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Volume V

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CM 200734 to CM 202212

(1933-1934)

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

Board of Review
CM 200734

AUG 22 1933

UNITED STATES v. Private 1st Class WILLIE BURNS (R-228025), Troop G, 9th Cavalry.	)	SEVENTH CORPS AREA Trial by G.C.M., convened at Fort Riley, Kansas, July 28 and 31, 1933. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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 1st Class Willie Burns, Troop G, 9th Cavalry, did, at Fort Riley, Kansas, on or about the 18th day of June, 1933, send to Mrs. W. C. Dolan, through the United States mail, an obscene, lewd and lascivious letter, in violation of Section 334, Title 18, of the Code of Laws of the United States of America.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to three years, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New

York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

3. In view of the conclusions hereinafter reached, the only question that need be considered at this time is whether or not the participation of Captain John A. Hettinger, 13th Cavalry, in the trial of this case as trial judge advocate was such an error as to require the vacation of the findings and sentence.

4. It appears from the record that the charges in this case were referred for trial on July 13, 1933, to Captain Alexander B. MacNabb, 9th Cavalry, trial judge advocate of a general court-martial appointed by paragraph 20, Special Orders No. 134, Headquarters Seventh Corps Area, Omaha, Nebraska, June 9, 1933. On July 14, 1933, by paragraph 11, Special Orders No. 163, Headquarters Seventh Corps Area, Omaha, Nebraska, Captain John A. Hettinger, 13th Cavalry, was detailed as trial judge advocate of this general court-martial vice Captain Alexander B. MacNabb, 9th Cavalry, thereby relieved, for the trial of this accused only. Subsequently, on July 28, 1933, another court appointed by paragraph 17, Special Orders No. 165, Headquarters Seventh Corps Area, Omaha, Nebraska, July 17, 1933, convened for the trial of this case under authority of the provision contained in the order appointing the court that all unarraigned cases theretofore referred for trial to Captain Alexander B. MacNabb, 9th Cavalry, trial judge advocate of the general court-martial appointed by paragraph 20, Special Orders No. 134, current series, Seventh Corps Area, would be transferred by him to First Lieutenant Elmer V. Stansbury, 13th Cavalry, trial judge advocate of the above court, for trial. The proceedings of this court in the trial of the instant case recite, among the names of the officers present, the following:

> "Captain John A. Hettinger, 13th Cavalry, Trial Judge Advocate for this case only,
> First Lieutenant Elmer V. Stansbury, 13th Cavalry, Trial Judge Advocate."

The record of trial is authenticated by the signature of "John A. Hettinger, Captain, 13th Cavalry, Trial Judge Advocate", upon the adjournment of the court on July 28, 1933, and again by the signature

of the same officer in like manner at the end of the record. The record shows that the members of the court and the personnel of the prosecution were sworn, and also that numerous witnesses were sworn and testified. From the fact that Captain Hettinger was senior to Lieutenant Stansbury, the regularly detailed trial judge advocate of this court, and from the fact that he and not Lieutenant Stansbury authenticated the record, the inference is unavoidable, in the absence of matter of record to the contrary, that Captain Hettinger took an active part in the prosecution of the case before this court. There is, however, nothing in the record to show that Captain Hettinger had any authority whatsoever to appear before this court in the office of trial judge advocate for the prosecution of this case. It is true that he had been detailed as trial judge advocate of another court for the trial of this case only, but his authority to participate in the trial of the case was thereby limited to the trial of the case by the court with which he was officially connected, and that court did not hear the case. The question is therefore presented whether or not the participation as trial judge advocate in the trial of a case before a general court-martial by an officer who was not the regularly detailed trial judge advocate of that court is such an error as to require the vacation of the findings and sentence.

5. The 11th Article of War provides in part that:

> "For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel ***."

It has been held that the conduct of a trial by a judge advocate detailed by an authority other than the convening authority in place of the judge advocate originally appointed, invalidates the proceedings. The following instances may be noted:

> "The proceedings in this case are disapproved for the reason that in the absence of the judge advocate, appointed by the superior authority convening the court, the commanding officer of the district appointed another

officer to act as judge advocate." G.O. 70, Department of the Missouri, 1863.

"The court, in this case, assumed the right to appoint one of its members judge advocate, in consequence of the one appointed in the order convening the court becoming a material witness. Such proceeding, although the appointment was but temporary, is irregular, and the sentence thereby rendered inoperative." G.O. 2, Department of the Platte, 1868.

The above authorities are cited by Winthrop (Reprint 1920, p. 182), who also states:

"*** at present the members and the judge advocate are invariably alike detailed by the officer ordering the court; nor would a commander of less authority be empowered to relieve a judge advocate so detailed or to appoint a new one."

The same principle was followed in a later holding:

"Where a court-martial excused its judge advocate and required its junior member to act as judge advocate in its stead, held that this action was wholly unauthorized and that its proceedings were properly disapproved. It is only the convening authority who can relieve or detail a member or judge advocate." Digest of Opinions, J.A.G. 1912, p. 572, G.C.M.O. 62, War Dept., 1874.

The above authorities were quoted with approval in CM 113341 (Dig. Ops. J.A.G. 1918, p. 144), wherein it was also said:

"In view of the fact that, as shown by the authorities cited above, the error in question was jurisdictional and not procedural, and, therefore, not a mere irregularity within the meaning of the 37th Article of War, it is recommended that the

proceedings, findings, and sentence in this case be disapproved."

Since in the cases cited it has been held that the proceedings of a court-martial must be disapproved where the trial was conducted by one who was appointed trial judge advocate by other than the authority who appointed the court, or his successor in office, it must necessarily be held that the proceedings of a court be disapproved in a trial conducted by an officer as trial judge advocate who was wholly without authority to appear before that court in such capacity.

The right of an accused to be protected during his trial from the intrusion of those who are not properly a part of the court-martial duly convened to try him was vigorously maintained by Judge Advocate General Crowder in CM 125676 (1919). In that case the staff judge advocate "made a short address" to the court which, at his request, was not made a matter of record. In recommending that the findings and sentence be set aside, General Crowder said:

> "The record is silent as to its (the 'short address') subject, but it is an unavoidable inference from the record that it was in connection with either the law or the facts in the case. It was a proceeding so contrary to the orderly administration of military justice that it constituted prejudicial error. To allow anyone not connected with the trial of a case to interfere in this manner might prevent that impartial trial to which every accused is entitled ***." Digest of Opinions, J.A.G. 1912-1920, 1417.

6. The holding in CM 198108 (1932), Casey, cited by the staff judge advocate in his review in support of the legality of the procedure in the instant case, has not been overlooked. In that case it was held that the trial of the accused by a court to which the charges had not been referred, instead of by the court to which they had been duly referred, was not a nullity. In that case both courts were legally constituted, had the same trial judge advocate, and

were appointed by the same authority. The holding did not relate to the question presented by the instant case.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 200912

OCT 2 1933

UNITED STATES	)	SECOND DIVISION
v.	)	Trial by G.C.M., convened at Fort Sam Houston, Texas, September 18, 1933. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private JOHN O. ARCHER (6252112), Headquarters, Headquarters Battery and Combat Train, 2d Battalion, 12th Field Artillery.	)	

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 record of trial is legally sufficient to support the findings of guilty of the charges and specifications, but it presents the question of whether or not it is legally sufficient to support the sentence in its entirety.

The evidence shows that the several articles mentioned in the specifications were taken by accused, during a period of twenty minutes, from three lockers of three enlisted men located in the same room. The larceny of the several articles was substantially one transaction (par. 149 g, M.C.M., 1928) and the sentence imposed should not exceed the maximum authorized for the offense when considered as one transaction. The total value of the several articles as found by the court is $14.70, and the maximum punishment authorized for the larceny of property of this value is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

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

W. A. Trundell, Judge Advocate.

_____, Judge Advocate.

Theodore Hall, Judge Advocate.

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

Board of Review
CM 200925

OCT 5 1933

UNITED STATES v. Private 1st Class WILLIAM J. MACKIEWICZ (6122970), and Private JOHN G. LANGMUIN (6121579), both DEML, Headquarters Detachment, 1st Corps Area.	)))))))))	FIRST CORPS AREA Trial by G.C.M., convened at Boston, Massachusetts, September 14, 1933. Dishonorable discharge and confinement for one (1) year as to each accused. Disciplinary Barracks.

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

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and found to be legally insufficient to support the findings and sentence as to Private 1st Class William J. Mackiewicz, DEML, Headquarters Detachment, 1st Corps Area, but legally sufficient to support the sentence as to Private John G. Langmuin, DEML, Headquarters Detachment, 1st Corps Area.

2. The charge sheet accompanying the record of trial shows that Private Mackiewicz was honorably discharged on March 9, 1933, upon expiration of term of service, and that he was reenlisted on March 10, 1933. The defense stated that these entries were correct (R. 25). The offenses for which Private Mackiewicz was tried and of which he was convicted are alleged to have been committed on February 19, 1933, and the evidence shows them to have been committed as alleged.

3. It is a general rule, with certain prescribed exceptions, that court-martial jurisdiction over soldiers ceases on discharge from the service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by reentry into the service. Par. 10, M.C.M., 1928. The offenses of which Private Mackiewicz was convicted, namely, housebreaking and larceny in violation

of the 93d Article of War, and his status as a reenlisted soldier after prior honorable discharge, do not bring his case within the exceptions to the general rule. The court was therefore without jurisdiction to try Private Mackiewicz for offenses of this nature committed in a prior enlistment terminated by honorable discharge prior to the preferment of charges and trial. Dig. Ops. JAG, 1912-1930, sec. 1436.

4. For the reasons hereinbefore stated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence as to Private William J. Mackiewicz, but legally sufficient to support the sentence as to Private John G. Langmuin.

W. A. Trumbull, Judge Advocate.

[illegible], Judge Advocate.

Theodore Hall, Judge Advocate.

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

Board of Review
CM 200989

December 11, 1933.

UNITED STATES	)	PANAMA CANAL DEPARTMENT
v.	)	Trial by G.C.M., convened at Fort Sherman, Canal Zone, August 28-30, 1933. Dishonorable discharge and confinement for two (2) years. Penitentiary.
Corporal ROBERT OSMAN (6708260), Headquarters Battery, 1st Coast Artillery.	)	

REVIEW 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 Corporal Robert Osman, Headquarters Battery, 1st Coast Artillery, Fort Sherman, Canal Zone, having unlawful possession of a copy of the White Plan, Fort Sherman, a secret document relating to the national defense, did, at Cristobal, Canal Zone, on or about July 9, 1932, willfully and feloniously attempt to transmit the same to one Herman Meyers, 1859 East 9th Street, Brooklyn, New York, a person not entitled to receive it, this in violation of Section 1, Title I, Act of Congress, approved June 15, 1917, and contrary to good order and military discipline.

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 be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, to pay to the United States Government a fine of Ten Thousand Dollars ($10,000.00), to be confined at hard labor, at such place as the reviewing authority may direct, for two (2) years, and to be further confined at hard labor, at such place as the reviewing authority may direct, until such fine is so paid, but for not more than eighteen (18) years in addition to the two (2) years hereinabove imposed". The reviewing authority approved only so much of the sentence as adjudged dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years, designated the United States Northeastern Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution is as follows:

On or about October 1, 1932, an envelope addressed to Mr. Herman Meyers, 1859 East 9th Street, Brooklyn, New York City (Ex. No. 1) came into the hands of Mr. L. R. Cook, Chief of the Dead Letter Section of the Canal Zone Postal Service (R. 13). This envelope bears the cancellation stamp of the Cristobal, Canal Zone, post office dated July 9, 1932. It was marked July 22, 1932, at the Brooklyn, New York, post office as undeliverable as addressed and returned to sender. The return address on the envelope was Mr. J. McCarthy, Cristobal P.O., Gen'l. Delivery. This mail was duly advertised and later sent to the Canal Zone Dead Letter Office for disposition, where the envelope was opened by Mr. Cook, who found inclosed the documents received in evidence and identified as Prosecution's Exhibits Nos. 2, 3, 4 and 5 (R. 15-20). Exhibit No. 2 was recognized as having a military character and was turned over with the other exhibits to Department Headquarters at Quarry Heights by the postal authorities (R. 25). As a matter of fact, Exhibit No. 2 was a carbon copy of what was known as the White Plan pertaining to the 2d Battalion, 1st Coast Artillery, a secret document (R. 31) relating to the national defense (R. 41). The addressee on the envelope, Mr. Herman Meyers, was a person not entitled to receive such a plan (R. 32).

Investigation by the military authorities developed that Exhibit No. 2 was, with the exception of one word (R. 46), a carbon copy of

one of two runs in making the final draft of the White Plan and that it was typed sometime between May 15, 1932, and June 3 or 4, 1932, by the accused on a Royal typewriter assigned to him (R. 43, 55-57) in his capacity as detail and order clerk of the Harbor Defenses in the post sergeant major's office, Fort Sherman, Canal Zone (R. 55). An expert in typewriting analysis and identification testified that Exhibits 3, 4 and 5, inclosures in the envelope Exhibit No. 1, were also typed on the same Royal typewriter (R. 43). The envelope, Exhibit No. 1, was typed on a Model 6 Underwood typewriter, which was not located (R. 51,52).

With respect to the return address on the envelope, Exhibit No. 1, it was shown that at one time not definitely fixed, probably in the early part of 1932, the accused had requested the mail orderly to call at General Delivery at Cristobal and see if there was any mail for him under the name of J. McCarthy (R. 84). Accused also admitted to the Department Inspector that he had used various names in his correspondence, one of which was McCarthy (R. 137).

Prosecution's Exhibit No. 4 was typed on the Royal typewriter used by the accused (R. 43,55), and contained the following:

"NAME - FREMA KARRY
RECEIVES LETTERS AND PROBABLY LIVES AT THIS ADDRESS:
F.K.
c/o P. Singer,
6801 Bay Parkway,
Brooklyn, N.Y.C."

The mail orderly testified that during the year 1932 he mailed some letters given to him by the accused addressed "F.K., care of P. Singer, 6801 Bay Parkway, Brooklyn, New York City" (R. 79,97). The accused admitted to the Department Inspector that he carried on a regular correspondence with Miss Frema Karry, Brooklyn, New York, and that he contacted certain acquaintances with Communistic connections through Miss Frema Karry or through Miss P. Singer (R. 138). A photographic plate (Ex. 16) was found in accused's locker (R. 102) from which a print (Ex. 17) was made (R. 133), which print was identified by the accused as being the photo of Miss Frema Karry (R. 133). Further, it was shown that accused had received letters

containing money (R. 81,88,90) totaling about $200 (R. 216) sometime between December, 1932, and May, 1933 (R. 91,92), probably from "Communistic people" (R. 138); also that he had been convicted of disorderly conduct (R. 243) growing out of a Communistic activity or riot (R. 244) in New York.

4. Accused was sworn as a witness and testified in his own behalf. He admitted typing the original White Plan, of which Exhibit No. 2 was a copy (R. 222), but denied writing Exhibits 1, 3, 4 and 5 (R. 222,223) and denied attempting to forward the envelope (Ex. 1) and the inclosures (Exs. 2,3,4 and 5) (R. 223). He admitted having friends in the Young Communists' League (R. 214) and having received money from them (R. 216). When asked whether he approved of Communism, he answered "Some of the ends that the Communists foresaw, when they told me, I thought were desirable, but I never approved of any of the means by which the Communists expected to bring about those ends, and on that point I very often argued with some of my friends" (R. 214,215).

5. The jurisdiction of the court was questioned at the trial and later in a brief filed by Mr. Louis Waldman, Attorney at Law, upon the ground that the charges had not been impartially investigated preliminary to trial as required by Article of War 70 (R. 7-10). Major Swan, the investigating officer, sometime prior to the formal investigation of the charges, had expressed an opinion as to the guilt or innocence of the accused (R. 9). However, The Judge Advocate General, in an opinion (CM 184069, Dec. 29, 1928), approved by the President, held:

> "It is my opinion that the mere fact that the investigation was made by the officer who preferred the charges in this case did not violate the provision of the 70th Article of War and that such fact was at most an irregularity which did not injuriously affect the substantial rights of the accused."

That was a much stronger case than the one now up for consideration; there the investigating officer had sworn to the charges, here the investigating officer had only expressed an opinion. That fact alone is not sufficient basis for holding that his investigation could not

have been fair and thorough. Major Swan's recommendation was based upon the evidence submitted at the investigation (R. 10), which, in the opinion of the staff judge advocate and the appointing authority, was sufficient to justify a trial. It does not appear that the rights of the accused were injuriously affected by the investigation in this case.

6. The defense counsel filed a brief after the trial with the reviewing authority and later a brief was filed with the Board of Review by civilian counsel. Among the assignments of error so raised and requiring consideration here is the admissibility of the testimony of Colonel Buchanan, Department Inspector, as to admissions against interest made by the accused, it being contended that the investigation by Colonel Buchanan was unfair and that the rights of the accused had not been properly safeguarded. The brief filed by civilian counsel indicates some confusion between the investigation of the charges pursuant to Article of War 70 made by Major Swan (see par. 5 above) and that made by the Department Inspector. An examination of the record leads to the conclusion that in the investigation made by the Department Inspector the accused was properly warned as to his rights as a witness and that he understood such warning. It further appears that such investigation was made in the manner prescribed by AR 20-30, November 6, 1930, and in accordance with the instructions contained in Inspection Guide No. 26, Inspector General's Office, October 15, 1930. Colonel Buchanan did testify to several damaging admissions made by the accused bearing on his association with certain Communists. It can hardly be said from the record that these admissions were not voluntary. However, the Manual for Courts-Martial, 1928, provides:

> "In many instances an accused has made statements which fall short of being acknowledgments of guilt, but which, nevertheless, constitute important admissions as to his connection or possible connection with the offense charged. Such statements are called 'admissions against interest' and are admissible in evidence without any showing that they were voluntarily made. Should it, however, be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either

exclude or strike out and disregard all evidence of the statement."

In this case, there does not appear to have been any duress on the part of the Department Inspector. While, it is true, he did order the accused to give answer to certain questions, he nevertheless at the same time told accused that he need not answer if such answer would incriminate him or, as to immaterial matters, if the answers would tend to be degrading (R. 144). As to the admissions not being true, it is sufficient to note that most of the facts so admitted were later testified to by the accused at the trial, so that they do not appear to fall within the exception made in the paragraph of the Manual cited above.

Error was also charged in the admission of testimony showing the receipt of money by the accused some five to ten months after the alleged offense in issue. It was contended that the admission of such testimony was highly prejudicial. This evidence, while collateral, was relevant in view of accused's admission that it probably came from "Communistic people". It was relevant as tending to show motive in the accused's connection with a political group hostile to the American form of government. Wharton's Criminal Evidence, vol. 1, par. 38, p. 145; 8 R.C.L., sec. 197. It was so also with respect to the alleged error in questioning the accused concerning his arrest for disorderly conduct growing out of a Communistic gathering or riot. This evidence was likewise admissible and relevant under the rule as tending to show motive. Wharton's Criminal Evidence, vol. 1, par. 25, p. 50.

In the famous Chicago Haymarket Riot case (Spies v. People, 122 Ill. 1; 3 Am. St. Rep. 320, 462), the court said:

"The defendants also complain that the court refused to give an instruction for them which contained the following statement: 'It cannot be material in this case that defendants or some of them are or may be socialists, communists, or anarchists,' etc.

If there was a conspiracy, it was material to show its purposes and objects, with a view of determining whether and in what respects it was unlawful.

> Anarchy is the absence of government; it is a state of society where there is no law of supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical anarchy. Whether or not the defendants were anarchists may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy, and what were their purposes in joining it. Therefore, we cannot say that it was error to refuse an instruction containing such a broad declaration as that announced in the above quotation."

That is, the fact of a conspiracy having been proven, it was proper to show the radical beliefs of an accused as furnishing a motive for joining such conspiracy. So in this case, the fact having been established that someone had attempted to transmit a paper relating to the national defense to an unauthorized person, it was proper and relevant to show that accused approved certain of the aims of the Communists and had friends among those of that belief as bearing on his willingness and motive to do the act charged, even though it was not shown that Mr. Herman Meyers was a Communist. "The Communist party is an organization which entertains a belief in the overthrow by force or violence of the government of the United States * * *." 4 Fed. (2d) 80, 81. See also 268 Fed. 413.

Still another assignment of error is that over the objection of the defense, Colonel Bunker was allowed to testify that some nine months after the alleged commission of the offense for which the accused was on trial, a secret document was missed (R. 185,189). The accused was not shown to have been connected with the loss in any manner. Therefore, the admission of this evidence was error, but in view of the testimony of Major Swan that during several months of surveillance, subsequent to the alleged offense, the accused had not taken any papers (R. 124,151,152), it cannot be said to have injuriously affected his substantial rights within the meaning of Article of War 37.

Another ground for objection was the evidence showing that accused received mail addressed to John Dynes, P.O. box 1276, Cristobal (R. 80,136,137), the contention being that it was not inconsistent with innocence and that no unfavorable inferences could be drawn therefrom. When considered in connection with the accused's admission to the Department Inspector that "he used this box for maintaining contacts with Miss Frema Karry and such other friends and people in the Communistic groups, or any such organizations officially" (R. 137), together with the testimony of the accused before the court (R. 215,216) to the same effect, such evidence becomes decidedly relevant for the reasons pointed out above.

7. The evidence connecting the accused with the mailing of Exhibit No. 1 and its contents may be summed up on the following facts and circumstances: The use of the address "J. McCarthy, Gen. Del., Cristobal" by the accused; the typing of Exhibit No. 2 (the White Plan); the name and address shown on Exhibit No. 4, together with the fact that it was typed on the machine assigned to the accused; and the admissions of the accused concerning his Communistic connections. Such evidence warrants a conviction in the absence of prejudicial errors. That the alleged errors complained of were not all of them errors, in fact, and that such as may have been were not prejudicial in the light of the entire record has been pointed out above.

8. The offense of which the accused was convicted is denounced in the Act of June 15, 1917, c. 30, Title I, sec. 1; 40 Stat. 217, which reads in material part as follows:

> "* * * or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of

the United States entitled to receive it; * * * shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years or both."

9. The record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized by Article of War 42 and by the Act of June 15, 1917, sec. 1, Title I (40 Stat. 217).

W. A. Crundall, Judge Advocate.

[illegible], Judge Advocate.

Theodore Hall, Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

December 28, 1933.

MEMORANDUM for the Acting The Judge Advocate General.

Subject: CM 200989 - Osman.

1. Pursuant to your direction the Board of Review has examined the authorities on the question raised informally by Major King as to whether or not the Commanding General, Panama Canal Department, was in fact the accuser in CM 200989, Osman, now before you for consideration.

Major King bases his contention that the Commanding General was in fact the accuser upon the following excerpt (R. 182-183) from the testimony of Colonel Bunker, who actually signed the charges:

"Q. Why did you wait until the latter part of June or the first of July of this year before preferring charges?

A. I was waiting for instructions from the Department, as nearly as I can remember, which came after an official investigation by the Department Headquarters.

* * *

Q. Was there anything at Fort Sherman to prevent that investigation being held, then, last November?

A. The only thing that I know is the fact that when the matter of the loss was discovered, it was apparently taken out of the hands of the Post Commander by the action of the Department Commander. The only thing I had to do with it was to prefer the charges, under instructions from the Department."

2. It should be noted that no time in the course of the trial did the defense counsel, who was diligent in conducting the defense, raise the question that the Department Commander was in fact the accuser. Nor was this contention made in the very able brief filed and oral argument made by Mr. Louis Waldman, civilian attorney, who

exhibited an unusual knowledge of military law. If there had been any merit in the point it is hardly conceivable that it would have been overlooked by the zealous counsel in this case.

3. Article of War 8 provides in part as follows:

"The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution. ***"

The Manual for Courts-Martial, 1928, has these provisions:

"Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. See 60 (Accuser) in this connection. 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.

"60. Courts-Martial--Procedure--Accuser.--An officer who has signed and sworn to the charges in a

particular case is necessarily an accuser in that case. But, while prima facie the person who signs and swears to the charges is the only accuser in the case, that is not always true. There may be another or others who are real accusers."

Also the following:

"A person subject to military law can not legally be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility; but he may legally be ordered by a proper superior to prefer such charges as in his (the subordinate's) opinion he may properly substantiate by the required oath." Par. 25, M.C.M., 1928.

4. The following authorities and decisions bearing on the subject have been noted:

"Whether the commander who convened the court is to be regarded as the 'accuser or prosecutor' in the sense of the article in question, where he has had to do with the preparing and preferring of the charges, is mainly to be determined by his animus in the matter. He may like any other officer initiate an investigation of an officer's conduct and formally prefer, as his individual act, charges against such officer; or by reason of a personal interest adverse to the accused he may adopt practically as his own charges initiated by another; in which cases he is clearly the accuser or prosecutor within the article. On the other hand, it is his duty to determine, when the facts are brought to his knowledge, whether an officer within his command charged with a military offense shall in the interest of discipline and for the good of the service be brought to trial. To this end he may formally refer or revise or cause to be revised and then formally referred, charges preferred against such officer by another; or when the facts of an alleged offense are communicated to him, he may direct a suitable officer, as a member of his staff, or the proper commander of the accused,

to investigate the matter, formulate and prefer such charges as the facts may warrant, and having been submitted to him, he may revise and refer them for trial as in other cases; all this he may do in the proper performance of his official duty without becoming the accuser or prosecutor in the case. Of course, he can not be deemed such accuser or prosecutor where he causes charges to be preferred and proceeds to convene the court by direction of the Secretary of War or a competent military superior." Dig. Ops. JAG 1912, LXXII I 1. p 184

Article of War

In a note to the above is cited an opinion by Attorney General Devens, August 1, 1878, vol. 16, p. 109, as follows:

"'In a certain sense the commanding general is the prosecutor in nearly every case that comes before a military court within the limits of his command; for in almost every case charges are submitted to his examination, approval, and, if necessary, amendment, and there is always an informal preliminary adjudication by him to determine that the case is one which is proper for trial by a court-martial before he orders the court-martial, and the accused to appear before it. It is quite apparent that in such case he is not an accuser or prosecutor in the sense of the article of war. * * * He does not alter his position as commanding officer and become accuser or prosecutor in the sense of the * * * article * * *, because he himself sees that the charges are in proper and definite legal form, and to that extent superintends their preparation. In the present case, the charges were not actually signed by General _____. He had no personal relation to, or knowledge of, the matter out of which the charges grew, so as to have created in him any personal feeling or interest in the conviction of the prisoner. In considering alike the question of the propriety of a court-martial and the preferment of charges, he dealt with the matter, as a commanding officer must deal in a large number of instances, upon the statements and allegations of others, and decided

the matter in his own mind no further than to pronounce that upon the information before him the alleged offender should be brought before a court-martial.' Opinion of Attorney General Devens, Aug. 1, 1878, vol. 16, p. 109. It is also held in this opinion that where the record of the trial fails to indicate that the convening officer was the 'accuser or prosecutor' of the accused, the latter, in applying to the Secretary of War to have the proceedings pronounced invalid on this ground, may establish the fact by the production of affidavits setting forth the circumstances of the case and the action of the commander."

Colonel Winthrop, in his Military Law and Precedents, 2d ed., 1920, reprint, p. 62, said:

"Whether a commander who has taken action in the case of an officer of his command proposed to be tried,--as by ordering his arrest, preferring or directing the preferring of charges, or approving charges as preferred, etc.,--is to be considered as an accuser or prosecutor in the sense of this Article, so as to disqualify him from ordering the court and to make it necessary for the President to do so, is a question depending mainly upon the relation and animus of such commander toward the accused or the case. Where his action has been merely official, the capacity indicated cannot in general properly be ascribed to him. Thus, where, upon the facts of the supposed offence being reported to him, and appearing to call for investigation by court-martial, he has, as commander, directed some proper officer, as the commander of the regiment or company of the accused, or his own staff judge advocate, to prepare the charges, (indicating or not their form,) or has approved or revised charges already prepared, he is not to be regarded as an 'accuser' in the sense of the Article, his action having been official and in the strict line of his duty. Nor is he to be deemed a 'prosecutor' merely for the reason that,

having personal cognizance of the facts of the case, he contemplates being a material and important witness on the trial. * * *"

5. The Department Commander (Major General Brown) was an officer of wide experience and must be presumed to have been familiar with Article of War 8, the Manual for Courts-Martial, and authoritative precedents, and to have acted accordingly.

"The well-recognized presumptions as to the legality and proper performance of official acts apply in criminal proceedings." 12 Cyc. 389.

There was no showing made, nor was any attempted, indicating animus on the part of General Brown.

"Whether or not an officer is the accuser in a particular case is a question of fact." Dig. Ops. JAG 1912-1930, 1350, p. 670.

The language used in the testimony of Colonel Bunker implies nothing more than administrative action on the part of the Department Commander in turning the case over to the Post Commander for appropriate disciplinary action. This is a common occurrence in military administration. As just stated above, the presumptions are all on the side of regularity of action.

6. In CM 199465, Lichtenberger, the Board of Review, with the concurrence of The Judge Advocate General, said (Jan. 21, 1933):

"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." (Underscoring supplied.)

In a case arising in France (CM 134167, Speir, 1919), it was held:

> "The charges are signed 'Major J. J., Adjutant.' In an argument upon the question of jurisdiction, counsel for accused stated that the appointing authority had preferred charges. There is nothing to indicate that the appointing authority had any save his official connection with the case as commanding officer. The record is barren of any suggestion or personal interest or animus on his part in the case. The record is not invalid because of the mere fact that the convening authority's adjutant, by his direction, under the circumstances appearing in the record may have signed the charges."

7. In a "motion in arrest of judgment" filed after trial by the defense counsel in CM 159101, Young, it was contended:

> "The record shows that the charges preferred by the original accuser were not referred for trial, but that on the contrary a new set of charges were preferred and that a staff officer who had not made a personal investigation of the facts was requested to and signed the new charges; that the investigating officer who investigated the original charges and recommended that those charges be dismissed with a reprimand, investigated the new charges and adhered to his original recommendation; that notwithstanding the recommendation of the investigating officer the charges were ordered referred for trial and a court was appointed which was aware of these facts and which could scarcely be uninfluenced thereby. Under these circumstances and the law cited the convening authority constructively became the accuser and the jurisdiction of the court fails and consequently the findings and sentence are void for lack of jurisdiction."

On the question so raised the Board of Review, with the concurrence of The Judge Advocate General, held:

> "The record does show the facts as stated in the foregoing 'motion', but in the opinion of the Board of

Review they fall far short of indicating that the convening authority in this case had become the accuser, and the objection is wholly without merit. Indeed, if the contention of the defense counsel were accepted it would remove from the convening authority all discretion in acting upon charges and require him to follow, regardless of his own opinion, the recommendation of the investigating officer. The Manual for Courts-Martial does not so prescribe."

8. From an examination of the entire record, it is apparent that there are no facts shown or alleged indicating animus, bias, or prejudice on the part of Major General Brown against the accused; and further apparent that the accused was well defended. Had such facts been in existence it is reasonable to assume that an effort would have been made to bring them out. It must be presumed that General Brown acted entirely in accord with the law and the Manual; and that if he had in fact been the accuser he would have so notified higher authority and requested that the court be appointed by such higher authority. Colonel Bunker's testimony does not appear even to raise an implication of unauthorized action on the part of General Brown, and, in the absence of any facts or showing to the contrary, the reasonable construction to be placed on this testimony is that department headquarters was acting administratively in the name of the Commanding General in sending down the papers in the case to Colonel Bunker. Further it should not be overlooked that the record in this case was not finally acted upon by General Brown, but by Major General Fiske, successor in command, after receiving the advice of his staff judge advocate. No shadow of suspicion has been cast upon his attitude in the matter.

9. After a full consideration of the point in question the Board of Review, for the reasons appearing above, respectfully adheres to its former opinion.

H. A. Trundle, Judge Advocate.

H. K. Dittmar, Judge Advocate.

Theodore Hall, Judge Advocate.

Military Affairs
CM 200989

1st Ind.

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

1. The record of trial and accompanying papers in the case of Corporal Robert Osman (6708260), Headquarters Battery, 1st Coast Artillery (CM 200989), and the opinion of the Board of Review thereon are submitted herewith pursuant to Article of War 50½ for the action of the President.

