therefore there was only a shortage of $100 left", and "But that is not the worst of it. I forged a check on the Athletic fund for $300 but am making up the money. I want to make a clean breast of this thing. I want to put it in writing" (Ex. V).

On January 18, 1933, accused was again interviewed by Colonel Peek and, after being again warned of his constitutional rights (R. 107), stated that when he terminated and transferred his Agent Finance account on September 25, 1932, the fund was short due to the fact that he had taken cash therefrom in order to purchase the major part of a $200 post office money order which he had sent to his bank in Georgia, and that he took approximately $200 in cash from the motion picture account to make up the shortage (R. 109; Ex. E). In regard to the two checks for $270.40 and $90, drawn on the Motion Picture Fund and sent to The Adjutant General when the fund had a balance of only about $8, accused stated that he sent as a deposit to the bank his own check for $353.30 in order to cover the above checks. This check was returned for insufficient funds; and he then sent another check of the same amount and on the same bank. In order to make this check good, accused stated that he signed the name "Paul R. Knight" on the $300 check, dated November 25, 1932, drawn on the Post Athletic Fund, and sent it to Columbus, Georgia, so there would be sufficient funds there to meet the check of $353.30 he had deposited in the Motion Picture Fund in Pemberton, New Jersey (R. 110,111,120).

5. Accused took the stand in his own behalf, confining his testimony to Specification 1, Charge I, the embezzlement of $351.82, the property of the United States Army Motion Picture Service. He testified that in his capacity as Agent Finance Officer the monthly disbursements were about $100,000, and he had that amount in his safe at one time. In addition to this work, he was notified on the evening of August 1, 1932, that he was to take over the Motion Picture Service the next day (R. 125), and on August 2d he took

over the funds and property which were in proper order. The help he received from the officer he relieved, who was leaving Camp Dix, was negligible and, moreover, this officer took away the cashier trained in this work, leaving a cashier who had insufficient instruction. The doorman who assists the cashier was also taken away. After much difficulty, accused replaced these men but the replacements were not properly trained and neither he nor his assistants had any adequate records as to the sale of the coupon books. The books were issued to organizations of practically every regiment in the division that was at Camp Dix temporarily for training. As a result of the loss of coupon books unaccounted for, accused estimated he had paid about $200 out of his own pocket (R. 125-130). Since the final accounting he has received payment for ten books not recorded and the Motion Picture Fund at the bank still has a balance of around $12 (R. 130,131). Accused stated he enlisted April 23, 1917, in the 74th New York Infantry, which became the 108th Infantry, 27th Division, with which he served during its entire service in France. After the war he attended the University of Michigan for three years, taking the mechanical engineering course (R. 137), and was commissioned on September 7, 1926, after two years enlisted service. He is married and has one child (R. 131,132).

On cross-examination, accused admitted that on September 25, 1932, he took approximately $150 from the Motion Picture Fund and used it to make up a shortage when he transferred his account as Agent Finance Officer (R. 133,134); that when the two checks for $270.40 and $90 were sent to The Adjutant General, he knew the Motion Picture Fund account had a balance of only $8.58 (R. 134, 135); and that when he deposited his personal check for $353.30 in the fund, he knew it was worthless as his personal bank balance was less than $100; and that the check was protested after the Pemberton bank had paid to The Adjutant General the two checks for $270.40 and $90 (R. 135,136).

In reply to questions by the defense, Colonel Peek testified that in his opinion, judging from the meager records which were

kept, accused never knew how many coupon books were out or where the Motion Picture Fund stood (R. 115).

Major Norman Randolph, 16th Infantry, Fort Wadsworth, New York, testified that in August his assistant had received certain change from the accused to be used in making collections, and after the collections they were about $35 over. Accused stated about this time that he was short $50 and thought it was caused by giving out excess change (R. 138,139,142). Witness was accused's battalion commander and rated him excellent in performance of military duties. In 1931 accused received the junior leadership medal for the grade of lieutenant for the battalion, and in 1932 the junior leadership medal for machine gun lieutenants in the regiment (R. 139,140). Accused's company won the competition in the transportation show last year (R. 141).

Captain Paul R. Knight, 16th Infantry, testified that as his assistant post athletic officer, accused had access to large athletic receipts from boxing, and that no discrepancy of over a dollar or so was ever discovered. Accused performed his military duties "exceptionally well" and witness rates him as "superior in most things", and would desire him in his command (R. 144,145).

Captain Samuel L. Metcalfe, 16th Infantry, testified that he had known accused about two years and was at present his company commander. He would rate accused excellent and in a few things superior, and desired him to continue as one of his company officers (R. 146,147).

Captain Sidney H. Young, 16th Infantry, testified he had picked accused as his assistant adjutant during the national matches at Camp Perry in 1931 and his work was superior. Witness would still desire accused under his command (R. 148,149).

Colonel William W. McCammon, Infantry, testified by deposition that he regarded accused as "an unusually efficient young officer" (Ex. W); Major Frederick C. Rogers, Infantry, that he was one of

the best company commanders in his command (Ex. X); and Major Jens A. Doe, Infantry, that he was above average for his rank and length of service (Ex. Y).

6. There is adequate competent evidence in the record to support the findings of guilty of all the offenses alleged in the charges and specifications. Accused has also by admissions, confessions, and testimony acknowledged his guilt of all the offenses charged, but offered in extenuation the fact that he was overburdened with work by the two jobs of Agent Finance Officer and officer in charge of the Motion Picture Service, and that his assistants in the latter position were inexperienced. A brief summary of the evidence under each specification is stated below.

Specification 1, Charge I, alleges embezzlement of $351.82 from the Motion Picture Fund, Camp Dix, New Jersey, of which he was custodian (Exs. I,J; R. 67). In settling his final accountability of the fund he sent to The Adjutant General two checks for $90 and $270.40, drawn on the Motion Picture Fund (Ex. K) when the bank balance of the fund was only $8.58, thus overdrawing $351.82. To cover these checks, he deposited his personal check of $353.30 in the Motion Picture Fund, which was returned because of insufficient funds. He finally obtained sufficient funds by forging and uttering a check for $300 (Exs. L,M). In his testimony before the court accused admitted that he had previously taken approximately $150 from the Motion Picture Fund to make up a shortage in his Agent Finance Fund (R. 134).

Specification 2, Charge I, and the Specification, Charge IV, - forgery and uttering. A check for $300 was drawn November 29, 1932, on the Corn Exchange Bank and Trust Company, Stapleton Branch, New York, signed Post Athletic Fund, Ft. Wadsworth, N.Y., Paul R. Knight, Capt., 16th Inf., Post Athletic Officer (Ex. M). Captain Knight, the custodian of the fund, did not sign the check and did not authorize accused to sign his name to the check (R. 85). Accused confessed to Colonel Peek that he had signed the name "Paul R. Knight" on the check (R. 120); he also admitted the forgery to Colonel Maghee (Ex. V) and to Captain Knight (R. 84). Accused uttered the check by indorsing it and sending it for deposit in his

personal account in the First National Bank of Columbus, Georgia. It was transmitted to the Corn Exchange Bank and paid (R. 101,102; Ex. M). Accused has since made good the $300 (R. 93).

Specification, Charge II, charges embezzlement of $110.85, government funds of which he was custodian as Agent Finance Officer (Exs. A,B; R. 15). The accounts were audited on September 15, 1932, by investigators from the office of the Comptroller General of the United States and a shortage of $110.85 was discovered, which accused made good out of his personal funds (Ex. C). Accused admitted to his commanding officer that at the time of the audit he was short not only $100 but more than $100, and that he had taken the money "from the till" and used it. He also admitted that he had taken money from the Motion Picture Fund and put it in the Agent Finance Fund so there was only a shortage of $100 (Ex. V).

Specification, Charge III - false official statement. Accused appeared before Colonel Peek, who was engaged in making an official investigation of the shortage of $100 in the accounts of the accused as Agent Finance Officer, and stated under oath that the shortage discovered by the investigators of the Comptroller General was due to a missing voucher made out to a reserve officer in the amount of approximately $111, which had been found by Corporal Connell or someone in his office between 3:00 and 4:00 p.m. on September 15, 1932, and the voucher had been posted (R. 52-56). The accused later admitted to Colonel Maghee that he was short over $100 at the time of the investigation and that he had taken the money and used it (Ex. V). Neither Corporal Connell nor any of the office personnel found the voucher after searching for it (R. 26,27,43,44,50) and the bookkeeper in charge of the cash book never entered a voucher of that amount in the cash book (R. 36).

7. The knowingly making a false official statement (Specification, Charge III) is properly chargeable under and constitutes conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. M.C.M., p. 186. The sentence of dismissal is mandatory on conviction of violation of the 95th Article of War and is appropriate for the offenses of embezzlement, forgery and

uttering, of which accused was properly convicted under Articles of War 93, 94 and 96.

8. At the time of trial accused was 34 7/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

> "Pvt., wag. and pvt. 1 cl. Co. F and Sup. Co. 74 Inf. N.Y.N.G., Hq. Co. 108 Inf. 23 Apr. 17 to 31 Mar. 19.-Pvt. 5 Obs. Sq. A.S. 28 July 25 to 6 Sept. 26; 2 lt. A.C. 13 June 26; accepted 7 Sept. 26; trfd. to Inf. 21 Apr. 27; 1 lt. 1 Apr. 32."

9. 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 opinion that the record of trial is legally sufficient to support the findings of guilty of all the charges and specifications and legally sufficient to support the sentence, and warrants confirmation thereof.

E. M. Lewis, Judge Advocate.
G. T. McDonald, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

JUN 7 1933

CM 200248

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | EIGHTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Fort Huachuca, Arizona, March 6 and 7, 1933. Dismissal. |
| | ) | |
| Second Lieutenant LEWIS R. BRIGGS (0-18909), 25th Infantry. | ) | |

---

OPINION of the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates
ORIGINAL EXAMINATION by CHEEVER, Judge Advocate.

---

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

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

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

Specification: In that Second Lieutenant Lewis R. Briggs, 25th Infantry, did, without proper leave, absent himself from his proper station at Camp Stephen D. Little, Nogales, Arizona, from about 8:00 a.m., September 6, 1932, to about 9:30 p.m., September 19, 1932.

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

Specification 1: In that Second Lieutenant Lewis R. Briggs, 25th Infantry, did, at Nogales, Arizona, on or about September 5, 1932, with intent to defraud, wrongfully and unlawfully make and utter

to the Owl Drug Store, Nogales, Arizona, a certain check, in words and figures as follows, to wit:

No_____

THE FIRST NATIONAL BANK
of Nogales, Arizona

Nogales, Arizona, Sept. 6, 1932
PAY TO THE ORDER OF cash $25.00
Twenty five.....Dollars

Lewis R. Briggs

and by the means thereof, did fraudulently obtain from the Owl Drug Store, twenty five dollars, legal money of the United States, he the said Second Lieutenant Lewis R. Briggs, then well knowing that he did not have, and not intending that he should have sufficient funds in the First National Bank of Nogales, Arizona, for the payment of said check.

| | DATE (on or about) | ON | AMOUNT | UTTERED TO |
|---|---|---|---|---|
| Spec. 2: | Sept. 5, 1932 | The First National Bank of Nogales, Arizona | $10.00 | John M. Hughes, Nogales, Sonora, Mexico. |
| 3: | do | do | 25.00 | C. M. Martin, Nogales, Sonora, Mexico. |
| 4: | do | do | 25.00 | do |
| 5: | do | do | 50.00 | do |
| 6: | do | do | 25.00 | do |
| 7: | do | do | 25.00 | do |
| 8: | (Disapproved by Reviewing Authority) | | | |
| 9: | | do | | |

| | DATE (on or about) | ON | AMOUNT | UTTERED TO |
|---|---|---|---|---|
| Spec. 10: | Sept. 5, 1932 | The First National Bank of Nogales, Arizona | $50.00 | C. M. Martin, Nogales, Sonora, Mexico. |
| 11: | (Disapproved by Reviewing Authority) | | | |
| 12: | Sept. 10, 1932 | do | 25.00 | Army & Navy YMCA, San Diego, Calif. |
| 13: | Sept. 12, 1932 | do | 30.00 | The Post Exchange, Fort MacArthur, Calif. |
| 14: | Sept. 14, 1932 | do | 40.00 | The Post Exchange, Presidio of San Francisco, Calif. |

in each instance well knowing that he did not have, and not intending that he should have sufficient funds in the First National Bank of Nogales, Arizona, for the payment of said check.

He first entered a special plea of not guilty of all charges and specifications on the ground that at the time of the alleged offenses he was suffering from some mental disturbance or derangement to the extent that he was not responsible for any of the acts alleged. Evidence for the prosecution and for the defense was heard upon this issue, and the plea was overruled by the law member in properly disposing of it as an interlocutory question. There being no objection to the ruling of the law member, the court held that the accused was, and should be, held responsible for the actions set forth in the charges before it. Thereupon the accused pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 8, 9 and 11 of Charge II, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. Accused was graduated from the United States Military Academy on June 10, 1932. Thereafter until September 5, 1932, the date of the commission of the first of the alleged offenses, he had had one week of temporary duty at Fort Bragg, North Carolina, and but one month and five days duty at Camp Stephen D. Little, Arizona. The remainder of the interval was spent on graduation leave for twenty days, legislative furlough and travel.

4. The only defense presented was that introduced in support of the special plea of not guilty because of mental disturbance or derangement, and was to the effect that during the particular period from September 5 to 17, 1932, during which the offenses are alleged to have been committed, the accused was in a mental state known as a "fugue" and that he was therefore not responsible for the acts he is alleged then to have committed (R. 11). To meet this plea the prosecution used one expert witness, the report of a board of medical officers which examined accused prior to the trial, and the depositions of two witnesses (R. 12-24,60-66; Exs. A,B,C). The defense presented two expert witnesses in support of the plea (R. 25-48,48-60).

Major Edward J. Strickler, Medical Corps, was called by the prosecution as its first witness (R. 12-24), and was also called in rebuttal (R. 60-64). He testified that he graduated in medicine in 1907, is a qualified psychiatrist, having specialized in psychiatry for twenty-four years, including six years in the hospital service for the insane of the States of New York and Illinois, has done research work at three state psychiatrical institutions and served as psychiatrist in all of the general hospitals of the Army in the United States and Hawaii. He is now in charge of the psychiatric work at Beaumont General Hospital, El Paso, Texas (R. 13). Witness was the psychiatrist member and recorder of the board of medical officers which examined accused, who was under observation for twenty-one days. He identified a copy of the report which was received in evidence and is attached to the record of trial as Exhibit A. The material part of the report, signed by the three members of the board and approved by the commanding officer of the

hospital, follows:

> "The board took under consideration a copy of the charges, the history of the case, including this officer's previous hospitalization from September 27th to October 7th, 1932, and after going over the circumstances with Lieutenant Briggs, arrived at the following conclusions:
>
> (1) That this officer presents no evidence of mental disease or derangement.
>
> (2) That this officer at the time of the commission of the alleged offenses was so far free from mental defect, mental disease, or mental derangement as to be able, concerning the particular acts charged, to distinguish right from wrong, and to adhere to the right." (Ex. A.)

Witness interviewed accused twice, spending less than two hours with him, but considered the examination entirely sufficient to form a conclusion. He stated it was not a question of hours or minutes but of continuing the examination until a conclusion is reached (R. 19-22). Accused told him that he (Lieutenant Briggs) remembered leaving his post and taking the road towards Tucson or Phoenix and that somewhere en route he had a collision in which his car was damaged; that he left the car in a garage in Phoenix and took an aeroplane for the Coast; that he did not remember having been in Tia Juana or other points on the Pacific Coast but that he regained control of himself in the Bellevue Hotel in San Francisco. Witness took into consideration that whenever accused had run out of funds on his trips he went to some Army institution, identified himself, and succeeded in getting his personal check cashed, and that he had put up at the Bellevue Hotel which caters to the Army trade (R. 15). He saw accused practically every day although he did not talk with him every day, and the ward surgeon of accused's ward, a member of the board, also observed accused before he appeared before the board. The members of the board discussed the situation with accused who believed at that time that, in view of the fact that the bad checks had been paid, he was to be tried only for absence without leave. Witness and the ward surgeon

made progress notes on accused's chart and communicated the result of these observations to the board as a whole. The opinion of the board that accused was not in a fugue was unanimous (R. 19-24). Witness does not regard hypnosis as of much value in diagnosing an alleged case of amnesia (R. 62). Accused's acts were an effort to escape from what he had come to consider an unbearable situation which was "partly due to his academic days, partly due to difficulty he had at his home, *** and *** being assigned to duty in a remote station, away from the things he considered essential to his welfare. *** he was suddenly removed from the restraint of the discipline of the Military Academy and found himself on his own here, and it just got away with him; he didn't have the will power to curb it" (R. 64).

Dr. Oleander Simley, Tucson, Arizona, a witness for the defense, testified that he holds the degrees of Bachelor of Arts, Master of Arts, and Doctor of Philosophy. He has been teaching psychology since 1921, and has qualified as an expert before the courts of Arizona. He is not a doctor of medicine nor has he had any experience on the staff of institutions for the care of mentally unbalanced persons. Psychology is concerned with the theory, discovery and recognition of mental diseases, and not with the treatment of them as in psychiatry. Witness has had no experience in treating mental cases but has had considerable experience in diagnosing and observing such cases (R. 26-31). He examined accused on three different occasions, spending from one and one-half to three hours with him on each occasion. Accused is "emotionally unstable with a tendency towards dis-association. This is evidenced by the fugue which he had, followed by an amnesia for the period" (R. 32). The witness defined a "fugue" -

> "The word means, flight. It is used in abnormal psychology to indicate a type of behavior which might be described as follows: it is similar to a somnambulism, that is, it has common features, but the difference is that the man in a fugue leaves his residence and goes away, and this may last for a period of several months, perhaps hours, weeks or months, and even years, and during this time he assumes, in some instances, a different name, and generally assumes a

> different set of habits and attitudes and ordinarily, when he 'comes to' it is more or less sudden and mysterious, he generally has a more or less complete amnesia and loss of memory for the events during his absence. A person in a fugue may come to miles away from his home and wonders how he got there and not know anything about it. He has forgotten everything that happened in the meantime and remembers only some of the things that happened previous to his departure." (R. 29).

Witness classified accused as "an unstable individual *** a type *** in whom the soil was just properly prepared for such an incident" (R. 33). One reason for this was the "history factor" as obtained from accused - his father suffered a nervous breakdown of considerable duration, his twin sister was "highly nervous", an uncle suffered from some nervous disorder. Accused himself might be regarded as a "spoiled child *** too much of a pet in the family". He had never learned to discipline his emotions. The high ideals that were instilled into him at the Military Academy came into conflict with his impulsive nature. He has had a number of "sex episodes" which are probably only indications of his instability. He had a girl whom he wished to marry but his parents objected. "When a man's love for a girl and for his parents come into conflict, something has got to happen." Witness thinks this conflict was one of the important sources of the trouble. Then there was his life at Nogales to which he had not been able to make a satisfactory adjustment (R. 34). A normal individual would overcome these conflicts, but in an unstable person they may produce a crisis - "a tremendous uneasiness *** to go some place, anywhere, to get away" (R. 35-36). A fugue is an unconscious escape mechanism employed as a means of getting away from an intolerable situation; it is not employed by the individual consciously, it is not his intention to do anything of the sort, and, as a matter of fact, that is why he develops the amnesia, because it is incompatible with what he wants to do or would do (R. 38). He may exhibit different moral attitudes, or an entirely different personality; or in some cases he may not exhibit either (R. 39,42,43). It would be possible for

a person in a fugue to go into a business institution and cash a check, make a statement that he is getting the money to go home, and still be in the fugue even though he then used the money to go elsewhere (R. 47). Witness saw accused put into a hypnotic trance for about two hours and observed his reactions while in the trance (R. 36,37,48), and was "quite convinced" that it was a genuine case of amnesia (R. 37). There are degrees of fugue (R. 39). It is difficult to know just when the fugue began, but witness believes accused was suffering from a fugue and total amnesia during his absence (R. 41,46).