2. The Board of Review holds that the record of trial is legally sufficient to support the sentence. I do not concur in that holding for the reasons hereinafter stated in detail, as I find in the record and accompanying papers many errors, irregularities and doubtful questions. I refrain from deciding whether or not any one such, taken alone, would constitute fatal error; but, taken together, I consider them as having injuriously affected the substantial rights of the accused.

3. Colonel Clarence G. Bunker, C.A.C., signed and swore to the charges against accused. Colonel Bunker was the commanding officer of the post and regiment in which accused was serving. The offense with which accused was charged, namely, attempting to transmit a secret document relating to the national defense (the White Plan, Fort Sherman) to a person not entitled to receive it, is alleged to have been committed July 9, 1932, the date of the postmark on the letter. The fact that such a letter had been mailed by some one was discovered by its being opened in the dead letter section of the Canal Zone Postal Service about October 1, 1932 (R. 13). The charge sheet is dated June 30, 1933, and the oath of Colonel Bunker thereon July 1, 1933. At the trial Colonel Bunker testified as follows (R. 182,183):

> "Q. Why did you wait until the latter part of June or the first of July of this year before preferring charges?
>
> "A. I was waiting for instructions from the Department, as nearly as I can remember, which came

after an official investigation by the Department Headquarters.

* * * * * * * *

"Q. Was there anything at Fort Sherman to prevent that investigation being held, then, last November?

"A. The only thing that I know is the fact that when the matter of the loss was discovered, it was apparently taken out of the hands of the Post Commander by the action of the Department Commander. The only thing I had to do with it was to prefer the charges, under instructions from the Department."

Article of War 8, after enumerating the officers authorized to appoint courts-martial, continues:

> "* * *; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, * * *."

The Manual for Courts-Martial, 1928, paragraph 60, says:

> "COURTS-MARTIAL-PROCEDURE-Accuser.- An officer who has signed and sworn to the charges in a particular case is necessarily an accuser in that case. But while prima facie the person who signs and swears to the charges is the only accuser in the case, that is not always true. There may be another or others who are real accusers. (See 5.)"

The Digest of Opinions of The Judge Advocate General, 1912, page 155, says:

> "It is not essential that the commander who convenes the court-martial for the trial of an officer should sign the charges to make him the 'accuser or prosecutor' within the meaning of this article. Nor is the fact that they have been signed by another conclusive on the question

> whether the convening commander is the actual accuser or prosecutor. * * *"

The question is presented whether, in view of Colonel Bunker's testimony (quoted ante, par. 3), the Commanding General, Panama Canal Department, who appointed the court before which accused was tried, was also his accuser. If so, the record is fatally defective, in view of the provisions quoted from Article of War 8 (ante, par. 3). On this point the Manual for Courts-Martial further says:

> "Whether the commander who convened the court is the accuser or the prosecutor is mainly to be determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved. See 60 (Accuser) in this connection. 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 a)
>
> "A person subject to military law can not legally be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility; but he may legally be ordered by a proper superior to prefer such charges as in his (the subordinate's) opinion he may properly substantiate by the required oath." (Par. 25)

In Digest of Opinions of The Judge Advocate General, 1912, page 154, it is said:

> "Whether the commander who convened the court is to be regarded as the 'accuser or

> prosecutor' in the sense of the article in question, where he has had to do with the preparing and preferring of the charges, is mainly to be determined by his animus in the matter. He may like any other officer initiate an investigation of an officer's conduct and formally prefer, as his individual act, charges against such officer; or by reason of a personal interest adverse to the accused he may adopt practically as his own charges initiated by another; in which cases he is clearly the accuser or prosecutor within the article. On the other hand, it is his duty to determine, when the facts are brought to his knowledge, whether an officer within his command charged with a military offense shall in the interest of discipline and for the good of the service be brought to trial. To this end he may formally refer or revise or cause to be revised and then formally referred, charges preferred against such officer by another; or when the facts of an alleged offense are communicated to him, he may direct a suitable officer, as a member of his staff, or the proper commander of the accused, to investigate the matter, formulate and prefer such charges as the facts may warrant, and having been submitted to him, he may revise and refer them for trial as in other cases; all this he may do in the proper performance of his official duty without becoming the accuser or prosecutor in the case. * * *"

It is difficult to bring the present case within the principle set out in the last quotations, because Colonel Bunker does not say that he was told to consider or investigate the matter and "prefer such charges as the facts may warrant." He speaks, on the contrary, of "an official investigation by the department headquarters", not by himself; and says that "it was apparently taken out of the hands of the Post Commander" (himself) "by the action of the Department Commander. The only thing I had to do with it was to prefer the charges, under instructions from the Department." This language, if aptly chosen,

indicates a direct command to prefer charges, leaving no discretion to the recipient of the order. It may be, upon further investigation, upon asking Colonel Bunker for particulars, upon obtaining evidence from the general then commanding the department and his staff officers, that it would appear that the order in question was not so peremptory as it appears from Colonel Bunker's testimony to have been. It would be permissible to consider such evidence aliunde the record. 16 Ops. Atty. Gen. 106, 108. However, in the view which I take as to the proper disposition of the case, it is unnecessary to seek such evidence.

The officer who commanded the department at the time of which Colonel Bunker speaks in his testimony is the same officer who convened the court. If, then, he was in fact the accuser, the record is fatally invalid, notwithstanding the fact that he was later relieved and the sentence was approved by his successor. That last circumstance does, however, permit a rehearing in Panama without its being necessary that the President should appoint the court. Neither is it material that the point now under consideration, that the convening authority was the accuser, was not raised by the defense, since the requirement that the convening officer shall not be the accuser is statutory and may not be waived, even expressly. Dig. Ops. JAG, 1912-30, par. 1350.

4. The next irregularity relates to the investigation of charges. Article of War 70 provides:

> "No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. * * *" (Underscoring supplied)

Immediately following the arraignment, the defense offered a special plea to the effect that a fair and impartial investigation of the charges had not been had (R. 7), and called to the stand in support of that plea Major Daniel N. Swan, 1st Coast Artillery, the officer who investigated them (R. 8). The witness admitted that previous to his investigation he had expressed an opinion as to the guilt or innocence of accused, that previous to his own investigation he had received certain evidence obtained by Colonel Buchanan, department inspector, and that his (Major Swan's) recommendations were at least in part based upon that evidence and Colonel Buchanan's report (R. 8-10); and it

furthermore appears from his report as Investigating Officer, appended to the record of trial, that he received and reported his own statement, as a witness in the case, as part of the evidence which he received and considered in his capacity as Investigating Officer. The court overruled the plea.

In four cases between 1924 and 1928, sentences were set aside because there was no investigation or because the investigation was not thorough and impartial. CM 161728, Clark; CM 182225, Keller; CM 183364, Jurkowski; CM 183905, Olsen. On the other hand, a case arose in 1929, CM 184069, Hughes, in which the investigating officer and the officer preferring charges were the same. A majority of the Board of Review held the record insufficient to support the sentence. A dissentient member of the Board of Review held otherwise, that the identity of the officer preferring charges and the investigating officer did not necessarily show that the investigation was not impartial, and that it was in fact impartial. The Judge Advocate General and the President sustained the minority member. That case would seem to go farther to sustain the sentence than would be necessary in the present case, so far as concerns the present point, but it is to be noted that the question was not raised by the defense in the Hughes case, whereas here it was expressly raised by a special plea.

5. The next irregularity concerns the admission of evidence. Colonel Edmund A. Buchanan, the department inspector, a witness for the prosecution, was examined as to an interview which he had with accused while he (Colonel Buchanan) was investigating the sending of the letter containing the secret document, but before charges had been preferred against accused. He testified that he warned accused (who was not then such) three times of his constitutional rights under Article of War 24 (R. 132). The witness started to relate what accused had said, and the defense counsel interposed thus (R. 133):

> "The defense objects at this point to any responses made by the accused to the Inspector until the defense has had an opportunity to further interrogate the Inspector as to whether his responses were entirely voluntary or not. If it is shown that his responses were voluntary, the defense will withdraw its objection."

The prosecution answered that what it proposed to bring out was not a confession, but an admission against interest, which need not be voluntary

to be admissible; and cited Manual for Courts-Martial, paragraph 114 b. The defense replied (R. 134):

> "The defense still objects on the same ground, and in a matter of half a dozen questions can show the court clearly, it believes, just how voluntary the statements were -- it can be done in a very short time; and we object to admissions and statements made by the accused to the witness until we have a chance to show the court the conditions under which they were made."

The law member overruled the objection and declined to allow cross-examination of the witness for the purpose requested. A few questions further on, the witness produced the report of his investigation, which he proposed to use to refresh his memory. The following colloquy then took place (R. 135):

> "PROSECUTION: Is there any objection by the defense to the use of that as a memorandum?
> "DEFENSE: No objection to the method, but in order to save the time of the court, and rather than object to all of the responses made by the accused to Colonel Buchanan, the defense wishes to go on record as stating that it objects to all responses, and will not further object as the responses are repeated, and that its failure to object in the future is not to be considered as a waiver of objection in that case.
> "LAW MEMBER: The objection of the defense is not sustained."

The witness then proceeded to relate admissions by accused to him of acquaintance and communication with communists, though he did not confess guilt, that is, he did not admit sending the letter in question. Upon the witness being turned over to the defense for cross-examination, counsel began to question him further as to the nature and manner of his examination of accused. The following then occurred (R. 140 et seq.):

> "PROSECUTION: May it please the court, the prosecution objects to this particular line of questioning, the court having ruled on the matter of the admissibility

of the evidence which the witness has given in this case, and contends that if the defense cross-examine the witness, it must be on the matters brought out on direct examination, and not concerning the admissibility of the evidence which the witness has already given before the court. If the reporter will read the opening statement by the defense, you will see that it states the manner in which the defense expects to cross-examine the witness, and the question has already been ruled upon. Will the reporter read the statement of the defense?

(The reporter complied.)

"DEFENSE: No reply.

"LAW MEMBER: That has already been ruled on, and the fact that the accused had been warned of his rights has been established. The objection of the trial judge advocate is sustained.

"DEFENSE: Do I understand by the ruling, sir, that the defense is prohibited from examining the witness as to any and all questions which have been brought out by the prosecution?

"LAW MEMBER: No.

"DEFENSE: Do I understand that the defense is prohibited from asking questions of the witness which would tend to show how the accused's answers were elicited?

"LAW MEMBER: The ruling of the court is that the testimony of the witness has shown that the accused was warned of his rights and made these statements knowing his rights.

* * * * * * * * *

"DEFENSE: I maintain that I may ask him any questions pertaining to his investigation of the accused.

"PROSECUTION: Not as to the manner of conducting his investigation--that has been ruled out.

"DEFENSE: That has been ruled out, if the court remembers, over the objection of the defense. The defense were not given an opportunity to cross-examine this witness before he testified--they were denied that opportunity. They ask now that they be permitted to cross-examine him--that they be

permitted that opportunity in their cross-examination.

"PROSECUTION: There has been an objection made that has been ruled upon by the court. The argument that is taking place here is as to something that counsel asked for. Counsel is not required to ask anything. Counsel is permitted to go ahead and conduct his examination, unless the prosecution or any member of the court objects to it, and there is nothing to discuss. The only matter before us is your proceeding with your cross-examination.

"DEFENSE: I am ready to proceed.

"PROSECUTION: There is no objection to be ruled upon, is there, Mr. Reporter?

"REPORTER: There is not; the objection was ruled upon.

"DEFENSE: May I ask to what extent the ruling limits the defense in its cross-examination of the witness?

"PROSECUTION: The defense are not required to ask anything. They are required, if they so desire, to conduct their cross-examination, and when a question comes up as to the legality or the admissibility of their cross-examination, then the trial judge advocate will take such action as may be called for in the matter. The prosecution requests that if the defense counsel is going to continue his cross-examination of the witness, he be directed to proceed.

"LAW MEMBER: It is the opinion of the law member that the defense counsel is quite within his rights when he desires to know the methods pursued in making the investigation."

Counsel did not examine witness further as to the alleged involuntary nature of the admissions elicited from accused. After a few more questions the witness was excused, and the defense moved to strike out the whole of his testimony on the ground that the admissions which he drew from accused had been obtained by duress (R. 145). The motion was overruled (R. 147).

Though the prosecution was right in maintaining that what was drawn from accused was admissions against interest rather than a confession, and was admissible (if at all) even though not shown to be voluntary; yet the law member's ruling denying the defense the privilege of cross-examining the witness as to the alleged involuntary nature of his admissions was clearly erroneous. Such cross-examination was proper to diminish the probative effect of those admissions and perhaps even to exclude them altogether. The error was the less excusable because the paragraph of the Manual for Courts-Martial (114 b) which should have shown the propriety of the questions excluded was read to the court.

It is true that some time after the erroneous ruling above noted, at the end of a long colloquy, the law member ruled (R. 143):

> "It is the opinion of the law member that the defense counsel is quite within his rights when he desires to know the methods pursued in making the investigation."

It is not clear whether the law member meant by the above to reverse his previous ruling. It is reasonably clear that he was not so understood by defense counsel, for the latter asked no further questions tending to bring out the supposed involuntary character of accused's admissions, but instead put a few questions on other topics and at the close of the examination of the witness moved to strike out all his testimony because the admissions related were made under duress (R. 145).

The accused himself testified that Colonel Buchanan threatened him with court-martial if he did not answer certain questions (R. 220, 234, 235), notwithstanding accused's statement that to force him to do so would violate his rights under Article of War 24. Question No. 61 of Colonel Buchanan's examination of accused was

> "* * * Then I order you, in the name of General Brown, to answer this question: * * *." (R. 236)

Sergeant Thomas M. Hendricks, Headquarters Battery, 1st Coast Artillery, another typist at headquarters, Fort Sherman, who appears to have been under suspicion at the beginning of the investigation, thus testifies as to the manner of his examination by Colonel Buchanan (R. 254):

"* * * He was shaking his finger in my face and saying, 'You know you did it,' and everything."

Colonel Buchanan's conduct and language, if they were as testified by accused and Sergeant Hendricks, were highly improper, the more so as they were similar to that of another inspector which was held improper in an opinion of this office (CM 199315, Oct. 27, 1932), extracts from which were sent to all inspectors-general in a circular letter from The Inspector General, dated November 15, 1932, which presumably had been received by Colonel Buchanan. I do not say that Colonel Buchanan's conduct and language in themselves necessarily rendered the admissions thereby elicited inadmissible, but they greatly diminished their evidentiary value. The defense was clearly entitled to cross-examine him to show such language and conduct, and had good reason to do so. Indeed, it may be that the denial of opportunity to do so forced the defense to put the accused on the stand.

6. The next error is also one involving the admissibility of evidence. On pages 185-188, it was brought out by the prosecution from Colonel Bunker, accused's post commander, that beside the White Plan mentioned in the specification, another secret document had also recently been missed at Fort Sherman. The law member overruled a timely objection by the defense to this evidence and a subsequent motion to strike it out. These rulings were erroneous. Accused was not charged with taking the other missing document, nor was there a syllable of evidence tending to connect him therewith. At the least the evidence was irrelevant. But it was worse. Its apparent purpose and probable effect were to instill into the minds of the court the idea that there was going on at Fort Sherman a series of thefts of secret papers, that possibly accused was guilty of more than one such offense, and that in any event something must be done, somebody must be convicted, to stop such thefts.

7. The last error to which I invite attention appears on pages 242-245 of the record of trial. The prosecution asked accused how he answered the question, "have you ever been arrested", when enlisted. He answered that he told the recruiting officer that he had been arrested. On further questioning, the prosecution brought out that accused had been arrested for disorderly conduct and sentenced to one day's confinement, that the disorderly conduct grew out of a

communistic activity or riot, though accused contended that his participation therein was accidental. The defense objected to this evidence on the ground that the prosecution was attacking the character of accused by proving a prior conviction by civil court, though he (accused) had not put his character in issue. The prosecution contended, on the other hand, that all that he was doing was attacking the credibility of the accused as a witness, which may be done by showing a prior conviction. To this the defense replied by reading the following from paragraph 124 b, Manual for Courts-Martial,-

> "* * * Evidence relating to an offense not involving moral turpitude or affecting the credibility of the witness should be excluded."

The colloquy ended thus (R. 244):

> "PROSECUTION: I reiterate that the prosecution is attacking the credibility of the witness.
> "DEFENSE: The defense has nothing further to say, in that case."

No ruling was made by the law member and the questions and answers continued.

I am of opinion that the contention of the defense was valid, that the evidence was inadmissible to attack the credibility of accused as witness, because disorderly conduct does not necessarily involve moral turpitude, and the admission of the evidence for that purpose was erroneous. However, the defense counsel, though he made an objection which I consider valid, did not persist in it and obtain a ruling from the law member. In this, I consider that the defense counsel was at fault, and failed in his duty of protecting the accused from the admission of incompetent evidence against him.

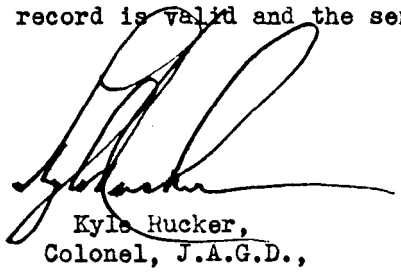
8. In a case of this complexity and importance I am of opinion that at the close of the trial the defense counsel should have analyzed and summed up the evidence and made an argument, but he did not do so. His failure in this respect was in my judgment seriously detrimental to accused. The rule of the courts of common law, both civil and criminal, that a party has no relief against errors, omissions, or poor judgment of his counsel, can have but a limited application in court-martial practice, where the majority of counsel are not learned in the law, and

where it is the duty of every one connected with the administration of military justice, and not least my own, to see that the rights of every accused are adequately protected. Though I do not mean to say that every error of judgment of defense counsel is ground for setting aside a conviction by court-martial, or specifically that failure to make an argument constitutes in every case, or even in this particular case, a fatal omission; yet I repeat that the fact that in so complex and important a case, involving the military career, liberty, and life-long reputation of accused, there was no analysis of the evidence, no summing up, no pointing out of the facts and inferences favorable to the defense, no argument in his behalf, is a circumstance to be weighed, with the others which I have mentioned, in determining whether the substantial rights of the accused were injured and whether he had a fair trial.

9. As I stated at the beginning of this indorsement, I refrain from deciding whether or not any one of the errors, irregularities, or other matters above mentioned would of itself be fatal to the validity of the record. Taken together, I consider them of such gravity that I am unable to say that the substantial rights of the accused were not injuriously affected. I therefore recommend that the President disapprove the findings and sentence and direct a rehearing. A precedent for my recommendation is found in CM 194200, Sanderson, in which the Board of Review and The Judge Advocate General took similar action, holding the record insufficient to support the findings of guilty of the most serious offenses with which accused was charged and the greater part of the sentence, because of numerous irregularities, no one of which they found to be fatal.

For use in case my recommendation meets your approval, I inclose draft of a letter to the President and a form of action by him, both marked in pencil "draft A". Alternate draft of letter to and form of action by the President, marked "draft B", are also submitted for use if, on the other hand, you approve the view of

the Board of Review that the record is valid and the sentence should be confirmed.



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

8 Incls.
Incl.1-Record of trial
Incl.2-Review by Bd. of Rev.
Incl.3-Memorandum by Bd. of Rev.
Incl.4-Draft letter for sig. Sec.of War ("A")
Incl.5-Draft letter for sig. Sec. of War ("B")
Incl.6-Form of executive action confirming reviewing authority (Draft B")
Incl.7-Form of executive action disapproving sentence ("Draft A")
Incl.8-Brief by attorney for accused

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

Board of Review
CM 201104

JAN 20 1934

UNITED STATES	)	FIRST CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	U.S. Army Base, Boston,
First Lieutenant RAYMOND	)	Massachusetts, October 10
A. KNAPP (0-11733), Coast	)	and 11, 1933. Dismissal.
Artillery Corps.	)	

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 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 1st Lieutenant Raymond A. Knapp, Coast Artillery Corps, then Recreation Officer, Fort H. G. Wright, New York, did, at Fort H. G. Wright, New York, from on or about December 26, 1931, to April 26, 1933, feloniously embezzle by fraudulently converting to his own use seven hundred and eighty-nine dollars and sixty cents ($789.60), United States Currency, property of United States Army Motion Picture Service, Fort H. G. Wright, New York, entrusted to the care, custody, and possession of him, the said 1st Lieutenant Raymond A. Knapp, by virtue of his office.

Specification 2: In that 1st Lieutenant Raymond A. Knapp, Coast Artillery Corps, then Commanding Officer of the Headquarters Battery, 11th Coast Artillery, did, at Fort H. G. Wright, New York, between about May 25, 1932, and April 27, 1933, feloniously embezzle by fraudulently converting to his own use, two hundred and eighty-five dollars and forty cents ($285.40), the property of said organization, entrusted to him, the said 1st Lieutenant Raymond A. Knapp, by virtue of his office.

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

Specification 1: In that 1st Lieutenant Raymond A. Knapp, Coast Artillery Corps, then Recreation Officer, Fort H. G. Wright, New York, did, at said Fort H. G. Wright, New York, on or about April 26, 1933, with intent to deceive, present to Lieutenant Colonel Lucian B. Moody, Inspector General's Department, Inspector General, First Corps Area, then inspecting the accounts of the United States Army Motion Picture Service, Fort H. G. Wright, New York, the purported duplicate of the original report rendered by him, the said 1st Lieutenant Raymond A. Knapp, to the War Department in accordance with Army Regulations 210-390, for the week ending April 22, 1933, which said purported duplicate was false and known by him, the said 1st Lieutenant Raymond A. Knapp, to be false in that said purported duplicate of the original report showed coupon books on hand beginning week small 389, large 328, and coupon books on hand end of week small 382, large 321, whereas the original report showed coupon books on hand beginning of week small 579, large 378, and coupon books on hand end of week small 572, large 371.

Specification 2: In that 1st Lieutenant Raymond A. Knapp, Coast Artillery Corps, then Recreation

> Officer, Fort H. G. Wright, New York, did, at Fort H. G. Wright, New York, on or about April 26, 1933, with intent to deceive, present to Lieutenant Colonel Lucian B. Moody, Inspector General's Department, Inspector General, First Corps Area, for the use of the said Lieutenant Colonel Lucian B. Moody in officially inspecting the United States Army Motion Picture Service account and claim credit therefor a memorandum receipt dated April 18, 1933, for 349 small books and 238 large books from S. Collings, bonded salesman, which said memorandum receipt was untrue and known by the said 1st Lieutenant Raymond A. Knapp to be untrue in that said S. Collings, at the time said memorandum receipt was presented as aforesaid, was responsible for only 244 small books and 136 large books.

He pleaded not guilty to all charges and specifications, and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for two years. Because of the hardship that would fall upon the dependents of the accused in the execution of this sentence, the members of the court unanimously recommended that the confinement imposed be remitted. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution under the several specifications may be summarized as follows:

Specification 1, Charge I.

It was stipulated between the prosecution and the defense that accused was the recreation officer for the post of Fort Wright between the dates July 3, 1930, and April 29, 1933; that his duties as recreation officer placed him in charge of the motion picture activities and that, as officer in charge of the motion picture activities, he was responsible for the accounts and funds; and that

during this period no other person had charge of these accounts, nor was he relieved or replaced at any time during that period. It was further stipulated that the type of motion picture coupon book was changed on about December 26, 1931, and that for the purpose of the trial a reference to "small books" will be to books of the value of $1.60 each, and a reference to "large books" will be to books of $2.40 each (R. 9-10).

Lieutenant Colonel Lucian B. Moody, Inspector General, First Corps, testified as follows: In April, 1933, he made an audit of the motion picture funds at Fort Wright during which he examined many numerous and bulky documents, including every document which had any bearing on the subject of the audit. He had been in the service twenty-nine years as a commissioned officer during which time he had been called upon to audit accounts probably somewhat more than the average officer, since a considerable portion of his service had been in the staff branches (R. 10). Except for a few years at service schools he could hardly recall any time at which he had not had to work with records or accounts pertaining to the Army, and for the last two years he had been working as an inspector general. (The defense stated that it had had a chance to examine the original documents, was satisfied with their authenticity and correctness, and had no objection to the introduction of appropriate calculations and no objection to permitting Colonel Moody to testify as a person qualified to make such calculations.) Witness examined the weekly reports of the motion picture service at Fort Wright from December 26, 1931, to April 26, 1933, and the original returns made to the War Department which he had requested for use in his audit (R. 11). This examination showed that between the dates mentioned above accused had received from the War Department 2500 books of a value of $1.60 each ($4000), and 1900 books of a value of $2.40 each ($4560), of a total value of $8560, for which he was accountable (Ex. 1). A summary prepared from the collection sheets of the different organizations at the post and the reports of the cashier for books sold on credit to the organizations and individuals showed a total value of $6416 worth of books so accounted for (Ex. 2). A summary of the books sold on credit to the organizations showing on their voucher files and also of the books sold on credit by the bonded salesman for which chits were turned over to the accused showed the same total amount of $6416 (Ex. 3). A tabulation made

from the weekly cashier reports showed the number of $1.60 and $2.40 books sold for cash by the cashier and that cash proceeds from this source were turned over to the accused in the amount of $1072.80 (Ex. 4). The examination also showed that 24 $1.60 books of a value of $38.40, and 7 $2.40 books of a value of $16.80, of a total value of $55.20, had been dropped, and that at the close of business on April 26, 1933, there were on hand 314 $1.60 books of a value of $502.40, and 214 $2.40 books of a value of $513.60, a total value of $1016 (Ex. 5). A summary from the weekly reports of the number of coupon books sold, made by the accused to the War Department, showed a total of $3046.40 for the $1.60 books, $3652.80 for the $2.40 books, and a total of $6699.20 for both (R. 12-16; Ex. 6). The tabulations referred to above and in evidence (Exs. 1-6, incl.) show that all books not accounted for had been sold and the proceeds of the sale received by the accused. Witness, therefore, arrived at the conclusion that any shortage existing in the motion picture fund was in cash and not in books in kind. This discrepancy in terms of money was $789.60 (R. 25-26). (Note: It thus appears that money came into the hands of the accused in the following amounts: $6416 for books first sold on credit and later paid for in cash; $1072.80 for books sold by the cashier for cash; of which total of $7488.80 he accounted for only $6699.20 to the War Department, leaving the sum of $789.60 in cash unaccounted for.) About May 11th accused stated to witness that he would probably find a shortage of about $790 which very closely agreed with the figures witness had deduced (R. 42).

Specification 2, Charge I.

Lieutenant Colonel Lucian B. Moody, Inspector General, First Corps Area, identified the council book of the Headquarters Battery, 11th Coast Artillery, and photostatic copies of pages of the book to which reference was later made were received in evidence and marked Exhibit 7. Witness had seen the book at an inspection made at Fort Wright in May, 1932, and again in April, 1933. In May, 1932, he had made an audit of the book and had noted the accountability to be $2588.71 (R. 17). The balance for May, 1932, was $2588.71, but this was carried forward on the June sheet as $2578.71, $10 less than the correct balance at his inspection of May 25, 1932. Upon

the October, 1932, sheet of the book no figures are shown opposite the item "Collection sheet". He identified the collection sheet for the Headquarters Battery, 11th Coast Artillery, for the month of September, 1932 (Ex. 8) and testified that it showed a net of $66 to be retained by the fund which normally should have been taken up opposite the words "Battery collection sheet" on the page covering October (R. 18). Under the heading "Ration savings" for the month of October, 1932, the receipts are totaled as $2115, while the total should have been $2125.10, a difference of $10.10. On the same sheet the expenditures are totaled as $425.34, while the correct total is $326.04, a difference of $99.30. The sheet for December, 1932, under the heading "Expenditures, Ration savings", shows a total of $1713.22, while the correct total is $1613.22, the total being in error by $100 (R. 19). The accused failed to account for $285.40 which came into his possession between May 25, 1932, and April 27, 1933 (R. 26). (Note: The arithmetical errors noted above of $10.00, $10.10, $99.30 and $100, respectively, reduced the accountability of the accused upon his records by $219.40, to which must be added the omitted item of $66, battery collections, making a total of $285.40 which came into his possession but was not shown upon his books and is unaccounted for.)

Specification 1, Charge II.

Lieutenant Colonel Lucian B. Moody, Inspector General, First Corps Area, testified that during the course of his audit of the motion picture funds at Fort Wright in April, 1933 (R. 10) accused presented to him the retained copy of the United States Motion Picture Service for the week ending April 22, 1933 (R. 19). This report, Exhibit 9, showed 382 small books and 321 large books on hand at the end of the week, and 389 small and 328 large on hand at the beginning of the week. When the report was presented to witness accused did not indicate in any way that the report was not what it represented itself to be (R. 20). Witness obtained from the War Department the original report for that week, Exhibit 10, which showed 579 small and 378 large books on hand at the beginning of the week and 572 small and 371 large books on hand at the end of the week. The figures just quoted at the top of the original report were initialed by what witness believed to be accused's initials,

and the signature on the retained copy was that of accused. The original report showed on hand at the end of the week 190 more small books and 50 more large books than the retained report, and similar differences between the numbers of books on hand at the beginning of the week (R. 21). It was witness' recollection that accused did not make any statement as to the discrepancy in the return of April 22, 1933, to the War Department until after witness had developed that additional shortage himself and brought it out about May 11th, at which time accused in his testimony rather anticipated witness in stating that the latter would probably find a shortage (R. 41).

Specification 2, Charge II.

Sergeant Sherman Collings, Headquarters Battery, 11th Coast Artillery, testified that he is coupon book salesman at the War Department Theater, Fort Wright. He had been on that job for about two and one-half years, and, until last April, accused had been recreation officer during this period. Until the relief of the accused the method of handling books at Fort Wright had been that coupon books were turned over to him by accused on witness' receipt, and the books were then issued by witness to individuals on the post on credit, each individual signing a promissory note for the book (R. 27). Witness was bonded. He identified a paper presented to him as a receipt signed by him, dated April 18th, and given to accused for 349 books at $1.60 and 238 at $2.40. On the date of the receipt an audit was in progress. Witness identified other attached receipts as receipts from the various organizations for promissory notes turned over to them by him for collection. These receipts referred to promissory notes from the books and were included in the receipt given accused for 349 $1.60 books and 238 $2.40 books. Accused knew at the time that they were included because at the time the receipt was made up books and receipts were all upon the desk (R. 28) and accused was present (R. 34). The smaller group of receipts for promissory notes included 109 of the small books and 104 of the large, and also included the officers (R. 28). (The receipt from witness, one from accused and the group of receipts from the different organizations on the post were received in evidence as Exhibit 11, later withdrawn and photostatic copies substituted therefor (R. 29)). The other receipts were attached to the

one at the top of the page of Exhibit 11, dated April 18, 1933, for 299 books at $1.60 and 238 books at $2.40, at the time witness signed that receipt and constituted a part of it. Witness was accountable to accused for the books that he had signed for and the other people were accountable to witness for what they had signed for. Witness' receipt was true and correct. The penciled notation of an additional 50 books was made before the receipt was signed and was for some books drawn at the time the receipt was made up. Witness made up the receipt dated April 18th because accused asked for the receipt for accountability, presumably for his audit. The receipts from the organizations for promissory notes were from the organizations which bought on credit. The receipt of accused was for officers' chits which he collected. It was customary during the period for the witness to issue all the books to the enlisted men and to turn the promissory notes over to the companies (R. 31). At the time of making the receipt (that of April 18th) witness did not actually have in his possession 349 small books and 238 large books, but some lesser number of books, the difference being made up by promissory notes and receipts (R. 35).

Lieutenant Colonel Lucian B. Moody, Inspector General, First Corps Area, testified that the top portion of Exhibit 11, that is, the statement of accountability between the coupon book salesman and accused, indicating that the former was responsible to accused on April 18, 1933, for 349 small books and 238 large books, was presented to him by accused at his audit of the motion picture fund at Fort Wright, as representing the books in the hands of the bonded salesman at that time. About a day later witness checked the books in the hands of the bonded salesman. In the opinion of witness the receipt did not properly account for the number of books it purported to represent since there were included therein sub-receipts from organizations to the bonded salesman covering books for which accused had already received cash, of which fact witness then had knowledge. The evidence of this fact was found in the company collection sheets and the tabulations therefrom, previously introduced in evidence (R. 36). Of the books covered by the sub-receipts, six books in all were accounted for by the return to the bonded salesman of the six chits represented by them. In the case of the

Headquarters Battery, 11th Coast Artillery, the sub-receipt presented to witness was for 28 small books and 10 large, which accused receipted to the Battery for the equivalent in cash of 28 small books and 8 large, uncollected chits for 2 large books having been returned to the bonded salesman. The receipt of Battery G to the bonded salesman was for chits representing 29 small and 26 large books, while accused receipted to the organization for the cash equivalent of 29 small and 25 large books, the chit for one large book having been returned to the bonded salesman (R. 37). For Battery H the receipt showed 23 small and 18 large books, while accused's receipt for cash was for 22 small and 17 large books, a difference of one small and one large, chits for which were found in the possession of the bonded salesman and credited. In the case of Battery K the receipt of the first sergeant was for 18 small and 27 large books, and accused's receipt to the organization for the cash equivalent was for the same. In the case of the Quartermaster Detachment the sub-receipt was for 3 small and 7 large books, and the receipt in cash to the organization was for 3 small and 5 large books, a difference of 2 chits for which witness allowed credit. For the Ordnance Department the receipt was for one large book and accused's receipt for cash covers one large book. In the case of the Medical Department the receipt shown was for one small and two large books, and accused's receipt to the organization was for the cash equivalent of the same number. In the case of the band the receipt was for 3 small and 5 large books, while accused's receipt to the organization was for the cash equivalent of 3 small and 7 large, indicating an excess of receipts for cash by accused which witness could not explain at the moment. At the time the original receipt for 349 small and 238 large books was presented to witness he was acting in his capacity as official inspector of the accounts of accused (R. 38). The receipt was presented to him as a credit claim for the number of books on the face of it. Witness first came across the sub-receipts in the hands of Sergeant Collings, the bonded salesman, on the morning of April 27th. He first saw the receipt for 349 small and 238 large books on the evening of the 23d or 24th of April, when he first looked at the account. He then tentatively gave accused credit for the face value of the receipt. Later he saw the accounts of Sergeant Collings and noted there the memorandum receipts as totaled for books that had been paid for by

the organizations. He brought the matter to the attention of the accused (R. 39), after the latter had been warned that he had certain constitutional rights, and questioned him as to the discrepancy between the receipt for 249 small books and 238 large and the amount set out in the sub-receipts from the organization. Accused admitted in the presence of Colonel Nugent that he had received cash for all of the books shown in the sub-receipts except for a small number, about 12 books representing chits for sales to officers on credit which the bonded salesman had turned over to him for collection, and stated that he had accounted for the money he had received from the latter. The reason why accused had given him the receipt for 349 small books and 238 large books was thoroughly investigated later and, as witness recalled, accused admitted in effect that the receipt of Collings had been presented to witness with the idea that it would be considered as a credit voucher to accused's account (R. 40). It was witness' recollection that as soon as he questioned accused about these records in the presence of his commanding officer accused made an immediate statement covering the shortage or discrepancy in the memorandum referred to as Exhibit 11 (R. 41). No explanation which witness considered satisfactory was made as to why the receipt was present after the company commander had turned over the money for the collection. No explanation was given as to where this money was that had been given to accused (R. 42). The investigation showed precisely what money accused had receipted for to each organization and the amount receipted for by him as shown on the exhibits which were in evidence. In general the company commanders turned over this money to accused early in April after they had made their company collections. The investigation of the matter began approximately twenty days later and at that time all company commanders had paid to accused certain sums of money as payment for their coupon books, the amounts and dates of which are in evidence (R. 43). This particular account when presented to witness for inspection about April 26, 1933, balanced out correctly, provided witness had allowed credit for things he later objected to. When on April 23d accused presented to witness the certificate at the top of the page of Exhibit 11, witness interpreted it to mean books for which Sergeant Collings was responsible, but, of course, in some cases he might have had chits for the books or even have sold a few for cash and had the cash. Witness considered it a statement of

accountability only. When accused presented the certificate his account as a whole consisted of accountability for motion picture books, accountability for cash and accountability for post exchange coupons. The cash, as witness recalled, was about $106 and the coupons 54 cents, all of which balanced out correctly, and he allowed accused credit, leaving only the discrepancies in the book account (R. 44). Accused did not present any such sum of money as $412.80, the value of 105 books small and 102 books large. The moneys that he did present were accounted for by other items than these books in question, and the statement of money accountability and post exchange coupon accountability would be found in one of the exhibits already before the court (See Ex. 5). Accused presented this certificate for 349 small books and 238 large, approximately $106 in cash, some post exchange coupons, about 60 cents, his retained return for the week of April 22d and the books he had actually in his possession, to make up his total accountability (R. 45).

The evidence for the defense is as follows:

First Lieutenant Raymond A. Knapp, Coast Artillery Corps, the accused, at his own request, was sworn and testified as follows: He enlisted in the Regular Army in August, 1917, and was sent to Fort Monroe for training as a master gunner. He went to France with the 54th Coast Artillery from Portland, Maine, in February, 1918, and was transferred to a combat unit as soon as he arrived. In August of that year he was commissioned a temporary Second Lieutenant and served in a school or with various regiments until January of 1919, when he served as map officer of the peace commission. During his combat service he was three times slightly wounded. After the peace commission in Paris broke up he went to General Headquarters as topographical officer for the Historical Section, and then to the Paris games where he was one of three officers in charge of fencing. He came home in October, 1919, was at Fort Monroe as instructor in the master gunners' school, and was then ordered in turn to Fort Dade, to Pensacola, to Honolulu, to Fort Monroe for a year of school, to Fort Banks, and then to Fort Wright, where he had since been for the last three years and a half (R. 47). After the first three or four months at Fort Wright he was put in command

of a battery, made recreation officer, mine property officer, defense counsel of both courts, safety officer for several of the batteries during the period of firing, and officer in charge of motion pictures. On November 11th, two years ago (1931), he started to build a new War Department theater, of which he had sole charge, and completed the theater for occupancy on July 1, 1932. He was not bonded for this. Colonel Nugent gave him a check for $20,000 to disburse and said that a bond was not necessary. He operated both the old theater while constructing the new one, and the new one until April, 1933. He was very much interested in the construction and maintenance of it (R. 48). During the construction he carried seven different accounts. After having been partially buried by a shell explosion in France he had more or less trouble with his back and kidneys for two or three years until, while in Honolulu, a stone larger than a hen's egg was discovered in his bladder and had to be removed. He always had trouble with his eyes, iritis at one time for sixteen weeks, and about two years before in December he was laid up for seven weeks. He had cystitis last December. About two years ago he took a vacation of ten days so that he could catch up on his mine property and other work, but did not leave the post. He had a wife, three children, nine, six and three years old, a father and mother, all living with him and dependent upon him. There had been much family illness. His wife had been hospitalized ten times in the past twelve years and sick at home "quite a lot". His mother at present was dying. When he came to Fort Wright he was several hundred dollars "in the hole" (R. 49), but he had managed to clear that off by monthly payments in his first two years there. He had always found it rather hard to support his family on his pay and felt that he had been under particular strain and mental worry. (The accused was then excused to be recalled later (R. 50)).

Major William J. Miehe, Medical Corps, Fort Wright, New York, testified that he had known the accused quite well for about three and a half years (R. 50). He first became acquainted with accused at the "annual physicals" in 1930. Accused then had very poor eyesight and complained occasionally and periodically of headache. In the winter of 1931 he had a severe iritis and was under treatment in quarters for about six weeks. In the winter of 1932, he had a moderately severe bladder condition, cystitis, probably due to

exposure. Accused's mother is about 71 years old, bedridden, has suffered multiple arthritis, and at that time was under daily treatment for a purulent bladder condition unquestionably due partially to infected kidneys. She requires a daily hypodermic of morphine in order to have rest. The father is about 74 and in fairly good health. Accused's wife was in Walter Reed in 1930 for ten weeks and in 1931 for about six or seven weeks. The three children, all girls, had been in fairly good health (R. 51). As far as witness knew, accused was not a gambler and certainly not a drinking man and had lived quite modestly and frugally. Accused developed the iritis at the time the moving picture theater was being erected, was marked quarters, and had to be warned several times that unless he stayed away from that building while it was being constructed witness would admit him to the hospital to keep him indoors. He insisted on going over to watch the construction of the building. In the opinion of witness he was then carrying a particularly heavy load of work (R. 52). Witness did not know that accused had been worrying and under mental strain, nor had he ever treated him for any nervous or mental disease, but, knowing his family conditions at home, he "would naturally think he would worry" (R. 53).

Captain Ivan G. Martin, Chaplain, Fort H. G. Wright, New York, testified that he had known accused since the early part of July, 1932, had seen him almost daily since that time, and had come to know him very well. He had never noticed in accused any indication in the slightest of intemperance, gambling or indulgences. He knew accused's family life and would say that he lived exceptionally modestly and frugally. Accused had been most conscientious in his work and "always on the job". Witness had the impression about November, 1932, that accused was carrying a pretty heavy load of official duties around the post (R. 54). He thought accused overworked and asked him if he wanted witness to go to the commanding officer and suggest the appointment of an additional recreation officer to assist him in the recreational end of the work. He gained from what accused said that he did not like to ask for an assistant since that might indicate that he thought himself overworked or unable to do his work. Knowing his family life, witness thought that accused had had cause for worry that might cause mental or physical strain (R. 55).

Accused was recalled as a witness, at his own request, and testified that Fort Wright was situated on an island about eight miles from the mainland. Boat service was such that to go to town you had to leave at nine o'clock in the morning and return at four, and since there were no banking facilities on the island, a whole day had to be used to make any deposits. Deposits which should normally have gone to a bank on Monday or Tuesday of a week were often delayed for three or four days because he had been directed by the commanding officer to exchange all his silver and small bills at the post exchange for larger bills and checks and he could not always find the post exchange officer in. Also a part of his receipts were in post exchange coupons which had to be redeemed and the cash sent to the bank. Civilian laborers and artisans required payment in cash weekly and he would often cash checks from one fund out of money he had on hand pertaining to another fund. There were quite a few small errors in his books (R. 56). It was always difficult for him to get his books to balance at the end of the month or quarter, and he did not take as much interest in that part of his job as he did in the mechanical and technical part which appealed to him more.

About December 15, 1932, Major Miehe diagnosed as cystitis a severe abdominal pain from which he was suffering and ordered him to bed. Three or four days later Sergeant Meese, his janitor and usher at the theater, phoned him that he had discovered his safe open. Four or five days later accused went over to the theater, opened the safe that Sergeant Meese had locked, and found that nearly all of the money which he had in the safe had disappeared (R. 57). As far as he could figure it out he had "pretty close to a thousand dollars" in the safe at the time, and there remained only some small change. Two bundles of coupon books, one of large and one of small, each containing less than 50 books, had also disappeared. This was the only safe of which he was the only man to have the combination, and it was his custom to keep in it Headquarters Battery, recreation, theater, or other money that he had on hand, in separate marked manila envelopes. His commanding officer had directed that whenever he made a remittance to Washington he would write a check on the recreation fund and send that to Washington and then deposit theater money in the recreation fund in the exact amount of the check to cover it (R. 58). On the morning of December 14th at about a quarter of nine his wife telephoned him at his

battery and asked him to go over to town with her that morning. He got permission from the adjutant, rushed to the theater, took out the money he had made ready for deposit a week or two before, and deposited it in the bank that day. This left a great deal of money that he did not have time to make ready for deposit before the boat left at nine o'clock (R. 59).

Sergeant Edmund B. Meese, Headquarters Battery, 9th Coast Artillery, Fort Wright, New York, testified that last December (1932) he was in and out of accused's office. While accused was absent sick in quarters during part of December, he found the safe door partly open. He closed the door, called up the accused at his quarters, and told him about it. It was possible that someone could have come in, found the office empty, and had a chance to open the safe (R. 60). Upon cross-examination witness stated that he found the safe open about 8:00 o'clock in the morning, but that he did not examine it closely enough to learn whether there was any money in it or not and merely noticed some envelopes. He locked the safe before he telephoned accused. He had no discussion with accused about the matter after the latter came back to duty (R. 61). Accused never mentioned that money had been stolen from the safe and as far as witness knew nothing had been taken. It was not until after accused had been relieved that he spoke to witness about the matter. Upon examination by the court witness stated that he did not know that the safe had been broken open. Accused was the only one who had the combination of the safe which was in the downstairs office of the post theater (R. 63). The office as a rule was open during the day, not always with anybody in it. The safe was a large quartermaster safe (R. 64).

First Lieutenant Edgar R. C. Ward, 11th Coast Artillery, testified that he relieved the accused of his duties as recreation officer in the spring and in a search of his office at that time found one coupon book. About a week later, the first week in May, he found 48 small coupon books of the $1.60 type in a large pasteboard carton in the storeroom on the second floor of the theater. The books were in the bottom of the carton under a pile of old records and made a package of about 4 x 4 x 2 inches. Witness put them with the other books he had on hand and made a report to the Adjutant General that he had found them on the post (R. 65-66).

Accused was recalled as a witness, at his own request, to continue his testimony as to the charge of embezzlement. He was the only person who knew the combination of this safe. It had not been broken open and was undamaged. The combination was a two figure one and the last figure 66. To lock the safe he would close the door and turn the dial to the left. Unless he turned it back through 55/100 of a circle, anyone who turned the knob to the right again could open the safe (R. 67). It was possible that when he closed the safe he flipped the dial and did not hit it hard enough to make it go through the half circle. When he discovered that the safe had been rifled he did not know what to do at first. He was still sick and worried and thought the thing over quite a while and tried to look at it from all angles. There were about fifteen different men who were in and about the theater building or who had access to it, and at least three of these were in serious financial difficulties as he knew from letters from civilian firms that he had received. He thought that if he kept quiet and watched these men to see if they were making payments that seemed to be larger than they could make from their pay, he would have a better chance of discovering who had taken the money. He realized at this time that he should have gone to Colonel Nugent immediately but he did not want to forfeit Colonel Nugent's good opinion by revealing his own carelessness if there was any possibility of recovering the money and restoring it. He was again having trouble with his bladder and was dreading another serious operation. He believed that the coupon books Lieutenant Ward had found had been taken from the safe. The men working about the building wore fatigue clothes buttoned up tight because of the cold, and he believed that the men who took the two bundles hid the bulkier one, because it would have made quite a bulge in a fatigue clothes pocket, either to get rid of it or to get it sometime later (R. 69). Accused kept in the safe all the battery and moving picture funds that he had on hand. He did not know that there were errors in the battery fund book. The local post auditor had audited the books and had not discovered them. He had had previous chances "to make a real clean up" if he had been dishonest. While disbursing $20,000 in the construction of the theater he could quite easily have received money from contractors or firms from whom he purchased material. While at Fort Dade he had been offered a bribe as large as $15,000 if he would negotiate a lease of land for a purpose he knew the Government would not entertain (R. 70).

Upon cross-examination the accused testified that he thought there was "pretty close to a thousand dollars" in the safe. There was a little over, or very close to $500 of credit collections for November which came in from the 1st to the 15th of December. And there was some recreation money, some battery money and receipts from the theater. The weekly receipts then amounted to between one and two hundred dollars in cash, and some coupons had been redeemed for cash. He did not know how much of the money belonged to the headquarters battery, but the bulk of it belonged to the motion picture service. He did not know when the robbery was committed. He went to the bank on the 14th, was taken sick on the 16th (R. 71), and it was three or four days later when he learned that the safe was found open. There were many men in and out of the office at all times during the day and he did not believe that the safe could have stayed open for three or four days. He thought that he had made a statement to Colonel Moody that there was around seven or eight hundred dollars, but at that time he did not know that any funds were missing from the battery fund, nor did he learn this until the charges were served on him. While he believed that there was money in the safe belonging to the Headquarters Battery and that it was stolen, he did not discern a shortage in his battery fund the next month when he made out his fund book because there were several errors, one error at that time of a hundred dollars that he did not discover. He thought that that error existed the month before and that it was carried on and passed by the creditor (R. 72). When he made out his sheet for the succeeding month of January, he did not show the difference of what had been stolen because he "didn't remember or know that any money was short from the battery fund". He knew now that there was money stolen from the battery fund because that was the only time that it could have been missing, but he did not know at the time.

As far as accused knew the tabulation showing that he had received motion picture service books to the value of $8560 (Ex. 1) was correct. He presumed that the tabulation made from his weekly reports showing receipts of $6699.20 from sales of coupon books in the period from December 26, 1931, until his relief (Ex. 6), was correct, and, having had access to the records, he did not object to it as a correct statement. The exhibit (Ex. 5) indicating

that books to the value of $55.20 were dropped was correct and those books were dropped for deserters (R. 73). The sum of $789.60, the shortage, resulting from the evidence that he received books to the value of $8560 and accounted for $7770.40, was, to the best of his knowledge and belief, stolen from his safe sometime in December, 1932. The regulations pertaining to the return of money to the War Department in connection with the Motion Picture Service provide that the receipts are turned in weekly with the exception of a sum of $20 which is retained for change. His weekly business varied from around $125 in some of the winter months to better than $1000 in the good summer months (R. 74). He had $789 on hand in December because he had been ordered by his commanding officer to deposit exactly the same amount of money in the bank for which he drew a check to send to Washington. The collections from the various organizations were often very slow. On one or two occasions he had to report to the commanding officer that some of the smaller organizations had not turned in their money, and on one occasion the commanding officer called these organizations and ordered them to make a settlement at once. It was customary for accused to wait until he had got all the collections in and make one settlement with his salesman, report the total number of books collected for the week of the settlement, and forward the money. He sent money in each week, but he did have on hand as much as $612.62, as shown in the tabulation of receipts from sales of coupon books extracted from his books for the month of November and through December 24th. He did not deposit it because he was directed by his commanding officer to make the deposit equal his check and he was not then ready to forward the large amount of money and only forwarded each week the weekly receipts (R. 75). He had not then made a settlement with his coupon book salesman to find out if they agreed as to the number of books sold, and he did not think he had received all the collections from one or two of the smaller organizations until after the latter part of the month. For the month of November he thought all of the organizations had paid him about the 12th or 15th of December, or possibly a little earlier. He did not get any of this money until after the first of the next month.

He had charge of the council book of Headquarters Battery, but only saw it during the investigation of charges. He made out the

sheet for May. The entry carried forward in June to show $2578.71, instead of $2588.71, as audited by Lieutenant Colonel Moody, was not accused's entry nor in his handwriting. He was not sure whether his first sergeant made the entry or a lieutenant who was in the battery at the time (R. 76). Accused checked the totals, was aware of the contents of it, and it was correct that it carried a ten dollar shortage but he "was not aware of the shortage". The sheet for October was in his handwriting and the collection sheet was omitted. Upon being asked the reason he stated that it was his custom the first of the month to bring the footings forward for the preceding month and No. 1 voucher was always the battery collection sheet. At the time he would bring the balance forward he would write in the voucher No. 1, battery collection sheet. At the time he made this entry he would close up the battery collection sheet and send his battery clerk with the small amounts of money to the tailor and the barber and so forth, and with the sheet to get their signatures. He presumed that he made this entry while the clerk was away on this errand, and did not have the collection sheet to put in the figures. As far as he knew, the collection sheet was right and $66 was coming to the battery fund which was not entered (R. 77). The ration receipt column showed an error in addition of $10.10 which he made. The expenditures from other funds on that same month shows an error of $99.30 which he made. The error was his in the total of $1713.22 for expenditures, ration savings, in December, 1932, which should have been $1613.22, an error of $100. Upon being asked to explain what became of the $285.40, the total of these errors, accused said that at the time he was sick he had to forward the report to Washington for the week before. The money was in his safe and he did not have an opportunity to go over and get it and send it to the bank (R. 78). The bank called him up and told him that the check had come back and that there were not enough funds in the bank to cover it. Not knowing that the safe had been robbed and believing that he had the money there, he drew a check for $200 on the battery fund and sent it to the bank, expecting when he got back to the theater to take the $200 from the other funds and reimburse the battery fund. When he got back to the theater he found all his money was gone and forgot about this $200 check (R. 79). He never had any use of the $285.40, $200 of that was accounted for by the check and "the other might easily have been in the safe". Some battery money was there,

how much he did not remember. The $285.40 came into his possession but was not accounted for because of "errors of some sort, due to the fact that the money was in my safe in December and was taken". Before the arrival of Colonel Moody to make that annual audit he had never mentioned to anybody the alleged loss occurring in December, 1932, which, from the allegations, appeared to be $789.60 plus $285.40, or $1075 (R. 80). As to the $285.40, he "knew the money came in when it came in". It did not come in "all in one lump" but "piecemeal". It was shown on the book, that was the trouble. There was a shortage of cash, although except for that $66, it showed on the book. If it had not been on the book there would have been no apparent shortage (R. 81). As far as accused knew the book did balance and the local auditor thought so.

Upon examination by the court accused testified that in February, after the robbery of his safe in December, he decided that he had no hope of getting anything definite on any one man and that he would borrow this money and replace it (R. 82). Then the banks closed. He had written to a loan company for their blank forms to make this loan, but Colonel Moody's audit came before he could complete the loan and make up the shortage. There was a United States post office at Fort Wright which sold postal money orders but he did not transmit his money to the bank by that means because money orders cost money and the War Department Motion Picture Service wanted every penny. His predecessor had told him that he originally sent his money by money order but had been ordered to stop and turn it in some other way. Colonel Moody the year before had objected to this method of sending money and wanted him to buy money orders. He had told Colonel Nugent what Colonel Moody had said and Colonel Nugent said: "You are doing it the way I want you to do it and you will continue to do it that way". And he had done so as long as he had the theater. He believed that he would have told the commanding officer about the whole transaction after he had replaced the money (R. 83). He borrowed no substantial sum of money after the robbery of the safe. To keep up his remittances to the theater fund without this money he had his weekly collections and for the month of December he sent in the January collections, and "for the month of February, the January collections".

Colonel George A. Nugent, General Staff Corps, Headquarters 2d Corps Area, testified that he had known the accused very well for about two years and a half (R. 84). Under his command accused had been the post recreation officer and in charge of the motion picture theater, and for about a year was commanding Headquarters Battery. His duties included the construction of a new theater involving the disbursement of some $20,000, which duty he performed very satisfactorily. His duty in the technical side of the management of the theater was satisfactory. In his accountability for various financial accounts connected with the theater he was a little careless in the filing of his vouchers. He lacked system, but otherwise, as far as witness could see, he was all right. He was an average battery commander. On certain jobs, like the motion picture, he was very enthusiastic. He did not have any too great ability. His mentality and education are just average. His principal defect was his lack of system. This very often resulted in careless mistakes. He would put away his vouchers in some peculiar places at times and when it came to the audit of funds they would have to dig the vouchers up for him (R. 85). Witness thought that some of the irregularities or difficulties were caused by the absence of a bank on the island. When the money for the construction of the theater first came in there was a fund of $20,000, $15,000 of which was deposited in the bank on interest and the balance used as a working deposit. From time to time accused did use money from the theater receipts and cash from the recreation fund to meet his payrolls for the construction of the theater, but he had the money in the bank and witness saw no objection to that. He did not think that there was any shortage that ran back for a year or more that completely escaped the attention of the post auditing officers (R. 86). He did not think that the accused had any habits of extravagance, gambling, drinking, or other excesses for which he might be tempted to appropriate funds other than his own. His family environment had been something of a handicap. His father and mother are old and have been living with him, and in addition he has a wife and three small daughters. His mother is an invalid and for six months or more his wife was very seriously ill at Walter Reed Hospital. Witness had noticed some evidence of worry and forgetfulness on the part of accused. He did not think that accused had ever appropriated any Government

funds for his own use (R. 87) and had always thought that he was conscientious, honest and hardworking, and had given the Government honest and faithful service according to his ability during his career.

Upon cross-examination by the prosecution witness testified that he knew of no reason why accused should not have made his motion picture returns weekly in compliance with Army Regulations, nor why he should have accumulated six or seven weeks proceeds without returning them as required by Army Regulations (R. 88). Accused sold during the month a great many "picture books" on credit and those were not paid for until after pay day, but that was the only case in which he would or could, so far as witness knew, accumulate any great amount of funds. The matter of the robbery of the safe and the taking therefrom of funds of Headquarters Battery and the Motion Picture Service aggregating approximately $1075 was brought to witness' attention only after the corps area inspector had arrived early in May, when a letter came from the War Department saying that a great many more coupons had been sent in than had been paid for "in the way of books". This had not been brought to witness' attention by accused and between December 17th and the middle of April he had received no notice of the robbery. He had never in any way indicated to accused that he could be dilatory in making his weekly motion picture returns and in incorporating in them amounts that had previously been received (R. 89). To a question by the court witness stated that, had a robbery or a safe-breaking occurred on the post, he, as post commander, would probably have known of it. To a question by the defense he stated that he did not know that accused had a habit of sending one check a month to the Motion Picture Service in Washington, but was under the impression that the check went forward with the weekly returns to cover everything except the $20 cash that he was allowed by the Motion Picture Service to retain (R. 90).

Technical Sergeant William J. Fayne, Headquarters Battery, 11th Coast Artillery, Fort H. G. Wright, New York, testified that last April he was cashier in the box office of the motion picture theater at Fort Wright and that he made out both the original and duplicate weekly reports for the week ending April 22, 1933. He recalled that

the accused had told him that he had discovered errors in the report (R. 91), an error in bringing forward the balance of the books on hand from the preceding week and a little error in addition, and that he (accused) had corrected the errors. Had he not been told by accused witness would not have learned that the errors existed.

Upon cross-examination by the prosecution witness testified that he was told of the error sometime after he made out the statement, but that Colonel Moody was not in the post making an audit at the time (R. 92). Accused told him that he had corrected the errors in the weekly statement and witness understood that both copies would be corrected. Witness saw the retained copy but did not look at it to see the correction. He identified Exhibit 9 as the weekly theater statement for the week ending April 22, 1933, which he had made out (R. 93). The report showed: "Coupon books on hand beginning of week, small books 389, large 328. Coupon books on hand end of week, 382 small, 321 large". Witness saw no evidence of any corrections having been made on it. Witness was handed the original copy for the week, April 22, 1933, and stated that there was evidence on it of its having been altered or corrected. He had not made that one out. The correction had been initialed. The original copy, which was sent to Washington, had been changed and the retained copy was as witness had typed it (R. 94).

Accused took the stand again at his own request in connection with the second charge and testified as follows: The original and duplicate returns were made out for him each Sunday by the cashier on duty, this particular report by Sergeant Fayne, and were put on his desk for checking and signature. He corrected a small error on this report, filed the duplicate in his files, and left the original on his desk so that later he could get the coupons which had to be forwarded to Washington and make up the envelope. The next day there was, he believed, a court-martial at one o'clock and he rushed into his office shortly before to get the report and coupons and take them to headquarters to be mailed. He took up the original and noticed that the report of coupon books seemed smaller than he had remembered it from the week before. He looked into his "book" and saw that the number brought forward from the previous week was not correct. He then corrected the original report on the typewriter,

took it to headquarters, told Sergeant Fayne that he had found errors in the report and had corrected them, handed him the report with envelope, coupons and check to be recorded and mailed from headquarters, and went to the court-martial forgetting all about the retained copy in the files (R. 96). The account which went forward was an accurate one, and the duplicate left in his files was as the Sergeant had made it out in so far as the number of coupon books brought forward was concerned. If, when Colonel Moody got hold of this return, it appeared to show that accused was "square", it was not because of any wrong figures he had put on it. Colonel Moody had him "pretty well worked up" at the time of the inspection of his financial accounts. The Colonel had inspected his mess at a quarter of one and had "made quite a fuss" about finger marks on the sugar bowl, although the table had not been cleared from dinner and the men had been eating pork chops and passing the sugar bowl from hand to hand (R. 97). He criticized some gravy that he did not like and discussed it at great length. He criticized accused because he had not inspected the breakfast, although accused told him it was the custom there for the officer of the day to inspect the breakfasts of all the messes so that the battery officers would not have to be at their batteries at reveille every single morning. Accused did not know what to make of Colonel Moody and thought that he was "jumping on" him "unnecessarily and a little unfairly". Sometime later and after he had forwarded his report and came from his battery to go home about a quarter past five, he met Colonel Moody in his car. Colonel Moody stopped his car and told accused that at the hospital they had the same kind of gravy but made it with bacon fat instead of lard and that it was much better and should be made that way. They had a discussion in which accused became "a little bit angry" and told him it "simmered down" to a matter of personal taste and that his ninety-six men liked the gravy and he was the only one who did not like it. Colonel Moody said, "Damn it, man, if you won't take criticism, I can't do anything about it". He then told accused that he was coming up to inspect the theater fund in about fifteen minutes and to go up there and wait for him (R. 98). When Colonel Moody came up accused gave him this report, the retained copy, and did not realize that he had not corrected it. He had no intention of giving him an erroneous report. The Colonel stayed there about an hour

and then said he would finish his audit at a later date when he could get hold of Sergeant Collings and his records and count his books. It was the next day before the accused suddenly realized "My gosh! I have given Colonel Moody an erroneous report". He did not know what to do about it. He thought that any other time under any other conditions he would have gone to the inspector and told him that it was erroneous, but Colonel Moody had him "so fussed up" that he was not quite capable of using his best judgment at that time, and made no attempt to correct the impression that Colonel Moody got from the retained copy. As to the question of receipts, it was the custom to give the bonded salesman the number of books that he considered necessary to carry on the business for the rest of the month and he would give accused a "hand receipt" for these books (R. 99). If the salesman needed more books at any time he was given them and they were added to the receipt. The latest receipt was always the correct one and superseded any previous receipt. Accused had the last receipt, to which 50 books had been added, and gave this to Colonel Moody as a basis upon which to compute the number of books that should be on hand at Fort Wright either in his (accused's) possession or in the hands of the bonded salesman. It did not seem to him that he was giving Colonel Moody a false official statement. He knew that he could - within a week or two at the most - get this money and replace it in the fund, and his whole idea was to get rid of Colonel Moody as soon as possible so he could straighten the thing out. He knew that if Colonel Moody came back, as he said he was going to, he would discover that there was a shortage, either in the books or in the money for books, and he determined to let him go ahead and find it and then explain it to him (R. 100). As soon as Colonel Moody questioned him about the matter and cautioned him as to his rights he made a full and honest statement to the best of his knowledge and belief.

Upon cross-examination by the prosecution accused testified as follows: He presented to Colonel Moody at the time of his annual inspection a retained copy of the Motion Picture Service report for the week of April 22, 1933 (Ex. 10), and did not in any way indicate that it was not what it purported to be for he did not then realize that it was not a correct copy. He had made the changes on the original which he had sent to Washington. Unknown to him at the time the copy he showed Colonel Moody had an accountability of 190

small books and 50 large books less than the copy that he sent to Washington. He pulled the copy from the file and handed it to Colonel Moody without even looking at it. He got the correct figures from the retained copy of the report of the previous week and based the changes on them. Accused identified the retained copy of the report dated April 15th (Ex. 12) and read from it the figures showing books on hand at the beginning of the week, small 457, large 384, and at the end of the week, small 389 and large 328 (R. 102). This was the copy on which he based his figures for the original copy to be sent to Washington for the week of the 22d of April, 1933. The figures then appearing on the paper (Ex. 12) were not the ones that were on it when he made the correction because he had changed them later on after Colonel Moody had made his audit. After he had realized that he had given Colonel Moody an incorrect report inadvertently, he was "rather panic stricken" and could not think what to do except to carry it through, so several days later he went to the files and took out the previous week's retained copy and changed it to agree with the retained copy for the week of April 22d. He kept the record of the figures he had changed and intended to change them back as soon as he got the money deposited to cover the shortage and make everything correct.

Accused identified Exhibit 11 as Sergeant Collings' receipt to him and bearing accused's signature to the effect that it superseded all other receipts. The receipt was dated the 18th. Colonel Moody had then been on the post but was not then making the audit of the motion picture funds (R. 104). The other receipts (included in Ex. 11) were receipts given to Sergeant Collings for chits sold on credit to the various organizations. At the date accused received the receipt from Sergeant Collings he (accused) had received probably all of the money for these books. The receipt was the amount of the accountability of Sergeant Collings to him until such time as he could make a settlement with Sergeant Collings. It included all the books on the other receipts for most of which accused had received the money. Upon settlement with Sergeant Collings accused would have reduced the receipt to the amount of books he actually had on hand plus the chits for the unpaid accounts from the previous month. Sergeant Collings was accountable to accused until he had given him clearance, and, while accused had already received pay for the books, Sergeant Collings did not know it. Accused presented the receipt to Colonel Moody

at the time he was making an inspection of the motion picture funds (R. 105), but did not indicate to him that he had already received the money from the organizations whose receipts were attached to it. Accused did not see that it made any difference to Colonel Moody whether he (accused) "gave him the money -- this receipt less money or the money less the number of books that this receipt called for". Accused understood that the receipt (that signed by Sergeant Collings) would indicate to Colonel Moody and he would draw the conclusion from it that Sergeant Collings was in possession of books, chits or receipts to the amount of 349 books for $1.60 and 238 books for $2.40.