Dr. J. Edward Caster, Tucson, Arizona, testified that he holds the degrees of Bachelor of Arts, Master and Doctor of Neurology and Psychology, and has had ten years experience in clinical psychology and in teaching psychology at the University of Wisconsin and the University of Arizona (R. 49). He is neither a doctor of medicine nor a psychiatrist (R. 50). Witness observed accused on two occasions at the laboratory of the University of Arizona, and on one of these occasions accused was examined under a hypnotic trance. When it is possible to hypnotize a patient, very frequently the loss of memory is restored and he is able to give a more accurate account of what he did during the period of the fugue (R. 51,52,54,55). There was no evidence that accused was malingering in any way during the examination (R. 54,55). As a result of his diagnosis, witness believes that accused was suffering from a fugue at the time of the alleged offenses, but there was no evidence of any other form of mental derangement (R. 52). A fugue is normally precipitated by some emotional crisis, and is accompanied by a partial or total loss of memory. It does not always begin suddenly but may be preceded by a period of restlessness during which the person is in a condition in which he is not responsible for his actions (R. 57,58). A person in a fugue is not responsible in the ordinary sense of the term, because he is only partly himself as far as his behavior is concerned (R. 55). Accused's gambling losses and utterance of checks considerably in excess of his bank balance might be considered as predisposing causes of the fugue, and not necessarily a part of it (R. 57-59).

5. Such evidence as relates only to Specifications 8, 9 and 11 of Charge II, of which the findings of guilty were disapproved by the reviewing authority, will not be considered in this opinion.

6. The facts established by the evidence are as follows: Accused reported for duty at Camp Stephen D. Little, Nogales, Arizona, about August 5, 1932, and two or three days later moved into the quarters of Second Lieutenant Augustus G. Elegar (R. 98). About 7:00 o'clock on the evening of September 5, 1932, accused and Lieutenant Elegar attended a picnic of Company F, 25th Infantry, "across the line" from Nogales, Arizona (R. 94). Accused had one drink of beer at the picnic (R. 97). They went from the picnic to the Cave Bar, located in Nogales, Sonora, Mexico, where accused had one drink of whiskey (R. 88,97). The proprietor, John M. Hughes, cashed accused's check for $10 and the check was dishonored by the bank when presented because accused's balance was insufficient (R. 72,89,91; Ex. D). Accused and Lieutenant Elegar went from the Cave Bar to the Casino, a gambling house, also in Mexico, where they both gambled until 9:00 o'clock in the evening, accused losing about $25 or $30. From there they returned to their quarters at Camp Little (R. 94). Shortly thereafter accused left the quarters and went back to the Casino alone, arriving there about 10:00 o'clock, where he continued to gamble until about 2:30 o'clock the next morning, September 6th (R. 78,83,94,102-103). At the Casino that evening, the proprietor, Charles H. Martin, cashed three of accused's personal checks for $50 each, and six for $25 each, a total of $300 (R. 78). Of the nine checks that he cashed, he identified, by his signature indorsement upon the back of each of them, the six checks received in evidence as Exhibit E (R. 79). The checks were cashed separately at the office window (R. 83). Accused requested Mr. Martin to withhold checks in the amount of $100 until 3:00 o'clock the next afternoon, September 6th, when, he said, there would be sufficient funds in his account to cover all checks (R. 78,79,83). Captain Irving A. Opperman saw accused at the Casino around 10:30 p.m., at which time he had "a lot of money in front of him". Captain Opperman asked accused to go home, and then took $50 of his money to keep for him until morning, but he returned $20 later as accused was "running short" (R. 103-104). Both Mr. Martin and Captain Opperman testified that accused was sober and appeared perfectly normal at the Casino (R. 81,82,104). Six of the checks,

totaling $200, were dishonored by the bank when presented on September 6th because of insufficient funds in accused's account (R. 72,73; Ex. E). At the time accused issued the check for $10 to Mr. Hughes and the nine checks totaling $300 to Mr. Martin, his balance was $127.36 (R. 69).

About 7:30 o'clock on the morning of September 6th, accused was awakened at his quarters on the post by Lieutenant Elegar (R. 95). Shortly thereafter accused drove up in his car alongside Captain Opperman, as he was walking down the road, told him that he was on the way to the target range, and requested him to deposit that morning to accused's credit at the bank the $50 he had the evening before obtained from accused at the Casino to hold for him overnight. Captain Opperman told accused that the sum he held was $30, not $50, and was about to explain the matter when someone interrupted their conversation. About 9:15 o'clock that morning, Captain Opperman deposited $30 to accused's credit in the First National Bank of Nogales, Arizona, but he was certain that accused believed that the deposit would be $50 (R. 102-104).

About 8:00 o'clock, shortly after leaving Captain Opperman, accused appeared at the Owl Drug Store (Phillips Reid Drug Co., Inc.) where Clara M. Phillips, then in charge of the store, cashed his personal check for $25. He appeared to be normal in every way, outside of being "in a rush". He had stated to Miss Phillips on another occasion that he did not like the station, the town, or the people in it, that there was nothing to do but get "tight", and that there were no decent girls to go with, nor any place to take them. This check was presented to the bank upon which it was drawn but was not paid because of insufficient funds (R. 72; Ex. F).

On the same morning, September 6th, before the regular banking hours, he went to the First National Bank where, his balance being $127.36, he cashed a check for $125. He explained to the assistant cashier that he was going to Tombstone and was in a hurry to get away. A deposit of $30 was made to his account on September 6th and another of his checks for $25 was cashed on that date (R. 69,76).

The evidence next shows accused, on September 10th, at the Army and Navy Y.M.C.A., Pacific Beach (San Diego), California. That organization, through its business secretary, Mr. Hugh F. Walburn, cashed for him his personal check for $25 drawn on the First National Bank, Nogales, Arizona (Ex. C). This check was dishonored when presented on September 17th because accused's account was then closed (R. 74). Accused identified himself to the Y.M.C.A. secretary by means of his class ring and told him that he had been knocked unconscious and his personal papers stolen during a visit to Mexico, and that he did not wish to apply at any nearby military station for further identification because of the fact that he was slightly over leave and wished to report directly to his commanding officer. He appeared to be sober, assured the secretary that the check was good, and made no reference to the effect that the account might be closed (Ex. C).

On September 12th, Lieutenant Allison R. Hartman, Post Exchange Officer, Fort MacArthur, California, acting for the Post Exchange, cashed for accused his personal check for $30 on the First National Bank, Nogales, Arizona, which check was later dishonored and returned because the account was closed (R. 73,74; Ex. B). At the time of cashing the check, accused was not drunk but there was an odor of liquor on his breath. He stated to Lieutenant Hartman that he had been on leave and needed money to return to his station at Nogales, Arizona (Ex. B).

On September 14th, at the Presidio of San Francisco, California, Second Lieutenant John K. Poole, Air Corps, indorsed a check for $40 drawn by accused on the First National Bank, Nogales, Arizona, in favor of the Post Exchange, and the Exchange cashed the check for accused (Exs. G,H). He stated to Lieutenant Poole that he needed the money to return to his station at Fort Huachuca, Arizona (Ex. G). The check was presented at the bank on September 24th and dishonored because the account was closed (R. 75). About September 15th, accused telephoned to Lieutenant Elegar at Nogales but there is no evidence as to the substance of this conversation except that accused inquired as to what had happened at the post with reference to him, and made some reference to returning (R. 96). Accused returned to his station at about 9:00 o'clock p.m. on

September 19, 1932, after having been absent without leave from 8:00 o'clock a.m. on September 6, 1932 (R. 99).

7. Captain Alexander L. Morris, 25th Infantry, a witness for the defense, testified that on September 20, 1932, he was directed by Colonel Knox, the post commander, to act as adviser and counsel for accused. He immediately conferred with accused who told him that when he realized he was in a hotel in San Francisco, he telephoned to his father in North Carolina, and, after talking with his father a few moments, decided to return to his station. At accused's request, witness telegraphed to his father that $850 would be necessary to liquidate the indebtedness of accused, and in two or three days he received that sum which he deposited in the First National Bank of Nogales, Arizona, to the account of A. L. Morris, Agent (R. 106,107). He then paid the holders of all outstanding checks of accused from the trust account thus established (R. 107-110). Mr. C. H. Martin held nine of accused's checks, totaling $300, but offered to accept $200 in full settlement of the obligation, and witness accepted this offer of settlement because he had underestimated the amount of accused's total indebtedness (R. 109,111). All obligations of accused, except that of Mr. Martin, were paid in full, witness receiving acknowledgments and accused's original checks (R. 108-110). These receipts and the original checks were turned over by him to the Adjutant, 25th Infantry, in compliance with orders from the Commanding Officer, 25th Infantry (R. 108-110). At that time accused objected to witness "turning those checks over to anyone" (R. 108), and witness has since then endeavored to recover them but without avail (R. 109).

The accused did not testify or make any statement to the court.

8. The prosecution offered in evidence all of the fourteen checks involved in the specifications of Charge II. The court sustained the objection of the defense to the admission of three of the nine checks issued to C. H. Martin because Mr. Martin had not indorsed them and could not identify them; the other six were positively identified and were admitted (R. 79-81). It was stipulated that the three checks excluded were the last $50 check drawn and the last two $25 checks drawn described in Specifications 8, 9

and 11, Charge II (R. 86). The findings of guilty as to these specifications were disapproved by the reviewing authority. The defense moved to exclude from evidence all other checks that had been introduced on the ground that they were the property of accused and had been illegally taken from him by order of the commanding officer and turned over to the prosecution (R. 112-114). The objection was overruled and the checks admitted (R. 114).

9. No discussion of the evidence in support of Charge I is needed, the only question in that respect being whether accused was legally responsible for his actions.

But as to Charge II and the specifications thereunder, some discussion of the evidence is required. The mere making and uttering of a check, without having in the 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. 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 utter the check 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. CM 195772, Wipprecht. In the instant case, each of the specifications under Charge II alleges that the accused fraudulently obtained money by the use of the check in question which he wrongfully and unlawfully made and uttered with intent to defraud "then well knowing that he did not have, and not intending that he should have, sufficient funds in the First National Bank of Nogales, Arizona, for the payment of said check". Each specification clearly states an offense in violation of the 95th Article of War.

Consideration of the evidence as to Charge II and the specifications thereunder may omit, for the present, the question of

accused's mental responsibility and be confined solely to a determination of whether or not, assuming his mental responsibility, the Government has established beyond a reasonable doubt that accused made and uttered the checks specified with knowledge and intent as alleged. In order to arrive at a conclusion, all direct and circumstantial evidence, including his flight and related conduct, may be considered. Wigmore on Evidence, 1923, vol. I, sec. 276; Allen v. United States, 164 U.S. 492, 499.

As to Specifications 1 to 7, inclusive, and 10 of Charge II, accused must be held to have had presumptive knowledge of the approximate condition of his account in the bank. Moreover, his act of drawing out $125 in cash when his balance was $127.36 shows that his knowledge was quite accurate. With such knowledge, he uttered checks considerably in excess (over $200) of such balance, withdrew in person practically the entire balance before these checks could reach his bank, and immediately fled from the vicinity. These facts warrant the inference that he did not intend to have sufficient funds in the bank for the payment of these checks on presentation. As to Specifications 12, 13 and 14, his utterance of these checks while on the Pacific Coast, after his bank balance was exhausted and no provision had been made for other funds or credit, evidences his guilt thereunder. The Board of Review is of opinion that the transactions with respect to these eleven checks were fraudulent as alleged, and that they were such acts of fraud or gross falsity as have long been deemed conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. Winthrop, Reprint 1920, p. 716.

In view of the foregoing, the main question presented by the evidence in this case may be stated as follows: Was accused mentally responsible for his conduct from about September 5, 1932, to about September 17, 1932? It was incumbent upon the prosecution to establish this element of the offense, as well as all others, beyond a reasonable doubt, and the contention of the prosecution (R. 66) that the defense had the burden of proving beyond a reasonable doubt that he was not responsible, is erroneous. The test of mental irresponsibility applied in the administration of military justice is that of the federal courts, and rests upon the determination of an existing mental defect, such as imbecility or idiocy, or an actual disease

of the mind. Davis v. United States, 160 U.S. 469, 478; CM 199465, Lichtenberger, p. 50.

The theory of the defense is that during the period covered by the offenses accused was in a fugue, a subdivision of amnesia. The expert witnesses for the defense both expressed the opinion that accused was in a fugue during the period in question. The medical witness for the prosecution was of opinion that he was not in a fugue, and the medical board, of which this witness was a member, unanimously concluded that he was mentally responsible at the time of the offenses. The medical witness for the prosecution had had long experience as a doctor and a psychiatrist whereas the defense witnesses were professors of psychology with little or no practical experience with insane persons. The examination of accused before trial by a board of medical officers in cases of suspected insanity is authorized by paragraph 35 c, Manual for Courts-Martial, 1928, and is in conformity with modern criminal procedure for the protection of the mentally deranged. The conclusions of the medical board and the testimony of the psychiatrist member thereof, because of their impartial character, should have considerable weight. Wigmore, supra, vol. I, pages 968-971. The testimony of the defense expert witnesses was not sufficiently persuasive to seriously question the conclusions of the medical board; and furthermore, the acts of accused during the period, as shown by the evidence, raise no suspicion that he was then mentally deranged or irresponsible. The Board of Review is therefore of the opinion, upon the evidence as a whole, that as to the particular acts charged the accused was able to distinguish right from wrong and to adhere to the right.

10. Objection was made by defense to the introduction in evidence of all the checks on the ground that they had been obtained by his commanding officer in violation of his constitutional rights, and were therefore not admissible as evidence. Writings alleged in the specifications may be proved testimonially if in the possession of accused. Wigmore, supra, sec. 1205(b). Therefore, had the checks not been turned over, they could have been proven by secondary evidence, and, since the utterance by accused of all the checks in question is so unquestionably established by other evidence, the Board of Review holds that accused's substantial rights

were not injuriously affected by their admission in evidence. It is therefore unnecessary to decide the point raised by the defense.

11. At the time of trial accused was 22 9/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

"Cadet M.A. 2 July 28; 2 lt. of Inf. 10 June 32."

12. 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 opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and warrants confirmation thereof. A sentence of dismissal is mandatory on conviction of violation of the 95th Article of War.

E. C. McNeil, Judge Advocate.
G. T. McDonald, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

June 5, 1933

CM 200289

| | | |
|---|---|---|
| UNITED STATES | ) | PHILIPPINE DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Manila, P. I., March 3, 1933. Dishonorable discharge, suspended, and confinement for one (1) year. Fort Mills, P.I. |
| Private FRED PITKOFF (6710627), Company B, 31st Infantry. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and HILL, 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 convicted of the offense set forth in the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Fred Pitkoff, Company B, 31st Infantry, having received a lawful command from Captain R. L. Wright, 31st Inf., his superior officer, to scrub the Day Room floor, did, at Post of Manila, Manila, P. I., on or about February 10, 1933, wilfully disobey the same.

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 Fort Mills, P. I., as the place of confinement. The sentence was published in General Court-Martial Orders No. 5, Headquarters Philippine Division, March 15, 1933.

3. The evidence shows that on the morning of February 10, 1933, Captain Robert L. Wright, the commanding officer of Company B, 31st Infantry, to which organization accused belonged, awarded accused company punishment under Article of War 104 consisting of restriction to quarters and extra fatigue for seven days. Accused asked to see his company commander regarding the punishment, and then was given an opportunity to take it up with the battalion commander, which he did, who later informed Captain Wright that the punishment had been allowed and that accused had accepted it (R. 9). As part of the extra fatigue duty adjudged, accused was directed to scrub the Day room floor (R. 7,10). He refused to do the work when ordered by the first sergeant (R. 10) and about 1:00 p.m. was called into the orderly room before Captain Wright who read the Article of War to him and "explained to him in detail the seriousness of his refusal to obey an order" (R. 7,9). Accused stated that he fully understood, and was then ordered by Captain Wright to "move out and carry on his duties". Accused did not move, and when asked if he intended to comply with this order, answered "No". He did not obey the order and was confined in the guardhouse. He was sober at the time (R. 7,14,15,17,21).

Accused testified that he asked to see the captain and "apologize for the things I had done. I wanted to tell him that I had made a fool of myself". The first sergeant swore at him and told him to get back to work, and when he was about to go, said to confine him. When he was called before Captain Wright, he was confused and mad because he did not like what the sergeant had told him. He did refuse to scrub the floor but did not realize the seriousness of the offense at the time. He had no intention of evading the company punishment given him. He intended to carry out the work (R. 24).

Accused enlisted September 24, 1932, at the age of 18 years, with no prior service. He was transferred from the Service Company to Company B about January 15, 1933, and had completed part of the course of recruit training (R. 8).

4. Paragraph 105, Manual for Courts-Martial, 1928, provides with respect to the procedure under the 104th Article of War, that:

> "Any failure to comply with the regulations in this chapter will not invalidate a punishment imposed under

A.W. 104, except to the extent that may be required by a clear and affirmative showing of injury to a substantial right of the person on whom the punishment was imposed, which right was neither expressly nor impliedly waived."

The record does not disclose, nor does it suggest, that accused was not fully advised of his right to demand trial in lieu of accepting company punishment. It does show that he was advised of his right to appeal to higher authority regarding the punishment, and that he did so, and thereafter entered upon his punishment. The fact that he was thus advised of his right to appeal goes far to indicate that he was at the same time fully advised of his right to demand trial in lieu of accepting punishment under the 104th Article of War. It also shows that the Articles of War had been read to him on several occasions. There is no indication of injury to any substantial right of the accused.

The Board of Review is of opinion that in the absence of an affirmative showing to the contrary it must be presumed that the punishment under the 104th Article of War was lawfully imposed, after compliance with all preliminary requirements, and is further of the opinion that the order given the accused by his superior officer was a lawful order, and that the evidence shows the order was wilfully disobeyed.

The dictum in an earlier case (CM 173875, Pichla, 1926) that it would be an injury to the substantial rights of a soldier to inflict disciplinary punishment upon him without first advising him of his rights to demand a trial, is held to have been modified by the above quoted provision of paragraph 105, Manual for Courts-Martial.

5. The above stated conclusion is reached by application of the presumption of regularity applying to official action recognized by The Judge Advocate General in CM 120611, a draft desertion case, wherein it was said that "where an official act has been performed which can only be lawful and valid after the doing of certain preliminary acts, it will be presumed that the required preliminary acts have also been done". Par. 2238(1), Dig. Ops. JAG, 1912-30.

The foregoing principle has been enunciated by the United States Supreme Court on many occasions, and for convenience the language of the decision in a few of them will be quoted.

In Cornett v. Williams, 20 Wall. 226, 250, Mr. Justice Swayne said:

> "As regards public officers, 'acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter' (Bank of the United States v. Dandridge, 12 Wheaton, 70). 'Facts presumed are as effectually established as facts proved, where no presumption is allowed.' In the case of Ward's Lessee v. Barrows (2 Ohio State, 247), a sale for taxes came under examination. It was held that certain acts of the county auditor were presumptive proofs that he had administered to the collector the oath prescribed by law touching the delinquent list. The sale was sustained. Here the judge who made the order of sale was the judge to approve the claim. The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record, pleading, will, deed, or contract, is as effectual as what is expressed (United States v. Babbit, 1 Black, 61)."

In Cincinnati & Tex. Pac. Ry. v. Ranking, 241 U.S. 319, 327, Mr. Justice McReynolds said:

> "It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.' Bank of the United States v. Dandridge, 12 Wheat. 64, 69-70; Knox County v. Ninth

National Bank, 147 U.S. 91, 97; Maricopa & Phoenix R.R. v. Arizona, 156 U.S. 347, 351; Sun Publishing Assn. v. Moore, 183 U.S. 642, 649."

In United States v. Chemical Foundation, 272 U.S. 1, 14, Mr. Justice Butler said:

> "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. Confiscation Cases, 20 Wall. 92, 108; United States v. Page, 137 U.S. 673, 679-680; United States v. Nix, 189 U.S. 199, 205. Under that presumption, it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts. Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 184; Monongahela Bridge v. United States, 216 U.S. 177, 195; Martin v. Mott, 12 Wheat. 19, 30. Cf. Levinson v. United States, supra, 201."