Upon examination by the court accused testified that he changed two or three of the back reports, he did not remember how many, but not very many. He was "panicky" and did not know what to do and started changing them for some time back, but quit after changing two or three. These he changed after he had presented his erroneous report unintentionally to Colonel Moody (R. 106). The defense then rested.

When the court reconvened on the following day the prosecution requested that the accused be recalled to the stand to be questioned in rebuttal on facts brought out by the defense on the day before. The defense objected to the recall of accused after he had been examined and the defense had rested. The president directed that accused take the stand. The prosecution stated that before the court had closed the night before he had brought to the attention of the court that he desired further to question accused on matters of rebuttal. This, however, does not appear of record.

Upon cross-examination by the prosecution accused was asked to examine the council book of the Headquarters Battery (Ex. 7; R. 107). He admitted that while on the stand the day before he had stated that the amount of approximately one thousand dollars, which the accounts showed he was short, had been stolen from his safe. His council book over his own signature showed that he was responsible for receipts or other funds in the amount of $1523.75 and for ration savings receipts of $192.18 (see December page and final page of Ex. 7). The amount of $285.40 carried forward from the audit at the end of

May, consisting of errors and omissions, was correct. The December sheet showed a note of $1500 and the amount of $43.68 in the savings bank (R. 108). Witness identified the check book of Headquarters Battery, 11th Coast Artillery, of which he was custodian (Ex. 13; R. 109), and read from it the sum of $302.20 as the amount of cash shown as the balance of December 12th. He admitted the apparent correctness of the figures showing a note of $1500, savings of $43.68, balance of cash in bank $302.20, making a total of $1845.88 which was accounted for; that his responsibility from the book fund appeared to be $2001.33 (the total of $1523.75 "receipts or other funds", $192.18 "ration savings receipts", and $285.40 "errors and omissions", as noted above); and that the difference of $155.45 ($2001.33 less $1845.88) was the most cash that he could have had on hand in the Headquarters Battery fund. He read the sum of $104.15 as the amount of cash on hand, as stated over his own signature on the December council book sheet (R. 110).

Lieutenant Colonel Lucian B. Moody was recalled by the prosecution and testified as follows: He identified a tabulation made by himself from the original weekly reports submitted to the War Department and from the tabulations of cash and credit sales made incident to the investigation and already in evidence, which tabulation showed week by week the proceeds of sales of motion picture books as actually reported to the War Department in comparison with the sales which should have been reported, and was received in evidence as Exhibit 14 (R. 111). Referring to the tabulation witness stated that accused's responsibility to the War Department for the motion picture fund for the week ending December 10, 1932, was readily ascertainable from the tabulation and was as follows: "The cumulative shortage for the week ending November 26, 1932, was $52, to which should be added $21.61 collected during the week ending December 3d and $403 collected for the week ending December 10, making a total of $476.80 which should have been reported by December 10, less $59.20 which was actually reported for the week ending December 3 and December 10, making a cumulative difference unreported of $417.60 as of December 10, 1932". (A comparison with the figures recorded on Exhibit 14 discloses typographical errors in the above matter as follows: "$21.61" for "$21.60", and "$403" for "$403.20". The sum of "$417.60" is correctly computed from the several items mentioned in Exhibit 14.) Witness identified the retained report

of the motion picture fund for the week ending December 17, 1932, and it was received in evidence as Exhibit 15 (R. 112). Defense objected to the question of the prosecution that the witness read from the report the cash on hand, on the ground that the accused had had no opportunity to examine these particular pieces of evidence in preparing his defense to the new evidence then being introduced. Prosecution replied that it was not new evidence and that these records had been available to the defense since the inception of the charges; that accused had taken the stand and stated that an amount of approximately a thousand dollars or $1075 was stolen from his safe; and that in rebuttal the prosecution was offering in evidence documents, of which accused had had opportunity to avail himself, to show that he could not possibly have had that much cash on hand, which documents were still available to the defense for whatever use they want of them. Thereupon the objection of the defense was properly overruled. Witness then stated that the sheet (Ex. 15) showed a working balance of $20 carried forward from the previous report and cash receipts of $75.65 from sale of tickets. There was also a receipt for $9.60 from sale of coupon books, which amount had been included in the tabulation as to which he had just testified and he did not think it should be considered in addition to the $75.65 referred to (R. 113). Witness identified the check book of the recreation fund, Fort H. G. Wright, through which the motion picture funds were handled under the heading "Recreation fund 'Unappropriated'", and it was received in evidence as Exhibit 16. The amount shown on the stub as carried as a balance on December 10, 1932, was $103.57 (R. 114).

Upon cross-examination by the defense witness testified that Exhibit J (officially marked "Exh. #14") refers to the proceeds from sales of coupon books and does not include cash sales of tickets at the theater window. The figure $75.65 was money derived from sales of tickets at the window for the week ending December 17, 1932, and not from sales of coupon books.

Upon redirect examination witness testified that the tabulation (Ex. 14) showed both sales reported to the War Department and sales which his investigation showed should have been so reported. It was a comparison. Assuming everything in perfect order, the

"difference between the sales reported to the War Department and the sales actually made would be the amount of cash which should have been in the hands of the recreation officer at any given period (R. 115).

Accused was recalled as a witness, at his own request, and testified as follows: He was making an estimate of the amount of money that may have been in the safe based in part on the trial judge advocate's and Colonel Moody's figures. Accepting these figures he could show that the amount might have been around the thousand dollars that he estimated it to be. There were Colonel Moody's figures of $417 for the collections from the sale of coupon books, the council book figures of $150, cash collections at the theater for the week ending about December 10th and three days of the next week would bring it up to another hundred dollars "plus funds pertaining to the recreation fund which, due to the fact that we put on a play in the theater in the first week in December and the cash of which was in my safe, making an estimated amount in the recreation fund of around $150 and taking into consideration the $2.40 coupon books which were taken from the safe--". Asked to explain more in detail about the coupon books in connection with those that Lieutenant Ward found, he testified that it was his custom to have two bundles of tickets in his safe, one large and one small, for the purpose of giving books to his cashier for cash sales at the ticket window. The cashier was allowed two large and four small at all times. If he sold a book accused would replace the book the next day from his safe. There were never more than 50 of each kind. As he used up one bundle of 50 books he would bring down another and put it in the safe. There might have been anywhere up to 50 large coupon books which had never been accounted for and which would total $120 more. The total of these figures came to approximately $940. Any other money of larger or lesser amount might have been due to clerical errors or to errors in estimating (R. 117).

Upon cross-examination accused testified that he had no proof outside of his own word of the amount of money which was in the safe that belonged to the recreation fund. The show was not "an army proposition". The building was merely used. They had two shows about that time, either both in the early part of December,

or in the very last part of November and one in December. He was making the statement under oath, and to the best of his knowledge and belief these figures were as nearly correct as he could estimate them. The receipts from the show with some money pertaining to the recreation fund that he always carried on hand for small purchases he estimated at around $150. Upon being asked if there was any other cash in the safe that had not been accounted for as belonging to either the Headquarters Battery fund or the motion picture fund, he replied, "I can't remember what was in there now. It is nearly eleven months - ten months ago". There was no record that he knew of that had not been presented already. He never reported any of this loss to anybody (R. 118).

Upon examination by the court accused testified that it never occurred to him at the time when this safe was found open and robbed that he might have gone to his commanding officer, told him the whole story, and that there might have been a board convened which might have absolved him from any responsibility for that loss. He thought that he was responsible for the money, regardless of what any board might do in clearing him of responsibility. The financial responsibility was still there and he would have to make it good unless he could discover who had taken it and get it back. That was his whole object. The sum of money "looked mighty big" to him to have to be replaced. It had not been his experience in the Army that when an officer lost money or property through no fault of his own that he was usually absolved from his responsibility or accountability for that property. He had lost money and property and made it good when he first came into the service in spite of the fact that any responsibility for any irregularity had not been laid to him. The fact that he was accountable for this amount of money made the Secretary of War "or somebody" order him to pay it back (R. 119).

At the request of a member of the court the original report of the United States Motion Picture Service, Fort Wright, New York, for the week of December 17, 1932, was received in evidence as Court's Exhibit A, to be withdrawn and a photostatic copy thereof substituted.

Accused's safe was small and it was not possible to keep in it all the coupon books that came in lots of three and four hundred

at a time. In his office on the second floor he had a strong steel box with a padlock in which he kept all spare coupon books and nothing else. The doors on his office were locked (R. 120) and only the janitor and he had that key. The other office downstairs, where the safes and the filing cabinets were, due to the design of the building, was used not only as an office but as a place for the cashiers, ticket salesmen and ushers to keep their hats and coats, so that at all times, especially before, during and after the show, there were from three to six men there. Soldiers who bought tickets or coupon books on credit had to come to that office to get them. There was a local audit of recreation funds every three months at Fort Wright.

Lieutenant Colonel Lucian B. Moody was recalled as a witness by the court and testified that of the original and duplicate of the report of April 22, 1933 (Exs. 9 and 10) he found the original report to the War Department to be correct (R. 121). When the duplicate was submitted to him in the course of his investigation no explanation was made at that time or a short time thereafter that it was not correct (R. 122).

4. Under the charge of embezzling funds of the United States Army Motion Picture Service to the amount of $789.60 (Specification 1 of Charge I), the evidence is clear and conclusive that the accused, as recreation officer at Fort Wright and in charge of the motion picture activities at that post, was, over the period from December 26, 1931, to April 26, 1933, short of cash in his accounts of these activities to the amount of $789.60. That a shortage of approximately this amount would probably be found he admitted to the inspector as the audit of his accounts was about to be concluded on May 11, 1933. Accused explained that the shortage was due to the fact that this amount of money and more had been stolen from his safe in December, 1932. This explanation will be discussed later.

Under the charge of embezzling funds of the Headquarters Battery, 11th Coast Artillery, to the amount of $285.40, of which organization accused was commanding officer (Specification 2, Charge I), the evidence is also clear and conclusive that as the commanding officer of this organization there had come into his

possession during the period from May 25, 1932, to April 27, 1933, the sum of $285.40, for which he had failed to account. Accused in his testimony admitted the existence in his battery fund account of the errors and omissions disclosed by the evidence, upon the correction of which the shortage of $285.40 in cash was predicated, and stated that this money came into his possession but was not accounted for because it too was in his safe in December and was taken. There is corroborative evidence in the testimony of Sergeant Meese that the safe in accused's office was found open in December, 1932, but the story of accused that there was taken from this safe at about that time $789.60 in funds of the motion picture business and $285.40 of battery funds is wholly without corroboration. It is unlikely and improbable that such a loss could have occurred, as claimed by accused, and he have neglected to report the fact to his post commander, whose intimate concern in the affairs of his post made it imperative that he be advised of a matter of such importance. Not only did the accused fail to make such a report, but it was not until some five months later, after the audit of his accounts had been commenced and he relieved from duty, that he even suggested to Sergeant Meese the possibility that money had been taken from his safe in December. And this explanation does not appear to have been seriously presented until the accused testified in his own defense under the charge of embezzlement about ten months after the date of the alleged loss. He then testified that "pretty close to a thousand dollars", as well as two bundles of coupon books, one of large and one of small, each containing less than fifty books, had disappeared. In attempt to corroborate the theft of a bundle of small coupon books, the defense introduced evidence that a package of 48 such books was found the first week in May, 1933, among old records in the storeroom on the second floor of the theater. Accused first testified that the money in his safe was recreation and battery money, and receipts from the theater. Upon cross-examination in rebuttal by the prosecution, he admitted that the most cash of the battery fund he could have had in the safe at the time of the alleged loss was $155.45. The prosecution further showed that the greatest amount of motion picture funds that could have been in the safe at that time was $417.60 and that the total of funds then in the safe could not have exceeded $573.08, assuming that everything was then in perfect order. Accused again took the stand and endeavored to show that the amount

of his shortage, $1075, might still have been taken from his safe since, in addition to the funds in the safe as shown above, there were the cash collections at the theater for the week ending December 10th and the three days of the next week amounting to $100, also the sum of about $150, proceeds of a play put on in the theater the first week in December, mentioned here for the first time, and a bundle of $2.50 coupon books anywhere up to 50 in number, which would add $120 to the amount lost, thus raising the total to about $940. The explanation of the accused that the amount of his shortage was stolen from his safe in December, 1932, did not merit belief when first presented and was shaken by the prosecution in showing that no such sum of money could have been in the safe at the time had everything been in order. In his effort to support this explanation the final story of the accused that there were other funds in the safe that he had not mentioned before is advanced without corroboration, and appears to be merely a desperate effort to maintain a position that had become untenable. The fact that a package of 48 small motion picture coupon books was found among old records in the storeroom in May, 1933, in the absence of evidence that these particular books had been in the safe in December, is of little weight to support the story of the defense that these and other books and cash had been stolen from the safe at that latter date.

The sole question under Specification 1 of Charge II is whether or not accused presented this report to Lieutenant Colonel Moody with intent to deceive, knowing it to be false. That the report was presented to Lieutenant Colonel Moody by the accused, and that it was false, as alleged, is established by the prosecution, and it is further shown that when he presented the report accused did not in any way indicate that it was not what it represented itself to be. The defense introduced evidence that both the original and duplicate returns for the week ending April 22, 1933, had been prepared by Technical Sergeant Fayne and that the accused had told him that he had discovered an error in bringing forward the balance of the books on hand from the preceding week and had corrected it, but that Sergeant Fayne would not have learned that the error existed had he not been so informed by accused. It is shown that the retained copy of this report was presented as Sergeant Fayne

had made it out, but it is not shown from what sources of information he prepared this report. It is not unreasonable to assume that, in preparing the report for each week, to show the number of books on hand at the beginning of that week he took the figures from the retained copy of the report of the previous week showing the number of books on hand at the end of that week. And it is difficult to conceive what other source of information would have been available to him. This matter will be discussed subsequently in connection with this specification and the following one. Accused testified that he gave Colonel Moody the retained copy of the report without realizing that he had not corrected it, but that he had no intention of giving him an erroneous report, and that he did not realize that he had done so until the following day. He further says that he was then "rather panic stricken" and could think of nothing to do except to carry it through, and that several days later he went to the files, took out the previous week's retained copy and changed it to agree with the retained copy for the week of April 22d, as well as two or three other back reports, he did not remember how many. He kept a record of the figures he had changed and intended to change them back as soon as he got the money deposited to cover the shortage and make everything correct. With reference to the probable source of Sergeant Fayne's information for the preparation of current reports, it is of particular interest to note accused's testimony that in the correction of the report to Washington for the week of April 22d he said that he got the correct figures from the retained copy of the report of the previous week and based the changes on them. If he looked to the retained copy of the report of the previous week for correct figures, there is every reason to assume that Sergeant Fayne did the same.

The sole question under Specification 2 of Charge II, like that under the preceding specification, is whether or not the accused presented this memorandum receipt to Lieutenant Colonel Moody with intent to deceive, knowing it to be untrue. That the receipt was presented to Lieutenant Colonel Moody by the accused, and that it was untrue, as alleged, is established by the prosecution. Accused admitted that he had received cash for all of the books shown in the sub-receipts and thereby admitted that this memorandum receipt as one for books in the possession of the bonded salesman, which it purported to be, was untrue. Accused also admitted that he had presented the memorandum receipt to Lieutenant Colonel Moody

with the idea that it would be considered as a credit voucher to his account, and he understood that it would indicate to Lieutenant Colonel Moody, and that he would draw the conclusion from the receipt, that the bonded salesman, Sergeant Collings, was in possession of books, chits or receipts to the amount shown upon the receipt. From this evidence it is clear that accused knew that this receipt was untrue and that he presented it with intent to deceive.

That the accused knew of the falsity of each of the documents described in Specifications 1 and 2 of Charge II, and that he presented each of these two documents with deliberate intent to deceive is shown beyond a reasonable doubt by other evidence. Colonel Moody testified that accused's account of the motion picture activities when first presented to him for inspection about April 26, 1933, balanced out correctly provided he allowed credit for things he later objected to. It consisted of accountability for motion picture books, for cash, and for post exchange coupons. In making up his total accountability, accused presented the receipt for 349 small books and 238 large (that referred to in Specification 2, Charge II), approximately $106 in cash, some post exchange coupons of about sixty cents, his retained report for the week of April 22d (that referred to in Specification 1, Charge II), and the books he had actually in his possession. The things that Lieutenant Colonel Moody "later objected to" were the receipt of the bonded salesman and the retained copy of the report for the week of April 22d. That the figures of this untrue receipt and this false report were such that, when accepted as true in the audit of accused's account, they balanced his account correctly, can by no means be considered as a mere accident. The chance of such a precise coincidence is too remote to have actually occurred. There is but one conclusion possible, namely, that the retained copy of the War Department report was advisedly altered to show a lesser number than the correct number of books with the deliberate purpose of correctly balancing the account. The query then arises as to how Sergeant Fayne, who made up this false and erroneous report, happened to insert figures in it which were false, but which, if accepted as true, permitted the account to balance. This by no chance was another accident. Accused said he altered the figures of the report of April 15th to bring them in accord with the erroneous figures of the retained copy of the report of April 22d, but that he did not

do this until several days after he had inadvertently presented the erroneous report to Lieutenant Colonel Moody. There is every reason to believe that Sergeant Fayne relied upon the figures of the report of April 15th in making up the report of the 22d. That being the case it follows that the figures of the report of April 15th were deliberately and carefully altered by the accused to provide that his accounts should balance, not several days after he had presented the false report but sometime before then, and also before Sergeant Fayne compiled the report of April 22d. For how else did Sergeant Fayne happen on such magic and satisfactory figures to balance this complicated account to a penny when as a matter of fact it was out of balance to the amount of $789.60? Accused testified that if the retained copy of the report for April 22d when Colonel Moody got hold of it appeared to show that he (accused) was "square", it was not because of any wrong figures that he had put on it. This is admittedly true since Sergeant Fayne put the erroneous figures on this report and accused left them there when he gave the report to Colonel Moody. Accused testified that in giving the untrue memorandum receipt to Colonel Moody it did not seem to him that he was giving Colonel Moody a false official statement, since he knew that within a week or two at the most he could get this money and replace it in the fund, and his whole idea was to get rid of Colonel Moody as soon as possible so that he could straighten the thing out. The specious reasoning of the accused in this respect is almost childish in its conclusions. He knew he was short of funds and he must have known that any official written statements he gave to Colonel Moody which had the effect of covering up this shortage and concealing it could only do so by the falsity of their contents. True statements would immediately have disclosed the shortage. The statement of the accused that he kept a record of the figures he had changed on the weekly reports to the War Department of April 15th and earlier, and that he intended to change them back as soon as he got the money deposited to cover the shortage and make everything correct, is illuminating in disclosing the deliberation and method of his plan to continue the deception in regard to his accounts until he might be able to restore the money he could not account for.

There is no evidence in the record that the accused was extravagant in his habits of living, a gambler, or wasteful of money. All

the evidence is quite the contrary, that he was a man of good habits and lived quite modestly and frugally. But it does appear that on his pay as a first lieutenant he had always found it rather hard to support his family of a sickly wife, three minor children, a father and an invalid mother. That individual bookkeeping errors of as much as one hundred dollars occurred in the very simple accounts of his battery fund apparently without coming to his notice through the discrepancy of the cash of this fund, shows all too clearly that the money of this fund was not properly segregated and that of the money in his hands he did not know what belonged to this particular fund. This undoubtedly indicates the manner in which he handled not only this fund, but the motion picture fund and his private funds as well, and is revealing as to the cause of the shortage in his trust funds.

Accused was in charge of trust funds for which he was responsible and accountable, and since he failed to respond with them or account for them when his stewardship was terminated, he cannot complain if the natural presumption that he has spent or made away with them outweigh any uncorroborated explanation that he may give, however plausible it may be. Dig. Ops. J.A.G., 1912-30, sec. 1563 (2)(3). The presumption of embezzlement is the stronger where the explanation is so lacking in plausibility as it is in the instant case. To knowingly make a false official statement or report 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.

5. At the time of the trial accused was 46 1/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

> "Pvt. C.A.C. 7 Aug. 17 to 20 Dec. 17; mr. gun. C.A.C. 21 Dec. 17 to 31 Aug. 18; 2 lt. C.A.C. U.S.A. 31 Aug. 18; accepted 1 Sept. 18; vacated 20 Sept. 20.--2 lt. C.A.C. 1 July 20; accepted 20 Sept. 20; 1 lt. 1 July 20; capt. 1 Aug. 31."

The entry "capt. 1 Aug. 31" is obviously an error. The accused is carried in the Army List and Directory of July 20, 1933, as a first

lieutenant, 11th Coast Artillery, promotion list number "6080", some 280 files at that time below the grade of captain, and he was brought to trial as a first lieutenant.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of 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.

N. A. Turnbull, Judge Advocate.
H R Bishop, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

JAN 15 1934

Board of Review
CM 201134

UNITED STATES	)	FIRST CORPS AREA
v.	)	Trial by G.C.M., convened at Boston, Massachusetts, September 19, October 13, 16, 17, 1933. Dismissal.
Captain CHARLES F. SULLIVAN (0-7994), 13th Infantry.	)	

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 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: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 2: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 3: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 4: In that Captain Charles F. Sullivan, 13th Infantry, did, at Newport, Rhode Island, on or about July 17, 1933, with intent to defraud, wrongfully and unlawfully make and utter to the Seamen's Church Institute of Newport, a certain check in words and figures as follows:

Laurel, Md., July 17, 1933. No.___
The Citizens National Bank of Laurel.
Pay to the order of C. F. Sullivan, $100.00
One hundred and 00/100 Dollars.
C. F. Sullivan.
Indorsed on back: C. F. Sullivan.

and by means thereof did fraudulently obtain from said Seamen's Church Institute the sum of One hundred dollars, he, the said Charles F. Sullivan, then well knowing that he did not have and not intending that he should have sufficient funds in said Citizens National Bank of Laurel for the payment of said check.

Specification 5: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 6: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 7: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 8: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty on motion of defense).

Specification 9: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty on motion of defense).

Specification 10: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 11: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 12: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 13: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 14: (Giving a check on a bank where he knows there are no funds to meet it, and without intending there should be - finding of not guilty).

Specification 15: In that Captain Charles F. Sullivan, 13th Infantry, did, at Newport, Rhode Island, on or about July 17, 1933, with intent to defraud, wrongfully and unlawfully make and utter to the Postal Telegraph Company, at its Newport Office, a certain check in words and figures as follows, to wit:

Laurel, Md., July 17, 1933. No.____
The Citizens National Bank of Laurel.
Pay to the order of the Postal Telegraph Co. $152.44
One hundred and fifty-two and 44/100 Dollars.
C. F. Sullivan.

and by means thereof, did fraudulently obtain from the Postal Telegraph Co. the payment of One hundred and fifty-two and 44/100 dollars, he, the said Charles F. Sullivan, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens National Bank of Laurel for the payment of said check.

Specification 16: In that Captain Charles F. Sullivan, 13th Infantry, did, at Newport, Rhode Island, on or about July 17, 1933, with intent to defraud, wrongfully and unlawfully make and utter to the Postal Telegraph Company, at its Newport Office, a certain check in words and figures as follows, to wit:

Laurel, Md., July 17, 1933. No.____
The Citizens National Bank of Laurel.
Pay to the order of the Postal Telegraph Co. $150.00
One hundred and fifty and 00/100 Dollars.
C. F. Sullivan.

and by means thereof, did fraudulently obtain from the Postal Telegraph Co. the payment of One hundred and fifty and 00/100 dollars, he, the said Charles F. Sullivan, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens National Bank of Laurel for the payment of said check.

Specification 17: In that Captain Charles F. Sullivan, 13th Infantry, did, at Fort Adams, Rhode Island, on or about the first day of December, 1932, borrow from First Sergeant Marcellus MacDonald, United States Army, retired, then Private first class, Medical Department, Fort Adams, Rhode Island, the sum of four hundred ($400) dollars and having promised to repay the said sum of four hundred ($400) dollars in two instalments of $200 each, with interest, on the first day of March, 1933, and the first day of June, 1933, respectively, did dishonorably fail to pay the same as promised aforesaid.

Specification 18: (Obtaining money by false pretenses - finding of not guilty).

Specification 19: In that Captain Charles F. Sullivan, 13th Infantry, did, at Fort Adams, Rhode Island, on or about January 17, 1933, with intent to deceive Lieutenant Colonel Edward E. McCammon, 13th Infantry, officially report to the said Lieutenant Colonel Edward E. McCammon that he had no personal indebtedness incurred since the original list was submitted referring to a list of debts submitted to the Commanding Officer, Fort Adams, Rhode Island, February 27, 1932, which report was known by the said Charles F. Sullivan, to be untrue in that he then owed Private First Class Marcellus MacDonald, Medical Detachment, Fort Adams, Rhode Island, an enlisted man, four hundred dollars, which debt was contracted on or about December 1, 1932.

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

Specification 1: In that Captain Charles F. Sullivan, 13th Infantry, at Fort Adams, Rhode Island, on or about the 11th day of January, 1932, did borrow from Technical Sergeant Barney Forbes, Detachment Finance Department, Fort Adams, Rhode Island, an enlisted man, the sum of five hundred and twenty-five dollars, this to the prejudice of good order and military discipline.

Specification 2: In that Captain Charles F. Sullivan, 13th Infantry, at Fort Adams, Rhode Island, on or about the twenty-fourth day of June, 1933, being in command of Company E, 13th Infantry, did borrow from Private Thomas J. O'Donnell, of Company E, 13th Infantry, an enlisted man under his command the sum of eighty dollars ($80.00), this to the prejudice of good order and military discipline.

Specification 3: In that Captain Charles F. Sullivan, 13th Infantry, having on or about March 17, 1932, received a lawful order from Major George C. Donaldson, 13th Infantry, not to borrow money from enlisted men, the said Major George C. Donaldson being in the execution of his office, did, at Fort Adams, Rhode Island, on or about the first day of December, 1932, fail to obey the same.

Specification 4: In that Captain Charles F. Sullivan, 13th Infantry, having on or about March 17, 1932, received a lawful order from Major George C. Donaldson, 13th Infantry, not to borrow money from enlisted men, the said Major George C. Donaldson being in the execution of his office, did, at Fort Adams, Rhode Island, on or about the 24th day of June, 1933, fail to obey the same.

ADDITIONAL CHARGE I: Violation of the 96th Article of War. (Plea in bar sustained.)

Specification: (Failing to obey a lawful order - plea in bar sustained).

He pleaded not guilty to Charges I and II and all specifications thereunder, and interposed a plea in bar of trial to Additional Charge I and its Specification, which was sustained. He was found guilty of Specifications 4, 15, 16, 17 and 19, Charge I, and of Charge I, and of Specifications 1, 2, 3 and 4, Charge II, and of Charge II, and not guilty of Specifications 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 18, Charge I. 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 salient evidence as to the several specifications of which accused was convicted may be summarized as follows:

Specifications 4, 15, 16, Charge I.

The defense stipulated with the prosecution "that the Seamen's Church Institute cashed checks as set out in Specifications 1, 2, 3

and 4, which were made and uttered by Captain Charles F. Sullivan, and gave value as set out in those specifications to Captain Charles F. Sullivan; those checks were later returned 'Insufficient funds'; that they were then at a later date made good in the amounts set forth in each specification, and were paid by Captain Sullivan" (R. 135).

Harold F. Gilpin, a witness for the prosecution, testified that he is cashier of the Seamen's Church Institute in Newport and has been such for about four and one-half years; that he is responsible for the cash and checks and keeps the accounts of the Seamen's Church Institute and is the custodian of its records (R. 81); that he knows the accused; that during the period July 13 to July 19 he cashed for accused three checks, one for $200, and two for $100 each, which he deposited in the Newport Trust Company, Newport, Rhode Island, during the period July 13-15, and that these three checks with a fourth, also cashed by the Institute for accused, aggregating in all $500, were returned unpaid to the Seamen's Church Institute and later taken up by accused on July 24th (R. 83-87).

Henry B. Whalen, a witness for the prosecution, testified that he is the manager of the Postal Telegraph Company at Newport and has been such for about fifteen years; that he has known accused for about two and one-half or three years; that witness is the custodian of the funds and records of his organization in Newport and handles the cash and checks that come in as a result of its daily operations (R. 96); that during the period July 10-17 accused gave him, in payment for transfers of money, seven personal checks, including two on July 17th for $152.44 and $150, respectively (R. 97); that all of these checks were later returned marked insufficient funds; that before the checks were returned accused called him and informed him that a few of the checks would come back and that thereafter the checks mentioned did come back; that he called on accused on Sunday, July 23d, at Fort Adams, and asked him to make the checks good, and that they were paid on Friday, July 28th (R. 98-99); that on Sunday "about four" of the checks had been returned and the last check was not returned until Thursday (R. 100).

Charles E. Little, a witness for the prosecution, testified that he is the cashier of the Citizens National Bank of Laurel, Maryland; that he knows accused who has had an account with his bank

for "a couple of years" (R. 30); that during the months of June and July accused kept his account "covered" by deposits telegraphed to the First National Bank of Baltimore, the agent for the Citizens National Bank of Laurel, and then sent by mail by the Baltimore bank to the Laurel bank (R. 32,39,45); that there is no telegraph office in Laurel; that in the latter part of June witness wrote accused a letter stating that his account was very unsatisfactory and asking him to close it as of July 1st; that thereafter accused telephoned witness and, on accused's request, witness agreed not to close the account until July 15th; that after July 15th the Citizens National Bank refused to accept any more deposits for credit to accused's account and so notified the First National Bank of Baltimore, through which the telegraphic transfers of money for accused's credit had been received (R. 31-32); that accused's bank balance at the close of business on July 15th was $162.24 (R. 50; Ex. 1), and at the close of business on July 17th (the next business day) $37.24 (R. 54; Ex. 1); that thereafter the bank returned, due to the fact that there were insufficient funds on deposit to meet them, fifteen checks, including one dated July 17th for $100, returned July 19th, and two others of the same date for $152.44 and $150, respectively, returned on July 20th (R. 34,35); that after a deposit of $490 had been refused by the Laurel bank on July 17th, accused telephoned the bank, talked with Mr. Cole, the assistant cashier, and requested that his account be continued until July 31st, but that this request was refused and accused informed the matter would be taken up with the Comptroller of the Currency (R. 41-45). In the course of the cross-examination the following testimony was given:

> "Q Up to this 15th of July there had never been a check of Captain Sullivan's returned for insufficient funds, had there?
>
> A Captain Sullivan kept his account covered by these telegrams from practically June to July by (but) sometimes he would call us up and ask us what checks were in, get the balance and remit the money by telegram, so I don't think during that time we returned any checks for insufficient funds, because he kept his balance covered all the time, his outstanding checks, by remittance." (R. 45.)

Exhibit 1, introduced by the prosecution (R. 34), is a statement of accused's account with the Citizens National Bank of Laurel which shows for the month of June, 37 deposits credited and 90 checks debited, and for the period July 1-15, 20 deposits credited and 54 checks debited.

The prosecution and defense stipulated "that on the 17th day of July the sum of $490 was transmitted by the accused and his agent, $130 being transmitted from the Newport office of the Western Union Telegraph Company and the sum of $360 from the Providence office of the Western Union Telegraph Company, both of which were received by the First National Bank of Baltimore and received for the credit of the account of Charles F. Sullivan in the Citizens National Bank of Laurel, Maryland; and that those two sums of money were returned, $130 to Captain Sullivan at Newport and $360 to his agent who transmitted it from Providence" (R. 135).

Roy W. Magoun, a witness for the defense, testified that he is superintendent of the Seamen's Church Institute, Newport, Rhode Island; that he knows the accused; that sometime in June it came to his notice that the Institute was cashing accused's personal checks; that at some time later he was notified by accused over the telephone that certain checks so cashed would be returned; that on July 20th, when two of the checks were returned, he went to Fort Adams but did not see accused as the latter was absent from the post; that the next day a third check was returned, and he again went to Fort Adams on Saturday, July 22d, and accused agreed to pay all four of the checks on Monday, July 24th, though the fourth check had not then been returned to witness and was not returned to him until the 25th; that on July 24th accused paid the four checks in full, including protest fees in the neighborhood of $11 (R. 165-168).

Accused did not testify as to these specifications.

Specification 17, Charge I.

First Sergeant Marcellus MacDonald, U. S. Army, Retired, a witness for the prosecution, testified that he had known accused for about three years; that on or about December 1, 1932, he had a transaction of a financial nature with the accused, which he described as follows:

"I was working in the hospital, in the kitchen in the hospital, and Captain Sullivan drove up to the back of it and he came in and he told me he wanted to see me. So I went out and him and I got in his car and drove over to Newport. On the way over he asked me could I lend him some money, and so I asked him, 'How much do you want?' And I told him I only could give him $400. I went down to my house where I lived, got my bank book, went up to the bank, drew the money and give it to Captain Sullivan." (R. 70.)

Witness prepared two notes for $200 each and accused signed them, one being due on the 1st of March (1933) and the other in June or July (R. 70-71,76). Witness further testified that accused did not ever pay the notes; that witness retired on May 31, 1933, and on that day met accused downtown and told him to "forget" about the notes (R. 71-72, 78); that after his retirement he met accused downtown and the latter asked for the notes (R. 71) and witness sent them to him by mail in June or July (R. 71,77); that sometime in February, 1933, witness spoke to accused about a transfer to the latter's company with a view to promotion to the grade of first sergeant and later retirement in that grade, and about March 10th the transfer was accomplished (R. 78-80).

Major Benjamin J. Marshall, Medical Corps, a witness for the defense, testified that he is the post surgeon, Fort Adams, Rhode Island, and knows the accused (R. 152); that Marcellus MacDonald, an enlisted man who was head cook in the post hospital, about December 1st asked him to assist in getting a transfer to some other organization so that he could retire a a sergeant when his thirty years service expired in May. Witness talked to accused several times about the matter and eventually MacDonald's transfer to accused's company was accomplished (R. 153-154). In the examination of the witness by the defense the following testimony appears:

"Q Did you have any talk with Sergeant MacDonald after his appointment as sergeant and about the time he was retired?

A Yes. He talked to me about the situation. I don't remember just exactly when it was, but he came in and told me that the thing had gone through and he was ready to go, or something of that kind.

Q Did you ask him if he had paid any money for it?

A Well, I asked him when he first went into this thing if it was going to cost him anything. He said, 'Yes, I will have to pay the first sergeant the difference in his pay'. He said, 'That is customary, isn't it?' I said, 'Yes, it is always customary' I asked him how he came out. He said, Well, it didn't cost him very much; he had to pay the sergeant for the difference in pay; and that was about all that was said about it.

Q And when he came out he said that he had to pay the difference in the pay to the first sergeant?

A Yes.

Q And that was all it cost him?

A I did have a conversation of that kind with him the first time I saw him about the time the transfer was made." (R. 155.)

Accused, as a witness in his own behalf, testified that he did not borrow any money from MacDonald (R. 177,187); that MacDonald never rode downtown in Newport with him and that he never rode with MacDonald (R. 180). He further testified as to a conversation with Major Marshall in regard to the transfer to his company of MacDonald and the latter's retirement as first sergeant. He also testified that he had no financial transactions at all with MacDonald (R. 179, 191-192).

Specification 19, Charge I.

Lieutenant Colonel Edward E. McCammon, 13th Infantry, a witness for the prosecution, testified that on or about January 17, 1933, he was in command of the post of Fort Adams, at which accused was then present in the status of company commander of Company E, 13th Infantry; that on January 13, 1933, he wrote accused the following letter:

"1. In compliance with instructions contained in letter Headquarters Post of Narragansett Bay, Fort Adams, R.I.,

February 23, 1932, a list of your personal indebtedness amounting to $4569.22 was submitted by you to the commanding officer, this post, on February 27, 1932.

2. You are now directed to submit to the undersigned by January 16, 1933, a complete list of any additional personal indebtedness, exclusive of actual running household bills and incidental household expenses, incurred by you since the original list amounting to $4569.22. This latter list will show names of firms or individuals to whom obligated and amount of indebtedness in each case.

3. Your attention is directed to the provisions of the 24th Article of War",

which was returned to him by accused with a 1st indorsement dated January 17, 1933, thereon, signed by accused, which contained the following statement:

"1. I have no personal indebtedness incurred since the original list was submitted. Of the original list $2146.66 remains unpaid." (R. 117-119; Exs. 5 and 6.)

In connection with this specification it was stipulated between the prosecution and the defense that "where the reference is made in the 19th specification to an original list, it pertains to a list of indebtedness submitted by Captain Sullivan on February 27, 1932, to the then commanding officer of the post, and that that is the original list" (R. 119).

Also applicable to this specification is the evidence summarized under Specification 17, Charge I, above.

Accused did not testify as to this specification.

Specification 1, Charge II.

Technical Sergeant Barney Forbes, Finance Department, a witness for the prosecution, testified that on January 13, 1932, he loaned accused $600 (R. 56,59), of which all has been repaid except about $61 (R. 59); that he did not come under the command of accused, and

that he is a first lieutenant in the Cavalry Reserve (R. 57). In explaining the circumstances attending the borrowing of the money, the witness further testified:

> "Well, Captain Sullivan had come to my office on that day in question and asked me to step outside for a minute and then he told me the circumstances. From what he told me I was under the impression that he was in dire need. Then from our--well, let's see--on account of relations--what would you call that--the fact that his wife and my wife had been so intimate, I thought I would do him a good turn and I told him if he would come back about half past twelve we would go to town and get the money, which we did. So it didn't interfere with my work at all and I was back at the desk at one o'clock." (R. 58-59.)

Accused did not testify as to this specification.

Specification 2, Charge II.

Private Thomas J. O'Donnell, Company E, 15th Infantry, a witness for the prosecution, testified that on June 24, 1933, he was a member of Company E, of which accused was then in command (R. 60); that on that date he had a conversation with accused in regard to purchasing his discharge from the Army and in the course of that conversation accused asked him for a loan, and he did loan accused the sum of $85 which was repaid to him in a "couple of days" (R. 60-69). He denied that he turned over the $85 in question to accused to apply on the discharge purchase price of $120 (R. 64,67). On cross-examination witness at first stated that he told no one but the first sergeant of Company E of the loan transaction (R. 67), but after further cross-examination he stated:

> "I only just told a couple of officers and civilians that works in the canteen over there and members of the company. So I guess they might have told each other about it." (R. 68.)

Accused, as a witness in his own behalf, testified that he did not borrow any money from O'Donnell (R. 177,184); that sometime in

May O'Donnell turned over $74 to him toward the purchase price of a discharge and that two days later O'Donnell met him and said that he did not want to purchase his discharge, whereupon accused returned the $74 to him (R. 177,186-187). When asked if he knew any reason why O'Donnell should make the statement he did, accused testified:

> "I tell you, O'Donnell was this kind of man: he is a very vain man. O'Donnell is a man that is given to boasting and bragging a great deal. And the only reason that I can see is that he boasted around the company that he had loaned the captain money. Why, I don't know, unless he thought he was getting a certain amount of - a certain amount of - reflected glory in it that he should loan money to an officer or should loan money to the captain. I don't know why he should say that. And then when he was questioned about it he said Yes, he did loan money to the captain, so I suppose he has been forced to hold to the statement. Now that may explain O'Donnell's statement."

Specifications 3 and 4, Charge II.

Major George C. Donaldson, 13th Infantry, a witness for the prosecution, testified that on March 17, 1932, he was accused's battalion commander (R. 115) and on that date in the adjutant's office at Fort Adams, while acting in official capacity, he gave the following order to accused:

> "Captain Sullivan, now you are being restored to duty and the commanding officer and corps area have given you a chance. It is up to you to behave from now on--have no financial dealings with enlisted men. Particularly, don't borrow any money from enlisted men. Don't fool with the company funds. And don't gamble or play the ponies or the stock market." (R. 116.)

Also applicable to these specifications is the evidence summarized under Specification 17, Charge I, and Specification 2, Charge II, above.

4. That the checks set out in Specifications 4, 15 and 16, Charge I, were made and uttered by accused, that by means thereof he obtained from the concerns named the sums stated, and that he knew he did not have sufficient funds in the bank on which they were drawn for their payment when made and uttered, is clearly established by the evidence. As to these checks the only question requiring special consideration is whether they were made and uttered with the intent to defraud and with the intention that accused should not have sufficient funds in the bank for their payment. It appears that during the months of June and July, 1933, accused's account in the Citizens National Bank of Laurel had been an active one, a considerable number of deposits having been made to the credit of the account, and a considerable number of checks drawn against it. During these months it was accused's custom to draw checks on his account when there were not sufficient funds in it to cover their payment and then to remit by telegraph to the First National Bank of Baltimore, as agent for the Laurel bank and for transmission to it, sufficient funds to meet the checks as they were presented for payment. During these months accused had not failed to make deposits in this manner to cover his outstanding checks as presented, and none of such checks was returned on account of insufficient funds. Though the Laurel bank had notified accused that his account would be closed on July 15th, he appeared to believe that the bank would continue to accept his deposits and checks, for on July 17th he sent to the Baltimore bank for credit with the Laurel bank deposits aggregating $490. When these deposits were refused by the Laurel bank, accused then realized that it would be futile to send further deposits and that payment of some of his outstanding checks would be refused, whereupon he notified the payees of the checks set out in these specifications that some of the checks given to them would be returned. The evidence indicates that after the deposits for $490 had been refused, no further checks were drawn on his account in the Laurel bank. The checks covered by these specifications, and other checks referred to in the record and also returned for insufficient funds, were promptly made good by accused after the payees had notified him of their return. All of these facts point to the conclusion that at the time he made and uttered the checks in question accused did not intend to defraud and that he did intend to have sufficient funds in his bank for the payment of the checks when presented. The intent to defraud and the intention not to have sufficient funds in bank for payment of the checks are essential elements of the offense charged in these three specifications,

and the proof does not establish these elements beyond a reasonable doubt.

As to Specification 17, Charge I, the testimony of First Sergeant Marcellus MacDonald, U. S. Army, Retired, clearly shows that on or about December 1, 1932, accused borrowed $400 from Sergeant MacDonald, then a private in the Medical Department, and that he promised to pay this amount in two installments of $200 each, with interest, the first payment being due on March 1, 1933. The evidence does not clearly show whether the second $200 was to be paid in June or July, 1933. On May 31, 1933, before the second payment was due, Sergeant MacDonald told accused to "forget" about the notes given in evidence of the indebtedness, and returned the notes to accused by mail in June or July. In view of these facts it cannot be said that there was a failure of accused to pay $200 to Sergeant MacDonald on June 1, 1933. Though accused did fail to pay $200 as promised on March 1, 1933, such failure was without circumstances of serious aggravation and cannot be said to amount to the dishonorable conduct contemplated by the 95th Article of War. The failure to keep such promise, in the opinion of the Board of Review, amounts only to a violation of the 96th Article of War. The accused denied the entire transaction with Sergeant MacDonald, but the circumstances leading to MacDonald's transfer to accused's company and his subsequent retirement as a first sergeant furnish a possible motive for both the loan and the subsequent forgiveness of it and add weight to the testimony of Sergeant MacDonald. The court was warranted in disbelieving accused and in believing Sergeant MacDonald.

As to Specification 19, Charge I, the evidence is clear and conclusive. The findings are supported by the evidence that accused made the official report alleged in the specification and that said report was untrue in that he then owed Sergeant (then Private) MacDonald $400, which debt was contracted on or about December 1, 1932.

As to Specification 1, Charge II, the evidence is undisputed. It is clearly established that on or about January 11, 1932, accused borrowed from Technical Sergeant Barney Forbes the sum of $600. The facts that Sergeant Forbes did not come under the command of the accused and that at the time the money was borrowed Sergeant Forbes held a commission as first lieutenant in the Cavalry Reserve do not constitute a defense to the specification. The offense charged is borrowing money from an enlisted man and Sergeant Forbes was an

enlisted man serving as such at the time the loan was made.

The evidence as to Specification 2, Charge II, is conflicting. Private Thomas J. O'Donnell, a member of accused's company, testifies that on or about June 24, 1933, he loaned accused $85, but accused flatly denies that any such loan was made. Private O'Donnell admits that the loan was made in the course of a conversation with accused relating to the possible purchase of O'Donnell's discharge from the Army and that the money loaned was returned in a "couple of days". Accused admits receiving $74 from O'Donnell at the time stated but insists that the money was paid over to him to apply on the purchase price of the discharge and that O'Donnell changed his mind two days later and thereupon the money was returned to him. A possible explanation of O'Donnell's testimony appears in the evidence that after paying over the money to accused, O'Donnell apparently boasted of the transaction to various persons, characterizing it as a loan, thereby committing himself to such an extent that he felt obliged to testify that a loan had actually been made. His testimony is not convincing and, considered with the testimony of accused, raises a reasonable doubt as to whether accused actually borrowed money from him as alleged in the specification.

The evidence as to Specifications 3 and 4, Charge II, establishes that on or about March 17, 1932, accused received from Major George C. Donaldson, 13th Infantry, an order not to borrow money from enlisted men. Accused failed to obey this order when he borrowed from MacDonald the $400 referred to above. Thus the evidence supports the finding of guilty of Specification 3, Charge II. In view of the opinion of the Board of Review that the evidence does not establish that accused borrowed $80 from Private O'Donnell, as alleged in Specification 2, Charge I, it is the opinion of the Board of Review that the evidence does not support the finding of guilty of Specification 4. It is to be noted that the order of Major Donaldson amounts to an order not to commit an act which is in itself a military offense. As accused is found guilty of borrowing money from Sergeant MacDonald and this act constitutes a violation of Major Donaldson's order, conviction of violation of the order would not serve to increase the punishment for the offense involved in the act which accused was ordered not to do.

5. At the time of trial accused was 44 5/12 years of age. His service is shown by the Official Army Register as follows:

> "1 lt. Cav. Sec. O.R.C. 4 June 16; accepted 2 Feb. 17; active duty 7 May 17; capt. Cav. Sec. O.R.C. 15 Aug. 17; accepted 15 Aug. 17; capt. of Inf. N.A. 15 Aug. 17; accepted 7 Dec. 17; hon. dis. 15 Sept. 19.--Pvt. corp. and sgt. Tr. B. 12 Cav. 25 Jan. 11 to 24 Jan. 14; 1 lt. of Inf. 1 July 20; accepted 24 Sept. 20; Capt. 1 July 20."

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds the record legally insufficient to support the findings of guilty of Specifications 4, 15 and 16, Charge I, and Specifications 2 and 4, Charge II, legally sufficient to support only so much of the finding of guilty of Specification 17, Charge I, as involves a finding of guilty of failing to pay $200, with interest, on the 1st day of March, 1933, as promised, as alleged in the specification, in violation of the 96th Article of War, legally sufficient to support the findings of guilty of Specification 19, Charge I, and of Charge I, and of Specifications 1 and 3, Charge II, and of Charge II, and legally sufficient to support the sentence and warrants confirmation thereof. A sentence of dismissal is mandatory on conviction of the 95th Article of War and authorized on conviction of violation of the 96th Article of War.

N. A. Turnbull, Judge Advocate.

H. H. Griffin, Judge Advocate.

Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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Board of Review
CM 201139

DEC 5 1933

UNITED STATES v. Sergeant IRA V. ASKINS (R-325985), Company C, 16th Infantry, on duty with 1253d Company, Civilian Conservation Corps.	NINTH CORPS AREA Trial by G.C.M., convened at Presidio of San Francisco, California, October 23, 1933. Reduction to grade of Private and confinement for six (6) months. Presidio of San Francisco, California.

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, 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 only question requiring special consideration is whether or not the charge and specification are signed by a person subject to military law as required by the 70th Article of War. The charge sheet and record of trial show that the charge and specification were signed and sworn to by First Lieutenant B. W. Atkinson, United States Marine Corps, Commanding Officer of 1253d Company, Civilian Conservation Corps. From information received from The Adjutant General it appears that at the time Lieutenant Atkinson signed and made oath to the charge and specification he was, under authority of the President, detached from the Navy and attached to the Army for duty with the Civilian Conservation Corps. The Judge Advocate General, in an opinion (JAG 210.45) dated July 21, 1933, held:

"Since the President under authority of the Act of March 31, 1933, Public No. 5, 73d Congress, has employed

> the Army in the service of the Civilian Conservation Corps, it is apparent that the assignment of a Marine Corps officer by Executive Order directing him to report to the Secretary of War for such duty, constitutes 'service with the armies of the United States' within the meaning of paragraph (c) of A. W. 2."

In view of the foregoing the Board of Review is of the opinion that the charge and specification are signed by a person subject to military law.

M. A. Crandall, Judge Advocate.
H. R. Pitzing, Judge Advocate.
Theodore Hall, Judge Advocate.

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

Board of Review
CM 201377

JAN 24 1934

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Meade, South Dakota, December 21, 1933. Dishonorable discharge, suspended, and confinement for six (6) months. Disciplinary Barracks.
Private CHESTER A. OVERDIER (6821676), Band, 4th Cavalry.	)	

OPINION of the BOARD OF REVIEW
TURNBULL, BITZING 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 in part, has been examined by the Board of Review, and the Board of Review submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Overdier, Band, 4th Cavalry, did at Sturgis, South Dakota, on or about November 25, 1933, with intent to commit rape, assault Mrs. Hope M. Averill.

He pleaded not guilty to the Charge and Specification. The findings of the court are:

"Of the Specification of the Charge: Guilty except the words 'with intent to commit rape assault Mrs. Hope M. Averill' substituting therefor the words

'commit an assault upon the person of Mrs. Hope M. Averill by fondling her against her will'. Of the excepted words not guilty, of the substituted words guilty.

Of the Charge: Guilty."

Evidence of one previous conviction was introduced. Accused 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 "only so much of the findings of guilty as finds that accused committed the offense as described by the findings in violation of the 96th Article of War", 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 Order No. 2, Headquarters Seventh Corps Area, January 2, 1934.

3. The record of trial presents the question of whether or not the offense of which accused is found guilty is one necessarily included in that charged. A court has authority to find an accused guilty of a lesser included offense only when such offense is necessarily included in that charged. Par. 78c, M.C.M., p. 65; CM 189842, Kammerdiener; CM 199063, Martin. The finding in this case does not involve an aggravated or indecent assault but is simply a finding of guilty of an assault and battery. Though an assault is necessarily included in the offense of assault with intent to commit rape, of which accused was charged, a battery is not so included (par. 149 l, M.C.M., p. 179), and the finding that accused committed a battery is an illegal one. The evidence does support a finding of guilty of a simple assault. The maximum punishment authorized for such assault is confinement at hard labor for three months and forfeiture of $11.90 pay per month for a like period.

4. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings as finds that the accused did, at the time and place alleged and found, commit an assault upon Mrs. Hope M. Averill, in violation of the 96th 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 $11.90 pay per month for a like period.

W. A. Turnbull, Judge Advocate.
H. R. Zittzig, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201390

JAN 13 1934

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
v.	)	Trial by G.C.M., convened at West Point, New York, December 15, 1933. Suspension until January 1, 1935.
Cadet DONALD O. VARS, First 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 specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Cadet Donald O. Vars, First Class, United States Corps of Cadets, did, at Boston, Massachusetts, on or about November 11, 1933, drink intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931.

Specification 2: In that Cadet Donald O. Vars, First Class, United States Corps of Cadets, was, at Boston, Massachusetts, on or about November 11, 1933, under the influence of intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931.

He pleaded not guilty to the Charge and specifications thereunder and was found not guilty of Specification 2 and guilty of Specification 1 and the Charge. No evidence of previous convictions was introduced. He was sentenced to suspension without pay and allowances until January 1, 1935, at which time he will join the then first class. The reviewing authority approved the sentence and forwarded the record of trial for the action of the President under the 48th Article of War.

3. The evidence for the prosecution may be summarized as follows:

Major Dennis E. McCunniff, Infantry, testified that on November 11, 1933, he was in command of the cadet special that had taken the Corps from West Point to the football game at Harvard and that accused accompanied the Corps to Boston (R. 5). Witness had boarded the train just before midnight and while standing in the door of his stateroom heard some cadet calling out in a loud and boisterous tone of voice, "Is this car number 30?" Shortly thereafter accused appeared

> "in what I considered a very peculiar sort of frame of mind and action. His hat was on the back of his head and he had a peculiar look in his face, and he came to attention shortly after seeing me and went on down the car." (R. 5.)

Later at an inspection of the cadets witness saw accused in ranks and recognized him immediately as the same cadet he had seen in the car.

> "He was weaving very slightly in ranks, and I doubt very much if I had not previously noticed him in the car and noticed his action, that I would have been able to detect anything out of the ordinary at this inspection." (R. 6.)

Accused was ordered by witness to report to him in his stateroom immediately after the inspection. Pursuant to that order accused reported about 12:05 a.m., at which time there were also in the stateroom Captain Bentley and Lieutenant Honnen. Accused was

directed to assume the kneeling bend position and to blow his breath in the face of each of the three officers present. Witness detected a distinct odor of some intoxicant in which alcohol was present (R. 6,7). Accused did not have full and complete control of his mental and physical faculties at that time. He also had difficulty in pronouncing the name of Cadet Upham. Considering the condition of accused, witness would not have permitted him to mount guard as cadet officer of the day or to attend class (R. 7). Accused was drunk within the definition of drunkenness found in the Manual for Courts-Martial but was not drunk in the personal opinion of the witness (R. 8). His actions at no time while under the observation of witness were other than those becoming a cadet and a gentleman (R. 9).

Captain George A. Bentley, Quartermaster Corps, testified that he was present in Major McCunniff's stateroom on the football special at about midnight November 11th, together with Major McCunniff, Lieutenant Honnen and accused, having been asked to come in by Major McCunniff. Witness detected a positive odor of liquor on the breath of accused. Accused, however, was sober and had full and complete control over his mental and physical faculties (R. 11-12).

The testimony of First Lieutenant George Honnen, Infantry, was taken by deposition (Pros. Ex. A). Witness was assistant to the train commander on the Harvard Special and was present in Major McCunniff's stateroom about midnight on November 11, 1933, together with Major McCunniff, Captain Bentley and accused. Accused's breath smelled of alcohol, not a strong odor but noticeable and distinct. There was a slight impediment in his speech but in the opinion of the witness accused was not drunk.

4. The evidence of the defense may be briefly outlined as follows:

Cadet Hudson H. Upham, First Class, United Statea Corps of Cadets, testified that he was with accused several hours in Boston on November 11, 1933;

> "I left the football game with him, met two young ladies and walked to their car after the game. In their car, we went into Boston to the Hotel Touraine.

> Then we waited in the lobby for another couple, Cadet Vars and his young lady friend went out to make a telephone call. I waited for him to come back and after he came back, we went downstairs to dinner. We had a table for four and off and on during the evening until about 11:00 o'clock we danced and ate. About 11:15, we left the hotel and in the young ladies car we went down to the station. We boarded the train as soon as we got there. Getting on the train, Cadet Vars called to me, 'Where is car 30'. I did not answer him. We went into the car, passing Major McCunniff and Lieutenant Honnen. Then a few minutes later, we went out to the formation for entraining. There Major McCunniff instructed Cadet Vars to report to his drawing room after the formation. I got on the train with Cadet Vars, and then I got into my berth after that." (R. 18,19).

Witness did not see the accused take a drink during the evening nor did he at any time on that day smell liquor on accused. Witness also testified that accused is often hesitant in his speech and does not always express his ideas clearly at first and sometimes makes several attempts. Witness is not always addressed by his proper name but is often called "Ufam, Upman, Upton, Up, Upnam, and Slim" (R. 20).

On cross-examination witness declined, on the ground of self-incrimination, to answer questions as to whether or not during the evening he had seen any liquor served at the table at which he and accused were dining (R. 21).

Miss Mary McCusker, Dorchester, testified by deposition (Def. Ex. A) that she is a teacher, in Boston, and that she has known the accused for about two months. On November 11th she met accused at Harvard Yard when the Corps was dismissed for lunch at about 11:30 a.m., and had lunch with him. After the game accused came to her seat in the stadium and the two drove to the Club Touraine, where they had supper at about 6:30 p.m. and danced until 11:40 p.m., when they hurried to the train yards. Witness

is sure that accused did not drink any intoxicating liquor during any of the time he was with her; that he was sober and that she did not notice any odor of intoxicants on his breath.

Mr. Frank E. Preble, Executive Morey Paper Mill Supply Co., Boston, Massachusetts, testified for the defense by deposition (Def. Ex. B). He stated that he met accused on the evening of November 11th at the Touraine Hotel, when accused was called over to his table by a Mr. Holloway. During the evening accused came to that table several times. At no time did witness see accused take any liquor nor was any odor of liquor detected on his breath. No intoxicating liquor was served at any time accused was at that table. Witness was most favorably impressed by accused's bearing, appearance and conduct.

Numerous other witnesses testified for the defense, among whom were Cadet Herbert H. Andrae, First Class (R. 23-25), Cadet T. C. Foote, First Class (R. 26-28), Cadet Harry J. Hubbard, First Class (R. 28-29), Cadet Albert J. Shower, Second Class (R. 30-32), Cadet William F. Nesbitt, Third Class (R. 33-34), and Cadet W. W. Stromberg, Fourth Class (R. 34-38). The testimony of the above named witnesses was in the main that accused was sober on the night in question and so far as any of them knew he had taken no intoxicating liquor.

Captain Paul R. Goode, Infantry, a witness for the defense, testified that accused in his fourth class year received 50 demerits and stood 153; 36 demerits and stood 149 in his third class year, and 18 demerits and stood 89 in his second class year. Witness stated accused has the appearance and ability of the average cadet. In attention to duty and loyalty he is well above average (R. 38).

The accused elected to remain silent.

5. Accused was charged with a violation of paragraph 135, Regulations for the United States Military Academy, 1931. This regulation was read to the court by the trial judge advocate at the beginning of the trial (R. 4), but was not copied into the record. Reference to the regulations, however, shows paragraph 135

to read as follows:

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

6. The evidence of Major McCunniff, Captain Bentley and First Lieutenant Honnen sufficiently establishes the fact that at sometime during the evening of November 11, 1933, accused had violated paragraph 135 of the United States Army Regulations by drinking intoxicating liquor.

7. The accused was admitted to the United States Military Academy on July 1, 1930, with no prior military service. He is now 25 years and 3 months of age.

8. 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. Trudrull, Judge Advocate.
H V E Tillinghast, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., FEB 6 1934 - To the Secretary of War.

1. The record of trial in the case of Cadet Donald O. Vars, First Class, United States Corps of Cadets, together with the foregoing opinion of the Board of Review, is transmitted herewith for the action of the President.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence. In view of the absence of any aggravating circumstances and of his prior good character and standing as a cadet, I recommend that the sentence be commuted to the usual restriction to limits and punishment tours, prescribed for cadets undergoing special punishment, for a period of three months beginning with the date of the action by the President.

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 hereinabove made should it meet with approval.

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

3 Incls.
Incl. 1-Record of trial.
Incl. 2-Draft of let. for sig. Secy. of War.
Incl. 3-Form of executive action.

REC'D. M. A. GROUP, APC DIRECT., CTF. DIV.

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

Board of Review
CM 201478

FEB 8 1934

UNITED STATES	)	PANAMA CANAL DEPARTMENT
	)	
v.	)	Trial by G.C.M., convened at Post of Corozal, Canal Zone, December 18, 1933. Dishonorable discharge, suspended, and confinement for six (6) months. Post Guardhouse, Post of Corozal, Canal Zone.
Private FRANK C. SOUTH (6379867), 10th Bakery Company, Quartermaster Corps, Panama Pacific General Depot, Corozal, Canal Zone.	)	

OPINION of the BOARD OF REVIEW
TURNBULL, BITZING 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 of guilty and the sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 93d Article of War. (Finding of Not Guilty)

Specification: (Finding of Not Guilty)

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

Specification 1: (Finding of Not Guilty)

Specification 2: In that Private Frank C. South, 10th Bakery Co., Q.M.C., P.P.G.D., Corozal, C. Z., did at Panama City, R. de P., on or about August 9, 1933, wrongfully deposit in the Chase National Bank, Panama, R. de P., to the credit of Detachment Fund,

School for Bakers and Cooks, Corozal, C. Z., a check drawn by him on The Peoples Bank, Cave City, Ky., in words and figures as follows:

"August 9th, 1933.

"THE PEOPLES BANK,
Cave City, Ky.

Pay to the order of Cash $90.08, Ninety Dollars and 08/100 Dollars, U. S. Currency.

(Signed) Frank C. South."

with intent to deceive, well knowing that he had no funds in said "Peoples Bank, Cave City, Ky."

Accused pleaded not guilty to the charges and specifications and was found not guilty of Charge I and the Specification thereunder, and of Specification 1, Charge II, but guilty of Specification 2, Charge II, except the words "deposit in the Chase National Bank, Panama, R. de P., to the credit of Detachment Fund, School for Bakers and Cooks, Corozal, C. Z., a check drawn by him", substituting therefor the words "draw a check", and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge, and designated the Post Guardhouse, Post of Corozal, Canal Zone, as the place of confinement. The sentence was published in General Court-Martial Orders No. 5, Headquarters Panama Canal Department, January 17, 1934.

3. The accused was charged with having wrongfully deposited a worthless check which, in effect, is the same as charging him with passing or uttering such check. The finding of the court was that he did "draw a check" which, in effect, is the same as finding that he made the instrument. In the opinion of the Board of Review this constitutes a fatal variance. In the analogous offense of forgery it has long been recognized, both in the civil courts and in our military practice, that the making and the uttering of an instrument are separate and distinct offenses. Bishop's New Criminal Law, vol. 2, sec. 481; McClain on Criminal Law, vol. 2, sec. 780; M.C.M., 1928, p. 176; Winthrop's Military Law and Precedents, 2d ed., reprint, p. 703; Dig. Ops. J.A.G., 1912-30, 1566 (1). The precedents seem so well settled that it is hardly necessary further to discuss the

question. It seems equally clear that one may wrongfully utter an instrument drawn by some other person so that the offense of making or drawing is not necessarily included in that of passing or uttering. A finding of guilty of a lesser offense is legal only when such offense is necessarily included in that charged. Par. 78 c, M.C.M., p. 65.

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

N. A. Trundell, Judge Advocate.
H. V. Bitzing, Judge Advocate.
Theodore Hall, Jr., Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201485

AUG 29 1934

UNITED STATES	SEVENTH CORPS AREA
v.	Trial by G.C.M., convened at Fort Snelling, Minnesota, November 27, 29, December 1, 4, 5, 6, 7, 8, and 11, 1933. Dismissal and confinement for one (1) year. Disciplinary Barracks.
Captain JAMES W. DARR (0-10116), 3rd Infantry.	

OPINION of the BOARD OF REVIEW,
TURNBULL, KING, and HALL, Judge Advocates.

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

2. Accused was tried upon nine specifications, each alleging embezzlement in violation of the 93d Article of War (Charge I), four specifications alleging conduct unbecoming an officer and a gentleman in violation of the 95th Article of War (Charge II), two specifications alleging conduct of a nature to bring discredit upon the military service in violation of the 96th Article of War (Charge III), and one specification alleging absence without leave in violation of the 61st Article of War (Charge IV). He pleaded not guilty to all specifications and charges and was found not guilty of specifications 2, 4, and 6, Charge I; and specifications 1 and 4, Charge II. He was found guilty with exceptions and substitutions of specifications 3 and 5, Charge I; and specification 3, Charge II. He was found guilty of all other specifications and all charges and was sentenced to dismissal and to confinement at hard labor for one year. The reviewing authority disapproved the findings of guilty of specification 5, Charge I, and specification 2, Charge III, approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record of trial under the 48th Article of War.

The specifications, other than those of which accused was acquitted or in which findings of guilty were disapproved, will be set out severally with the evidence in support of each, and the Board's views.