The Supreme Court has also frequently stated the principle as it applies to judicial acts. In Lutz v. Linthicum, 33 U.S. 165, Mr. Justice Story said:

> "Then, again, it is said, that no notice appears to have been given to Lutz of the appointment of the third referee, or of the making or returning the award, and that these acts appear all to have been done on the same day. There is certainly no objection to these acts being done on the same day, if the parties had due notice and a due hearing before the referees, and the award was made upon due deliberation. Without question, due notice should be given to the parties, of the time and place for hearing the cause; and if the award was made, without such notice, it ought, upon the plainest principles of justice, to be set aside. But it is by no means necessary, that it should appear upon the face of the award, that such notice was given. * * * If no notice is in fact given, and no due hearing had, the

proper mode is to bring such facts (not appearing on the face of the award) before the court, upon affidavit, and motion to set aside the award. But, prima facie, the award is to be taken to have been regularly made, where there is nothing on its face to impeach it. This very objection was made and overruled in Rigden v. Martin, 6 Har. & Johns. 403.

"Another objection is, that the same act of Maryland of 1785, ch. 80, sec. 11, requires, that in all cases of awards made under a rule of court, the party in whose favor the award is made shall cause a copy thereof to be delivered to the adverse party or his attorney, at least three days before judgment is moved for upon the award; * * *. If no such copy had been delivered, the proper remedy would have been, to take the objection in the court below, upon the motion for judgment, or to set aside the judgment for irregularity, if there had been no waiver, or no opportunity to make the objections, before judgment. But in the present case, sufficient does appear upon the record, to show, that the party had full opportunity to avail himself of all his legal rights in the court below. * * * We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court, and that the parties were fully heard upon all the matters properly in judgment."

In Loring v. Frue, 104 U.S. 223, 227, Mr. Justice Miller said:

"Whether the court had the power to set aside this nonsuit more than two years after the judgment had been rendered is a very interesting question, the determination of which would depend somewhat on facts that are not in this record. * * *

"When a case is heard in an appellate court on a writ of error, it is a principle equally well settled in law and necessary in the administration of justice, that only such errors as are plainly made to appear can be grounds of reversal, and that every presumption consistent with the record is to be made in favor of the action of the inferior court.

"It is not inconsistent with anything in this record that at the term when the nonsuit was granted the motion to set it aside was made, and then continued by regular orders from term to term until it was decided. In such case there can be no question of the power of the court to make the order. So it may have been stipulated that, until the chancery suit between the same parties which is found in the record should be decided, the action was to remain in court, and then come up on the motion to set aside the nonsuit. This also would have given the court the right to set it aside.

"As the plaintiff in error, although present by counsel when the objectionable order was made, and the subsequent motion to set it aside was heard, took no bill of exceptions to negative the presumptions we have mentioned, as well as others which might be suggested, we must presume that the action of the court was in accordance with law. The assignments of error based on the order setting aside the nonsuit are not well taken."

In Rogers v. United States, 270 U.S. 154, 161, Mr. Chief Justice Taft said:

"In the absence of any other circumstances, and in the face of the presumption of regularity that must obtain in proceedings of this sort, we cannot assume that the final board of classification considered as a basis for putting the plaintiff in class B, charges which had never been presented to him, charges which he denied, and charges which the court of inquiry ignored."

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

E. C. Meeker, Judge Advocate.

H. McDonald, Judge Advocate.

George A. Hill, Judge Advocate.

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

CM 200320 MAY 5 1933

| | | |
|---|---|---|
| UNITED STATES<br><br>v.<br><br>Private JOSEPH SCHOENBERGER (6672793), Medical Detachment, Fort Niagara, New York. | )<br>)<br>)<br>)<br>)<br>)<br>) | FIRST DIVISION<br><br>Trial by G.C.M., convened at Fort Jay, New York, March 30 and April 13, 1933. Dishonorable discharge and confinement for two (2) years. Penitentiary. |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, Judge Advocate.

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

2. By the Specification, Charge II, it is alleged that accused did take, steal and carry away one two-piece civilian suit, value $35, one top coat, value $25, and two shirts, value $4, total value $64. The only material evidence as to the value of these articles is that of Private William Albert Pringle, the owner, who testified by deposition (Ex. 1) that he bought the suit and top coat for the above amounts six months before the theft, and had received the shirts as a gift at Christmas, 1931, then valued at $2 each, approximately one year and nine months before the theft; and (providing that the proceedings (R. 30-31) may be considered a stipulation that Private Pringle would testify that the clothing introduced in evidence was the identical clothing taken from his locker at Fort Niagara) the testimony of Isador Bugdonowitz, the civilian tailor at Fort Jay, New York, who testified that a similar new top coat would cost around $15 and a new suit of clothes made of the same material as the pants would cost about $19.50 (R. 20,22).

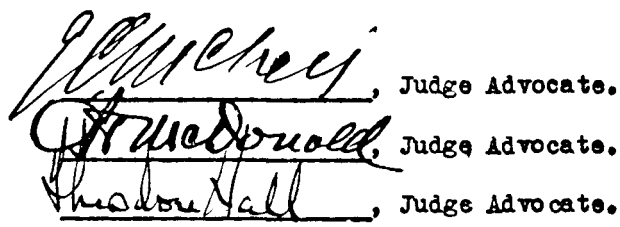
Value as relates to stolen property in a case of this nature is the market value of the same at the time and place of the taking.

REC'D
MAY 13 1933

2 Bish. Crim. Prac., Sec. 751; Cunningham v. State, 236 S.W. 89; CM 194353, Hyden-Swift. Due to the lack of evidence as to the value of the articles at the time of the theft, the court was not justified in finding their value as that of the purchase price nor of any value in excess of $20. Even though part of the stolen clothing was before the court, it is evident from the record that the clothing was in such state that the court could not say from its appearance that it was of a total value greater than $20. CM 195212, Robinson; 192911, Weckerle. The evidence is legally sufficient to support only so much of the finding 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, Manual for Courts-Martial, is confinement at hard labor for six months.

3. Confinement in a penitentiary in this case is not authorized under the 42d Article of War, no offense being punishable by confinement for more than one year by any statute of the United States. CM 192456, Ciambrone.

4. For the reasons stated, the Board of Review holds the record legally sufficient to support the findings of guilty of the Specification and Charge I, legally sufficient to support only so much of the finding of guilty of the Specification, Charge II, as involves a finding of guilty of larceny of the articles described, of some value not in excess of $20, and legally sufficient to support the sentence.



, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

May 29, 1933.

CM 200375

| | | |
|---|---|---|
| UNITED STATES | ) | SEVENTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Fort Riley, Kansas, March 30, April 21 and 24, 1933. Dishonorable discharge, suspended, and confinement for six (6) months. Disciplinary Barracks. |
| Private JEFF R. DAVIS (6792345), Machine Gun Troop, 13th Cavalry. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, McDONALD and HALL, 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 convicted of offenses set forth in the following Charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Jeff R. Davis, Machine Gun Troop, 13th Cavalry, did, at Fort Riley, Kansas, on or about February 15, 1933, violate Section 12 of Title 27 of the Code of Laws of the United States of America, by selling intoxicating liquor contrary to the provisions of the said Section.

Specification 2: In that Private Jeff R. Davis, Machine Gun Troop, 13th Cavalry, did, at Fort Riley, Kansas, on or about February 15, 1933, violate Section 12 of Title 27 of the Code of Laws of the United States of America, by possessing intoxicating liquor contrary to the provisions of the said Section.

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, Governors Island, New York, as the place of confinement. The sentence was published in General Court-Martial Orders No. 76, Headquarters Seventh Corps Area, May 3, 1933.

3. The pertinent part of the Federal statute under which the accused was convicted declares that,

> "No person shall manufacture, sell, barter transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." Section 12, Chapter 2, Title 27, U.S. Code, 41 Stat. 308.

By Section 4 of the same Title,

> "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes ***." 41 Stat. 307.

4. Private Walter G. Matthews, Machine Gun Troop, 13th Cavalry, a witness for the prosecution, testified that the accused, at the time and place alleged, was seen in the corral of the post with a car in which there was a case of whisky; that the accused took the case of whisky from the car into the stables and delivered

a pint bottle of whisky to a soldier, for which he received $1.00 (R. 8,9,10). Though this witness did not smell or drink any of the contents, it was in a "flat pint whiskey bottle" and "it looked like whiskey" (R. 9). The accused informed this witness at the time that he had "a case of twenty-four pints of liquor in the car" (R. 18).

The above evidence of alleged possession and sale of intoxicating liquor is strengthened by the voluntary statement of the accused made to Captain Manly Meador and read to the court. Captain Meador testified that the accused said:

> "I have been selling liquor since about 1930, the 19th of December when I returned from furlough. While I was on furlough in Kansas City, Missouri, I met two men - one known as 'Speedie' and the other known as 'Blackie'. They said that they would haul liquor to me - make all deliveries to me. They were to make regular runs twice a week, Fridays and Tuesdays - the early part of the morning of those days. I was to meet them at the railroad station, Fort Riley, between 4:00 a.m. and 6:00 a.m. I took a regular shipment of ten (10) gallons twice a week. The liquor came in one gallon jugs. I would bury it at the dump and along the river. I paid three ($3.00) dollars a gallon in jugs, and sold it from four ($4.00) dollars to six ($6.00) dollars a gallon in jugs, and fifty (50¢) cents a half pint, one ($1.00) dollar a pint, one dollar (1.50) and fifty cents a quart. I sold on the average of twenty-five (25) gallon jugs a month. In case I ran short I would make a long distance call from Junction City to Kansas City for them to make an extra run. *** I handled liquor, liquor generally - sometimes alcohol. Special orders - Gin - Rum - Canadian Club - Rye and alcohol." (R. 15-16).

It is unnecessary to prove the alcoholic content or fitness of liquor for use as a beverage as that word is construed to include

whisky (United States v. McClure, 300 Fed. 98; Strada v. United States, 281 Fed. 143) and the court may take judicial notice that whisky is intoxicating liquor. The proof that the accused sold and possessed liquor may, under the circumstances established by the evidence in this case, be considered sufficient to sustain the findings of guilty that he sold and possessed intoxicating liquor within the meaning of the statute. Hollender v. Magone, 149 U.S. 586. The proof further shows that the single possession and sale of liquor were merely incidental and ordinary acts of the accused in an established active business in violation of the prohibition law.

5. The only other question presented is whether the unlawful possession and sale of intoxicating liquor of which the accused was found guilty warranted the sentence. Accused is charged with two offenses in violation of a Federal statute, the possession and the sale of intoxicating liquor. The offenses charged are separate and distinct offenses and a conviction may be had for both, though both are involved in the same transaction. United States v. One Oldsmobile Coupe, 22 Fed. (2d) 441; Clayman v. Smithers, 18 Fed. (2d) 955; Hadley v. United States, 18 Fed. (2d) 507; Albrecht v. United States, 273 U.S. 1.

Mr. Justice Brandeis, speaking for the court in the case last above cited on the question of double punishment, said:

> "Of the nine counts in the information four charged illegal possession of liquor, four illegal sale and one maintaining a common nuisance. The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily

a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act; but the general principle is well established."

It follows that accused has been found guilty of two distinct and separate offenses in violation of a Federal statute; the maximum punishment for one of which (selling) is six months confinement under the amendment to the Jones Act hereinafter mentioned (46 Stat. 1036), and for the other (possessing) a fine of not to exceed $500.

The Table of Maximum Punishments, paragraph 104, Manual for Courts-Martial, provides for the closely related offense of introducing intoxicating liquor into quarters, station or camp, for sale, a maximum punishment of confinement at hard labor for six months and forfeiture of two-thirds pay for a like period. Section B of paragraph 104, M.C.M., in part provides that:

"If an accused be found guilty by the court of two or more offenses for none of which dishonorable discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more, will authorize dishonorable discharge and total forfeitures."

Applying this rule to the punishments authorized either under the statute law, or under the Table of Maximum Punishments, the sentence of dishonorable discharge, total forfeitures and confinement for six months is authorized.

6. There is another legal ground upon which the sentence may be sustained. The Jones Act (March 2, 1929, 45 Stat. 1446) fixed the maximum penalty for the sale of intoxicating liquor at $10,000 fine or imprisonment for five years, or both. The Jones Act was amended by the Act of January 15, 1931 (46 Stat. 1036), providing in substance that anyone who violates the intoxicating liquor law by sale of not more than one gallon of intoxicating liquor, unless he has not there-

tofore been convicted of a violation of the law, or is not engaged in habitual violation of the same, shall for each offense be subject to a fine not to exceed $500 or to be confined in jail without hard labor not to exceed six months, or both. Rachel v. United States, 61 Fed. (2d) 360.

Summing up the evidence, we have a confessed bootlegger, who by his own admissions has been actively engaged for more than two years in the business of selling intoxicating liquor, on an average of 25 gallons per month, which he received in regular shipments from Kansas City. On February 15, 1933, he brought into the post of Fort Riley in an automobile a case of 24 flat pint whisky bottles filled with a red brown liquid, and at the time said to an eye witness that he had "a case of twenty-four pints of liquor in the car". He carried the case into the stables and sold one bottle to a soldier for $1.00, which is the price he admitted he got for a pint of whisky.

The Board of Review holds that the evidence is sufficient to support the findings of guilty of both selling and possessing intoxicating liquor, and moreover is sufficient to show that accused "is engaged in habitual violation" of the prohibition laws, and therefore he is not entitled to any benefit of the amendment of January 15, 1931, but is liable to the severer penalty prescribed by the Jones Act.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the sentence.

[illegible] Judge Advocate.

[illegible] Judge Advocate.

Theodore Hall Judge Advocate.

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

CM 200407

| | | |
|---|---|---|
| UNITED STATES | ) | PANAMA CANAL DEPARTMENT |
| | ) | Trial by G.C.M., convened at |
| v. | ) | Albrook Field, Canal Zone, |
| | ) | April 27, 1933. Forfeiture |
| PRIVATE BAXTER D. BOOZER | ) | of $12 pay. |
| (6317736), 24th Pursuit | ) | |
| Squadron, Air Corps. | ) | |

---

OPINION by the BOARD OF REVIEW
McNEIL, McDONALD and HALL, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, 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 sentence in part, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Baxter D. Boozer, 24th Pursuit Squadron, Air Corps, was at Albrook Field, Canal Zone, on or about April 1, 1933, drunk in quarters.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of five previous convictions by court-martial was introduced. He was sentenced to be confined at hard labor for three months and to forfeit $12 per month for a like period. The reviewing authority approved only so much of the sentence as involves forfeiture of $12 of his pay. The sentence as thus modified

was published in General Court-Martial Orders No. 23, Headquarters Panama Canal Department, May 4, 1933.

3. The accused was properly convicted of the offense charged, and the only question presented by the record requiring consideration is whether or not the sentence as approved is in excess of the maximum limits of punishment fixed by paragraph 104, Manual for Courts-Martial, 1928.

Section B of paragraph 104, Manual for Courts-Martial, reads in part:

> "If an accused be found guilty by the court of an offense or offenses for none of which dishonorable discharge is authorized, proof of five or more previous convictions will authorize dishonorable discharge, total forfeitures, and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months."

The Board of Review is of opinion that, in five previous conviction cases, the court has no power to exceed the maximum punishment provided in the Table of Maximum Punishments, unless it adjudges dishonorable discharge and total forfeitures, but that if it does adjudge dishonorable discharge and total forfeitures, it may adjudge, in addition thereto, confinement at hard labor for three months or for less, or it need adjudge no confinement at all. In the present case the court did not adjudge dishonorable discharge and therefore the sentence could not exceed the maximum limit fixed in the Table of Maximum Punishments which, for the offense of being drunk in quarters, is forfeiture of fifteen days' pay. The monthly pay of accused is stated on the charge sheet to be $22.05, or, with fifteen per cent deducted, $18.74. Fifteen days' pay would be $9.37.

4. The court was legally constituted. Except as above stated, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of opinion that the record is legally sufficient to support only so much of the sentence, as approved by the reviewing

authority, as involves forfeiture of fifteen days' pay.

E. C. Mosle, Judge Advocate.

C. H. McDonald, Judge Advocate.

Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

CM 200419

July 24, 1933.

| | | |
|---|---|---|
| UNITED STATES | ) | EIGHTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Fort Bliss, Texas, April 18, 1933. Confinement for five (5) years. Penitentiary. |
| CHARLES B. HANES, formerly Second Lieutenant (0-18321), Medical Administrative Corps. | ) | |

REVIEW by the BOARD OF REVIEW
McNEIL, HILL and HALL, Judge Advocates.

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Charles B. Hanes, formerly Second Lieutenant, Medical Administrative Corps, United States Army, and on and before January 9, 1932, being such Second Lieutenant, Medical Administrative Corps, United States Army, an officer in the Military Service of the United States, did, at William Beaumont General Hospital, El Paso, Texas, on or about the ninth day of January, A.D. 1932, feloniously embezzle by fraudulently converting to his own use and benefit the sum of, to-wit: Twenty-nine dollars and twenty cents ($29.20), of the value of Twenty-nine dollars and twenty cents ($29.20), the money and property of Private Henry W. Bryant, Battery A, 82d Field Artillery, an enlisted man of the United States Army, theretofore entrusted to him by virtue of his office, by the said Private Henry W. Bryant, for custody and safe-keeping, while said Private Henry W. Bryant was an enlisted man in the United States Army, and a patient in the said

William Beaumont General Hospital, he, the said Charles B. Hanes, then and there a Second Lieutenant, Medical Administrative Corps, United States Army, as aforesaid, being at that time the properly appointed guardian and duly designated custodian of the Patients' Fund, said William Beaumont General Hospital, and of said Twenty-nine dollars and twenty cents ($29.20).

Specification 2: In that Charles B. Hanes, formerly Second Lieutenant, Medical Administrative Corps, United States Army, and on and before January 9, 1932, being such Second Lieutenant, Medical Administrative Corps, United States Army, an officer in the Military Service of the United States, did, at William Beaumont General Hospital, El Paso, Texas, on or about the ninth day of January, A.D. 1932, feloniously embezzle by fraudulently converting to his own use and benefit the sum of, to-wit: Twenty-one dollars ($21.00), of the value of Twenty-one dollars ($21.00), the money and property of Private James M. Husak, 26th Wagon Company, First Cavalry Division, Quartermaster Train, an enlisted man of the United States Army, theretofore entrusted to him by virtue of his office, by the said Private James M. Husak, for custody and safe-keeping, while said Private James M. Husak was an enlisted man in the United States Army and a patient in the said William Beaumont General Hospital, he, the said Charles B. Hanes, then and there a Second Lieutenant, Medical Administrative Corps, United States Army, as aforesaid, being at that time the properly appointed guardian and duly designated custodian of the Patients' Fund, said William Beaumont General Hospital, and of said Twenty-one dollars ($21.00).

Specification 3: In that Charles B. Hanes, formerly Second Lieutenant, Medical Administrative Corps, United States Army, and on and before January 9, 1932, being such Second Lieutenant, Medical Administrative Corps, United States Army, an officer in

the Military Service of the United States, did, at William Beaumont General Hospital, El Paso, Texas, on or about the ninth day of January, A.D. 1932, feloniously embezzle by fraudulently converting to his own use and benefit the sum of, to-wit: Two hundred dollars ($200.00), of the value of Two hundred dollars ($200.00), the money and property of Private William Lucas, Troop E, 10th Cavalry, an enlisted man of the United States Army, theretofore entrusted to him by virtue of his office, by the said Private William Lucas, for custody and safe-keeping, while said Private William Lucas was an enlisted man in the United States Army and a patient in the said William Beaumont General Hospital, he, the said Charles B. Hanes, then and there a Second Lieutenant, Medical Administrative Corps, United States Army, as aforesaid, being at that time the properly appointed guardian and duly designated custodian of the Patients' Fund, said William Beaumont General Hospital, and of said Two hundred dollars ($200.00).

Specification 4: In that Charles B. Hanes, formerly Second Lieutenant, Medical Administrative Corps, United States Army, and on and before January 9, 1932, being such Second Lieutenant, Medical Administrative Corps, United States Army, an officer in the Military Service of the United States, did, at William Beaumont General Hospital, El Paso, Texas, on or about the ninth day of January, A.D. 1932, feloniously embezzle by fraudulently converting to his own use and benefit the sum of, to-wit: Six dollars ($6.00), of the value of Six dollars ($6.00), the money and property of Corporal Ralph A. Timson, Motor Transport Company, Quartermaster Corps, an enlisted man of the United States Army, theretofore entrusted to him by virtue of his office, by the said Corporal Ralph A. Timson, for custody and safe-keeping, while said Corporal Ralph A. Timson was an enlisted man of the United States Army and a patient in the said William Beaumont General Hospital, he, the said Charles B. Hanes, then

> and there a Second Lieutenant, Medical Administrative Corps, United States Army, as aforesaid, being at that time the properly appointed guardian and duly designated custodian of the Patients' Fund, said William Beaumont General Hospital, and of said Six dollars ($6.00).

He pleaded in bar to the jurisdiction of the court, and, upon denial of the plea, refused to plead to the general issue and remained silent. The court directed a plea of not guilty to the Charge and specifications thereunder be entered, and proceeded with the trial in the same manner as if this plea had been made by accused. After the prosecution had rested, the defense entered a motion requesting that trial be suspended and the reviewing authority notified that the evidence presented indicated some crime but not that charged. This motion was overruled, whereupon the defense entered separate motions for a directed verdict of not guilty on each of the four specifications and the Charge. Each motion was overruled. The defense then announced that it would call no witnesses and present no evidence and that the accused would remain silent. The accused was found guilty of the Charge and the four specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to confinement at hard labor for seven years. The reviewing authority approved only so much of the sentence as provided for confinement at hard labor for five years, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that accused, at the time of the commission of the alleged offenses, was a Second Lieutenant, Medical Administrative Corps, United States Army, on duty at William Beaumont General Hospital, El Paso, Texas (Army Register 1932; Ex. B). On February 1, 1931, he was assigned as custodian of the "Patients' Fund" at that hospital and took custody of the fund on the following day (Ex. B; R. 27,28; Ex. G, p.40; R. 77-79). He continued as custodian of the fund until he left his station on January 9, 1932, on an authorized week-end absence from which he never returned to his station (R. 39). He was carried as absent without leave (R. 109) until July 6, 1932, on which date he was dropped from the rolls of the Army (Ex. A).

The "Patients' Fund" is a trust fund consisting of deposits made by patients who are under treatment in the hospital (R. 28). Patients

upon admission are informed that the hospital will receive their money and valuables for safe-keeping and that receipts will be given for such articles by a commissioned officer. It is provided by Army Regulations that such money and valuables will be received and receipted for without condition or other evasion of complete responsibility by the commanding officer or by an officer designated by him. Money and valuables of considerable intrinsic value will be deposited in a bank or locked in the hospital safe. The custodian of the fund will keep a book of receipt blanks with stubs, receipts and stubs to be numbered serially, and will give each patient a receipt listing the money and valuables received from him for safe-keeping, and will also list them on the corresponding stub which the patient will sign to indicate that the list is correct. The custodian will deposit all money in the hospital safe or a local bank to the credit of the "Patients' Fund". Money deposited in a bank will draw no interest unless the patients to whom it belongs consent in writing to the transfer of any accrued interest to the hospital fund. The custodian will keep a patients' fund cash account wherein will be debited all money received from, and credited all money returned to, patients. Any patient desiring to withdraw money or valuables will be required to present his receipt. The custodian will note on the back of the receipt and on the stub the date and amount of the withdrawal, and will require the patient to initial or sign both. Par. 8 c, AR 40-590, December 31, 1929; Ex. C.

In the instant case, the "Patients' Fund" was on deposit without interest, as a checking account, with the First National Bank, El Paso, Texas, and was later removed to the El Paso National Bank, El Paso, Texas, where it was carried under the title, "Patients' Fund Account, William Beaumont General Hospital". A certain working balance was kept by the custodian in cash in the hospital safe (R. 31,34,38; Exs. E and F). All deposits were kept by the bank "in one single lump sum account" and the bank records did not show the names of the individual depositors in the fund (R. 39). Accused, while custodian of the fund, drew checks against the bank account over his own signature as custodian (Ex. M). At the time the offenses are alleged to have been committed the following enlisted men, who were patients in the hospital, had the following amounts to their credit in the fund:

| | |
|---|---|
| Private Henry W. Bryant, Battery A, 82d Field Artillery ..... | $ 29.20 |
| Private James M. Husak, 26th Wagon Company, 1st Cavalry Division, Quartermaster Train ... | 21.00 |
| Private William Lucas, Troop E, 10th Cavalry .. | 200.00 |
| Corporal Ralph A. Timson, Motor Transport Company, Quartermaster Corps ..... | 6.00 |
| Total | $ 256.20 |

(R. 95-97,105-107,117,118,122; Exs. H,I,J,K and Q). On January 11, 1932, an audit of the "Patients' Fund" was made, which disclosed that of the total amount, $4696.35, for which accused was then responsible, only $308.11 remained in the fund. This remaining balance consisted of $46.03 in the El Paso National Bank, which agreed with accused's stub balance, $18.75 in cash in the office safe, and a receiver's certificate for $243.33 in the suspended First National Bank, El Paso, Texas (R. 114-117; Exs. N,O and P). This latter item was covered, subsequent to the suspension of the First National Bank, by the receipt of $250 from the United States Army Hospital Fund, through the office of the Surgeon General, and had been credited by the accused upon a ledger card to the account of the "Patients' Fund" on September 14, 1931 (R. 99,108,109; Ex. L). Of the total amount of $4453.02 ($4696.35 less $243.33) intrusted to the accused and subject to withdrawal by him, a balance of but $64.78 remained at the time of his disappearance (R. 115). Withdrawals from the El Paso National Bank to the amount of $1900 by checks signed by the accused and payable to "Cash" were shown to have been made during the period from January 5-9, 1932 (Exs. E and N). The accused is shown to have admitted on February 26, 1933, that prior to leaving his station he had taken money from the fund over a period of several months because he could not keep up appearances on the salary of a second lieutenant (R. 71-72).

3. It was contended by the defense that the court was without jurisdiction over the person of the accused and over the offenses he is alleged to have committed. This was maintained on the ground that he should have been charged with embezzlement of the "Patients' Fund" and not of the money of certain enlisted men intrusted to him by virtue of his office. It was further maintained that the 94th Article of War is unconstitutional and for that reason could not give jurisdiction to the court to try an officer after his separation from the service for embezzling money intrusted to his charge by enlisted men.

The nature of the "Patients' Fund" and of the duties of the custodian of it shows clearly that it was merely an accumulation of the moneys of patients intrusted by them to the custodian for safe-keeping. He was not required to deposit these moneys in a bank but was permitted to keep them in the hospital safe, and the evidence shows that he did so keep a part of the fund. The custodian had no control over the fund other than to keep it safely and to return to the individual owners upon demand all or any part of the money they had intrusted to his care. It appears from the evidence that four of these owners were enlisted men and that the fund was so depleted by the wrongful acts of the accused that the greater part, if not all, of their money was dissipated and could not be restored to them. Had the remainder of the fund been applied solely to the repayment of the money of these four enlisted men, as could not equitably be done, it would not have sufficed to repay them in full and the remaining defalcation of the accused would be adequate in amount to support the sentence.

The constitutionality of the 94th Article of War is not a matter for determination by a general court-martial. It is provided by this Article in pertinent part that

> "*** if any officer, being guilty, while in the military service of the United States, of embezzlement *** of money *** intrusted to his charge by an enlisted man or men *** is dropped from the rolls, he shall continue to be *** held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so *** dropped from the rolls."

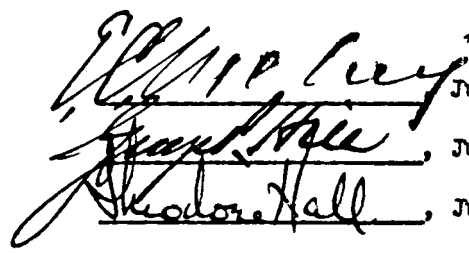
In ex parte Joly, 290 Fed. 858, Dig. Ops. JAG, 1923, p. 99, the court said:

> "The provisions of this article (A.W. 94) that any person guilty of an offense thereunder while in the military service is subject to arrest and trial by court-martial therefor after his discharge will not be held unconstitutional by a court of the first instance, in view of the fact that it has been in effect and enforced for sixty years."

4. At the time of the commission of the offenses, accused was 32 years, 7 months of age. His service is indicated in the Army Register, 1932, as follows:

> "Pvt. and pvt. 1 cl. Med. Dept. 17 Aug. 17 to 25 Mar. 19.- Pvt. Hq. Co. 33 Inf. 27 Feb. 26 to 5 May 26; Pvt. corp. sgt. and staff sgt., Med. Dept. 6 May 26 to 2 Nov. 30; 2 lt. Med. Adm. C. 1 Nov. 30; accepted 3 Nov. 30."

5. 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 the sentence. Confinement in a penitentiary is authorized by the 42d Article of War and Title 6, Section 83 of the District of Columbia Code.


Judge Advocate.


, Judge Advocate.


, Judge Advocate.

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

JUN 26 1933

CM 200436

| | | |
|---|---|---|
| UNITED STATES | ) | UNITED STATES MILITARY ACADEMY |
| | ) | |
| v. | ) | Trial by G.C.M., convened at West Point, New York, April 20 and 21, 1933. Suspension without pay and allowances until January 2, 1934. |
| | ) | |
| Cadet Corporal DAVID G. PRESNELL, Second Class, United States Corps of Cadets. | ) | |

OPINION of the BOARD OF REVIEW
McNEIL, HILL and HALL, Judge Advocates
ORIGINAL EXAMINATION by CHEEVER, 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 Corporal David G. Presnell, Second Class, United States Corps of Cadets, West Point, New York, was at Weehawken, New Jersey, on or about March 12, 1933, in a public place, to wit, on a railroad train of the New York Central Line, drunk while in uniform.

He pleaded not guilty to, and was found guilty of, the Specification except the words "in a public place, to wit, on a", substituting therefor the words "on a cadet special", of the excepted words not guilty, and of the substituted words guilty, and of the Charge, not guilty, but guilty of violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced

to be suspended without pay and allowances until January 2, 1934, at which time he will join the then Second Class. The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. The material evidence contained in the record is summarized as follows: First Lieutenant George E. Bruner, Infantry, a witness for the prosecution, testified that on March 11 and 12, 1933, he was Officer in Charge of the Second Class educational trip to New York City comprising 144 cadets, including accused. A special train of the New York Central Lines was used for the trip, leaving Weehawken, New Jersey, on the return trip, at 12:15 o'clock a.m., March 12, 1933, and arriving at West Point, New York, at 1:20 o'clock a.m. Lieutenant Honnen, Infantry, was assistant to witness on this trip. A roll call check was made of the cadets on the platform at Weehawken, New Jersey, prior to the departure of the special train (R. 5,6). Witness and Lieutenant Honnen boarded the third car of the train and were standing near the rear of the car when witness noticed accused, in uniform, stagger down the aisle of the car and fall into a double seat about half way down the car on the right hand side. Witness walked up to accused and said, "Mr. Presnell", but accused did not answer. He took hold of accused by the arm and said, "Come with me", taking him to the rear of the car where he ordered him to sit beside Lieutenant Honnen (R. 6,7,10-12). Witness smelled the breath of accused and noticed a strong odor of alcohol. The pupils of his eyes were very small. He then sent for Cadets Tank and Cary and ordered them to observe accused. In the meantime, accused had "fallen to his right in the seat". In order to arouse accused, one of the cadets took hold of his shoulders and pulled him to a sitting position while another rubbed his ears, slapped his face, and twisted his neck. They succeeded in getting him to his feet and into the next car (R. 7,8,10). He could not have performed any military duties (R. 14). Witness believed accused was drunk, basing his opinion on the fact that his breath smelled strongly of alcohol and that his staggering showed him to be without full control of his physical faculties (R. 11). After the train arrived at West Point, witness was standing on the station platform when accused approached, saluted, and the following was said:

"Accused: Sir, Cadet Presnell reports.
Witness: What is it, Mr. Presnell?

Accused: Sir, I was drinking.
Witness: Have you anything further to say?
Accused: No, Sir.
Witness: Very well, Mr. Presnell, that will be all. Go to your room."

At this time accused did not stagger, rendered an "excellent" military salute, and there was no thickness of speech or impaired articulation (R. 8,13). On cross-examination, witness stated that he first saw accused in the car as he was passing down the aisle and had reached a point past where witness was standing. Witness had reserved a seat for Lieutenant Honnen and himself by placing newspapers on it before the time for the departure of the train from Weehawken, and, upon finding that two cadets had occupied the seat, required them to vacate. He did not know whether one of these two cadets was accused (R. 11). Witness did not note any confusion of memory on the part of accused, nor did he observe that accused had a furred tongue or any body tremors. He found it necessary to take accused by the arm and support him down the aisle of the train. He did not hear accused talk until they arrived at West Point (R. 10-12).

Cadet Charles F. Tank, Second Class, testified that on the cadet pecial which left Weehawken on the night of March 11 and 12, 1933, he was ordered by Lieutenant Bruner to take accused to the front of the train and remain with him because he (Lieutenant Bruner) and Lieutenant Honnen thought accused was drunk. Witness first saw accused sitting in one of the train seats, leaning forward. He was conscious, awake; and answered questions, but his speech was thick. Witness saw Cadet Cary jerk accused's head from side to side, slap his face, and rub his ears. Accused was assisted by Cadet Walsh to the next car where he vomited out of the window. He then walked unassisted to the lavatory at the end of the car where he vomited again. Witness remained in the lavatory about fifteen minutes with him and then took a seat in the car. A little later accused went out on the vestibule. Witness at first believed accused was drunk because he had been told that, but later was of the opinion that he was not drunk but was "just sick" (R. 17-21). Recalled by the defense, he testified that the cadets had insufficient time for lunch on March 11th (R. 69), and substantially repeated his previous testimony summarized above (R. 70-74).

Cadet Louis A. Walsh, Jr., Second Class, testified that accused was sick at the Weehawken station and witness took him outside of the station where he vomited at the unlighted end of the platform, where there were no civilians. Accused seemed to be "all right" immediately after getting on the train, but later he was sick and spent considerable time in the lavatory where he vomited. On the train witness was with accused all of the time, except about ten minutes. In the opinion of witness, accused was sick from what he had had to eat and drink (R. 21-25). Witness was recalled by the defense and testified that the cadets had insufficient time for lunch on March 11th; they did not leave their classrooms until 11:55 o'clock and had to go to their rooms, dress, have lunch, and be in formation to leave at 12:20 o'clock (R. 63). At Weehawken that evening accused boarded the train for West Point unassisted. He and witness took the last seat in the rear of the car, but they were ordered to vacate the seat by Lieutenants Bruner and Honnen, who were standing right next to them, waiting for them to get out. They gathered up their things and started up the car and in "about thirty seconds" accused was called back (R. 64,65,69).

Cadet James E. Walsh, Second Class, testified that on the train he saw Cadet Tank arouse accused by slapping his face and rubbing his hand across his face. Lieutenant Bruner instructed witness to assist accused into the next car. He put his arms under accused's armpits and helped him to his feet, then assisted him down the aisle and into the next car by walking behind him and holding on to him, although accused could have walked without assistance. Witness smelled accused's breath but perceived no odor. When witness first saw accused he thought accused was drunk because of the way he was slumped in his chair. He was pale and gave the appearance of being not in full possession of his faculties - more or less half asleep (R. 25-30).

First Lieutenant George Honnen, Infantry, a witness for the prosecution, testified that he was on the cadet special train returning from Weehawken, New Jersey, to West Point on the night of March 11 and 12, 1933 (R. 30). Immediately after boarding the train, Lieutenant Bruner instructed two cadets to vacate a seat which the officers had reserved. Witness saw these cadets but had no idea who they were, although he doubted very much that one of them could have been the

accused (R. 34). As witness was removing his overcoat and cap, several cadets passed up the aisle and he then noticed accused because he was staggering. Lieutenant Bruner brought accused back to where they had been standing and seated him. Witness smelled accused's breath and it smelled strongly of alcohol. Cadets Tank and Cary were summoned and upon arrival conferred with the two officers at the rear of the car. The cadets were ordered to smell accused's breath and to take care of him. All four then returned to the seat occupied by accused and witness observed that he had "slid over towards the window" and was apparently sleeping. Cadets Tank and Cary were quite small, so witness detailed a larger cadet (Cadet J. E. Walsh) to assist accused to the next car (R. 31,32). Witness was of opinion that accused was drunk; he had no doubt about it then and he has not changed his opinion. His opinion is based upon the fact that accused staggered up the aisle from side to side and his breath smelled strongly of alcohol (R. 33,34). Upon arrival at West Point, accused reported to witness on the station platform and was referred to Lieutenant Bruner who was standing with him. He reported in a military manner, saluted properly, standing at attention. His speech was normal, his bearing was normal, and "quite military" (R. 33,35,36). On cross-examination, witness stated that on the train accused was neither loquacious, foolish, nor quarrelsome, but that he did show a lack of physical coordination (R. 34,35).

4. The defense introduced in evidence (R. 40,41) a circular letter from the Second Corps Area Surgeon, dated April 7, 1930, which purports to enumerate many reliable symptoms of alcholic drunkenness, the presence of a majority of which would warrant a positive diagnosis, and warns against being misled by certain symptoms regarded as unreliable (Ex. A).

Mr. Daniel E. Long testified by deposition (Ex. B; R. 45) that he was rear brakeman on the West Point passenger special leaving Weehawken, New Jersey, at 12:15 o'clock a.m. March 12, 1933, and arriving at West Point, New York, at 1:20 o'clock a.m. He saw every cadet three times; once as he checked them through the gate at Weehawken, and twice on the train as he counted them. He saw no drinking, nor any sign of drunkenness, on the part of any cadet.

Mr. John R. Wood testified by deposition (Ex. C; R. 45) that he was conductor in charge of the West Point cadet special train on the night of March 11 and 12, 1933. He counted the cadets twice and did not see any drinking, nor any indication of drunkenness, on the part of any cadet, but when the train arrived at West Point he saw one cadet who acted as if he might be sick.

Miss Kathleen H. Parsons, Larchmont, New York, a witness for the defense, testified that about 3:30 o'clock p.m., March 11, 1933, accompanied by Mr. Palmer (the next witness), she met accused, who was perfectly sober, in the foyer of the Herald Tribune building in New York City and they went immediately to the apartment of Miss Davis on East 16th Street. About 6:30 o'clock, Miss Davis served dinner, consisting of waffles and honey, country sausage, pineapple and cheese salad, chocolate pudding and coffee. Accused seemed to overeat, especially of waffles and sausage, and after dinner remarked that he had eaten to such an extent he felt stuffed, and during the evening complained of pains in his stomach. They played bridge until about 10:30 o'clock when "Russian whiskey" was served, accused having a little more than two whisky glasses. Accused had no other liquor during the evening and at no time did he show any signs of intoxication. They continued playing bridge until about 11:30 o'clock, and accused played an excellent game. They then all started for Weehawken, witness leaving accused there about 12:10 o'clock a.m. He seemed to be sick while they were en route to Weehawken and when witness left him he was "feeling badly" (R. 46-50).

Mr. Frederick Palmer, Jr., New York City, a witness for the defense, testified that he met accused about 3:30 o'clock p.m., March 11, 1933, and they proceeded immediately to Miss Davis' apartment. Witness went out shopping before dinner and rejoined accused at dinner. They played bridge from after dinner until 11:30 o'clock with but one interruption about 10:15 o'clock when drinks were served. He and accused had two drinks of Russian whisky together, and he did not see accused drink any more. The drinks had a slightly exhilarating effect on witness, but accused did not appear to be visibly affected, although remarking later in the evening that he was sick to his stomach. Witness accompanied accused to Weehawken to catch the train and his actions en route were normal; he was not drunk but when witness

left him at the Weehawken station he was sick (R. 52-57).