3. Charge I: Violation of the 93rd Article of War.

Specification 1: In that Captain James W. Darr, 3rd Infantry, did, at Fort Snelling, Minnesota, from on or about September 30th, 1931, to on or about November 10, 1931, feloniously embezzle by fraudulently converting to his own use one hundred twenty five dollars ($125.00), the property of Corporal, then Sergeant, Evan Sanders, Company K, 3rd Infantry, entrusted to him by the said Corporal, then Sergeant, Evan Sanders in sums and on dates as follows: thirty dollars ($30.00), September 30, 1931; ten dollars ($10.00) October 31, 1931, and eighty-five dollars ($85.00) November 10, 1931, all for the purpose of applying the same as payments on an obligation due to Carl Peterson, Amboy, Minnesota.

Finding: Guilty.

It appears from the depositions of Corporal Sanders (Ex.2) and Mr. Peterson (Ex.3) that a collision between the automobiles owned by them occurred September 6, 1931, that a board of officers assessed the damage to Peterson's car at $126.55 and held Corporal Sanders responsible. Pursuant to the findings of the board, Corporal Sanders made payments to accused, his company commander, for transmittal to Mr. Peterson as follows:

Sept. 30, 1931	$ 30.
Oct. 31, 1931	10.
Nov. 10, 1931	85.
	$125.

Accused made payments to Mr. Peterson as follows:

March 18, 1932	$ 40.00
September 19, 1933	86.55
	$126.55

Attached to Mr. Peterson's deposition are the original or true copies of several letters passing between accused and him. Those which are material may be quoted or summarized as follows:

a. March 11, 1932, accused to Peterson.

"I have succeeded in arranging for a payment on damages done your car in wreck at Fort Snelling, will you please let me know your very lowest price for settlement in full."

b. March 18, 1932, accused to Peterson.

Remits $40, and adds "Payments will be made as often as possible."

c. August 18, 1932, accused to Peterson.

"Yours of recent date received. A payment on account will be made September 1st."

d. November 14, 1932, accused to Peterson.

"Request yours of the 26th. You are advised that further payment cannot be made until Dec. 1st at which time a substantial payment will be made."

e. April 11, 1933, Peterson to accused.

"I have not heard from you since your letter of Nov. 14th 1932, in which you promised that a substantial payment would be made to me for the damage done to my car by Sergeant Evan Sanders.

"* * * Please let me hear from you as soon as possible * * *."

f. Letter from CCC 702 Camp, Bena, Minnesota, undated but testified to have been postmarked July 25, 1933 (Ex.3, p.6). Accused to Peterson.

"With reference to balance due you for repairs of car, please send me a statement of the amount due and I will take care of it.

"I have been up here in the woods since May therefore have lost track of things."

g. August 1, 1933. Peterson to accused.

(This letter was not attached to Ex.3 but was read into the record by accused, R.413, Def. Ex.4). This letter gives the information requested by the preceding letter.

h. September 19, 1933, accused to Peterson.

Remits $86.55. Asks about insurance on the car.

In his voluntary statement before the board of officers convened to investigate Captain Darr's alleged financial irregularities (R.41-43), and in his testimony before the court (R.408-420, Def. Exs. 5 and 6) accused admitted receipt and transmittal of the money substantially as above set out, but excused his delay by saying that in November, 1932, Sanders borrowed $200 on the security of his automobile from the McDonald Chevrolet Company to pay his repair bill to that company and Mr. Peterson and that he (accused) orally guaranteed the loan. At the time that he did so, he expected to be able to control Sanders' pay; but, when Sanders was ordered transferred to the 18th Infantry and was planning to take the automobile away to his new and distant station, accused felt that he had been foolish in guaranteeing the loan, and "so I thought, in order to protect myself, that I would stall Mr. Peterson for a sufficient length of time to enable Sanders to pay a portion, at least, of this loan." Accused also claimed to have written an insurance company to make sure that Peterson was not collecting double damages and to have received no answer. A. K. McDonald (R.617-623), former owner and manager of the McDonald Chevrolet Company, testified that he refinanced Sanders' car after the accident to it, and that he received from accused an oral guaranty that the car would be available for repossession if necessary.

Several circumstances cast doubt upon the bona fides of accused's excuse that he was withholding payment from Peterson in order to protect himself from liability on his guaranty of Sanders' loan from the McDonald Chevrolet Company. In the first place and most important, accused expressly admitted that he never inquired from the finance company whether or not accused had kept up his payments to it (R.418), which he surely would have done had his reason for withholding payment to Peterson been that which he stated. Further, accused made the following admission to the board of officers investigating his alleged irregularities (R.42) -

> "* * * Captain Darr further admitted that later on he might have paid the balance to Mr. Peterson in view of the fact that whatever obligation Sanders had with the Finance Company would have long since been settled one way or the other before this amount had been paid to Mr. Peterson. In other words, the danger of Captain Darr having to make good anything that Sanders had obligated himself for to the Finance Company had passed before Captain Darr had remitted the full amount of money to Peterson."

The letters from accused to Peterson are lacking in the frankness and sincerity consistent with fair dealing. Why should he have asked on March 4 for Peterson's "very lowest price for settlement in full," when the amount to be paid had been fixed, so far as military authority could fix it, by a board of officers, as he well knew? Accused wrote on March 11 that he had succeeded in arranging "a payment." On March 18 he sent $40 and told Peterson that payments would be made "as often as possible." Yet when these letters were written accused already had in his possession the full amount due Peterson. He definitely promised Peterson payments on September 1 and December 1, 1932, but failed to make them. Though he mentions his anxiety lest Peterson receive double payments from him and from an insurance company, he made no inquiry of Peterson about insurance until his last letter to him of September 19, 1933, transmitting the final payment (Ex.3, XQ. 2), and in no event need it have taken nearly two years to clear up the matter of insurance. Finally, it is to be noted that accused did not send Peterson the last payment of $86.55 until September 19, 1933, after his financial irregularities, including the present matter, had been the subject of investigation by the board of officers of which Lieutenant Colonel Emile V. Cutrer was president. (R., foot p.34).

It is not clear what legal authority the Commanding General, Fort Snelling, had to bind Corporal Sanders and Peterson with respect to their civil rights and liabilities by the decision of a board appointed by him; but, even if he had no such authority, that gave accused no right to convert money paid to him by Sanders pursuant to the findings of the board, and such conversion was none the less embezzlement.

The Board of Review considers that the evidence supports the finding of guilty of this specification and that that finding should stand.

4. Specification 3, Charge I: In that Captain James W. Darr, 3rd Infantry, did, at Fort Snelling, Minnesota, from on or about February 1, 1932, to on or about February 1, 1933, feloniously embezzle by fraudulently converting to his own use, money in the total sum of sixty-five dollars ($65.00), the property of Private Stokely Jackson, Company K, 5rd Infantry, entrusted to him by the said Private Jackson, in sums and on dates as follows: ten dollars ($10.00) February 1, 1932; twenty dollars ($20.00) May 31, 1932; twenty dollars ($20.00) December 31, 1932; and fifteen dollars ($15.00) January 31, 1933, all for the purpose of applying the same as payments on an obligation due to William B. Walden, Cass, Arkansas.

Finding: Guilty except the words and figures, "Sixty-five dollars ($65.00)," substituting therefor the words and figures "Twenty dollars ($20.00)," and of the words and figures "Ten dollars ($10.00), February 1, 1932," the words and figures "Twenty dollars ($20.00), December 31, 1932," and the words and figures "Fifteen dollars ($15.00), January 31, 1932"; of the excepted words "Not Guilty" and of the substituted words "Guilty."

The finding is inartificial in form, but it is sufficiently clear that the court meant to modify the specification by reducing the total amount embezzled from $65 to $20 and by striking out all reference to payments by Jackson of $10 on February 1, 1932, $20 on December 31, 1932, and $15 on January 31, 1933 (erroneously given as 1932 in the finding).

Private Jackson owed $65 to William B. Walden of Cass, Arkansas, on a note given in payment of an automobile. Walden had sent the note to accused for collection (Ex.8). Jackson testified that he personally made payments to accused for transmittal to Walden in settlement of his obligation, as follows:

February	1, 1932	$10
May	31, 1932	20
December	31, 1932	20
		$50

He exhibited receipts purporting to be signed by accused and corresponding to the above table in dates and amounts, which he said had been given him by accused (R.63 et seq., Ex.7). Accused admitted that the signature to the receipts appeared to be in his handwriting (R.630). The receipts dated February 1 and May 31 contain the words "payment on note." The other does not. Jackson further testified that he signed the pay roll for January, 1933, but received no pay, and that the $15 balance owing on the note was supposed to come out of his pay for that month.

The post finance officer testified that the pay due Jacksen for January, 1933, was paid to accused as agent finance officer (R.61,62). His pay was $22.05 and his company bills $6.52 (R.64). Lang, First Sergeant of Company K, 3rd Infantry, which accused commanded and of which Jackson was a member, testified that Jackson was absent from the post January 31, 1933, and that on or about that date he (Lang) turned over $15 to accused for Jackson for payment on his note (R.77-79). Walden, Jackson's creditor, produced a letter to him from

accused dated January 12, 1933, to the effect that if Walden would be patient and accept small payments, Jackson could pay him and he (accused) would see him paid. Walden testified that all that he received from accused was $10 on February 23, 1932 (Ex.8, Q.6), and that he wrote a registered letter to accused, the receipt for which showed May 31, 1932, as the date of delivery, to which he received no answer (Ex.8, XQ.1).

The court properly cleared accused of guilt in connection with the payment to him by Jackson of $10 on February 1, 1932, since, as has just been said, Walden, the creditor, admitted receiving $10 from accused February 23, 1932 (Ex.8, Q.6).

With respect to the $15 alleged to have been received by accused January 31, 1933, considerable testimony was introduced to show that Jackson by misrepresentation was twice paid his proper wage of $10 for service as fireman for that month in the building occupied as quarters by Captain Burgheim and accused, once by each, and that accused reimbursed himself by retaining $10 from Jackson's pay (Accused, R.625; Burgheim, Def. Ex.23). The court apparently cleared accused of responsibility for $10 on this ground, but why it cleared him of the remaining $5 does not appear.

Why the court found accused not guilty with respect to the payment of $20 on December 31, 1932, does not clearly appear; but it is to be inferred that it did so because the receipt for this payment does not contain any word connecting it with a note, and because accused testified that he frequently received sums for safekeeping from members of his company, giving receipts therefor; and that upon returning the deposits he sometimes omitted to take up the receipts, or, if he did so, failed to destroy them and placed them in an unlocked drawer of his desk in the orderly room (R.625,626).

No definite defense was offered with respect to the payment to accused of $20 May 31, 1932, except an attack on Jackson's reputation for veracity (R.646), alleged inconsistent statements made by him as to the amount paid by him to accused (Accused, R.627; Bigelow, R.658); and evidence that after payment of his company bill he had insufficient cash to pay the sum which he claims that he paid (Tillman, R.639; accused, R.641-643). The court evidently considered none of these sufficient to overcome the silent testimony of a receipt in accused's handwriting (Ex.7) for $20, May 31, 1932, containing the words, "payment on note."

The Board of Review is of opinion that the evidence is legally sufficient to support the finding made by the court with respect to this specification and that the finding should stand.

5. Specification 7, Charge I: In that Captain James W. Darr, 3rd Infantry, did, at Fort Snelling, Minnesota, on or about March 16, 1933, feloniously embezzle by converting to his own use, money in the sum of twenty-five dollars ($25.00), the property of Private First Class William H. Walling, Company K, 3rd Infantry, entrusted to him by the said Private First Class William H. Walling, for the purpose of applying the same toward the payment of an obligation due the Evergreen Finance Company, Vancouver, Washington.

Finding: Guilty.

Private Walling, a member of the company commanded by accused, owed $25 to the Evergreen Finance Company of Vancouver, Washington. That company wrote a letter about the matter to accused, who called Walling before him and told him that the debt should be paid immediately. Walling did not have that much money, but with accused's permission arranged to borrow it from Private Derrington of the same company. Pursuant to this arrangement, Derrington paid $25 to accused and received a receipt signed by him, dated March 16, 1933, and saying "Rcd from Pvt. Derrington $25.00 for Walling." On July 23, 1933, accused wrote the Evergreen Finance Company a letter from Bena, Minnesota, saying that he had assumed responsibility for this debt and asking a statement. On August 16, 1933, he sent that company $26 in settlement (Deposition of Case, of the Evergreen Finance Company, Ex.12; Walling, R.129-135; Derrington, R.135-7; receipt, Ex.13). An official communication from Headquarters, Fort Snelling, drew the matter to accused's attention July 20, 1933 (R.528); and the investigation of accused's alleged irregularities by a board of officers began August 2, 1933 (R.34).

Accused admitted the genuineness of his signature to the receipt, and, after first being unable to do so, remembered receiving the money from Derrington. At the time he was very busy and must have put the money in his desk or in the cash drawer and forgotten it (Cutrer, R.137-139; accused, R.526-528). The defense also attacked the credibility of Walling (R.529-535, Def. Exs.8-13), but such testimony is immaterial to the present issue, since accused admits receipt of the $25 at the time and for the purpose alleged. The only real issue is what credit is to be given to accused's contention that he forgot the matter. If true, this would not relieve accused of financial responsibility, but

might of criminal liability, since it negatives the existence of a guilty intent. The court was unwilling to accept this explanation, nor does the Board of Review do so. In the opinion of the Board the evidence supports this finding, which should stand.

6. Specification 8, Charge I: In that Captain James W. Darr, 3rd Infantry, did, at Fort Snelling, Minnesota, from on or about March, 1933, to on or about June, 1933, feloniously embezzle by fraudulently converting to his own use, one hundred forty-six dollars ($146.00), property of the enlisted men of Company K, 3rd Infantry, collected as cash during the months of March, April and May, 1933, and entrusted to him by the said enlisted men of Company K, 3rd Infantry, for the purchase of linoleum for the company barracks.

Finding: Guilty.

It was desired to place linoleum between the bunks in the barrack of Company K, 3rd Infantry, commanded by accused, but the battalion commander declined to authorize the purchase from the company fund. A meeting of the company was held at which it was voted to purchase the linoleum and to pay for it by contributions of $1, $1, and sixty cents, respectively, from each member of the company on three successive pay days. Accused, therefore, about February 7, 1933, arranged for the purchase of the linoleum from Farwell, Ozmun, Kirk, & Company, a wholesale house of St. Paul, for $142.83, payable in three installments, March 7, April 7, and May 7, 1933. The linoleum was delivered and installed at once, and collections were made by accused from the men as above, amounting to $146, but payment was not made until October 4, 1933, after a letter from the firm to the Commanding General, Fort Snelling, about the matter, July 15, 1933, and after an investigation of accused's alleged financial irregularities had been made (Lang, R.139-142; Collection sheet, Ex.14; Derrington, R.142-4; stipulation, R.145; Buchwald, R.145-146, 147-151; Gillen's deposition, Ex.15; Cutrer, R. foot p.34). Accused stated to the investigating board that he used about $100 of the linoleum fund to start a company store or exchange for Company 702, CCC, of which he later took command (R.159,161,252).

Accused's defense was that the purchase of linoleum was a personal transaction between him and Farwell, Ozman, Kirk, & Company, on his own credit (R.158-161, 537-9). This is expressly denied by the credit manager of the firm (Ex.15, Q.3 c), and inferentially by the circumstance that invoices, bills, etc., were made out against Company K. Furthermore, in their letters written before the case came to trial, the firm referred to the account as owing by Company K. Accused maintains that the purchase

was billed against Company K because Farwell, Ozmun, Kirk, & Company were a wholesale house whose policy it was not to sell to individuals not engaged in retail business, and that the course followed was necessary to obtain the wholesale price.

The explanation given by accused was apparently unconvincing to the court and is so to the Board of Review. Even if the facts were as alleged by him, it is doubtful if they would justify him in devoting to other purposes the sums collected from the men of his company for linoleum, or make such conversion any less embezzlement. Neither did the circumstance that the purchase of linoleum in this manner was unauthorized and irregular make the conversion of the fund so collected any less embezzlement. Nor does the fact, if it be such, that part of the funds was devoted to a purpose praiseworthy in itself, namely, the starting of a company store for the Civilian Conservation Corps, alter the legal situation. Such a conversion was nevertheless to accused's own use, even though he did not benefit from it pecuniarily. A man who converts funds entrusted to him for another purpose to the benefit of his church or his favorite charity would nevertheless be an embezzler.

The evidence supports the finding of the court, which should stand.

7. Specification 9, Charge I: In that Captain James W. Darr, 3rd Infantry, while acting as Camp Exchange Officer, Company 702, CCC, did at Bena, Minnesota, from on or about May 13, 1933, to on or about July 31, 1933, feloniously embezzle by fraudulently converting to his own use, approximately six-hundred-thirty dollars ($630.00), the property of the Camp Exchange, Company 702, C.C.C., which came into his possession by virtue of his office.

Finding: Guilty.

On or about May 9, 1933, accused proceeded in command of the 702d Company, CCC, from Fort Snelling to Bena, Minnesota, and made a camp at that place. For the benefit of the men of the company he established a camp exchange or company store, for which he bought supplies on credit from several wholesale houses. The exchange made sales to the members of the company, sometimes for cash, but usually on credit. On pay day accused made collections from the men to satisfy their indebtedness to the exchange. At the end of the months of May and June accused deposited these collections in his personal account in a bank in the near-by town of Bemidji.

Major John R. Brooke, Jr., arrived at the camp at Bena June 6, 1933, and superseded accused in command. He directed accused to continue operation of the exchange as camp exchange officer, and accused continued to do so until July 31. On that day accused made the collections for the exchange, turned them over to Major Brooke at his direction, and departed with leave for Fort Snelling, supposedly for a couple of days but in fact not to return at all. After accused left, numerous bills against the company exchange came in from merchants who had supplied stock to it, and it was found that the only payment made by accused to such merchants was $75 to the Bemidji Candy Company.

From the testimony, accused's account with the post exchange stood as follows:

Dr.			Cr.
May collections	$339.74	Paid Bemidji Candy Co.	$ 75.00
May cash sales	12.60	Paid Major Brooke	17.00
June collections	330.99	Balance due	618.23
June cash sales	26.90		
	$710.23		$710.23

The balance due as above shown was not paid over by accused; and the bills of the several merchants (except the $75 to the Bemidji Candy Company) were paid, if at all, only after accused's financial irregularities were the subject of investigation (Brooke, R.161-185; Exs. 17-22; Cutrer, R.191; accused, R.552).

Accused's defense to the present specification was similar to that which he made to specification 8, that at the time when he established the company exchange or store he knew of no authority of regulation or otherwise for its existence, that he advanced his own money to buy stock for the exchange and made purchases for the same purpose on his personal credit, that the exchange was therefore merely a personal, unofficial, commercial venture for whose debts he (accused) was individually liable. Accused "compared it to a man who had drawn his pay and had failed to pay the grocery bills." Just after the fourth of July Major Brooke instructed accused to operate the company store as a camp exchange, and thereafter he did so (Cutrer, R.190-195; accused, R.539-555; Lang, R.555-559). The defense presented testimony of the commanding officer of another CCC Company camped a few miles from that of accused that he received no written authority for the establishment of a camp exchange until the latter part of June (Boruski, Def. Ex.17, QQ. 5,6).

On the other hand Major Brooke testified that when he arrived at the camp June 6 he found there two copies of regulations dated in April, 1933, authorizing the establishment of camp exchanges (R.173-5).

Camp exchanges were not mentioned in the provisional War Department regulations dated April 5, 1933, on Relief of Unemployment - Civilian Conservation Corps. So far as the files of this office show, they were first mentioned in mimeographed circular letter of The Adjutant General to all Corps Area Commanders, April 19, 1933 (AG 324.5 C.C.C. (4-13-33) Pub.), subject, Civilian Conservation Corps, par. 4 g, as follows:

> "Camp commanders may, in their discretion, authorize the operation of camp exchanges at work camps to be conducted in accordance with Army Regulations."

Camp exchanges were also mentioned in and authorized by Bulletin No. 1, Department of Labor, April 17, 1933, Emergency Conservation Work, April 17, 1933, top p. 6, and subsequent bulletins of the same series: No. 2, April 20, 1933, p. 9; and No. 3, May 1, 1933, top p. 14.

That none of these papers had arrived at the post or camp where accused was serving seems improbable. If they had, it was his duty as the commanding officer of a CCC camp and company to be familiar with their contents. But even if no such document fell under his eye, accused as an Army officer was familiar with post exchanges and the method of their operation. When he started a store or exchange for his CCC company the natural inference is therefore that he established and ran it according to the method with which his training and environment had made him familiar, and not as a personal business venture. This justifiable inference is converted into a moral certainty by the statements of accused himself and by other considerations.

Accused is thus quoted by Colonel Cutrer, president of the investigating board (R.194),

> "He did state to me that at the time he had departed from Fort Snelling that he knew of no authority, that is regulations which permitted him to open a store and operate it as a Company store. He stated he had struck upon the solution and thought it was a good idea for the purpose of making money with which to buy extras for the men of the Company."

On page 540 of the record, accused, speaking of his plans for the company exchange or store, said, "any profits from such activity, of course, to go to the company to buy magazines or such equipment that was not advanced."

For an Army officer to run a store as a private business enterprise in the camp under his command and to make money out of his own men would clearly be most improper; and accused, to do him justice, so recognized; but, if the store had been his private enterprise, he and not the men of the company would have been entitled to the profits. If, on the contrary, the men were entitled to the profits, as accused says they were, the exchange or store was not the private enterprise of accused, but an institution analogous to a post exchange, even if not known by accused to be officially authorized. If, as accused correctly says, the profits were to belong to the men of the company, the collections from which those profits were to come belonged to the men also, and the deposit of such collections in accused's personal account constituted an embezzlement of the money.

Furthermore, if the exchange was accused's personal venture, and if he alone was personally liable for its debts, he owned its stock. Yet, neither when ordered by Major Brooke to run the exchange thenceforward like an Army post exchange nor at any other time did accused demand the stock on hand or ask to be paid its value.

The merchants who sold goods to the exchange obtained their ideas of its constitution from accused. What they testify, and still more what they did at the time, are therefore material to show what accused himself considered the situation to be. Most of them testified that they extended credit to the exchange rather than to accused individually (Ex.17, Q.4; Ex.18, Q.4, XQ. 3; Ex.19, Q.4; Def. Ex. 20, XQ.2). Also the invoices and bills attached to the exhibits above cited or otherwise introduced (Def. Exs.14,15,16), are made out against Company 702, or the company fund. One merchant testified that he considered the bill to be against the company commander as an individual, but adds the inconsistent statements that he does not know the company commander's name and that "the order was turned into this office as U.S. CCC Co. 702" (Ex.20, Q.4). The ledger account attached is headed "U.S. C.C.C. Co. No. 702." Accused undertakes to explain the charging of goods to the company or the company fund on the ground that this was necessary to obtain a wholesale price.

That accused advanced some of his personal funds to start the exchange may well be true, but that does not necessarily make it a personal and unofficial business venture. It may also be true that he personally guaranteed to the merchants from whom the purchases were made that their accounts would be paid, but all that that does is to make him a surety and does not prove that the exchange was his individual enterprise.

The theory that the exchange was accused's private business venture, the profits of which, if and when made, be proposed as a matter of generosity, though not of legal obligation, to turn over to the company, seems too fanciful for detailed consideration.

The exchange was in fact duly authorized when started. Whether accused knew it is immaterial. Even if he did not, he knew that the profits in equity belonged to the men of the company, and that conversion of the funds of the exchange from which the profits must come was unauthorized and wrong. Such conversion in the opinion of the Board constituted embezzlement. The Board considers that the record supports the finding of guilty of this specification and that the finding should stand.

8. Charge II; Violation of the 95th Article of War.

Specification 2: In that Captain James W. Darr, 3rd Infantry, did, at Bena, Minnesota, on or about July 20, 1933, wrongfully remove from the official mail of Company 702, CCC, a letter addressed to his Commanding Officer from Headquarters Chippewa Sub-District, C.C.C., Cass Lake, Minnesota, dated July 19, 1933, with intent to conceal from his commanding officer the contents of the aforesaid letter pertaining to an unauthorized purchase that he, the said Captain Darr, had previously charged against the company fund, Company 702, CCC, under date of May 16, 1933.

Finding: Guilty.

The facts with respect to this specification are undisputed. On July 17, 1933, J.W. Hough, proprietor of the Motor Inn, Cass Lake, Minnesota, addressed a letter to Major "Walsh", meaning Waltz, in command of the Chippewa sub-district, CCC, with reference to an unpaid bill for tires, tubes, and a muffler, supplied May 16 and attached to a Plymouth coupe. The bill was made out to "Capt. J.W. Darr. Co. Fund, Co. 702 CCC", and the sales slip was headed "Co. Fund, Co. 702 CCC," and signed "Capt. J.W. Darr." Hough testified that the accused "told me that the goods were for CCC Company 702." The sub-district commander, on July 19, placed a first indorsement on Hough's letter addressed to "Commanding Officer, 702d Company CCC," and directing "suitable action." The communication was received and placed unsealed on the desk of the company commander, Major Brooke. Accused saw it there, and carried it away. On July 28, in consequence of an inquiry from the Adjutant of the sub-district, Major Brooke asked accused and First Sergeant Lang if they had seen it. Accused thereupon said that he had it, left the room, and returned with the communication. He said that he "had seen this communication in the basket and had removed it from the basket because he thought it was a personal matter and did not pertain to any one else." Major Brooke had not authorized him to take it (Brooke, R.224-232; Exs.28,29).

When before the investigating board and again when testifying in court, accused stated that the communication was lying open on Major Brooke's desk, that he (accused) picked it up and was reading it when Brooke came in, that there had been friction between him and Major Brooke, accused was therefore avoiding Major Brooke, that he walked out with it in his hand and carried it to his tent, that the supply sergeant called him, that he (accused) laid the letter in his locker and went to take care of whatever duty he had been called for, that he had been drinking considerably and completely forgot that he had the letter (Cutrer, R.232-3; accused, 577-580).

If either of the explanations made by accused be true, accused may still be guilty of an offense in violation of the 96th Article of War, but not of that dishonorable conduct which constitutes a violation of the 95th Article of War. However, the fact that accused made one explanation contemporaneously to Major Brooke and a wholly different one later to the board of officers and the court indicates that he is sincere in neither and that his purpose was as alleged in the specification "to conceal from his commanding officer the contents of the aforesaid letter."

It is also alleged in the specification that the purchase which was the subject of the letter was "unauthorized." That it was so was not proved, since testimony on this point was excluded upon objection of the defense (R.foot p. 227). However, the word "unauthorized" may be treated as surplusage. The gist of the offense was the removal of the letter with intent to conceal it from his commanding officer. That the Board considers proved.

The correspondence which was removed from Major Brooke's desk by accused appears in the record attached to Ex. 28, deposition of Hough. The other witnesses in mentioning the correspondence do not properly identify it, but there is no reason to doubt that they referred to the same papers. There is no dispute as to the facts with respect to the specification anyhow, the only question is as to the inference to be drawn concerning the intent of accused.

Exhibit 29, deposition of Major Waltz, bears his autograph signature but not that of the officer taking the deposition. It is certified to be a true copy by the trial judge advocate. Why the original deposition was not attached does not appear. The irregularity is not considered serious. As has been said, there is no dispute as to the facts concerning this specification.

Accused further testified that when he admitted possession of the letter, as above stated, Major Brooke called upon him for a written explanation and restricted him to the limits of the camp. Accused then sent a note to Major Waltz, the sub-district commander, asking him to come to camp, which he did that afternoon, and the three talked the matter over. Accused apologized to Major Brooke, who accepted the apology and released accused from restriction, and he considered the matter closed. It is contended by accused that the above restriction constitutes punishment and that accused may not be again punished by court-martial for this offense (R.579-580).

If accused was punished under the 104th Article of War for this offense, of course he can not now be convicted of and punished for it again, but the record does not indicate that he was so punished. Before disciplinary punishment may be imposed upon an officer there must be a preliminary investigation, a written notification of intention to impose disciplinary punishment must be made, and the officer must be asked whether he demands trial. After he answers in the negative, he must be notified in writing of the punishment and informed of his right to appeal to superior authority. A written record must be made of the punishment (MCM, pars. 107-109). None of these steps was taken with respect to accused on this occasion. On the contrary, the restriction of a few hours only appears to have been an arrest or restriction preliminary to investigation and possible further disciplinary action.

The Board of Review considers that the record supports the finding of guilty of the specification and that the finding should stand. The offense alleged and proved constitutes a violation of the 95th Article of War.

9. Specification 3, Charge II: In that Captain James W. Darr, 3rd Infantry, while acting as Company Exchange Officer, Company 702, CCC, did, at Bena, Minnesota, on or about July 31, 1933, with intent to deceive, officially report to his commanding officer, Major J. R. Brooke, Jr., that the outstanding obligations of the camp exchange amounted to one-hundred-forty-nine dollars and thirty-seven cents ($149.37), he, the said Captain Darr then well knowing that the said Camp Exchange was at the time insolvent; that the outstanding obligations due and payable from the Camp Exchange approximated one-thousand-two-hundred-forty-one dollars and ninety-three cents ($1241.93).

Finding: Guilty except the words and figures "One thousand Two hundred Forty-One dollars and ninety-three cents ($1241.93)," substituting therefor the words and figures "One thousand seven dollars ($1007.00)"; of the excepted words "Not Guilty" and of the substituted words "Guilty."

On July 31, 1933, Major Brooke, the commanding officer of the camp, asked accused for a statement of the outstanding bills of the exchange. Accused made out and handed to Major Brooke a rough statement in pencil, which, omitting certain additions, showed,

Barnes	$24.00	
CCC	92.85	
Bemidji	32.52	
	$149.37	(Brooke, R.243-247)

Barnes presumably means Barsness Candy Company, CCC the C.C.C. Canteen Service, and Bemidji the Bemidji Candy Company. It is shown by the depositions of the merchants who sold goods to the exchange that there were at that time outstanding liabilities of the exchange as follows:

		Exhibit
Nash-Finch Co.	$505.20	17
CCC Canteen Service	292.37	18
Bemidji Candy Company	150.99	19
Barsness Candy Company	32.80	20
	$981.36	

There is also a deposition (Ex.21) of John E. Johnson, manager of the Lyceum Theater, Deer River, Minnesota, that on May 24, 1933, he delivered to accused a roll of tickets to his theater to be sold by him to members of the CCC at fifteen cents a ticket, of which 161 tickets, worth $24.15, have been sold, no payment for which has been made to Johnson. It does not clearly appear, however, that this transaction was to be handled by the camp exchange.

Mention is also made in the deposition of Lieutenant Nyquist (Ex.22, Q.3), of a debt of $2.17 to N.F. Decker (erroneously transcribed by the reporter as N.F. Edgar, R. top p.247), but there is no proof that this obligation was known to accused.

The two items last mentioned, added to the $981.36 already given, make $1007.68, which, disregarding the odd cents, is the sum fixed by the court in its finding.

The defense offered by accused to this specification (Cutrer, R.348-353; accused, R.580-587) is the same as he offered to Specification 9, Charge I, namely, that prior to July the exchange had been his own personal venture, and that he therefore listed only obligations incurred after it became a camp exchange, i.e., those incurred in July.

The court rejected this defense and the Board of Review does likewise. The reasons for doing so have already been set out in some detail in discussing Specification 9, Charge I (ante, par.7), and need not be repeated. It may further be remarked that even upon accused's theory he did not present a true statement of the liabilities of the exchange, since, if it was his private venture up to July 4, he should have listed as an obligation a debt to himself of the value of the stock as of that date.

The two small items last mentioned, the claims of Johnson, proprietor of the Lyceum Theatre, and of N.F. Decker, should be disregarded for reasons already given. Without these, the outstanding obligations of the exchange as of July 31 were $981.36. The difference between this sum and $1007, fixed by the court, is of no importance so far as concerns the present case. Subject to what has just been said, the Board of Review considers that the record supports the finding of the court, and that the finding should stand. The specification states an offense in violation of the 95th Article of War.

10. Charge III: Violation of the 96th Article of War.

Specification 1: In that Captain James W. Darr, 3rd Infantry, did, at Bemidji, Minnesota, on or about June 1, 1933, wrongfully misappropriate an automobile described as a Plymouth Coupe, property of Sergeant William Warner, Company K, 3rd Infantry, and wife, Mrs. William Warner, by disposing of said automobile as part consideration for the purchase price of a new automobile in his, the said Captain Darr's own name, from the Bemidji Motor Service Company, this to the discredit of the military service.

Finding: Guilty.

In the view which the Board of Review takes of this specification, it is unnecessary to set out the evidence in full.