Miss Margaret Genevieve Davis, New York City, a witness for the defense, testified that she entertained Miss Kathleen Parsons, accused, and Mr. Palmer at her apartment on the evening of March 11, 1933, and prepared the dinner which consisted of waffles, country sausage, honey, cream cheese, pineapple salad with mayonnaise dressing, chocolate pudding, and coffee. This was the third time that persons had been ill after partaking of waffles made by witness, probably due to the fact that they are made from a very rich recipe, and people, especially men, are inclined to eat too many of them. A caller "stopped in" during the evening and served some Russian whisky, accused having between two and three whisky glasses. The introduction of liquor to the party had not been planned. Accused did not appear to be noticeably exhilarated as a result of the drinking; nor did he show any signs of being under the influence of liquor, but during the evening he did complain of indigestion. On the way to Weehawken he said that he felt much worse, and when witness last saw him in Weehawken he was sick. At no time during the evening was he under the influence of liquor (R. 57-59).

Mrs. Hortense Thorne Parsons, Larchmont, New York, testified that she went to the 42d Street Ferry on the night of March 11, 1933, to meet her daughter. She saw accused at the ferry landing; he was very white and had a drawn look around the mouth, which, from her experience with children, means an upset stomach. He appeared to be decidedly ill. If she had thought him intoxicated, she would never have permitted her daughter to cross the ferry with him (R. 59-61).

Cadet John B. Cary, Second Class, testified that he saw accused at the Weehawken station just before boarding the special train returning to West Point, and he appeared perfectly normal. On the train witness was ordered by Lieutenant Bruner to take care of accused and be prepared to testify against him at a court-martial. When witness first saw accused on the train, he was leaning back against the back of his seat with his eyes closed and had the appearance of having fainted. After he vomited, he was perfectly normal in every way (R. 75-78).

Major Earle D. Quinnell, who has been in the Medical Corps for fifteen years, and Captain William F. DeWitt, who has been in the Medical Corps for eight and one-half years, were called by the defense as expert medical witnesses (R. 79,89). Major Quinnell testified that accused was admitted to the hospital on March 19, 1933, for treatment for chicken pox and was discharged on April 6th. The incubation period for chicken pox is from ten to twelve days and during that period one is more than usually susceptible to stomach disorders (R. 82,83). Witness answered numerous hypothetical questions regarding the symptoms of drunkenness (R. 80-88). He stated that the effect of alcohol upon the pupils of the eyes is to dilate them (Lieutenant Bruner stated that he had noticed the appearance of the accused's eyes and that the pupils were very small), and that if the pupils were small either they had not been reacted on by the alcohol or else they had been constricted by some other ethyl compound (R. 79). He further testified that a state of drunkenness could not be definitely determined merely from the odor of alcohol upon a person's breath and the additional fact that the person staggered (R. 80). It was highly improbable that a person who was intoxicated, as accused is said to have been, could regain normal control of his faculties within an hour's time. On the other hand, if a person was suffering from a gastric disorder, vomiting would remove the cause of the disorder and the person would become normal again within a very short time, that is to say, within an hour's time (R. 80-81). Vomiting by a drunken person tends to remove the source and to prevent further assimilation, thereby preventing him from becoming more drunk. However, it would not cause him to become sober any sooner (R. 85). Witness has never known whisky to suddenly affect a person two hours after taking, except in the case of a chronic drunkard (R. 87). Considering the actions of accused as shown by the evidence, witness is of opinion that he was sick and not drunk (R. 80,81).

Captain DeWitt testified generally in corroboration of the testimony of Major Quinnell. He stated that drunkenness was caused by absorption of alcohol into the blood stream, and that vomiting could not remove it from the blood stream, and therefore could not affect the time of recovery which depends on the elimination of the alcohol from the blood. Absorption of liquor would be slower on a

full stomach than on an empty stomach. Recovery from drunkenness within an hour would be very unsual (R. 92), but cold air would tend to sober one (R. 93). On the facts of this case, witness stated that the person could be either sick or drunk but in his opinion was more likely to be sick (R. 90,96-97).

The accused did not testify or make any statement to the court.

5. Drunkenness is defined in paragraph 145, page 160, Manual for Courts-Martial, as "any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties". The two officer witnesses whose testimony is outlined above were the only witnesses who testified that the accused was drunk. They arrived at this conclusion by smelling alcohol on the accused's breath and noticing that he staggered and went to sleep a few minutes after sitting down. Their observation of the accused was brief, and they did not hear him talk. On the other hand, four cadet witnesses and four civilians testified that the accused was not intoxicated, but that he was suffering from a stomach disorder. All of the civilian witnesses but one (Mrs. Parsons) had been with the accused from 3:30 p.m. on the day in question until the train was about to start from Weehawken at about 12:15 a.m. The four cadet witnesses were with the accused practically all the time between 12:15 and 1:20 a.m., when the train arrived at West Point. The opinion of the medical experts inclines to the contention of the defense that the accused was sick rather than intoxicated. The court, in the exercise of its judicial functions, may weigh the testimony of the witnesses and arrive at its determination of the facts upon its sound judgment exercised in that manner. It is apparent that the court, in the exercise of this discretion, gave great weight to the testimony of the two officers in charge of the trip, no doubt considering them more disinterested witnesses.

Summing up the pertinent evidence, it is admitted that at about 10:20 p.m. accused drank two or three drinks of a very potent liquor called Russian whisky; his companion, Mr. Palmer, testified that he felt an exhilarating effect from two drinks of it; thereafter accused complained of being sick at his stomach, which, however, was no doubt due as much to the rich food he had eaten as to the whisky; before

boarding the train at 12:15 a.m., he vomited and thereafter stood roll call; after the train started, Lieutenant Bruner's attention was attracted to accused because of the way he staggered up the car aisle and lurched into a seat; Lieutenant Bruner went to accused and brought him to the rear of the car, noticing a strong odor of liquor on his breath and that he had difficulty in walking; left alone for a few minutes, although knowing that he was under investigation, he went sound asleep so that he was aroused with difficulty and had to be practically lifted from the seat; after this, he vomited several times, spent about fifteen minutes in the lavatory, and the remainder of the time until arrival at West Point at 1:20 a.m. in the car vestibule (it was after midnight on the night of March 11-12). After arrival at West Point, he reported to Lieutenant Bruner although he was not required to do so, and, as if in explanation of his conduct, stated: "Sir, I was drinking". It is noticeable that he did not say he had been sick. At this time he appeared normal.

It is probably true that accused's condition was caused both by the rich food which disagreed with him and by the strong whisky which he drank. It is impossible to say in what proportion each contributed to the result, nor is it necessary to do so. After careful consideration of the evidence, the Board of Review is of opinion that the record is legally sufficient to support the findings of guilty of being drunk in violation of the 96th Article of War. Since the trial accused has completed the work of the Second Class, but as he must in any event return to the Academy by June, 1934, it is proper that he return in January, 1934, to prepare himself to go on with the work of his final year. The sentence of suspension until January 2, 1934, is therefore appropriate in this case.

6. In the case of Cadet Norman L. Mini, CM 197398, published in General Court-Martial Orders No. 3, War Department, January 7, 1932, the Board of Review discussed at length the meaning of "conduct unbecoming an officer and a gentleman", as denounced by the 95th Article of War, particularly as it applies to offenses involving drunkenness. In that case the Board of Review reached the conclusion that the evidence did not sustain a conviction of violation of the 95th Article of War, but of a lesser offense tending to bring discredit upon the

military service in violation of the 96th Article of War. This view was concurred in by The Judge Advocate General, the Secretary of War, and the President. A copy of the opinion in that case was furnished to all judge advocates. In spite of this, however, the offense in the present case was alleged and referred for trial as a violation of the 95th Article of War, although the facts showed clearly that the offense was not any more aggravated than the offense in the Mini case. The court quite properly found accused not guilty of violation of the 95th Article of War, but guilty under Article of War 96. The Board deems it appropriate to say that had the accused been charged with the offense of drinking intoxicating liquor in violation of the Regulations of the Military Academy, which provide the same penalty for that offense as they do for being drunk, the proof would have been simple and easy, no defense would have been possible for the accused who had voluntarily admitted drinking, and the final disposition of the case would have been much accelerated.

7. The Cadet Register shows that accused was admitted to the Military Academy from the Third District of Oklahoma on July 1, 1930, without prior military service; and that he was 22 years of age on September 24, 1932.

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

E. M. Lehey, Judge Advocate.
Grant Illg, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

JUN 26 1933

CM 200472

| | | |
|---|---|---|
| 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, May 18, 1933. Suspension without pay and allowances until January 2, 1934. |
| | ) | |
| Cadet ADRIAN L. HOEBEKE, First Class, United States Corps of Cadets. | ) | |

OPINION of the BOARD OF REVIEW
McNEIL, HILL and HALL, Judge Advocates,
ORIGINAL EXAMINATION by CHEEVER, 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 96th Article of War.

Specification: In that Cadet Adrian L. Hoebeke, First Class, United States Corps of Cadets, was, at West Point, New York, on or about May 6, 1933, drunk.

He pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to reduction to the grade of cadet private, suspension without pay and allowances until January 2, 1934, and to join the then First Class. The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. The evidence introduced by the prosecution shows that on Saturday evening, May 6, 1933, accused was absent from "supper

formation" (R. 6,11), and consequently the Officer in Charge, Captain Paul R. Goode, Infantry, gave instructions for accused to report to him immediately upon his return to barracks (R. 16). About 7:00 p.m. Cadet Frederick A. Thorlin, accused's roommate, encountered him in the toilet room of the seventeenth division of barracks and asked him if he realized that he had missed supper, to which accused replied "Yes". At this time witness thought accused's conduct and manner were "perfectly normal" (R. 5-6). Ten minutes later, while discussing the matter in their room, accused said that he had been up in the hills and had overslept (R. 6). A little later, witness saw accused taking a shower bath. At that time he had an onion in his mouth. He walked in a peculiar manner - a "sidling" motion, not "staggering but it was a rotary motion" (R. 7-8). Witness thought he did not realize the gravity of the situation and took the matter "rather lightly". Cadet Thorlin testified that at this time accused was "slightly intoxicated" (R. 7), that he was not in condition to have gone on parade (R. 8), and would be considered drunk according to the definition of drunkenness in the Manual for Courts-Martial ("any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness ***." P. 160, M.C.M.) (R. 9-10).

About 8:30 o'clock that evening accused reported to Captain Paul R. Goode, the Officer in Charge, at his office, and, in reply to an inquiry as to his whereabouts, stated that he had been asleep. He did not behave in a normal manner; he staggered and could not stand still; his speech was peculiar; and his eyes were blurred. Although Captain Goode could not detect any odor of liquor on accused's breath, he believed that accused was drunk. He was not fit to go on parade or any other duty (R. 11-12). He immediately reported the case to the Commandant of Cadets, Lieutenant Colonel Robert C. Richardson, Jr., Cavalry (R. 13), who testified that on arriving at the office about 8:40 o'clock he advised accused of his right not to answer any questions that might tend to incriminate him, but that if he replied voluntarily his answers could be used against him. Accused said he understood (R. 16). Witness observed accused and his impression was that he "was suffering from either alcoholism or some drug". Witness further testified:

"I therefore said to him: 'Mr. Hoebeke, blow your breath in my face.' He did. I detected no odor of alcohol upon his breath, but a strong odor of onions, or of some deodorant. I then had him walk toward me on a straight line, making an about face and retreat for approximately five paces. He showed, as a result of this, a lack of equilibrium. He did not fall or stagger, but was unsteady. I then had him raise his arms to the side and forward, as in calisthenics and while he showed no tremors, there was an unsteadiness in his movements. He was of an extreme pallor, circles under his eyes, pupils dilated. He answered all of my questions normally and intelligently. I was convinced, however, that he was suffering from either illness, alcoholism, or a drug, but morally convinced that it was alcohol. Wishing, however, to have a technical confirmation of my opinion, I turned to the Officer in Charge, and said, 'Captain Goode, you will take Mr. Hoebeke personally to the hospital and have the Surgeon examine him. Please report to me the result of the examination at once.'" (R. 16-17.)

Accused stood at attention and maintained a proper military attitude during the questioning. Witness would not have permitted him to go on guard or parade and expressed the opinion that he could not safely execute any duty that might have been assigned to him, and was drunk under the definition of drunkenness in the Manual for Courts-Martial. However, there was some doubt in witness' mind, and therefore he directed that a technical opinion be obtained from the medical officer (R. 17-19).

Cadet Harry S. Tubbs, First Class, testified that he was the Cadet Senior Officer of the Guard on the evening in question and just before 9:00 o'clock took accused to the post hospital in compliance with orders from Captain Goode. Accused wanted a glass of water but witness told him they could not stop. There was an odor on his breath which witness thought was intoxicating liquor (R. 21,22). On the way to the hospital accused remarked that he was "afraid they had him" and he seemed "more frightened than anything else". He walked normally and was in condition to go on parade. Witness was

of opinion that accused was not drunk as drunkenness is defined in the Manual for Courts-Martial, although he thought that he had been drinking (R. 23,25).

Major Charles K. Berle, Medical Corps, West Point, New York, testified that he has been a physician and surgeon for nineteen years and has testified before courts as to the sobriety of persons and as to the diagnosis of drunkenness. He examined accused about 9:05 o'clock on the night of May 6, 1933, at the post hospital and concluded that he was drunk (R. 26-28). Accused was required to remove his hat, collar, and blouse. His breath had the odor of onions. He walked rather unsteady in a straight line, and deviated to the left about two to two and one-half feet. A normal person attempting such a test would deviate slightly to either side but would correct such deviation of his own volition. Accused was given the equilibirum test and swayed perceptibly. While his speech was coherent, it was slow, with an effort to enunciate clearly and carefully. It was so unlike the speech of a cadet that it was unusual (R. 28-30,32). Witness summed up the facts upon which his diagnosis of drunkenness was based as follows: "His general attitude, manner, his speech, condition of his pupils, the unsteadiness on arising, the changed gait, and the general makeup of the examination" (R. 28). There was no question in his mind that accused was drunk (R. 33). On cross-examination, witness testified that accused was neither foolish nor sullen, nor did he notice any confusion of memory, but in view of the symptoms as a whole his condition could not be attributed to illness (R. 29,30).

After Major Berle had examined accused, Cadet Tubbs took him to his room and placed him in arrest in complaince with orders from Captain Goode. On the way from the hospital to the barracks accused remarked that he "didn't think that they had found a thing" (R. 24).

4. Colonel Richardson, Commandant of Cadets, testified for the defense that accused is

> "a man of very good moral character. He has always conformed to the standards exacted of the Corps of Cadets, and, to the best of my belief and recollection, he has never been in any serious disciplinary trouble

before. He was appointed a non-commissioned officer as a result of his general reputation, plus additional weight given to the opinion of his tactical officer as regards his quality of leadership. The cadet officers are made from a complicated rating system, which includes the elements of tactics, scholarship, conduct, leadership, bearing, appearance, activities, and athletics. *** He has always appeared to be very modest and correct in his deportment." (R. 20.)

The other character witnesses for the defense were First Lieutenant Philip E. Gallagher, Infantry, who knew accused four years, First Lieutenant Kyrl L. F. DeGravelines, Coast Artillery Corps, who knew him one and one-half years, and Cadet Captain Edward T. Ashworth, First Class, United States Corps of Cadets, who knew him four years. They testified that his character is excellent, that he has the reputation of being always sober, and that his conduct is quiet, serious, and disciplined. Cadet Ashworth saw him on week-end leaves and his conduct was "always superb" (R. 33-38).

Accused did not testify or make any statement to the court.

5. The evidence shows that accused was absent from supper formation on the evening of May 6th; that when he returned to barracks he appeared intoxicated to his roommate; that he ate an onion, with the obvious purpose of disguising his breath, and also took a shower bath, both before reporting to the Officer in Charge; that when seen by the Commandant, the Officer in Charge and the medical officer, he walked unsteadily, swayed during equilibrium tests, his speech was abnormal, his eyes were blurred with dilated pupils, and he had an extreme pallor. These facts sufficiently show that, although accused was not extremely drunk, he was drunk within the definition of drunkenness contained in the Manual for Courts-Martial.

6. The Cadet Register shows that accused was admitted to the Military Academy from the Fifth Congressional District of Michigan, on July 1, 1929, without prior military service; that he will be 22 years of age on July 7, 1933; and that his class standing for

the fourth class year was 292 in a class of 377, for the third class year 285 in a class of 367, and for the second class year 158 in a class of 350. He was given no class standing for the last year although he completed all the work.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons hereinabove indicated, the Board of Review is of opinion that the record of trial is legally sufficient to support the findings and sentence.

The accused was a member of the class which graduated from the Military Academy on June 13, 1933. He has completed satisfactorily all of the work required of a cadet for graduation and commission as a second lieutenant. Under the circumstances, it seems a useless waste to require him to return to the Academy on January 2, 1934, and take over again the academic work of the last term which he has already completed. It would be better to permit him to graduate at some date during the summer which would place him at the foot of his class in the Army, a loss of about one hundred files in rank, which would be a sufficiently severe penalty for his offense. The Corps of Cadets knows that he was not permitted to graduate with his class, and that knowledge will have as great a deterrent effect as the execution of the sentence imposed by the court. It is therefore recommended that the sentence be confirmed and commuted to confinement to cadet restricted limits until July 15, 1933, on which date he shall be graduated and commissioned if otherwise qualified.

E. C. Mulrey, Judge Advocate.
Gerard Vile, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

CM 200498

July 15, 1933

| | | |
|---|---|---|
| UNITED STATES | ) | SEVENTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Fort Leavenworth, Kansas, |
| Private MOSES CLAYBORNE | ) | May 18, 1933. Dishonorable |
| (6792438), Headquarters | ) | discharge and confinement for |
| Troop, 10th Cavalry. | ) | ten (10) years. Penitentiary. |

---

HOLDING by the BOARD OF REVIEW
McNEIL, HILL and HALL, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, 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 and properly convicted of the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Moses Clayborne, Headquarters Troop, 10th Cavalry, did, at Fort Leavenworth, Kansas, on or about December 12, 1932, wrongfully attempt to extort the sum of two hundred and fifty ($250.) dollars from Major Samuel C. Cumming, United States Marine Corps, a student at The Command and General Staff School, Fort Leavenworth, Kansas, by threatening in writing to the said Major Cumming, that he would "get the baby" of the said Major Cumming, if the said Major Cumming did not place said sum of money in his (Major Cumming's) box at The Command and General Staff School.

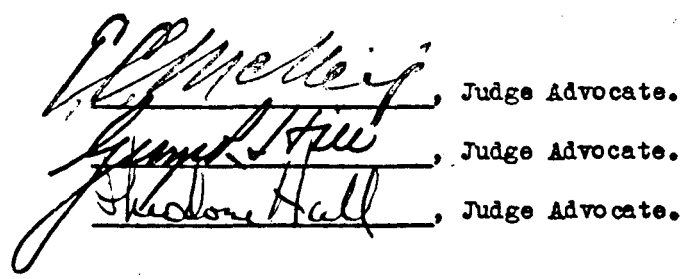
3. The offense described in the specification is not denounced by any statute of the United States of general application, nor by

the law of the District of Columbia, either common or statutory. Under section 289, Federal Penal Code, March 4, 1909, the following statute of the State of Kansas, enacted in 1868, is in force on the reservation of Fort Leavenworth, Kansas:

> "21-532. Extortion or blackmail. Every person who shall knowingly send or deliver, or shall make, and, for the purpose of being delivered or sent, shall part with the possession of any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark or other designation, threatening therein to accuse any person of a crime, or to do any injury to the person or property of anyone, with a view or intent to extort or gain any money or property of any description, belonging to another, shall on conviction be adjudged guilty of an attempt to rob, and shall be punished by confinement and hard labor not exceeding five years." G.S. 1868, ch. 31, Sec. 77; Oct. 31; Revised Statutes of Kansas, Annotated, 1923.

A penitentiary may not be designated as the place of confinement for conviction of an offense under section 289 of the Penal Code. Sec. 90, M.C.M., 1928.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary.



_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

CM 200499 JUN 30 1933

| | | |
|---|---|---|
| UNITED STATES | ) | EIGHTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G.C.M., convened at |
| | ) | Fort Crockett, Texas, May 26, |
| Private CHARLIE H. WILLMETT | ) | 1933. Dishonorable discharge |
| (6214912), 60th Service | ) | and confinement for six (6) |
| Squadron, Air Corps. | ) | months. Fort Crockett, Texas. |

HOLDING by the BOARD OF REVIEW
McNEIL, HILL and HALL, 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 specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Charlie H. Willmett, Air Corps Detachment, 8th Corps Area, did, at Hensley Field, Grand Prairie, Texas, on or about September 1, 1932, feloniously take, steal and carry away three (3) Woolen O.D. blankets of the value of ten dollars and five cents ($10.05), the property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private Charlie H. Willmett, Air Corps Detachment, 8th Corps Area, did, at Hensley Field, Grand Prairie, Texas, on or about February 13, 1933, feloniously take, steal and carry away two (2) Woolen O.D. blankets of the value of six dollars and seventy cents ($6.70), the property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Private Charlie H. Willmett, Air Corps Detachment, 8th Corps Area, did, at Arlington, Tarrant County, Texas, on or about September 1, 1932, knowingly and willfully apply to his own use and benefit by leaving as security for the payment of merchandise, two (2) Woolen O.D. blankets of the value of six dollars and seventy cents ($6.70), the property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Charlie H. Willmett, Air Corps Detachment, 8th Corps Area, did, at Fort Worth, Tarrant County, Texas, on or about September 1, 1932, knowingly and willfully apply to his own use and benefit by leaving as security for the payment of merchandise, one (1) Woolen O.D. blanket of the value of three dollars and thirty five cents ($3.35), the property of the United States, furnished and intended for the military service thereof.

Specification 5: In that Private Charlie H. Willmett, Air Corps Detachment, 8th Corps Area, did, at Fort Worth, Tarrant County, Texas, on or about February 13, 1933, knowingly and willfully apply to his own use and benefit by leaving for the use of an unauthorized person, two (2) Woolen O.D. blankets of the value of six dollars and seventy cents ($6.70), the property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to, and was found guilty of, the Charge and all specifications. Evidence of one previous conviction by summary court-martial for absence without leave was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence, remitted six months of the confinement imposed, designated Fort Crockett, Texas, as the place of confinement, and forwarded the record pursuant to Article of War 50½.

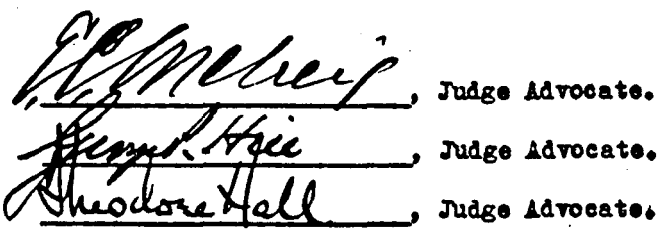
3. Specifications 1 and 2 allege larceny. There is no competent evidence of the corpus delicti, viz., that Army blankets were missing at Hensley Field either on November 15, 1932, or on March 6, 1933. The testimony by deposition of Lieutenant Cooper (Ex. A) that 5 and 9 blankets, respectively, were missing on these dates, and that of Captain Weddington (Ex. B) that 9 blankets were missing on March 6, 1933, is hearsay and incompetent to establish such facts, since both testified that Private Hogg conducted each of these inventories. Private Hogg also testified by deposition (Ex. D), but not upon this matter, notwithstanding the statement of the Acting Judge Advocate in his review that the testimony of Lieutenant Cooper and Captain Weddington upon the matter, although hearsay, was not prejudicial to the rights of the accused due to the fact that Private Hogg, who conducted the inventory, testified to the same effect. There is no other evidence tending to prove the corpus.

Of the 5 blankets traced to the possession of accused and recovered, all were O.D. in color, carried the markings "U.S." and were of the general appearance of Army blankets (Exs. A,B,C,D,F,G, and H). The two blankets recovered from the house on West Daggett Street in Fort Worth, the misappropriation of which is charged under Specification 5, carried the same lot number as other blankets on hand at Hensley Field (Exs. C and D). It is well known that thousands of O.D. blankets with markings of "U.S." upon them have been disposed of by the makers and by the Government and are subject to legitimate private ownership. In the absence of other distinctive markings serving to identify them with like blankets so marked and missing from government possession, the fact is not established that they are government property furnished and intended for the military service. The similarity of the lot numbers of the blankets recovered on West Daggett Street with the lot numbers of other blankets on hand at Hensley Field adds little or nothing to proof of identity, since there is no evidence showing that blankets of such lot numbers have not been disposed of commercially and properly have reached the hands of civilian owners.

Of the blankets described in Specifications 3 and 4, of the Charge, there is total failure of proof that they are the property

of the United States, furnished and intended for the military service thereof, as alleged, and there would be like failure of proof in respect to the two blankets described in Specification 5 of the Charge, were it not for the statement of accused to the owner of the apartment house where they were left that they were the property of the United States (Ex. H), and the subsequent admission of the accused to the detective that these were Army blankets (Ex. E). To support the finding of guilty of Specification 5, proof that such blankets were missing is unnecessary; it is enough that they were wrongfully disposed of. The proof that two blankets, admitted by accused to be the property of the United States, were left by him for the temporary use of a friend, as admitted by his counsel (R. 10), and were recovered from the possession of this friend in a private apartment at Fort Worth, Texas, is sufficient to support the finding of guilty under this specification.

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1, 2, 3 and 4 of the Charge, but legally sufficient to support the findings of guilty of Specification 5 and the Charge, and legally sufficient to support the sentence.


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

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

CM 200520

JUL 7 1933

| | | |
|---|---|---|
| UNITED STATES | ) | EIGHTH CORPS AREA |
| v. | ) | Trial by G.C.M., convened at Fort Sam Houston, Texas, June 2, 1933. Dishonorable discharge, suspended, and confinement for one (1) year and six (6) months. Disciplinary Barracks. |
| General Prisoner ARTHUR C. TOMPKINS. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, BITZING and HALL, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, 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 of guilty of Charge I and its Specification, alleging desertion in violation of the 58th Article of War, and legally insufficient to support the sentence in part, has been examined by the Board of Review.

2. In the Specification under Charge I and in that under Charge II the accused is charged as "General Prisoner Arthur C. Tompkins, formerly Private, Battery B, 12th Field Artillery". There is evidence by stipulation in the record that on the date of the alleged desertion he was a general prisoner, and by his plea of guilty to Charge II and its Specification, in which he is so charged, he has admitted his identity as that person. Notwithstanding the statement of the Acting Staff Judge Advocate in his review that the record of trial shows that on the date of accused's alleged desertion he was serving sentence under a suspended dishonorable discharge, the record of trial contains no proof, either direct or circumstantial, that the dishonorable discharge previously adjudged against him, which changed his status from that of private to general prisoner, had not in fact been executed prior to the date of the alleged desertion. A general prisoner, in whose case the dishonorable discharge has been executed, is no longer in the service and cannot legally be guilty of desertion on a date subsequent to that on which he was separated from the service. Dig.

Ops. JAG, 1912-30, Sec. 1499-1. To warrant a finding of guilty upon trial of a general prisoner for desertion, it is incumbent upon the prosecution to establish, as a necessary element of proof, that the dishonorable discharge has not been executed. CM 199228, Hoppert. This the prosecution has failed to do.

3. 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, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months, the maximum punishment which may be imposed for violation of condition of his employment by a Class A general prisoner, to which offense the accused pleaded guilty and of which he was properly found guilty under Charge II and its Specification.

4. This accused was previously convicted of desertion at Fort Sam Houston, Texas, on or about June 5, 1930, terminated by surrender at Fort Sam Houston, Texas, on or about June 18, 1931, and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one and one-half years. The sentence was approved and ordered executed, but the execution of the dishonorable discharge was suspended until his release from confinement. The case is published in General Court-Martial Orders No. 184, Headquarters Second Division, Fort Sam Houston, Texas, August 1, 1931. No additional penalties are inflicted upon him by a second conviction of desertion. Therefore, since the conviction is not of an offense involving moral turpitude or affecting the civil status of the accused, remedial action may be taken in the War Department in compliance with the policy directed by the Secretary of War in his approval of the opinion of The Judge Advocate General of April 13, 1923, relative to action under Article of War 50½.

E. C. McNeil, Judge Advocate.

H. R. Billings, Judge Advocate.

Theodore Hall, Judge Advocate.

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

July 29
1933

CM 200589

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | SEVENTH CORPS AREA |
| | ) | |
| v. | ) | Trial by G. C. M., convened at Fort Leavenworth, Kansas, June 20, 1933. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks. |
| | ) | |
| General Prisoner WILLIAM REED. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, BITZING and HALL, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, Judge Advocate

1. The record of trial in the case of the general prisoner named above has been examined and is held by the Board of Review to be legally sufficient to support the finding of guilty of Charge II and its Specification, alleging escape from confinement in violation of the 69th Article of War, and so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

2. The only question presented by the record is as to the legal sufficiency of the record to support the findings of guilty of Specifications 1 and 2, Charge I, alleging that the accused deserted the service of the United States, in violation of the 58th Article of War.

When an accused is charged as a "General Prisoner", as in the instant case, to warrant a finding of guilty of desertion it is incumbent upon the prosecution to establish, as a necessary element of proof, that the dishonorable discharge has not been executed. CM 199224, Hoppert; 200520, Tompkins. The accused, upon arraignment, entered a special plea in bar of trial to Specifications 1 and 2, Charge I, and offered in evidence General Court-Martial Order No. 87, Headquarters Second Division, Fort Sam Houston, Texas, March 30, 1931, which ordered

executed a dishonorable discharge, which order the defense contended showed accused was not at the time of the alleged desertions a member of the military service and therefore could not be tried for the offense of desertion (Ex. 3). The prosecution in rebuttal offered in evidence the service record of the accused (Ex. 2). The last completed indorsement of this record contained no notation regarding the conviction published in General Court-Martial Order No. 87, supra, nor was the final indorsement completed, an administrative requirement when a soldier is discharged from the military service. On this last mentioned showing, the court denied the special plea in bar of trial (R. 12).

3. The dishonorable discharge of the accused was ordered executed by General Court-Martial Order No. 87, Headquarters Second Division, Fort Sam Houston, Texas, March 30, 1931 (Exs. 1, 3 and 4). The accused testified that he received a copy of this order in April, 1931, that he was given a medical examination for discharge (R. 9), and was under the impression that he was a discharged soldier (R. 7). The service record of the accused, introduced by the prosecution to rebut the plea in bar, is of little evidentiary value to show that the accused had not been dishonorably discharged. No presumption of regularity may attach to the absence of a final entry showing dishonorable discharge since this service record is obviously irregular and incomplete in that it wholly fails to show the conviction of the accused published in General Court-Martial Order No. 87, supra. Thus, there remains no affirmative evidence in the case indicating that the dishonorable discharge directed in General Court-Martial Order No. 87, supra, has not in fact been executed. Accordingly, this case is controlled by the principle announced in the Hoppert and Tompkins cases cited above.

4. In view of the above, the court erred in denying the special plea in bar of trial as to Charge I and its specifications.

While it is unnecessary to give a second dishonorable discharge, nevertheless in this case there appears to be so much uncertainty concerning the status of the accused and as to whether or not either of the two former sentences to dishonorable discharge has been executed that it is considered advisable again to include dishonorable discharge in the sentence.

5. For the reasons hereinabove stated, the Board of Review holds the record legally insufficient to support the findings of guilty of Charge I and Specifications 1 and 2 thereunder, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

_____, Judge Advocate.

J. R. Bitting, Judge Advocate.

Theodore Jr., Judge Advocate.

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

July 29, 1933

Military Justice
CM 200601

| | |
|---|---|
| UNITED STATES<br><br>v.<br><br>Private EDWARD J. ROWLAND (R-41286), Battery D, 3d Field Artillery. | SIXTH CORPS AREA<br><br>Trial by G. C. M., convened at Fort Sheridan, Illinois, June 15, 1933. Dishonorable discharge, suspended, and confinement for six (6) months. Fort Sheridan, Illinois. |

OPINION by the BOARD OF REVIEW
McNEIL, BITZING and HALL, Judge Advocates.
ORIGINAL EXAMINATION by O'KEEFE, 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 of guilty of the Charge and Specification alleging desertion in violation of the 58th Article of War, 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 Edward J. Rowland, Battery D, 3rd Field Artillery, did, at Fort Sheridan, Illinois, on or about April 5th, 1933, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Sheridan, Illinois, on or about May 5th, 1933.

He pleaded guilty to the Specification except the words "desert" and

"in desertion", substituting therefor respectively the words "absent himself without leave from", and "without leave", of the excepted words not guilty, of the substituted words guilty, to the Charge, not guilty but guilty of a violation of the 61st Article of War, and was found guilty of the Charge and Specification. Evidence of two previous convictions by courts-martial 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 and ordered its execution but suspended the execution of the dishonorable discharge, and designated Fort Sheridan, Illinois, as the place of confinement. The sentence was published in General Court-Martial Orders No. 90, Headquarters Sixth Corps Area, July 8, 1933.

3. The evidence shows the accused went absent without leave from Battery D, 3d Field Artillery, at Fort Sheridan, Illinois, on April 5, 1933, and remained absent without leave until he returned to Fort Sheridan, Illinois, on May 5, 1933. Accused was dressed in uniform at the time he returned (R. 9). Sergeant Julius S. Jasper, 3d Field Artillery, testified for accused that he was Acting Supply Sergeant on the day accused absented himself and checked in his personal and military equipment. He had left behind a complete outfit of civilian clothes in his wall locker in fair condition and a full set of toilet articles and items of that nature (R. 16,17). The testimony regarding the civilian clothes was corroborated by the Gunner Corporal of accused's section, Corporal Joseph Doyer, 3d Field Artillery (R. 18).

Accused chose to remain silent before the court (R. 20,22).

4. The record of trial therefore presents the question of law whether the evidence is legally sufficient to support the findings that accused deserted.

Desertion is absence without leave from the service with the concurrent intent not to return thereto. The law is well settled that mere absence without leave is not satisfactory evidence of desertion unless it is much prolonged. The Board of Review has repeatedly expressed the opinion in its holdings that in order to sustain the finding of guilty of desertion there must be in addition to the fact of absence without leave for a short period, some evidence tending to

30 days here

show motive for desertion, or tending to show that prior to absenting himself without leave accused had stated that he was going to desert or some other evidence from which a court might reasonably infer that the accused intended not to return to the military service. CM 198750, Knouff; 196776, Maioloha; 196187, Roath; 195988, Parr; 189658, Hawkins. There is no such supporting evidence in the record. On the contrary, the evidence produced concerning the items of a personal nature which were left behind strongly indicates an intent to return to his station and rebuts any unfavorable presumption which might otherwise be drawn from his comparatively brief period of absence.

5. For the reasons stated, the Board of Review is of 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 three months and forfeiture of $13.08 of his pay per month for a like period.

C. W. Mellor, Jr., Judge Advocate.
H. R. Bitting, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

JUL 29 1933

CM 200627

| | |
|---|---|
| UNITED STATES<br><br>vs.<br><br>Private MICHAEL MURRAY, JR., (6000247), Headquarters Company, 14th Infantry. | PANAMA CANAL DEPARTMENT<br><br>Trial by G.C.M., convened at Fort Davis, Canal Zone, May 26, 1933. Dishonorable discharge and confinement for seven (7) years. Penitentiary. |

REVIEW by the BOARD OF REVIEW
McNEIL, BITZING, and HALL, Judge Advocates.
ORIGINAL EXAMINATION by CHEEVER, Judge Advocate.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Michael Murray, Jr., Headquarters Company, 14th Infantry, did, at Fort Davis, Canal Zone, on or about April 10, 1933, unlawfully enter the dwelling of 1st Lieutenant H. V. Ellis, Quartermaster Corps, with intent to commit a criminal offense, to wit, assault therein.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of four previous convictions, two by summary courts-martial for drunkenness in Cristobal, Canal Zone, and absence from bed check, and for absence without leave, respectively, and two by special courts-martial for drunkenness at Colon, Republic of Panama, presence in Republic of Panama without proper written authority, and breach of restriction, and for drunkenness in a public place and presence in a restricted area at Colon, Republic of Panama, respectively, 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 (7) years. The

reviewing authority approved the sentence, designated the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that in April, 1933, First Lieutenant H. V. Ellis, Quartermaster Corps, was occupying Quarters No. 57-B at Fort Davis, Canal Zone. These quarters are on the road leading to the stables and separated from the road by a grass plot about 15 feet wide. The stables are about 175 or 200 feet distant and the Headquarters Company Barracks about 350 yards. The road is habitually used by soldiers going to and from the stables. Lieutenant Ellis' name on the front of the quarters is plainly visible from the street and the building had been used for officers' quarters for at least two years. All living rooms are on one floor. A porch extends across the front, and entry to the porch is on the left as one faces the quarters. A hall runs through the center of the quarters from the front porch to the bathroom at the rear. There is no door or partition between this hall and the porch. The rooms on the left of the hall as one enters from the porch are three bedrooms, and those on the right a living room, dining room, and kitchen, respectively. On the night of April 9, 1933, Lieutenant Ellis' daughter was occupying the front bedroom and sleeping in the one of the two beds farthest from the one door of the room leading to the hall. The shades of the windows of this room opening on the porch were not drawn and one standing on the porch could see into the room (R.11-14; Ex.2).

On the evening of April 9, 1933, Lieutenant Ellis fell asleep upon the day bed in the front room of his quarters about 9:00 or 9:30. Some time later he awoke, decided it was time to go to bed, and walked towards the bathroom. As he was about to enter the bathroom door he thought he heard the click of a lock in another part of the house. He walked to the front of the house and saw that the door to the bedroom and the front door were closed. He felt quite a breeze strike him in the face and thought that one of the doors must have blown shut. He then went back to the bathroom, remained there possibly a minute, and was just going into the door of his own bedroom when his daughter "yelled," "Daddy, come here! There's a soldier in my room!" He rushed into her room. It was dark but there was a faint glow in the room from the lamp post outside. His daughter's bed was right under the window and he could see a man sitting on the end of the bed. He struck the man once or twice on the head, knocked him over the bed, and then dragged him out into the hall. He then went to the telephone to call the guard house. He got the Artillery Guard House first by mistake, and, while he was looking for the number of the 14th Infantry Guard House, accused had "come to," got on his feet, and said "Lieutenant Ellis, don't send me to the guard house. I'm due to go back to the States on the boat tomorrow." Lieutenant Ellis finally got the guard house, and the commander

of the guard came over with a sentry and took accused to the guard house. He did not think accused was conscious when he dragged him from the bedroom into the hall (R.9-11), but when he got to his feet he talked coherently, made himself understood, and seemed to know where he was and what he had been doing (R.14). He was in uniform, blouse, hat, and belt. Lieutenant Ellis thought he was sober (R.16).

Betty Ellis, a witness for the prosecution, testified that she lives at Fort Davis, her father is in the military service, and she is twelve years old. She never knew accused before the night of April 10th, nor his name until she heard him tell her father that night it was Private Murray. On that night she happened to wake up and look down and saw a head lying on her leg. She could not tell what it was and the man kept saying "Don't tell." Then he said that he was sick and was going "to make a mess" on her bed. She asked him why he did not go in the bathroom and he said "no," he did not want to. She then realized it was somebody she did not know at all and "got sort of scared." The man kept saying "Don't tell." She heard some foot steps and a "light click" and called her father who came in and hit the man. She said to her father, "Daddy, come here!", and when he was about at the door she "woke up" and said, "I found a soldier in my room." There were no lights in her room but there was a light in the dry closet, the door of which was "the slightest bit open." The curtains on her windows were not closed. When she woke up accused was kneeling beside her bed and "up a little more toward the head of the bed" than when her father came in. At that time he was "around to the bottom" of the bed. He made no offer to do her violence or to strike her but he had his head on her leg over the covers of the bed. It was light enough in her room so that she could see "he was dressed in the suit that soldiers wear," and by that she "guessed" he was a soldier. He spoke to her in "a real low voice." She smelled no liquor on his breath. She had never seen him before (R.16-20).