What the evidence for the prosecution, if believed, proves is embezzlement (CM 201960, Cinkowski). A specification covering the transaction might have been laid under the 93rd Article of War, and the offense is none the less embezzlement because the specification is alleged to be in violation of the 96th Article of War. The specification alleges that the car embezzled was the property of Sergeant and Mrs. William Warner. These words, both in their colloquial sense and as a strict matter of law, mean that the automobile belonged to Sergeant and Mrs. Warner in common. The evidence shows that the car belonged to Mrs. Warner alone, that it had been bought with her money, and was registered in her name (Mrs. Warner, R.335,343).

The Judge Advocate General and the Board of Review, following court decisions too numerous to cite, have held many times with respect to larceny that a variance as to ownership of the property stolen is fatal. In the earliest of these cases, CM 110910, Brooks, the Judge Advocate General, Major General Crowder, said,

> "2. * * * *
>
> "The question presented is an important one, and involves a consideration of the purpose of the charge and the essential allegations thereof that is, the allegations without which the charge is bad, and without proof of which the case must fall.
>
> 'A charge corresponds to a civil indictment. It consists of two parts—the technical "charge", which should designate the alleged crime or offense as a violation of a particular article of war or other statute, and the "specification", which sets forth the facts constituting the same. The requisite of a charge is that it shall be laid under the proper article of war or other statute; of a specification, that it shall set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended.' (M.C.M. 1917, par. 61.)

> 'While the same particularity is not called for in military charges which is required in civil indictments, there are certain essential conditions which must be complied with in their preparation. These are (1) that the charge shall be laid under the proper article of war or other statute; (2) that such charge shall set forth in the specification facts sufficient to constitute the particular offense.' (Davis, Military Law, p. 69).

"This author then enumerates the essential requirements of a good charge and specifications, and continues:

> 'These precautions are necessary, not only to apprise the accused of the offense charged against him, but for the purpose of showing affirmatively that the person mentioned in the charges, as well as the offense charged or alleged, is within the jurisdiction of the court convened for the trial of the case.'

"There are two controlling principles by which the purpose, and the sufficiency of a charge to accomplish that purpose, are measured and tested. Winthrop says (Vol. 1, 2nd Ed., p. 188):

> 'The purpose and province of the charge are:--1st, to so inform the accused of the precise offense attributed to him that he may intelligently admit, deny, or plead specially to the same; and may be enabled to plead his conviction or acquittal upon any subsequent prosecution on account of the same act; 2d, to advise the court and the reviewing authority of the nature of the accusation and of the article or other statute upon which it is based, so that the former may rightly and judiciously try, determine, and (upon conviction) sentence, and the latter may understandingly pass upon all the proceedings.'

"The Supreme Court of the United States, speaking to this same question, said:

> "But the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead former acquittal or conviction. (Cochran v. United States, 157 U.S., 290.)"

"Obviously, a person charged with the theft of the property of A is not apprised that he is to be tried or may be convicted of the theft of the property of B. Quite obviously he could not plead a former conviction or acquittal of the charge that he stole the property of A upon conviction or acquittal of stealing the property of B, or an acquittal or conviction of stealing the property of B upon a conviction or acquittal for stealing the property of A.

"3. An indictment for larceny in civil courts, or charge of larceny in a military court, must contain certain essential allegations. These are, that the accused took and carried away property appropriately described, belonging to a person named in the indictment or charge (unless the owner be unknown, in which case that fact must be alleged and proved), that the taking was unlawful, and with felonious intent to deprive the owner of his property; and that the property was of some value. An indictment or charge which omitted any of these elements would not support a judgment of conviction. (25 Cyc 74). The felonious taking must be properly alleged (25 Cyc, 73, 74), the description must be sufficiently certain to enable the court to identify the property described in the indictment or a charge as that referred to by the evidence, and show that the property is the subject of larceny (25 Cyc, 75), the name of the owner of the property said to have been stolen must be correctly stated (25 Cyc, 88), and, in civil indictments, if it is alleged that the name of

the owner is unknown, and it is proved that the name of the owner was in fact known when the indictment was prepared, or in the exercise of reasonable diligence might have been ascertained, the variance is fatal (25 Cyc, 93). When the name of the owner is stated in an indictment or charge it becomes a part of the description of the offense, serving not only to identify the offense, but especially to identify the property which is alleged to have been the subject of larceny.

"It is elementary that, with respect to the essential allegations of an indictment or charge, the proof must correspond therewith. The Manual for Courts-Martial, 1917, page 262, states that a charge of larceny must be sustained by proof of:

'(a) The taking by the accused of the property as alleged.
(b) The carrying away by the accused of such property.
(c) That such property belonged to a certain other person named or described.
(d) That such property was of the value alleged, or of some value.
(e) The facts and circumstances of the case indicating that the taking and carrying away were by trespass, and with a fraudulent intent to deprive the owner permanently of his property or interest in the goods, or of their value or a part of their value.'"

The present Manual for Courts-Martial, par. 149 g, sub-heading, "Proof," is word for word with the same as to (a), (b), (c), and (d), supra, and the difference as to e is immaterial to the present case.

In CM 129356, Mumford, the Board of Review said,

"4. The variance between the specification and the proof was fatal, and the error could not be cured by a substitution in the specification. (C.M. No. 110910, Brooks,). This office adheres to the ruling laid down in the case cited. The person charged with the theft of the property of A is not apprised that he is to be tried or may be convicted of the theft of the property of B."

The two cases from which quotations have just been made are digested in the recently published Digest of Opinions of the Judge Advocate General, 1912-30, par. 1579 (1), and were followed in the cases of CM 164042, Rodden, and CM 193191, Hosmer. But the case most directly in point is CM 157982, Acosta, Dig. Ops. JAG 1912-30, par. 1579 (5). There the Board of Review said,

> "In Specification 8 accused is charged with the larceny of a jade necklace belonging to Mrs. Robert K. Alcott and he was found guilty as charged. The testimony of Major Alcott is the only competent evidence with reference to the ownership of the necklace. He testified that it belonged to him and was stolen from his quarters. Although his attention was directed to the fact that the necklace was charged as the property of Mrs. Robert K. Alcott he made no explanation other than to say that she was his wife. It results that there is a fatal variance between the allegations of ownership of the stolen necklace in Specification 8 and proof of ownership thereof. The testimony, therefore, is not legally sufficient to support the finding of guilty of Specification 8."

The foregoing cases deal with larceny, and the offense now under consideration is in substance embezzlement. No embezzlement case haw been found in the files of this office in which there was raised the precise point discussed in the preceding larceny cases, but certain court decisions throw light on the subject. In United States v. Denicke, 35 Fed. 407, one of the cases cited and relied upon by General Crowder in his opinion in the Brooks case, supra, a post office employee was indicted for embezzling a letter from the mail. The Circuit Court for the Southern District of Georgia said (p. 410),

> "But the prosecution must fail for another reason: There is a fatal variance between the allegations and the proof. It is charged that the letter embezzled was directed to the treasurer of the Travellers' Insurance Company, Pittsburgh, Pa. The letter offered in evidence is written to the treasurer of the Traders' Insurance Company, Pittsburgh, Pa. However guilty might be the prisoner, it would be impossible to enforce the law with such a variance in pleading and proof as this. 'It being necessary,' says Mr. Greenleaf,

> in his work on Evidence, paragraph 63, 'to prove the substance of the issue, it follows that any departure from the substance in the evidence produced must be fatal, constituting what is termed in the law a variance. * * * If the allegations contain matter of description, and is not proved as laid, it is a variance, and is fatal. * * * The allegation being that the letter was directed to the treasurer of the Travellers' Insurance Company, and the letter showing that it was directed to the Traders' Insurance Company furnishes as complete and unanswerable an offense against the rule as can be found. A charge of embezzlement of the property of the Central Railroad & Banking Company would be as well sustained by proof of theft from the Georgia Railroad & Banking Company. * * *."

Rauguth v. People, 186 Ill. 93, 57 NE 832, is the converse of the present case. Accused was charged with embezzlement of money belonging to Barbara Hellgoth, and the evidence showed that it belonged to her and her husband jointly. The court called this variance an "insuperable obstacle in the way of sustaining the verdict," and reversed the conviction.

Apart from the authority of the last two cases, no logical reason is seen why the principle laid down in the several larceny cases cited should not be equally applicable to embezzlement.

Nor can the conviction of the present specification be sustained on the ground that Sergeant Warner had possession of the automobile and might therefore be described as its owner. Dig. Ops. JAG 1912-30, par. 1579 (2) and (4). The principle, though sound as applied to larceny, can never be applicable to embezzlement, since in such a case, ex hypothesi, possession is in accused at the time of commission of the crime and can not be in a third party. Such was the fact here. The car belonged to Mrs. Warner. With her permission, when he was stationed at Fort Snelling, her husband drove it to the post every morning. At such times he had possession of it. Before accused and Sergeant Warner went to the CCC camp at Bena, Minnesota, an agreement was made between them, sanctioned by Mrs. Warner, whereby accused while at camp was to have the use of the car whenever he wanted it in consideration of his paying for tires, gasolene, oil, and repairs. When accused did not want it, Sergeant Warner used the car,

and at such times it was in his possession; but at the time of the trade-in of the car which constitutes the alleged embezzlement, accused, pursuant to the above arrangement, had driven the car from camp to Bemidji, Minnesota. Neither Sergeant Warner nor his wife was present, and the car was in possession of accused with their permission (Warner, R.323-324; Mrs. Warner, R.334-344; Exs.44, 45; Cutrer, R.345-348; accused, R.597-604; Lang, 604-609). That Sergeant Warner had at previous times been in possession of it is immaterial.

The Board has not overlooked CM 200851, Taylor, and the earlier like cases which it follows. In the Taylor case, a corporal whose duty it was to take charge of property of prisoners pawned several suits of civilian clothes belonging to a prisoner. The specifications were in the following form, that accused did,

> "wrongfully and fraudulently convert to his own use and benefit, by pawning, one brown suit of clothes, value about Fifty dollars ($50.00), the property of General Prisoner Paul A. Rody, the same being entrusted to him by General Prisoner Rody for storage only; the said Cpl. Walter C. Taylor being acting supply sergeant of the Post Prison supply room at Fort Francis E. Warren, Wyoming, at the time."

The court excepted the words "entrusted to him by General Prisoner Rody" and substituted "entrusted to him by the Post Prison Officer." The Board of Review said,

> "The substitution by the court in its findings of the 'Post Prison Officer' for 'General Prisoner Rody' as the person who entrusted the alleged embezzled articles to accused, did not change the nature or identity of the offenses charged. It is immaterial who actually delivered the articles to accused, as the necessary fiduciary relationship between accused and the owner of the property was alleged and proven. Secs. 1563 (CM 133226) and 1565 (CM 130909), Dig. Ops. JAG, 1912-1930; Sec. 1292, Wharton's Criminal Law, 12th Ed., Vol. 2."

In the Taylor case, as in the earlier cases cited in the quotation just made, no substitution was made as to the name of the owner, but only as to the name of the person delivering the property to accused. Here the variance is as to the owner.

The variance between an allegation that property belonged to Mr. and Mrs. A in common and proof that it belonged to Mrs. A alone is, as a matter of law, a variance as great as that between an allegation that it belonged to A and proof that it belonged to B.

For the reasons indicated, the Board of Review holds the record to be legally insufficient to support the finding of guilty of Specification 1, Charge III. As the only other specification under that charge was disapproved by the reviewing authority, it follows that the record is legally insufficient to support the finding of guilty of Charge III.

11. Charge IV: Violation of the 61st Article of War.

Specification: In that Captain James W. Darr, 3rd Infantry, did, without proper leave, absent himself from his camp and duties at Bena, Minnesota, from about August 2, 1933, to about August 8, 1933.

Finding: Guilty.

Major Brooke, his commanding officer, on July 31, 1933, granted accused permission to return from the CCC camp at Bena to Fort Snelling. Accused was to be back at camp by 6 A.M., August 3, 1933. When he did not appear, he was dropped as absent without leave. He returned to military control at Fort Snelling, August 8, 1933, when he was admitted to the station hospital there as a patient (Morning Report, Ex.32; Brooke, R.253-254; Speece, R.254-5; Caldwell, R.257).

Accused testified that he obtained the pass above mentioned in order to return to Fort Snelling to obtain money to meet his pecuniary obligations falling due August 1 but was unsuccessful. He telegraphed Major Brooke asking an extension of his leave. After consultation with the sub-district commander, Major Brooke by his authority telegraphed accused denying the extension, but his message was not received at Fort Snelling until accused had left for Bena, apparently by automobile and alone, after providing himself with an ample supply of liquor. He has only a hazy recollection of what happened until 3 A.M., August 8, when he awoke in the back seat of the car in the northern part of Minnesota. He then returned to Fort Snelling (Cutrer, R.255; accused, R.615-616).

The evidence shows that accused's absence without leave began August 3, and not August 2 as alleged, and continued until August 8. In the opinion of the Board of Review, the record supports only so much of the finding of guilty of the specification as involves absence without leave from his camp and duties at Bena, Minnesota, from August 3 to 8, 1933. The record supports the finding of guilty of the charge.

12. At the trial evidence was received from two medical officers with respect to the physical and mental condition of accused. One of these was First Lieutenant Spencer Johnson, Medical Reserve Corps (Def. Ex.22), who was the medical offiter on duty at the CCC camp at Bena. He stated that during July, 1933, and particularly the latter half of that month, accused was unable to sleep and could eat but little, that he lost weight, that he was extremely nervous and agitated, and in the opinion of the witness, on the verge of a nervous breakdown.

First Lieutenant John N. Caldwell, Jr., Medical Corps, Neuropsychiatrist at the station hospital, Fort Snelling, in whose professional care accused was placed upon his return from absence without leave, testified that when admitted to the hospital accused was restless, irritable, jumpy, fatigued, but that he made a good recovery. He further stated that accused can distinguish right from wrong, but that he is of a constitutional psychopathic state (R.258), and

> "* * * a psychopathic individual is fully cognisant of everything that goes on and around about them, and of the result of any actions that they may take, but nevertheless, they are unable to evaluate the consequences of those actions."

After accused's trial, at the request of military authorities at Fort Snelling a board of two neuropsychiatrists of the Veterans' Administration made an examination and report, with the following result,

> "II. MEDICAL OPINION: It is the opinion of this board that the history and immediate psychiatric findings indicate that this man has had psychotic episodes as superstructure erected on the basis of the constitutional personality defects and superimposed conditions noted as diagnoses #1 and #2 and #3, during which psychotic episodes he has not been wholly responsible for his conduct."

The board recommended further care and treatment at a hospital for mental disorders with a view to proof or disproof of its findings. It is to be noted that the above board saw accused only on one occasion.

Accused was sent to Walter Reed General Hospital where he arrived March 5, 1934, and remained until after June 11, 1934, on which date the disposition board reported as follows:

> "This officer was admitted here primarily for mental observation following conduct at Fort Snelling, Minnesota, which excited the suspicion that he might be mentally unbalanced. He has been carefully studied and observed here from the point of view of mental disease. * * * A study of this officer's life history as given by himself and of all the available documentary evidence, as well as his conduct while in hospital, does not reveal the existence of a psychosis at any time. This study, however, does indicate the presence of a constitutional psychopathic state, inadequate personality, and chronic alcoholism with dypsomanic episodes, the latter clearly brought out in the past history of the patient. These conditions are due to basic inherent defects in character and are not due to mental or physical disease processes."

The above findings were approved by the Commanding Officer, Walter Reed General Hospital, and the Surgeon General. The latter said,

> "* * * This officer is regarded as being responsible for his acts and statements and as having the normal ability to distinguish between right and wrong and the normal ability to control himself from wrongful actions."

Mrs. Darr, accused's wife, has addressed a letter to The Judge Advocate General in which she refers to the testimony of Lieutenant Caldwell and the report of the Veterans' Administration board above quoted, and states that certain other medical officers on duty at the Station Hospital, Fort Snelling, and at Walter Reed General Hospital have unofficially expressed the opinion that accused is insane and not responsible for his actions. She maintains that such officers plus Lieutenant Caldwell and the Veterans' Administration psychiatrists constitute a majority of the physicians who have examined accused; and that, in the opinion of that majority, he is insane. She therefore contends that he ought not be held responsible for his acts but ought to be retired for disability.

Two of the medical officers to whom Mrs. Darr attributes the opinion that her husband is insane are not in fact of that view. Lieutenant Caldwell, as has been said, expressly stated that accused knew the difference between right and wrong, though he was of a

constitutional psychopathic state (R.258,261). Major Harry E. Hearn, Medical Corps, is a medical officer on duty at Walter Reed Hospital to whom Mrs. Darr attributes the opinion that her husband is insane. Upon informal inquiry, Major Hearn stated to a member of this Board that he had at first been inclined to that opinion, but that upon further observation of accused he became convinced that he was sane and had never been otherwise, and that he (Hearn) had seen the report of the disposition board and fully concurred in it.

This leaves only four of the six officers who Mrs. Darr says consider her husband insane, a minority and not a majority of those who have examined him. But it is elementary that witnesses are weighed and not counted, and this is as true of medical witnesses as of any other. Two of the remaining four of those relied on by Mrs. Darr, Major William G. McKay, Medical Corps, and First Lieutenant Russell O. Sather, Medical Reserve Corps, were on duty at Fort Snelling, and neither is a psychiatrist. The other two are the two psychiatrists of the Veterans' Administration. They saw accused on a single occasion only, whereas he was under observation at Walter Reed General Hospital for over three months.

On the other hand, the reputation of Lieutenant Colonel Sidney L. Chappell, Medical Corps, head of the psychiatric service at Walter Reed Hospital when accused was there, is that he is one of the best alienists in the Army; and it may be presumed that Majors Hearn, Pratt, and Peak, who also examined accused there, are thoroughly competent alienists, or they would not be detailed to such duty at the most important medical institution of the Army. All of these officers had accused under their observation for over three months and all concur in considering him sane. The officers holding the important positions of members of the disposition board at Walter Reed General Hospital are presumed to be among the ablest and best qualified medical officers in the Army. Their conclusions have been approved by the highest and most responsible medical officers in the Army, namely, the Commanding Officer of that hospital and the Surgeon General. These officers all considered accused sane.

The fact that accused's case was considered by the disposition board at Walter Reed General Hospital and not by a board convened for the sole purpose of determining his mental responsibility is immaterial, as is the further fact that its findings do not expressly state in so many words that he understood the difference between right and wrong. The present Manual for Courts-Martial does not specify either the nature and composition of the medical authority which shall investigate the sanity of an accused or the form of its findings. The disposition board said in its report that "this officer was admitted here primarily for mental observation" and "a study of this officer's life history as given by himself

and of all the available documentary evidence, as well as his conduct while in hospital, does not reveal the existence of a psychosis at any time." These statements show that the board's attention was primarily directed to the accused's mental condition and that it decided that he was and always had been sane.

The Board of Review is convinced that the conclusions of all the medical officers at Walter Reed General Hospital who examined accused or considered his case and of the Surgeon General, that accused is and was responsible for his acts, should be accepted.

13. Certain irregularities with respect to depositions are noted.

a. The 25th Article of War authorizes depositions only if the witness is or is about to go beyond the state or more than 100 miles from the meeting place of the court.

Without objection a number of depositions were introduced of witnesses resident in St. Paul or Minneapolis, but a few miles from Fort Snelling, where the court sat. In accordance with paragraph 119, Manual for Courts-Martial (near top of p. 123), the objection to the admissibility of these depositions must be regarded as waived, but the Board of Review considers it preferable that a witness living so near the scene of trial should appear in person.

b. A number of blanks were sent out for the depositions of various business houses and returned executed by that house "by" some official or employee. See for example Exhibit 15, the deposition of "Farwell, Ozmun, Kirk, & Company, by Joseph T. Gillen, District Credit Manager."

Only a natural person can take an oath as a witness or make a deposition. The interrogatories should have been sent to Mr. Gillen by name, or to the proper officer of Farwell, Ozmun, Kirk, & Company, and executed by Mr. Gillen or that officer individually, stating his position or duties in answer to proper interrogatories. MCM, par. 98 a. This irregularity does not appear to have injured the substantial rights of accused.

14. At the time of trial accused was 42 years and six months of age. The Army Register shows that accused graduated from the Infantry School, Company Officers' Course, 1929, and gives his service as follows:

"2 lt.Inf. Sec. O.R.C. 27 Nov.17; accepted 27 Nov.17; active duty 27 Nov.17; 1 lt. of Inf.U.S.A. 23 Aug.18; accepted 14 Sept. 18; vacated 18 Sept.20. Pvt.corp. and sgt. Tr. L 14 Cav.and Co.G 9 Inf.5 June 12 to 4 June 15; pvt.and corp.23 Rctg. Co. G.S.I. 21 Mar.16 to 26 Nov.17; 1 lt. of Inf.1 July 20; accepted 18 Sept.20; capt.18 May 29."

15. 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 insufficient to support the findings of guilty of Charge III and Specification 1 thereunder; legally sufficient to support only so much of the finding of guilty of the Specification, Charge IV, as involves absence by accused without leave from his camp and duties at Bena, Minnesota, from August 3 to 8, 1933; and legally sufficient to support all other approved findings of guilty and the sentence. The Board considers that the findings should stand unchanged, except as above stated, and that the record warrants confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War.

H. A. Trumbull, Judge Advocate.

[illegible], Judge Advocate.

_____, 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 of Captain James W. Darr (O-10116), 3rd Infantry (CM 201485), together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review except so much thereof as reaches the conclusions that the record is insufficient to support the findings of guilty of Charge III and Specification 1 thereunder and is sufficient to support only a part of the finding of guilty of the Specification of Charge IV.

3. By Charge III and Specification 1 thereunder it was alleged that the accused, in violation of the 96th Article of War, wrongfully misappropriated an automobile, the property of Sergeant and Mrs. William Warner.

That the accused did wrongfully misappropriate the automobile which it was intended to describe in the specification is clearly established by the evidence. This the Board of Review does not question. The evidence however indicates that title to the automobile was in Mrs. Warner. Because of this the Board of Review is of opinion that there is a fatal variance between pleading and proof and that, consequently, the record does not support the findings of guilty of this charge and specification and they should be disapproved. With this view I am unable to concur.

It is a firmly established principle, of course, that if one is charged with stealing or embezzling the property of A and the proof is that the property belonged to B, with no evidence that A had any interest in it, the variance is fatal and a conviction cannot stand. The same principle would unquestionably apply to a case of wrongful misappropriation. In the instant case, however, the evidence shows that, though title to the automobile was in Mrs. Warner, she had authorized her husband, Sergeant Warner, to use the car and to permit the accused to use it when not in use by the Sergeant. Thus it appears that while Mrs. Warner was the real owner of the car, her husband had a special property interest therein. He had a right to the possession of the automobile and authority from the real owner to control the use thereof.

It is a well established legal principle that, in charging larceny of an article which belongs to one person but in which another person has a special property interest, such as possession,

custody or control, ownership may be alleged in either the general owner or the person holding the special property interest. In McClain on Criminal Law, Vol. 1, Section 546, p. 539, in the discussion of larceny, the following appears:

> "The property of the wife in the husband's possession or control or management may be charged as his property. The husband has a qualified ownership of the property of the wife which is in the house or used in the family such as to support a charge of the stealing of it as his property."

In my opinion this principle is as applicable to a case of wrongful misappropriation as it is to one of larceny and, consequently, that, had ownership been charged in Sergeant Warner alone there would have been no question of variance between pleading and proof or as to the sufficiency of the record to sustain the findings of guilty of the charge and specification now under consideration.

It seems almost self-evident that if ownership might properly be charged in either the general or the qualified owner it might with equal propriety be charged in both. The purpose of alleging ownership is to describe the property sufficiently to identify it so that the accused may be so informed of the precise offense charged against him as to be able intelligently to admit or deny the offense or plead specially thereto and prepare his defense and also to be able to plead his conviction or acquittal to any subsequent prosecution for the same act. It can scarcely be denied that where, as in this case, there are two owners, one the general owner and the other a qualified owner, the naming of both as owners more completely describe the property than would the naming of only one, better informs the accused of the property referred to and equally enables him to plead his conviction or acquittal to any subsequent prosecution for the same act.

Moreover, the 37th Article of War provides that

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case * * * for any error as to any matter of pleading * * * unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall

> appear that the error complained of has injuriously affected the substantial rights of an accused; Provided, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: * * *."

Here, even assuming that ownership was erroneously alleged, still the error is as to a matter of pleading. An examination of the entire proceedings not only fails to show that any substantial right of the accused was injuriously affected but clearly indicates the contrary. There is no question that the act alleged constitutes an offense denounced and made punishable by the Articles of War. It follows that even if it was technically an error to allege ownership in both Sergeant Warner and his wife, nevertheless the 37th Article of War would apply.

For the reasons indicated I am of the opinion that the record is amply sufficient to support the findings of guilty of Charge III and Specification 1 thereunder.

4. In the Specification of Charge IV it is alleged that the accused absented himself from his camp and duties "from about August 2, 1933 to about August 8, 1933." He was found guilty of this specification. The Board of Review is of opinion that the record of trial is legally sufficient to support only so much of this finding of guilty as involves absence by accused without leave from his camp and duties from August 3 to 8, 1933. The basis for this opinion of the Board of Review is that the evidence shows that the accused was not actually absent without leave until the morning of August 3rd. It is to be noted that it was alleged and the court found, not that the accused was absent without leave from August 2 to August 8, but that he was absent without leave from about August 2 to about August 8. In my opinion evidence that he was absent without leave from the morning of August 3 clearly sustains the finding that he was absent without leave from about August 2. I therefore am of opinion that the record of trial supports the finding of guilty of this specification.

5. For the reasons herein above indicated I recommend that the sentence be confirmed.

6. Inclosed herewith for use in case you approve my views and recommendation are a draft of a letter to the President prepared for your signature and a form of action by him as confirming authority

designed to carry my recommendation into effect. Also inclosed is an alternate last page of the letter to the President to be substituted in case you approve the views of the Board of Review together with an alternate form of action designed to carry those views into effect.

7. Also inclosed are the report of the Disposition Board at Walter Reed General Hospital concerning accused's mental condition; a letter from Mrs. Darr to The Judge Advocate General dated July 12, 1934; and my memorandum stating the service of accused, summarizing certain requests for clemency, and explaining the length of time that this case has been under consideration. I recommend that no clemency be extended to the accused, because I consider the sentence imposed light for the serious offenses of which he has been convicted. With deduction for good conduct, less than a month of the period of confinement now remains to be served.

A. W. Brown,
Major General,
The Judge Advocate General.

7 Incls.
Incl. 1-Record of trial.
Incl. 2-Draft of letter for sig. of Secy. War (alternate last page).
Incl. 3-Form of executive action (Bd. of Rev.).
Incl. 4-Form of executive action (J.A.G.).
Incl. 5-Report of Disposition Board, W.R.G. Hospital.
Incl. 6-Letter from Mrs. Darr, July 12, 1934, to J.A.G.
Incl. 7-Memo from J.A.G. to Secy. War.

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

Board of Review
CM 201493

FEB 9 1934

UNITED STATES	)	EIGHTH CORPS AREA
v.	)	Trial by G.C.M., convened at The Field Artillery School, Fort Sill, Oklahoma, January 12, 1934. Confinement for six (6) months. Fort Sill, Oklahoma.
General Prisoner LOUIS L. SMITH.	)	

OPINION of the BOARD OF REVIEW
TURNBULL, BITZING 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 the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 69th Article of War.

Specification: In that General Prisoner Louis L. Smith, formerly Private, Battery A, 16th Field Artillery, having been duly placed in confinement in the Post Guardhouse, Fort Leavenworth, Kansas, on or about August 22, 1930, did, at Fort Leavenworth, Kansas, on or about July 26, 1931, escape from said confinement before he was set at liberty by proper authority.

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

He was sentenced to confinement at hard labor for one year. The reviewing authority approved only so much of the sentence as provides for confinement at hard labor for six months and designated Fort Sill, Oklahoma, as the place of confinement. The sentence was published in General Court-Martial Orders No. 10, Headquarters Eighth Corps Area, January 27, 1934.

3. The evidence shows that on July 26, 1931, accused, a general prisoner confined in the post guardhouse, Fort Leavenworth, Kansas, was detailed to work within the limits of the Fort Leavenworth reservation without an armed guard and that at noon on that day he checked out of the guardhouse for that purpose, but failed to return thereto at 4:30 p.m., the required time. He remained absent from military control until November 26, 1933, when he was turned over to the military authorities by the Warden of the Oklahoma State Penitentiary, McAlester, Oklahoma, where he had been in confinement since December 23, 1931 (Exs. III, IV, VI; R. 11).

4. The accused was charged with escape from confinement and "confinement imports some physical restraint". Par. 139 a, Manual for Courts-Martial. There is no evidence in the record of trial to show that accused broke away from any physical restraint. On the contrary, the record shows that he was detailed to work outside of the guardhouse without an armed guard and left his post without authority. The proof fails to establish an essential element of the offense charged, that is, breaking away from some physical restraint. CM 191766, Gilchrest; 191693, Boudreau; 191403, Evans.

Though the evidence shows that the accused committed some offense analogous to breach of parole in violation of the 96th Article of War (par. 139 a, M.C.M., p. 154), he cannot be punished therefor in this instance inasmuch as he was not charged with such an offense. Breach of parole is not a lesser included offense where an accused is charged with escape from confinement. CM 189830, Walcher; 191693, Boudreau; 191766, Gilchrest.

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

W. A. Trumbull, Judge Advocate.
H. R. Dilling, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201537

MAY 11 1934

UNITED STATES	)	SECOND CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Post of San Juan, Puerto Rico,
Captain CHESTER R. FOUTS	)	December 4,5,6,7,8,11 and 12,
(0-8222), Finance Depart-	)	1933. Dismissal.
ment.	)	

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 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. (Finding of not guilty)

Specification: (Embezzlement of the sum of $7913, property of the U.S. - Finding of not guilty.)

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

Specification: In that Captain Chester R. Fouts, Finance Department, being on duty as Special Disbursing Officer of the Puerto Rican Hurricane Relief Commission, an agency of the United States, and, having received in his capacity as said Disbursing Officer, during the period from February 27, 1931, to December 19, 1932, both dates inclusive, the sum of $7,913.00, public money belonging to the United States which he was not authorized to retain as salary, pay or emolument, did, in violation of Section 90, of the Federal Penal Code of 1910, at San Juan, Puerto Rico, during the said

period from February 27, 1931, to December 19, 1932, both dates inclusive, wilfully, wrongfully and unlawfully fail to render his accounts for the same as provided by law.

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

Specification: In that Captain Chester R. Fouts, Finance Department, being on duty as Special Disbursing Officer of the Puerto Rican Hurricane Relief Commission, an agency of the United States, did, at San Juan, Puerto Rico, on or about December 19, 1932, with intent to deceive the Comptroller General of the United States, the Chief of Finance, United States Army, and the Secretary of the Puerto Rican Hurricane Relief Commission, sign and submit to the said Comptroller General of the United States, to the said Chief of Finance and to the said Secretary of the Puerto Rican Hurricane Relief Commission, on his account current as such Special Disbursing Officer for the period from December 1, 1932, to December 19, 1932, both dates inclusive, a certificate in words and figures as follows, to wit:

"I certify that the above is a full, true, and correct account of all moneys coming into my possession on account of the United States during the period stated, under my official bond above mentioned, except amounts reported in the following accounts rendered under the said bond: None. The balance of $ Nothing is held as stated on the reverse hereof.
(Place) San Juan, P.R. (Date) December 19,1932.
(Signature) C. R. FOUTS (Title)_____
C. R. Fouts, Capt., F.D., U.S.A.,
Sp. Disbg. Agent, P. R. H. R. C."

which said certificate was known by the said Captain Fouts to be false and untrue in that he had knowingly and intentionally failed to include in his said account current two collections received by him in his capacity as such Special Disbursing Officer during the said period, one for $250.00 between the dates of December 14, 1932, and December 17, 1932, and the other for $42.00 between the dates of December 15, 1932, and December 17, 1932.

He pleaded not guilty to all charges and specifications, and was found guilty of the Specification of Charge II, and of Charge II, and of the Specification of Charge III, and of Charge III, and not guilty of the Specification of Charge I, and of Charge I. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution under the two specifications of which the accused was found guilty may be summarized substantially as follows:

Specification, Charge II.

The accused was appointed "Disbursing Officer", Puerto Rican Hurricane Relief Commission by order of the Commission, dated March 7, 1929, which order was later amended on June 5, 1929, to name him "Special Disbursing Officer for the Commission, to serve without bond" (Ex. 6). He was also detailed as disbursing officer for the Commission by War Department orders of March 8, 1929 (Ex. 7). The Puerto Rican Hurricane Relief Commission was created by Public Resolution No. 78, 70th Congress, approved December 21, 1928, to consist of the Secretary of the Treasury, the Secretary of War, and the Secretary of Agriculture, of whom the Secretary of War should be the chairman. It was the duty of the Commission to assist in the Island of Puerto Rico in the rehabilitation of agriculture destroyed or damaged by a hurricane of unusual violence on September 13 and 14, 1928. The Commission was authorized to utilize the personnel of the War Department to the extent deemed advisable by it, and money was authorized to be appropriated for its administrative expenses. To carry out the provisions of the resolution, the Commission was given power to make loans to any individual coffee planter, coconut planter, fruit grower, or other agriculturist in the Island of Puerto Rico in such amounts and upon such terms and conditions as the Commission should by regulation prescribe. Provision was made as to the period, amount and interest of such loans, and that all such loans should be made by the Commission itself or through such agencies as it should designate. The sum of $6,000,000 was authorized to be appropriated, of which $3,000,000 should be made immediately available, $2,000,000 available on January 1, 1930, and $1,000,000 available on January 1, 1931 (Ex. 1). By the Second Deficiency Act of

1929, approved March 4, 1929 (45 Stat. 1623), Congress authorized the Commission to delegate to a Board of Alternates, designated by the Commission for that purpose, any of the powers and duties vested in the Commission by Public Resolution No. 74, 70th Congress, and provided that the acts of such Board of Alternates should have the same force and effect as though performed by the Commission. Congress further provided that the Commission or the Board of Alternates might authorize the disbursement of funds, approved for disbursement by either of them, directly through a disbursing agent appointed or designated by the Commission for that purpose (Ex. 2). Pursuant to the authority so granted, the Commission on March 14, 1929, designated a Board of Alternates (Ex. 5), and, as noted above, named the accused Special Disbursing Officer. The accused acted in that capacity from March 8, 1929, the date of his detail, until December 19, 1932, when his duties were taken over by transfer by Captain J. L. Tunstall, Finance Department (R. 192).

While the Commission functioned in Washington, D. C., the Board of Alternates was its field or operating agency and functioned in San Juan, Puerto Rico. Applications for loans were received by the Board from farmers or lessees of farms in Puerto Rico, and, if they met the requirements specified by the Commission in its regulations, were approved by the chairman with the concurrence of the Board of Alternates. The money loaned was owned by the United States and was disbursed by the accused, the special disbursing officer appointed by the Commission (R. 17-18). He placed the money to the borrower's credit at some designated bank and the bank paid the borrower each month the amount fixed by the Board of Alternates (R. 24). Over three thousand such accounts were opened (R. 25). Repayments of loans were made by the borrowers directly to the Commission at the office of the Board of Alternates in various forms, such as currency, money orders, and personal or certified checks. Certain circumstances called for refunds from the bank to the Commission, such as the death of a borrower, the sale of the farm by him, or his failure to comply with the loan regulations. When it was determined by the chairman of the Board, with the approval of the Board, that a refund should be made, the chief clerk of the Board was directed to send a form letter of stop-payment (Ex. 11) to the bank in which the particular borrower's money was placed to his credit. Upon the receipt of this letter the bank remitted by letter of transmittal acknowledging receipt of the stop-payment letter, a manager's check for the amount of the unused balance left to the credit

of the borrower at the bank, the individual loan card pertaining to the borrower, and the letter of credit pertaining to the loan (R. 18-19,21). The chairman of the Board of Alternates, with the approval of the Board, had administrative control of its financial transactions. Payments were effected by the disbursing officer, who was accused, during the period from February, 1931, to December, 1932. He was required to account to the General Accounting Office, but, by special arrangement, through the secretary of the Commission in Washington and the Chief of Finance. Accused was also charged with looking after the individual loan cards and the loan book. His duties in general were to receive, disburse and account for all moneys placed to his credit, and these duties he performed in the office of the Board of Alternates in San Juan. The bank account that he was authorized to maintain as a special disbursing officer was his account with the Treasurer of the United States (R. 19).

a. Colonel F. J. Behr, who had been chairman of the Board of Alternates since May 15, 1930 (R. 16), identified a certain document, received in evidence as Exhibit 9, as one which he had prepared after consulting over three thousand records made in the regular course of business by various employees of the Board of Alternates at the time the transactions took place, of which records he was custodian as chairman of the Board of Alternates. The document was a list of certain refunds made by the banks concerned, and showed the name of the borrower, his contract number, the bank designated as depository for the loan, the date refund was requested, and the undrawn balance at that time.

Witness testified accused was disbursing officer both at the time these loans were made and at the time the refunds were ordered. The list contained eighteen refunds from the National City Bank of New York, San Juan Branch, aggregating $2,393.00, five refunds from the Banco Comercial de Puerto Rico aggregating $1,203.00 (R. 20), thirteen refunds from the Banco Territorial y Agricola aggregating $1,695.00, two refunds from the Royal Bank of Canada aggregating $233.00, twelve refunds from the Credito y Ahorro Ponceno aggregating $983.00, and four refunds from the Banco de Ponce aggregating $1,676.00, making a grand total of $8,183.00 (R. 21).

Upon cross-examination by the defense, Colonel Behr testified that $6,000,000.00 was made available to the Commission. In addition to this amount $2,000,000.00 was also made available for the rebuilding

and repair of school houses (R. 23), $100,000.00 for seeds and seedlings, and $2,000,000.00 for insular roads, a total of $10,100,000.00, of which about $9,000,000.00 was disbursed by accused (R. 24,27). Accused was authorized to have a special account in the National City Bank of New York, San Juan Branch, for approximately one and one-half million dollars which was a part of the loan money. This amount had been used by the bank and it was directed that instead of returning it to the United States Treasury it should be left in the bank for the accused to draw against instead of drawing on the Treasury. He was authorized to have no other account (R. 26-30).

b. Captain John L. Tunstall, Finance Department, Post of San Juan, Puerto Rico, was introduced by the prosecution as an expert in finance matters and testified as to the duties of a disbursing officer. He had had approximately twenty years in finance and accounting of property and had been in the finance department of the United States Army since September, 1920, during which time he had been a disbursing officer for over eight years. A disbursing officer is required to submit monthly an account of all his activities on a standard form known as his "account current", which is submitted to the Comptroller General through the chief of the independent bureau or establishment under which the officer is functioning. The "account current" carries with it various supporting papers including a "schedule of collections" and a "schedule of disbursements" (R. 31-32). The "schedule of collections" shows all moneys received during the accounting period, and the total of the "schedule of collections" is required by regulation to be carried to the "schedule of funds received", and the total of the "schedule of funds received" is carried to the current account as a debit entry. The total of the "schedule of disbursements" is carried to the face of the "account current". The total of column one shows actual cash and is carried to the rear of the "account current" known as "cash summary". With respect to his disbursement of official receipts, the disbursing officer can either use the cash for the purpose of making cash disbursements or he may deposit all his receipts. In any case, he picks up all his receipts on the "schedule of funds received", or the "schedule of collections", and picks up the sum of these two on the "account current". If he uses any part of his official receipts for cash disbursement purposes that is shown by the cash summation on the back of the "account current". If he uses any of his receipts for cash voucher payments, then the cash analysis will show it by comparing the debit and credit sides. He charges himself on the debit side with

the full amount of his receipts and credits himself with the amount of receipts he uses for the purpose of paying cash vouchers. The difference between them is the total of admitted receipts he shows as deposits. A disbursing officer is required to effect withdrawals from the Treasury account and to make deposits to the Treasury of the United States through a designated government depository (R. 33). Deposits are made to the official credit of a disbursing officer by his preparation of three forms which he presents with the deposit at the designated government depository. The original form is forwarded to the Treasury with the transmittal, the duplicate is signed by the bank and returned to the officer for his files as evidence of the deposit, and the triplicate is retained by the depository. Upon the form appears the name and symbol number of the depositing officer, the amount of the deposit and the account to be affected by it. A disbursing officer may maintain no official account other than that with the Treasurer of the United States except by special permission of the Secretary of the Treasury. An act of June 10, 1921, requires the General Accounting Office, of which the Comptroller General is the head, to settle all disbursement accounts after such accounts have received an administrative examination by the chief of the department concerned (R. 34).

c. Eugenio D. Delgado, assistant to the receiver of the Banco Territorial y Agricola, San Juan, Puerto Rico, testified that during the period of August 25, 1931, to December, 1932, he was assistant managing director of the Banco Territorial y Agricola (R. 35). He identified each of thirteen letters of transmittal signed by himself and stated that each letter referred to the loan named therein, was written in compliance with a letter of instructions received from the Board of Alternates, and transmitted to the Board a manager's check in favor of accused in the sum named as a reimbursement of the balance due to the individual named. The witness also identified each of the thirteen manager's checks of his own bank drawn to the order of accused at the request of the Board of Alternates, each of which was sent to the office of the Board of Alternates. All these checks were negotiated at the National City Bank, San Juan Branch, as indicated by their indorsements, and were finally paid and canceled by the Banco Territorial y Agricola upon which they were drawn. When each of these checks was sent to the Board of Alternates it was accompanied by a letter of transmittal from the Banco Territorial and the original and duplicate of the letters of credit in favor of the payee (R. 36-46). The letters

of transmittal and the checks were received in evidence. The facts shown by these several letters of transmittal and checks identified by the witness and their respective numbers when received in evidence as exhibits may be summarized as follows:

1. Borrower, Severo Rosario, contract number 3016, letter of transmittal dated August 26, 1931 (Ex. 29); check number 1854 for $419.00, dated August 26, 1931 (Ex. 18).

2. Borrower, Rafael Padro Pares, contract number 1686, letter of transmittal dated October 23, 1931 (Ex. 30); check number 2270 for $84.00, dated October 23, 1931 (Ex. 19).

3. Borrower, Jenaro Acevedo, contract number 1764, letter of transmittal dated October 26, 1931 (Ex. 31); check number 2281 for $25.00, dated October 26, 1931 (Ex. 20).

4. Borrower, Andres Esteves Beauchamp, contract number 2148, letter of transmittal dated October 28, 1931 (Ex. 28); check number 2296 for $25.00, dated October 28, 1931 (Ex. 21).

5. Borrower, Andres Esteves Beauchamp, contract number 295, letter of transmittal dated October 28, 1931 (Ex. 32); check number 2297 for $8.00, dated October 28, 1931 (Ex. 22).

6. Borrower, Carmen Blanco Carvajal, contract number 2030, letter of transmittal dated March 2, 1932 (Ex. 33); check no. 3154 for $105.00, dated March 2, 1932 (Ex. 23).

7. Borrower, Ramona Velazquez Vda. de Figueroa, contract number 1532, letter of transmittal dated May 26, 1932 (Ex. 15); check number 3754 for $68.00, dated May 26, 1932 (Ex. 40).

8. Borrower, Ramon Font Espinet, contract number 1655, letter of transmittal dated July 5, 1932 (Ex. 34); check number 4030 for $77.00, dated July 5, 1932 (Ex. 24).

9. Borrower, Manuel Rivero Ortiz, contract number 2918, letter of transmittal dated July 7, 1932 (Ex. 35); check number 4060 for $186.00, dated July 7, 1932 (Ex. 25).

10. Borrower, Carlos Villafane Leotau, contract number 2920, letter of transmittal dated July 19, 1932 (Ex. 16); check number 4139 for $96.00, dated July 19, 1932 (Ex. 39).

11. Borrower, Jose Rosario Quinones, contract number 3057, letter of transmittal dated August 3, 1932 (Ex. 36); check number 4255 for $80.00, dated August 3, 1932 (Ex. 26).

12. Borrower, Fermin de Leon Reyes, contract number 1826, letter of transmittal dated August 5, 1932 (Ex. 17); check number 4272 for $322.00, dated August 5, 1932 (Ex. 38).

13. Borrower, Constantino Hernida Jorge, contract number 562, letter of transmittal dated August 16, 1932 (Ex. 37); check number 4353 for $200.00, dated August 16, 1932 (Ex. 27).

Total of checks noted under items 1 to 13, inclusive, above, $1,695.00.

Upon cross-examination the witness stated that his bank was not a United States government depository. According to the instructions from the Board of Alternates the funds were received under a trust contract with the Board and an individual account opened in the name of the Board stating the name of the beneficiary under the trust. Approximately three hundred such accounts were opened by the Commission. In every case the bank was furnished with letters of credit showing the name of the payee and the place where payment was to be made, whether in San Juan or elsewhere in the island, and through banks or correspondents. The letter of credit was a printed form carrying the instructions, payments to be made every fifteen or thirty days in a sum stated. A lump sum was received every six months from the Board of Alternates with a list enumerating the letters of credit in favor of the different payees, and the bank was supposed to make the deposits in accordance with these instructions (R. 46-47).

d. Diego Capo, assistant manager of the Banco Credito y Ahorro Ponceno, Ponce, Puerto Rico, testified that as assistant manager and auditor of the bank his duties were to inspect the books and records and see that the accounts were in order as the law required. He had access to all the records of the bank for inspection (R. 48). During the period of July 6, 1931, to December 19, 1932, Angel Saenz, as assistant manager of the bank, and witness in his official capacity,

were authorized to sign manager's checks. Mr. Jose D. Campillo was authorized to sign as counter-signing cashier of the bank, with whose signature witness was familiar (R. 50). Witness identified each of twelve certificates of deposit of his bank, signed by himself or by other officers of his bank, whose signatures he recognized, and payable to the order of accused. These certificates or checks were drawn under a loan contract with the borrower by which the Commission reserved the right under certain conditions to cancel the payment of the instalments, and in the case of such cancellation any portion of the deposit remaining in the bank to the credit of the borrower would be repaid to the United States by the bank on demand of the Commission or its representative. The accused was named as payee on each of the twelve checks in compliance with the instructions of the Board of Alternates and each check was sent in a letter to the Board. The Board of Alternates, by a check of the Treasurer of the United States, had made the deposit of the funds which created the obligation of the bank to honor the request of the Board for a refund in the case of each of the twelve checks, and the bank intended by these twelve checks to refund the money to the Board (R. 50-56). Each of the twelve checks had been canceled and paid by the bank. Witness consulted his records and identified each of the checks with the name of the borrower to whom the original loan was made and stated the number of his contract. He also stated that a letter of transmittal accompanied each of the checks to the Board of Alternates, and identified each of the several letters of transmittal stating its date and the number of the check to which it pertained. The certificates of deposit and the letters of transmittal were received in evidence (R. 57-63). The facts shown by these several certificates of deposit and letters of transmittal identified by the witness, and their respective numbers when received in evidence as exhibits, may be summarized as follows:

1. Borrower, Candelaria Rodriguez, contract number 2403, letter of transmittal dated July 6, 1931 (Ex. 54); certificate of deposit number 14129 for $238.00, dated July 6, 1931 (Ex. 42).

2. Borrower, Santos Cabra, contract number 128, letter of transmittal dated August 21, 1931 (Ex. 55); certificate of deposit number 14355 for $19.00, dated August 21, 1931 (Ex. 43).

3. Borrower, Emilio Sala Cruells, contract number 2076, letter of transmittal dated October 1, 1931 (Ex. 56); certificate of deposit

number 14561 for $174.00, dated October 1, 1931 (Ex. 44).

4. Borrower, Juan J. Cartagena Texidor, contract number 1013, letter of transmittal dated October 1, 1931 (Ex. 57); certificate of deposit number 14562 for $127.00, dated October 1, 1931 (Ex. 45).

5. Borrower, Juan Ramos Soto, contract number 1427, letter of transmittal dated October 16, 1931 (Ex. 58); certificate of deposit number 14653 for $36.00, dated October 16, 1931 (Ex. 46).

6. Borrower, Juan D. Gomez, contract number 102, letter of transmittal dated November 6, 1931 (Ex. 59); certificate of deposit number 14820 for $25.00, dated November 6, 1931 (Ex. 47).

7. Borrower, Jose A. Caparros Soler, contract number 694, letter of transmittal dated November 30, 1931 (Ex. 60); certificate of deposit number 14964 for $4.00, dated November 30, 1931 (Ex. 48).

8. Borrower, Jose E. Gaztambide, contract number 2446, letter of transmittal dated February 24, 1932 (Ex. 61); certificate of deposit number 15486 for $49.00, dated February 24, 1932 (Ex. 49).

9. Borrower, Francisco Oliver Cuvelje, contract number 1689, letter of transmittal dated October 24, 1932 (Ex. 62); certificate of deposit number 17384 for $34.00, dated October 24, 1932 (Ex. 52).

10. Borrower, Olimpio Olmo Pinedo, contract number 982, letter of transmittal dated October 24, 1932 (same as in 9) (Ex. 62); certificate of deposit number 17383 for $38.00, dated October 24, 1932 (Ex. 51).

11. Borrower, Guillermo Sepulveda Perez, contract number 2064, letter of transmittal dated November 30, 1932 (Ex. 63); certificate of deposit number 17664 for $44.00, dated November 30, 1932 (Ex. 53).

12. Borrower, Jose Lebron Muniz, contract number 15, letter of transmittal dated April 5, 1932 (Ex. 64); certificate of deposit number 15942 for $195.00, dated April 5, 1932 (Ex. 50).

Total of certificates of deposit noted under items 1 to 12, inclusive, above, is $983.00.

Upon cross-examination the witness stated that his bank had been designated a government depository of the postal savings funds of the United States. In each case of a loan an account was opened in the bank in the name of the borrower, subject to the rules and regulations of the Board of Alternates. Something like 250 or 300 such special accounts were opened in his bank by the Puerto Rican Hurricane Relief Commission. The letters of transmittal sending money to the bank to open the account were signed by accused as disbursing officer of the Commission (R. 63).

e. Aristides F. Armstrong, sub-manager of the Banco de Ponce, Ponce, Puerto Rico, testified that during the period October 5, 1931, to September 10, 1932, the persons authorized to sign manager's checks for the Banco de Ponce were, among others, Mr. Jose R. Peralta until July, 1932, as assistant manager, and from July 21, 1932, witness as sub-manager (R. 66). He had seen Mr. Peralta sign his name and was able to identify his signature. Witness identified each of four separate checks as manager's checks of his bank, signed either by Mr. Peralta or himself, and payable to the accused. Accused was named as payee on each of the four checks in accordance with instructions from the Board of Alternates of the Puerto Rican Hurricane Relief Commission, and each of the checks was sent to the Relief Commission, San Juan, Puerto Rico (R. 67-68). The United States through the Relief Commission had made the deposits of the funds which created the obligation of the bank to honor the request of the Board of Alternates for a refund in the case of each of the four checks. Each of the four checks had been paid and canceled. Witness stated the name of the borrower and the contract number of his loan, whose refund was covered by each of the checks. Each check was sent to the Board of Alternates accompanied by a letter of transmittal (R. 69). Witness identified each of four letters of transmittal signed either by Mr. Peralta or himself, and stated the amount, date and number of the check, and the name of the borrower and his contract number to which it referred (R. 70-72). The checks and the letters of transmittal were received in evidence. The facts shown by these four checks and four letters of transmittal identified by the witness, and their respective numbers when received in evidence as exhibits, may be summarized as follows:

1. Borrower, Alfonso Castaner Montaner, contract number 2480, letter of transmittal dated October 6, 1931 (Ex. 70); check number 14620 for $1155.00, dated October 6, 1931 (Ex. 66).

2. Borrower, Salvador Rivera Cintron, contract number 467, letter of transmittal dated January 15, 1932 (Ex. 71); check number 15287 for $34.00, dated January 15, 1932 (Ex. 67).

3. Borrower, Miguel Angel Padro, contract number 2089, letter of transmittal dated March 5, 1932 (Ex. 72); check number 15592 for $67.00, dated March 5, 1932 (Ex. 68).

4. Borrower, Sucn. Francisco Pieraldi, contract number 1316, letter of transmittal dated August 18, 1932 (Ex. 73); check number 16558 for $420.00, dated August 18, 1932 (Ex. 69).

Total of checks noted under items 1 to 4, inclusive, above, is $1,676.00.

Upon cross-examination witness stated that his bank was not a United States depository. In each case of a loan an account was opened with the bank in the name of the borrower, subject to the orders of the Commission. More than three hundred and seventy-five such separate accounts were opened with the bank. The deposits opening the accounts were signed by accused (R. 72).

f. A. Perez, sub-accountant of the Royal Bank of Canada, San Juan, Puerto Rico, testified that he had access to the records of his bank (R. 73) and was authorized to sign "checks, drafts, important letters, etc." He identified each of two checks as official checks of the Royal Bank, bearing his own signature, and naming accused as payee, both of which were drawn and named accused as payee at the request of the Board of Alternates, and were sent to the Board of Alternates, Hurricane Relief Commission, San Juan. The proceeds of both checks were intended for the United States, and both checks had been paid and canceled. Witness also identified two letters of transmittal signed by himself and stated the amount, date and number of the check and the name of the borrower and his contract number to which each letter referred (R. 74-77). The checks and letters of transmittal were received in evidence. The facts shown by these two checks and two letters of transmittal, identified by the witness, and their respective numbers when received in evidence as exhibits, may be summarized as follows:

1. Borrower, Antonio Arbona Vazquez, contract number 166, letter of transmittal dated July 7, 1932 (Ex. 77); check number 2923 for

$198.00, dated July 7, 1932 (Ex. 75).

2. Borrower, Temistocles Collado, contract number 905, letter of transmittal dated November 29, 1932 (Ex. 78); check number 4481 for $35.00, dated November 29, 1932 (Ex. 76).

Total of checks noted under items 1 and 2, above, is $233.00.

Upon cross-examination witness stated that his bank was not a United States depository. In each case of a loan, the account was opened with his bank for a certain party. About two hundred such accounts were opened by the Relief Commission (R. 77).

g. J. D. Andino testified that during the period of April 20, 1931, to December 10, 1931, he was sub-manager of the Banco Comercial and was authorized to sign manager's checks. He identified each of five separate manager's checks of the Banco Comercial signed by himself in favor of the accused. Each of these checks was sent to the Board of Alternates of the Puerto Rican Hurricane Relief Commission and accused was designated as payee because he was the disbursing officer of the Commission. The five checks had been drawn because the bank had received from the Board of Alternates deposits made by accused as disbursing officer for different people around the island to be paid for the account of the Puerto Rican Hurricane Relief Commission, and had started to make the different payments, when it received advice from the Board of Alternates to make refunds of the balances still in the name of certain people. Each of the five checks had been paid. When the checks were returned to the Board of Alternates each had been accompanied by the contract, the canceled letter of credit, and a letter of transmittal. Witness identified each of the five letters of transmittal addressed to the Board of Alternates of the Puerto Rican Hurricane Relief Commission, sent by the Banco Comercial, and signed by E. Iriarte as assistant manager of the bank, and stated the contract number and the name of the borrower to which each letter referred. He also stated the date, number and amount of each of the five checks, and the contract number and name of the borrower whose balance was represented by each check (R. 78-85). The checks and letters of transmittal were received in evidence. The facts shown by the five checks and five letters of transmittal, identified by the witness, and their respective numbers when received in evidence as exhibits, may be summarized as follows:

1. Borrower, Andres Rivera Virella, contract number 1849, letter of transmittal dated April 22, 1931 (Ex. 85); check number 27226 for

$55.00, dated April 22, 1931 (Ex. 79).

2. Borrower, Atanasio Ruiz Hernandez, contract number 1612, letter of transmittal dated July 22, 1931 (Ex. 86); check number 27988 for $101.00, dated July 22, 1931 (Ex. 80).

3. Borrower, Pio Perez Maldonado, contract number 1751, letter of transmittal dated July 22, 1931 (Ex. 87); check number 27989 for $403.00, dated July 22, 1931 (Ex. 81).

4. Borrower, Valentin Sotomayor Cardona, contract number 160, letter of transmittal dated September 2, 1931 (Ex. 88); check number 28309 for $140.00, dated September 2, 1931 (Ex. 82).

5. Borrower, Rafael Arrillaga Urrutia, contract number 1208, letter of transmittal dated September 2, 1931 (Ex. 89); check number 28308 for $504.00, dated September 2, 1931 (Ex. 83).

Total of checks noted under items 1 to 5, inclusive, above, is $1,203.00.

Upon cross-examination witness stated that his bank was not a United States depository. In each case of a loan a regular account was opened in his bank for the man who was borrowing the money. The money was sent to his bank by the Hurricane Relief Commission by a check in favor of the Banco Comercial with a list to show to whom each credit should be made. The accounts were special accounts because they were not subject to check. About two hundred such accounts were opened by the Commission (R. 85-86).

h. Oscar Norgard testified that he was one of the sub-managers of the National City Bank and dealt principally with the supervision of accounts. During the period from February "31" (27), 1931, to date, among the employees of his bank authorized to sign checks as sub-accountants or pro-managers were Mr. Bozzo, Mr. Pope, Horacio Garcia and Mr. McFeeters. He had seen each one of these sign his name, had seen his signature frequently in the course of business, and could identify his signature. Witness identified eighteen separate manager's checks as those of his bank, signed by an officer of the bank, with the accused named as payee, and stated that each check was drawn because of a notice from the Puerto Rican Hurricane Relief Commission that payment had been stopped on the balance of the respective letters

of credit and requesting that the balance be repaid to the Commission. Accused was designated as payee on each of the checks because he was so designated in the letter of instructions from the Commission. Witness identified each of eighteen letters of transmittal from the National City Bank of New York, San Juan Branch, signed by an officer of that bank, addressed to the Board of Alternates, and stated the name of the borrower and the number of the loan contract to which each referred. The several manager's checks were also identified each with its letter of transmittal and with the name of the borrower and the number of the loan contract to which it referred (R. 86-106). The several manager's checks and the letters of transmittal were received in evidence. The facts shown by the eighteen checks and the eighteen letters of transmittal, identified by the witness, and their respective numbers when received in evidence as exhibits, may be summarized as follows:

1. Borrower, Miguel Marrero Rivera, contract number 228, letter of transmittal dated February 27, 1931 (Ex. 109); check number 34871 for $138.00, dated February 27, 1931 (Ex. 90).

2. Borrower, Emilio Sala Cruells, contract number 209, letter of transmittal dated September 1, 1931 (Ex. 110); check number 38648 for $50.00, dated September 1, 1931 (Ex. 101).

3. Borrower, Lorenzo Gonzalez Gonzalez, contract number 864, letter of transmittal dated October 7, 1931 (Ex. 111); check number 39416 for $55.00, dated October 7, 1931 (Ex. 91).

4. Borrower, Felicita Rosado, contract number 1162, letter of transmittal dated October 24, 1931 (Ex. 112); check number 39994 for $79.00, dated October 24, 1931 (Ex. 92).

5. Borrower, Agustin Delgado Delgado, contract number 1237, letter of transmittal dated October 27, 1931 (Ex. 113); check number 40019 for $75.00, dated October 27, 1931 (Ex. 93).

6. Borrower, Antonio Santos Colon, contract number 437, letter of transmittal dated November 13, 1931 (Ex. 114); check number 40230 for $6.00, dated November 13, 1931 (Ex. 102).

7. Borrower, Rosa Delgado Delgado, contract number 2575, letter of transmittal dated January 29, 1932 (Ex. 115); check no. 41889 for

$230.00, dated January 29, 1932 (Ex. 94).

8. Borrower, Juan Ralat Garcia, contract number 804, letter of transmittal dated February 20, 1932 (Ex. 116); check number 42038 for $20.00, dated February 20, 1932 (Ex. 95).

9. Borrower, Jose E. Arraras Goyco, contract number 1048, letter of transmittal dated May 20, 1932 (Ex. 117); check number 448 for $58.00, dated May 20, 1932 (Ex. 96).

10. Borrower, Manuel Cortes Nieves, contract number 555, letter of transmittal dated May 21, 1932 (Ex. 118); check number 466 for $420.00, dated May 21, 1932 (Ex. 97).

11. Borrower, Maria Lopez Benitez, contract number 2362, letter of transmittal dated May 27, 1932 (Ex. 119); check number 523 for $90.00, dated May 27, 1932 (Ex. 103).

12. Borrower, Maria Quintina Rodriguez, contract number 2491, letter of transmittal dated May 27, 1932 (Ex. 120); check number 526 for $247.00, dated May 27, 1932 (Ex. 98).

13. Borrower, Juana Dionisia Leon Rivera, contract number 2910, letter of transmittal dated June 15, 1932 (Ex. 121); check number 674 for $18.00, dated June 15, 1932 (Ex. 99).

14. Borrower, Juana Dionisia Leon Rivera, contract number 2910, letter of transmittal dated July 12, 1932 (Ex. 122); check number 931 for $78.00, dated July 12, 1932 (Ex. 107).

15. Borrower, Francisco Bianchi Orsini, contract number 1741, letter of transmittal dated August 5, 1932 (Ex. 123); check number 1102, for $476.00, dated August 5, 1932 (Ex. 104).

16. Borrower, Desideria Torres, contract number 2643, letter of transmittal dated November 21, 1932 (Ex. 124); check number 1973 for $61.00, dated November 21, 1932 (Ex. 100).

17. Borrower, Jaime Enrique Viqueira Solivellas, contract number 3139, letter of transmittal dated December 14, 1932 (Ex. 125); check number 2187 for $250.00, dated December 14, 1932 (Ex. 105).

18. Borrower, Juan Lopez Santiago, contract number 2419, letter of transmittal dated December 15, 1932 (Ex. 126); check number 2191 for $42.00, dated December 15, 1932 (Ex. 106).

Total of checks noted under items 1 to 18, inclusive, above, is $2,393.00.

Upon cross-examination witness stated that his bank was a United States depository. In each case of a loan a certain amount of money was delivered to the bank by the Commission to be paid out to the beneficiaries named, and at such intervals, as designated by the Commission. A separate account was opened for each individual called a letter of credit deposit, and from that account disbursements were made against his receipts. Each account was not a current account against which he could draw a check, but might be called a trust account (R. 108-109).

It was stipulated between the accused, his counsel, and the trial judge advocate that if Mr. C. F. Zimmerman were present he would testify that he is an official of the National City Bank of New York, San Juan Branch, and that he knows the accused and on December 17, 1929, saw the accused sign his name on the signature card of that date, which card was thereupon received in evidence as Exhibit 127 (R. 109-110).

i. Oscar Norgard was then recalled as a witness for the prosecution. He testified that he had been engaged in the banking business for more than fifteen years and had had extended experience over that time in making comparisons of signatures. Upon comparing the signature signed by accused on the card (Ex. 127) and the signature appearing as a first indorsement upon each of the following checks, he gave his opinion that they were one and the same signature:

National City Bank checks, numbers: 39994 (Ex. 92); 526 (Ex. 98); 674 (Ex. 99); 1973 (Ex. 100); 40230 (Ex. 102); 523 (Ex. 103); 1102 (Ex. 104); 2187 (Ex. 105); and 2191 (Ex. 106).

Banco de Ponce checks, numbers: 16558 (Ex. 69) and 15287 (Ex. 67).

Credito y Ahorro Ponceno checks, numbers: 17664 (Ex. 53); 17384 (Ex. 52); 17383 (Ex. 51); 14820 (Ex. 47); and 14653 (Ex. 46).

Banco Territorial y Agricola checks, numbers: 2281 (Ex. 20); 2270 (Ex. 19); 4225 (Ex. 26); 4353 (Ex. 27); and 4272 (Ex. 38).

Royal Bank of Canada checks, numbers: 2923 (Ex. 75); and 4481 (Ex. 76).

Banco Comercial de Puerto Rico checks, numbers: 27989 (Ex. 81); and 27988 (Ex. 80). (R. 110-112.)

The prosecution stated that a certain number of the checks were not signed by anyone on the back as indorser, but bore a stamped indorsement, and that, in order to give the witness and the court something on which to base a comparison of the stamped indorsement he proposed to introduce in evidence a check not concerned in the particular controversy, but which was deposited at the National City Bank in San Juan and was reported by the accused as having been received. The witness then identified a manager's check number 391, dated May 11, 1932, issued by the National City Bank of New York, San Juan Branch, to the order of accused, for $26.00, signed by W. L. Pope as pro-manager and Mr. Bozzo as sub-