First Sergeant Basil Smith, Company D, 14th Infantry, Fort Davis, Canal Zone, a witness for the prosecution, testified that on April 10, 1933, he was commander of the guard. About 1:55 a.m., the telephone at the guard house rang and Lieutenant Ellis told him to have a guard come to his quarters immediately. Witness and one sentry went to the quarters and found Lieutenant Ellis and accused standing in the hallway (R.21). Lieutenant Ellis told him that he had found accused in his child's bedroom and wanted him confined in the guard house. On the way to the guard house accused remarked, "Smith, I'm in trouble now." Before reaching the guard house accused said "What a man won't do for cunt" (R.22). It would have been possible for accused to make this remark to him and for the sentry, Private Dillman, not to have caught what he said since accused's head was turned toward witness and Private Dillman

was on his right. Accused spoke in a normal tone of voice (R.34). Witness noticed that accused's face was "pretty well cut" so he had him sent to the hospital. While accused was at the hospital Captain Blizzard phoned that he wanted him examined by a medical officer. Witness immediately went to the hospital and found that a medical officer had already examined accused. Witness had not told accused his name when the latter addressed him as "Smith", and Lieutenant Ellis had addressed him only as "Sergeant." He was led to believe that accused recognized him (R.23). Accused's talk was "a little thick," but he walked "straight enough" and unassisted the distance of about 200 yards to the guard house. Witness smelled liquor on accused's breath. During the time accused was at the guard house until he was sent to the hospital he stood up in the room of the commander of the guard. He spoke during this time and his speech was coherent and witness understood what he said (R.24).

Private Charles H. Dillman, Company D, 14th Infantry, Fort Davis, Canal Zone, a witness for the prosecution, testified that about 2:00 o'clock in the morning on or about April 10th he went with Sergeant Smith to Lieutenant Ellis' house. There they found accused and started out with him to the guard house. As they left accused said, "Sergeant Smith, isn't there something that you could do to help me, as I leave on the next boat tomorrow?" Accused walked from Lieutenant Ellis' quarters to the guard house (R.25). He heard accused say nothing else. As they started out of the house witness had hold of accused's arm until accused asked him not to hold it, but he stayed right by his side. Accused was talking to Sergeant Smith and not to witness, and witness was not paying any attention to the conversation (R.26-27).

Major Clarence M. Reddig, Medical Corps, a witness for the prosecution, testified that about 3:25 a.m., on the morning of April 11th he examined accused at the station hospital. In witness' opinion accused "was so suffering from the effects of some intoxicant as to sensibly impair his natural and full exercise of his mental and physical faculties." He could walk, but not steadily, and could talk, but not clearly. He seemed to know what he was doing and he responded to directions given him. He stood up when told to stand. He apparently knew where he was and recognized the witness as a medical officer (R.28-29).

First Sergeant Victor E. LaPine, Headquarters Company, 14th Infantry, Fort Davis, Canal Zone, a witness for the prosecution, testified that accused first arrived in his organization about January 16, 1932. Accused was assigned to the Howitzer Platoon, a mounted organization, had routine duty at the stables, and in going to and fro between the stables and the barracks would pass probably 10 or 15 yards from the quarters of Lieutenant Ellis (R.32-33).

Upon completion of the case for the prosecution the defense moved under paragraph 71 d, MCM, that accused be found not guilty because no intent had been shown, and, the motion having been overruled by the court, the defense again moved for an acquittal upon the ground that no assault had been shown in the case and "no intent of assault." This motion was also denied.

Sergeant Exire O. Wood, Headquarters Company, 14th Infantry, a witness for the defense, testified that he was charge of quarters of his organization on the night of April 10th (R.38). He saw accused between 11:30 and 12:00 o'clock outside the barracks on the steps. Accused was "absolutely drunk" did not know what he was doing and could not talk. Witness tried to persuade him to go to bed. He tried to take accused by the arm and help him, but accused pushed him away and "mumbled." Later he went back and talked to accused for about 20 minutes but could not get a word out of him but "mumbles." Witness then went to bed about 12:20 and saw nothing more of accused that night (R.38-39).

Private George F. Fritz, Headquarters Company, 14th Infantry, a witness for the defense, testified, that accused was "pretty drunk" at supper on April 10th. Later that night, about 12:00 o'clock, after witness had gone to bed he heard a noise "like somebody was falling into the shrubbery along the walk." He got up, looked through the window, and saw accused. He waited for accused to come up stairs. Accused bumped into two gun racks near the door, fell over against his bed, and then upon the floor. He then got up, recovered his balance, and went out. Witness thought that he was drunk (R.42-43).

Corporal Henry F. Dowling, Headquarters Company, 14th Infantry, a witness for the defense, testified that he met accused in Dutch's Bar in Colon about 10:30 o'clock on the night of April 10th. Accused was staggering around from table to table and went up to the bar and had a drink. He saw accused later, about a quarter after 12:00, sitting outside on the Headquarters Company steps (R.46). Accused was drunk. Witness tried to talk to him and persuade him to go to bed but could make no headway with him. Accused did not talk very intelligently and made nothing clear (R.47).

Private John B. Hughes, Headquarters Company, 14th Infantry, a witness for the defense, testified that on April 11th he was in confinement in the post guard house, Fort Davis. About 6:00 o'clock in the evening before accused was placed under arrest he saw him in the corridor of Headquarters Company apparently under the influence of liquor (R.48). At about 5:15 the next morning he saw accused in the guard house latrine sitting on the bowl with his head leaning on the nearest urinal. Witness shook him and woke him up since it was nearly time for first call. Apparently he did not understand witness and was too drunk even to talk (R.49-50).

Captain Austin Lowrey, Jr., Medical Corps, a witness for the defense, testified that in his opinion if a man had been drinking and was hit very forcibly by another the blow would tend to sober him. It would be possible for a man so sobered to become drunk again later without taking any further liquor (R.50-51).

3. The only question presented by the record is whether or not there is in it substantial evidence showing that accused was capable of entertaining the intent to commit the criminal offense with which he is charged and that he did have such intent. The staff judge advocate, in his review of the record, expressed the opinion that the evidence set forth therein shows that accused was so completely under the influence of intoxicating liquor that he was incapable of entertaining an intent to commit any criminal offense at the time he entered Lieutenant Ellis' quarters and that since a necessary element of the offense charged was lacking the conviction cannot be sustained. The staff judge advocate further stated that this was a question of fact upon which different persons might reach different conclusions, but that his opinion was based upon what he considered reasonable and logical deductions from the evidence presented, and he recommended that the sentence be disapproved. The reviewing authority in the proper exercise of his functions also weighed the evidence but came to the contrary conclusion that the sentence should be approved.

In passing upon the legal sufficiency of this record it is not the function of the Board of Review or The Judge Advocate General to weigh evidence, judge of the credibility of witnesses, or determine controverted questions of fact. These are exclusive functions of the court-martial and the reviewing authority. It follows that if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the Board of Review and The Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts. CM 152797; MCM, 1928, p. 216, Note.

There is evidence in the record that accused between one and two o'clock in the night unlawfully entered the quarters of Lieutenant Ellis. For more than a year accused's duties had taken him by these quarters almost every day. Lieutenant Ellis' name was displayed plainly upon them and there can be no question but that accused knew they were occupied by this officer and his family since the previous December. It does not appear that accused wandered aimlessly about these quarters upon entering them. Apparently he did not enter the living room on the right of the entrance in which Lieutenant Ellis was taking a nap at the time, but did enter the sleeping room of the twelve year old girl,

Betty Ellis, at the left of the entrance. As he came upon the porch he could look through the windows of her room and could see that it was occupied solely by this little girl whose bed was directly under the window. Betty awoke to discover him kneeling by her bed with his head resting upon her leg with the bed covers between. In a voice low, but clear and coherent, he repeatedly cautioned her "Don't tell, Don't tell." He then said that he was sick and was going "to make a mess" upon the bed. Not yet alarmed, Betty urged him to go to the bathroom. But he said "No," he did not want to go, and continued to caution her not to tell. Then, upon discovering that she did not know him at all, Betty "got sort of scared" and called her father, Lieutenant Ellis rushed in, struck accused several blows upon the head, knocking him from the place at the foot of his daughter's bed to which he had withdrawn, and then dragged him unconscious into the hall. While Lieutenant Ellis was trying to get the guard house by telephone accused regained consciousness, got to his feet, addressed Lieutenant Ellis by name, and by his remarks indicated unmistakably not only that he knew Lieutenant Ellis was calling the guard house for the purpose of having him taken there, but that he had an intelligent appreciation of the difficulty he was in and that it would undoubtedly interfere with his departure for the States by boat the next day. Lieutenant Ellis thought he was sober. It must have been about this time that Betty heard accused tell her father that he was Private Murray. On the way to the guard house between Sergeant Smith and the sentry, Private Dillman, accused recognized the Sergeant and addressed him as Smith, although the Sergeant's name had not previously been mentioned, saying as, testified by Sergeant Smith, "Smith, I'm in trouble now," and later before reaching the guard house, saying, "What a man won't do for cunt." His speech while a "little thick" was intelligent and coherent. He was able to walk "straight enough" and unassisted the distance of about 200 yards to the guard house. Private Dillman heard accused say, "Sergeant Smith, isn't there something you could do to help me, as I leave on the next boat tomorrow?" He heard no more because as he said, accused was talking to Sergeant Smith and he was paying no attention to the conversation. While at the guard house and before he went to the hospital accused stood up in the room of the commander of the guard, spoke coherently, and made himself understood.

Notwithstanding other evidence in the record that accused was drunk both before and after the time of the commission of the offense, and the opinion of Captain Austin Lowrey, Medical Corps, that if a man had been drinking and was hit very forcibly by another the blow would tend to sober him, there is, as noted above, substantial and satisfactory evidence that accused at the time of the commission of the offense was not so drunk as not to know what he was doing and to be incapable of entertaining the intent to commit the criminal offense of assault.

It should be noted that accused is not charged with unlawfully entering the dwelling of Lieutenant Ellis with intent to commit an indecent assault or assault with intent to rape. While there is colorful evidence in his own admission, "What a man won't do for cunt," to indicate that his purpose was an indecent one, he is charged only with the intent to commit a simple assault. The evidence shows conclusively that he not only intended to commit such an assault, if not a more aggravating one, but that he actually did so assault the twelve year old girl, Betty Ellis, when in the middle of the night he entered her sleeping room, knelt by her bed, and, without her consent and to her alarm, placed his head upon her leg.

> "A battery is an assault in which force is applied, by material agencies, to the person of another, either mediately or immediately. * * * So it is a battery for a man to fondle against her will a woman not his wife. The force may be applied through conductors more or less close. * * *." (MCM, 1928, p. 78).

Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein. MCM, p. 169. Proof of the offense in the instant case is complete upon proof of the unlawful entry of the dwelling with intent to commit a criminal offense. A simple assault is a criminal offense.

4. The service of accused shown upon the charge sheet is as follows: 17th Tank Battalion from April 2, 1919 to August 2, 1922, discharged as a private upon expiration of term of service, with character good; 17th Tank Battalion from October 31, 1922 until June 19, 1926, discharged as a private by purchase, character good; First Tank Battalion from November 22, 1928 until January 2, 1932, discharged as a private first class, character very good. Date and term of current enlistment are not shown. He was thirty two years and seven 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 at the trial. The record of trial is legally sufficient to support the findings and sentence.

The Board of Review is indisposed to make any suggestion as to the extension of clemency. The maximum confinement which might have been imposed under paragraph 104 c, Manual for Courts-Martial, 1928, is ten years. Since the offense of which accused is convicted was a serious menace to the security of an officer's home in an outlying post and to the safety of his twelve year old daughter, and since the evidence shows that accused was not

so drunk as to be incapable of entertaining the specific intent involved in the offense, the punishment imposed is not considered excessive.

Confinement in a penitentiary is authorized by the 42d Article of War for the offense of housebreaking which is recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by Section 823 of the Code of the District of Columbia.

_____, Judge Advocate.

H R Bitzig, Judge Advocate.

Theodore Hall, Judge Advocate.

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

Military Justice
CM 200633

July 24, 1933.

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | FIRST CAVALRY DIVISION |
| v. | ) | Trial by G. C. M., convened at Fort Bliss, Texas, June 30, 1933. Dishonorable discharge and confinement for one (1) month. Fort Bliss, Texas. |
| Private EARL T. WHITTINGTON (6249050), Troop B, 8th Cavalry. | ) | |

HOLDING by the BOARD OF REVIEW
McNEIL, BITZING and HALL, Judge Advocates
ORIGINAL EXAMINATION by O'KEEFE, 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 Specification 1, Charge I, and Charge I, and legally sufficient to support the sentence.

2. By Specification 2 of Charge I, it is alleged that accused did take, steal and carry away two cantaloupes, value about $.10, the property of a restaurant owner. The only material evidence as to theft was that of Private Raymond C. Cobb, Battery C, 82d Field Artillery, who testified that he saw a man breaking into the 8th Cavalry restaurant and notified the corporal of the guard (R. 10-12). Witness could not identify accused as the man who broke in, neither did he see anything in "the man's" possession when he came out of the restaurant (R. 11,12), nor did he testify what "the man" had in his possession when he saw him break in the restaurant. Corporal Creswell Odess, Machine Gun Troop, 8th Cavalry, who apprehended the accused coming out of the restaurant, stated he saw nothing in accused's possession (R. 13). Corporal Herman T. Holt, Machine Gun Troop, 8th Cavalry, who took accused from Corporal Odess, testified accused had two cantaloupes in his shirt (R. 16) which he later dropped (R. 17). The owner of the restaurant, Harvey V. Lashus, testified that he checked the property in the restaurant after the

REC'D
AUG 1 1933
J. A. G. O.

alleged breaking and nothing was missing (R. 26). The record is void of any proof of the value of the cantaloupes.

It is self-evident from the above evidence that the prosecution did not prove that the property alleged as stolen belonged to the person named in the specification or in fact that he even possessed such property, nor is there proof that the property was of the value alleged or that it had any value.

3. For the reasons stated, the Board of Review holds the record legally sufficient to support the findings of guilty of Specification 1 of Charge I, and Charge I, legally insufficient to support the findings of guilty of Specification 2 of Charge I, and legally sufficient to support the sentence.

_____, Judge Advocate.

H R Bitting, Judge Advocate.

Theodore Pall, Judge Advocate.

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

Board of Review
CM 200671

AUG 17 1933

| | | |
|---|---|---|
| UNITED STATES | ) | HAWAIIAN DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Schofield Barracks, T.H., June 27, 1933. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks. |
| Private EMORY G. COOK (6710769), Headquarters Detachment, 18th Pursuit Group, Air Corps. | ) | |

HOLDING by the BOARD OF REVIEW
TURNBULL, BITZING and HALL, 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 96th Article of War.

Specification: In that Private Emory G. Cook, Headquarters Detachment, 18th Pursuit Group, A.C., did, at or near Wahiawa, T.H., on or about May 1, 1933, with intent to defraud, falsely counterfeit an obligation of the United States, to wit, a United States silver certificate in the sum of five dollars ($5.00) in violation of Section 148 of the Federal Penal Code of 1910.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification 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 five years. The reviewing authority approved the sentence,

RECEIVED: HQ. HAWAIIAN DIVISION.
OFFICE OF THE STAFF JUDGE ADVOCATE,
DATE: AUG 30 1933

reduced the period of confinement to one year, 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. On or about the 3d of May, 1933, the chief clerk of the group supply office, 18th Pursuit Group, Wheeler Field, T. H., in preparing for an inspection, had occasion to clean up a desk used by the accused, and as he tore off the top blotters he found several so-called bills underneath (R. 8). Two imitation five dollar United States notes were identified and introduced in evidence (R. 9-10). Upon further investigation there was found in a room formerly used as a photographic shop, which was then in use by accused and Private Keefe, a large box of waste paper containing crude reproductions of currency similar to the exhibits found under accused's blotter (R. 14). Accused, upon being questioned, after having been warned of his rights, admitted that he had helped to make some bills marked on the back "File Copy" and "April Fool" (R. 20,45). A more detailed discussion of this and other evidence in the record is not necessary for the purpose of this holding.

4. Counterfeiting is defined in Section 148 of the Federal Penal Code as follows:

> "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

A definition of terms is contained in Section 147 of the Federal Penal Code as follows:

> "The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national-bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United

States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress."

5. The only question presented by the record requiring discussion here is whether or not the variance between the specification and the proof is fatal. The specification alleges the counterfeiting of a five dollar United States "silver certificate". The evidence shows that the purported reproductions were of five dollar United States "notes". There is no evidence of the counterfeiting of a "silver certificate". In the opinion of the Board of Review, this variance is fatal.

"The notes stated in the indictment and given in evidence as counterfeited, and those alleged to be counterfeited, must be shown to be the same, but mere literal variances are not fatal." United States v. Moses (C.C. Pa. 1827) Fed. Cas. No. 15,825. "An incorrect description in respect to the bill number which defendant is indicted for uttering is a fatal variance." United States v. Mason (C.C. N.Y. 1875) Fed. Cas. No. 15,736. See also 15 Corpus Juris 373, and cases cited.

"In prosecutions for counterfeiting or cognate offenses, the indictment should contain a description of the alleged counterfeit, or state a sufficient reason why it is not described." 15 Corpus Juris 367. Had this been done in the instant case the variance would have appeared on the face of the specification and might then be termed a mere "literal" variance only, as the allegations would still be sufficient to apprise the accused of the offense for which he was being tried, and in case of a conviction or acquittal would support a plea in bar of a second trial. The counterfeiting of silver certificates and bank notes, as indicated in Section 147, Federal Penal Code, supra, are distinct offenses. In this case the accused was charged with one offense and convicted thereof upon proof tending to establish an entirely different offense. There is no evidence in the record showing or tending to show the counterfeiting of a silver certificate. In that respect there is not only a fatal variance but a total failure of proof to establish the offense charged.

6. For the reasons hereinabove stated, the Board of Review

holds the record of trial legally insufficient to support the findings and sentence.

N. A. Trumbull, Judge Advocate.
H. R. Fitzing, Judge Advocate.
Theodore Hall, Judge Advocate.

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

AUG 17 1933

Board of Review
CM 200681

| | | |
|---|---|---|
| UNITED STATES | ) | HAWAIIAN DIVISION |
| | ) | |
| v. | ) | Trial by G.C.M., convened at Schofield Barracks, T. H., June 15, 1933. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks. |
| | ) | |
| Private First Class PAUL E. KEEFE (6238206), Headquarters Detachment, 18th Pursuit Group, Air Corps. | ) | |

---

HOLDING by the BOARD OF REVIEW
TURNBULL, BITZING and HALL, 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 specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private First Class Paul E. Keefe, Headquarters Detachment, 18th Pursuit Group, A.C., did, at or near Wahiawa, T. H., on or about May 1, 1933, with intent to defraud, falsely counterfeit an obligation of the United States, to wit, a United States silver certificate in the sum of five dollars ($5.00) in violation of Section 148 of the Federal Penal Code of 1910.

Specification 2: (Uttering and passing a counterfeit security - finding of not guilty.)

Accused pleaded not guilty to the specifications and the Charge, and was found guilty of Specification 1 and the Charge, and not guilty of Specification 2. 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

RECEIVED: HQ. HAWAIIAN DIVISION.
OFFICE OF THE STAFF JUDGE ADVOCATE.
DATE: AUG 30 1933

three years. The reviewing authority approved the sentence, reduced the period of confinement to one year, 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. On the 3d or 4th of May, 1933, the chief clerk of the group supply office, 18th Pursuit Group, Wheeler Field, T. H., had occasion to clean up a desk used by Private Emory Cook and in so doing found four or five imitation five dollar United States notes, three of which were introduced in evidence at the trial (R. 9-11; Exs. 1, 2 and 3). Upon further investigation there was found in a room formerly used as a photographic shop, which was then in use by Private Cook and accused, a large box of trash and waste paper containing crude reproductions of currency similar to the exhibits found under Private Cook's blotter (R. 16,21). Accused, upon being questioned, after having been warned of his rights, admitted making the bills, Exhibits 1 and 2, and the other similar reproductions together with Private Cook simply as an "April Fool" joke (R. 22). A more detailed discussion of this and other evidence in the record is not necessary for the purpose of this holding.

4. Counterfeiting is defined in Section 148 of the Federal Penal Code as follows:

> "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

A definition of terms is contained in Section 147 of the Federal Penal Code as follows:

> "The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national-bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for

money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress."

5. The only question presented by the record requiring discussion here is whether or not the variance between the specification and the proof is fatal. The specification alleges the counterfeiting of a five dollar United States "silver certificate". The evidence shows that the purported reproductions were of five dollar United States "notes". There is no evidence of the counterfeiting of a "silver certificate". In the opinion of the Board of Review, this variance is fatal.

"The notes stated in the indictment and given in evidence as counterfeited, and those alleged to be counterfeited, must be shown to be the same, but mere literal variances are not fatal." United States v. Moses (C.C. Pa. 1827) Fed. Cas. No. 15,825. "An incorrect description in respect to the bill number which defendant is indicted for uttering is a fatal variance." United States v. Mason (C.C. N.Y. 1875) Fed. Cas. No. 15,736. See also 15 Corpus Juris 373, and cases cited.

"In prosecutions for counterfeiting or cognate offenses, the indictment should contain a description of the alleged counterfeit, or state a sufficient reason why it is not described." 15 Corpus Juris 367. Had this been done in the instant case the variance would have appeared on the face of the specification and might then be termed a mere "literal" variance only, as the allegations would still be sufficient to apprise the accused of the offense for which he was being tried, and in case of a conviction or acquittal would support a plea in bar of a second trial. The counterfeiting of silver certificates and bank notes, as indicated in Section 147, Federal Penal Code, supra, are distinct offenses. In this case the accused was charged with one offense and convicted thereof upon proof tending to establish an entirely different offense. There is no evidence in the record showing or tending to show the counterfeiting of a silver certificate. In that respect there is not only a fatal variance but a total failure of proof to establish the offense charged.

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

H. A. Imuhull, Judge Advocate.
H. R. Bitting, Judge Advocate.
Theodore Hall, Judge Advocate.

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

Board of Review
CM 200704

AUG 25 1933

| | | |
|---|---|---|
| UNITED STATES | ) | UNITED STATES MILITARY ACADEMY |
| | ) | |
| v. | ) | Trial by G.C.M., convened at West Point, New York, July 6, 1933. Suspension until June 1, 1934. |
| | ) | |
| Cadet ARTHUR F. TOWNSEND, Jr., Third Class, United States Corps of Cadets. | ) | |

OPINION of the BOARD OF REVIEW
TURNBULL, BITZING and HALL, 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Cadet Arthur F. Townsend, Jr., Third Class, United States Corps of Cadets, was, at West Point, New York, on or about June 17, 1933, in a public place, to wit, on Thayer Road and Jefferson Road, drunk while in uniform.

Accused pleaded not guilty to the Charge and Specification. He was found guilty of the Specification and 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 suspension without pay and allowances for one year. The reviewing authority approved only so much of the sentence as involves suspension without pay and allowances until June 1, 1934, and forwarded the record for the action of the President under the 48th Article of War.

3. The material evidence adduced by the prosecution may be summarized as follows:

Cadet Philip S. Gage, Third Class, United States Corps of Cadets, testified that at about 5:10 p.m., on June 17, 1933, he saw accused with a young lady, just outside of camp, in a parked car on the road leading up to the Washington monument. Witness, accused, and the young lady later walked across the practice parade ground. Witness noticed accused's face was flushed and that he staggered (R. 6). Witness could smell alcohol on accused's breath (R. 7,13). Witness saw accused again at the supper formation and asked him if he was all right (R. 7). Accused was then in the line of file closers but after the march commenced witness noticed that he was in the rear rank of the platoon. On the way to supper, near the French monument on the Jefferson Road, witness, who was a file closer in the same platoon in which accused was placed, shifted his position to keep the officer in charge from seeing accused. Accused was bouncing up and down and was out of step (R. 8-9). Accused was in uniform at the time. Witness did not believe that accused at the time could properly perform guard duty, but that he could properly march at a cadet parade (R. 9). Witness was of the opinion accused was not in full possession of his mental and physical faculties while on the way to the mess hall (R. 10, 12), and that he was under the effects of alcohol (R. 11). There were quite a few civilians along the line of march (R. 10).

Cadet C. A. Cozart, Third Class, United States Corps of Cadets, testified that he saw accused on the afternoon of June 17, 1933, just before the formation for supper, that is, about 6:10 p.m. (R. 13-14). Accused was at the place of formation. He seemed to be unduly happy over something as he approached witness and shook hands with him, and made some incoherent remarks. The handshake was unduly prolonged. It was unusual for accused to shake hands with witness. Witness smelled the odor of liquor on the breath of the accused. Witness was of the opinion that accused at this time was unable to do the normal duties of a cadet such as guard mount or parade (R. 14), and that accused was mildly intoxicated (R. 15). Witness has no resentment at this time toward accused, but at certain times during the past year accused has been harsh and domineering toward witness and has bullied witness once or twice (R. 16-17).

Stipulated testimony of James J. Davis: That on June 17, 1933, he was a cadet, Second Class, in the United States Corps of Cadets, West Point, New York. On the date in question, witness saw accused just before supper formation in camp and asked him if he could "make it to the Mess Hall", and accused replied that he could. On the way to the mess hall accused's actions seemed normal until he reached the intersection of Thayer and Jefferson roads, when witness, who was marching next to accused on the latter's right, noticed that accused could not keep step and counted step for him. Witness took hold of accused's hand in order to steady his marching. On the march to the mess hall they passed quite a number of civilians. Witness smelled something on the breath of accused but could not tell whether it was mouth wash or alcohol. Witness did not believe that accused at that time was in such a condition that he could have attended a parade or be placed on guard. Accused was not drunk at the time the Corps left summer camp for the mess hall, but when they reached the mess hall he was either under the influence of liquor or was sick, and was unable to perform normal duties (R. 18-19; Pros. Ex. A).

Cadet John J. Phelan, Third Class, United States Corps of Cadets, testified that he saw accused on the afternoon of June 17, 1933, just before supper formation and again at supper formation. On the first occasion witness did not notice anything unusual about the accused (R. 19). At supper formation accused started to the mess hall in the file closers, but at the suggestion of Mr. J. J. Davis he got into ranks. On the march to supper witness, who was then on accused's immediate left, noticed that accused did not keep step very well and, when they reached the corner of the clock tower, he noticed that accused began to stagger a bit. Witness counted step occasionally for accused, and also took accused's hand a couple of times to steady him. There were civilians along the line of march (R. 20-21). Witness smelled the odor of alcohol on the person of accused (R. 22,24). Witness did not believe accused was able to perform the normal duties of a cadet at this time. In the opinion of witness accused had been drinking (R. 22). Accused was in uniform when marching to supper (R. 23).

Cadet R. T. Schrein, Third Class, United States Corps of Cadets, testified that he saw accused on the afternoon of June 17, 1933, at

about 6:15 (R. 24). Accused was walking down the L-M Company street and appeared to be rather unsteady on his feet. Witness saw accused again at the supper formation and noticed that he appeared to be in a rather happy frame of mind and was not very steady on his feet. From the appearance of accused's face and from his walk, witness was of the opinion that accused was slightly under the influence of intoxicating liquor (R. 25,27). Witness was of the opinion that at the supper formation accused was not in a condition to perform properly the normal duties of a cadet (R. 26).

Cadet William L. Kimball, Third Class, United States Corps of Cadets, testified that he saw accused on the afternoon of June 17, 1933, just before the evening formation for supper (R. 27). Witness heard accused talking and his speech was incoherent. He also noticed that accused was rather unsteady on his feet (R. 28). On the march to supper accused did not march properly - he was not in step and was weaving from side to side and receiving assistance from the men on either side of him (R. 28-29). Witness believes that he did smell the odor of alcohol or liquor on accused before the supper formation and that in his opinion accused was not then in full control of his mental and physical faculties and was not able to perform the normal duties of a cadet (R. 29). Witness admitted that prior to June of this year he was not on friendly terms with accused; that accused had on different occasions treated him in a harsh and domineering manner and had bullied him to some extent, but that witness now has no resentment toward accused (R. 30-32).

First Lieutenant G. A. Hadsell, Infantry, West Point, New York, identified accused and testified he is in the military service of the United States (R. 32). Witness further testified that he saw accused on June 17, 1933, at about 6:30 p.m. (R. 32-33). On this date witness was officer in charge and it was his duty to supervise the supper formation. About one hundred yards from the camp he stood and observed each platoon as it passed. In the last platoon of the last company witness noticed accused and that his actions in ranks were peculiar. Accused seemed to be held up by two other cadets on either side of him, with whom he was holding hands. Accused swayed from side to side, and now and then took a wrong step - he was not keeping step. Accused gave the appearance of being under the influence of liquor (R. 33).

Spectators followed the last platoon of the last company right up to the steps of the mess hall (R. 34); they were talking about accused (R. 33). When accused arrived at the mess hall, witness called to him and started to question him (R. 34). Witness noticed that accused's face was flushed and he seemed dazed, and witness smelled alcohol on accused's breath. Witness then decided to take accused to the hospital. Accused asked several times if he could not eat his supper first. On the way to the hospital accused remarked, "Won't you give me a break, sir". Accused was able to walk from the mess hall to the hospital, though it was necessary for witness to take his elbow from time to time. When they first arrived at the hospital accused was smiling, but later on there were tears in his eyes (R. 35). The medical officer arrived about ten minutes after they got to the hospital, that is, about 6:50 p.m. Witness noticed a slight change for the better in the condition of accused from the time he took him to the hospital to the time he was examined by Captain DeWitt, the medical officer. Witness was with accused constantly from the time he spoke to him at the mess hall until he reported him to the medical officer (R. 36). The accused did not vomit nor did he eat any food or any substance, nor use a deodorant during that time. Witness was not positive whether or not accused had a drink of water after arrival at the hospital. On the way to the hospital witness smelled alcohol but did not know whether it was on accused's breath. Accused was drunk (R. 37).

Captain William F. DeWitt, Medical Corps, West Point, New York, testified that he was medical officer of the day at the hospital on the evening of June 17, 1933. About 7:30 p.m., on this date, Lieutenant Hadsell brought accused to the hospital and asked that he be examined to see what was the matter with him. Witness examined accused at the time and noticed a slight stagger in his walk but found nothing to indicate the cause of this stagger. Accused performed the usual test of coordination without any difficulty. His conversation was clear and logical and he carried out properly orders that were given him (R. 38). In the opinion of witness, it is possible that a person drunk at 6:00 o'clock would give no medical reaction to drunkenness at 7:00 or 7:30 o'clock. There was no odor of alcohol on the accused's breath (R. 39). About 8:00 o'clock that night, witness, after talking over the phone with Colonel Buckner, decided to pump the accused's stomach and see if there was any evidence of alcohol in his stomach

(R. 39-40). He pumped accused's stomach and found liquid but no food in it. Witness did not have accused swallow any liquid before pumping his stomach, but accused may have had a drink after coming to the hospital. From the stomach washings of the accused there was no gross evidence of alcohol. The stomach contents were later given a chemical examination in the laboratory and no evidence of alcohol was found. Witness is thoroughly familiar with what constitutes drunkenness in a military sense. At the time that he examined him, accused, in his opinion, was not drunk (R. 40-41). In his opinion, alcohol drunk on an empty stomach will disappear rather rapidly from the stomach (R. 41). A shock experienced by a person somewhat under the influence of alcohol would tend to sober him, but this would not "expedite" the odor of it from the breath or the stomach (R. 42).

4. The material evidence adduced by the defense may be summarized as follows:

Stipulated testimony of Thomas J. Lawlor: That on June 17, 1933, he was a cadet, Third Class, United States Corps of Cadets, and just before supper formation he was in his tent when accused entered. Accused was normal in every respect at that time. It is customary for the accused to joke a great deal and he did so on this occasion. Witness did not smell any liquor on accused's breath, and in his opinion accused was normal and able to perform any normal duties. Accused frequently used Listerine as a mouth wash (R. 43; Def. Ex. A).

Stipulated testimony of Gaylord W. Schultz: On June 17, 1933, witness was a cadet, Third Class, United States Corps of Cadets, and just before supper formation he was in his tent with accused. Witness did not believe the accused was then intoxicated and did not notice anything exceptional about his conduct, nor did he smell liquor upon him. Accused frequently clowns and is boisterous, and on this occasion his conduct was not unusual. Accused is in the habit of using a mouth wash several times a day and before going to meals. Witness believes that the accused was capable of attending a parade on the evening in question (R. 44: Def. Ex. B).

Stipulated testimony of Daniel W. Tetlow: Witness saw accused on the afternoon of June 17, 1933, at about 2:30 p.m. Accused was not

drunk at that time and witness was of the opinion that he had not been drinking. Witness saw accused again just before supper at about 6:00 o'clock and noticed nothing unusual about accused or his actions at that time, and he did not smell any liquor upon him. Witness was the roommate of accused and knew that he was in the habit of using a mouth wash several times a day and always before going to meals. Accused was in complete control of his mental and physical faculties on the afternoon and evening in question, and in the opinion of witness could have gone on guard or performed any other normal duty (R. 44-45; Def. Ex. G).

Major W. S. Prout, Medical Corps, West Point, New York, testified that he saw the accused on June 17, 1933, at about a quarter of seven or seven o'clock. At the request of Captain DeWitt, the witness examined the accused on this occasion. Witness noticed that the accused showed no slurring of speech or any incoherence. He then examined accused's throat with a tongue depressor with the deliberate intention of smelling his breath and found accused's breath to be practically odorless. Witness saw Captain DeWitt put the accused through the routine test for coordination which the accused performed normally. In the opinion of the witness, it is hardly "reasonable to presume, or assume, or suppose that the accused was drunk fifteen minutes before". Witness is thoroughly familiar with what constitutes drunkenness in the military service and is of the opinion that when he examined him the accused was not drunk (R. 46). Witness was of the opinion that if accused had been drunk a half hour before witness saw him and "this drunkenness was tapering off at that time to a sobering condition", and "a shock followed also tending to sober accused", it is possible he would not show any symptoms of drunkenness at the later hour though perhaps alcoholic odor on the breath would persist. Alcohol will remain longer in the human system than on a person's breath. Witness could not state that accused was not drunk one hour prior to his examination and was of the opinion it is not possible for a person to say that a man has not been drunk an hour before (R. 47).

Accused, after being informed of his right to remain silent, to testify as a witness under oath, or make an unsworn statement, elected to remain silent (R. 48).

5. It appears from the foregoing that the question in issue is whether accused was drunk on the supper march from the cadet camp to the mess hall at West Point, New York, on June 17, 1933. The evidence of Lieutenant Hadsell, the officer in charge whose duty it was to supervise the supper formation, Cadets Davis and Phelan, who marched next to accused on his right and left, respectively, Cadet Gage, who was a file closer in accused's platoon, and Cadet Kimball, that during this march there was the odor of alcohol on accused's breath, that he bounced and staggered in ranks, failed to keep step, had to be assisted by the cadets on his right and left to steady his marching, and that he was not in condition to perform his duties, clearly establishes accused's drunkenness on this occasion. The line of march is not directly proven in the evidence but it appears that at least part of the route covered Thayer and Jefferson roads, as alleged in the specification. It also appears that there were civilian spectators along the line of march and that accused was in uniform at the time.

As bearing on accused's condition during the march, the evidence of his condition before and after should be considered. At about 5:10 p.m., Cadet Gage saw accused and a young lady outside of the camp and walked with them across the practice parade ground. He noticed that accused staggered and that his face was flushed, and he smelled alcohol on accused's breath. Of the several cadets who saw accused just before the supper formation, Gage and Davis were concerned about his condition, Cozart smelled liquor on his breath and was of the opinion he was mildly intoxicated, Schrein was of the opinion that he was slightly under the influence of intoxicating liquor, Kimball smelled the odor of alcohol or liquor on him, and Phelan, Lawlor, Schultz and Tetlow saw nothing unusual or abnormal in his condition. Tetlow also saw accused at about 2:30 p.m., and was of the opinion that at that time he was not drunk and had not been drinking. This evidence, though conflicting, is not inconsistent with the other evidence in the case. The several witnesses observed accused for varying periods of time and no doubt the powers of observation of some were more acute than those of others so that symptoms of drunkenness which some observed were not noticed by the others.

Lieutenant Hadsell, after noticing accused's unusual actions on the march to the mess hall, stopped and questioned accused on his arrival there. The lieutenant smelled alcohol on accused's breath, noticed that his face was flushed and that he seemed dazed, and decided to take him to the hospital. On the way to the hospital he again smelled alcohol on accused's breath and was of the opinion accused was then drunk. At about 6:50 p.m., Lieutenant Hadsell, according to his testimony, turned accused over to Captain DeWitt, a medical officer, for examination, remained during the examination, and then left the hospital at about 7:10 p.m. Captain DeWitt and Major Prout, another medical officer, examined accused, found no evidence of drunkenness, and arrived at the conclusion he was not then drunk. Evidence as to the time of these examinations is conflicting. Lieutenant Hadsell fixed the time of Captain DeWitt's examination as between 6:50 and 7:10 p.m., while Captain DeWitt fixed it at about 7:30 p.m. Though Major Prout's examination was made after Captain DeWitt's, the major fixed the time as about a quarter of seven or seven p.m.

There appears to be no real inconsistency between the evidence of accused's condition during the march to the mess hall and the evidence of his condition at the hospital. The evidence shows that accused was drunk as early as 5:10 p.m., and no doubt he was becoming sober as time passed. The shock of being stopped and questioned by the officer in charge and then taken to the hospital tended further to sober him. Thus the effects of alcohol drunk on an empty stomach had disappeared when the examinations were made by the medical officers.

Though the propriety of securing evidence of drunkenness by means of a stomach pump has been questioned by a previous Judge Advocate General (CM 153697, Crandall), the use of the pump in this case was not objected to by accused and neither was objection made to the introduction of the evidence as to the chemical examination of the stomach washings. In view of these facts and of the further fact that the evidence of the result of the chemical examination was favorable to accused, the admission of such evidence was not prejudicial to accused's substantial rights.

The evidence of record establishes beyond a reasonable doubt the guilt of accused of the specification and charge.

6. The Cadet Register shows that accused was admitted to the Military Academy from the Twenty-fifth District of New York on July 1, 1931, without prior military service; and that he was 23 years of age on October 17, 1932.

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 warrants confirmation thereof.

W. A. Trumbull, Judge Advocate.

H. H. Fry, Jr., Judge Advocate.

Theodore Hall, Judge Advocate.

To The Judge Advocate General.

1st Ind.

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

1. Herewith transmitted for the action of the President is the record of trial in the case of Cadet Arthur F. Townsend, Jr., Third Class, United States Corps of Cadets, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review, and, for the reasons therein stated, recommend that the sentence be confirmed.

3. The accused was taken to the hospital of the Military Academy for examination, and the medical officer of the day, after consultation with Colonel Buckner (the Commandant of Cadets), pumped accused's stomach and subjected a portion of the contents thereof to chemical examination. The chemical examination disclosed no trace of alcohol. Though the admission of evidence of these facts was not prejudicial to accused's substantial rights in this particular case, I concur in the view expressed by former Judge Advocate General Hull in the Crandall case (CM 153697) when in commenting on the use of the stomach pump under similar circumstances he stated: "Personally, I do not approve of such means to secure evidence".

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.

William Cattron Rigby

William Cattron Rigby,
Colonel, J.A.G.D.,
Acting The Judge Advocate General.

4 Incls.
Incl. 1-Record of trial.
Incl. 2-Opin. of Bd. of Rev.
Incl. 3-Draft of let. for sig. of Secy. of War.
Incl. 4-Form of executive action.

vol 4 Army JAG Bd. Rev.

Vol 4 Army JAG Bd. Rev.

TITLE

| DATE | BORROWER'S NAME | EXT. |
|---|---|---|
| 27 JUL | Cdr. Brown | 74457 |
| | | |
| | | |
| | | |
| | | |
| | | |

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT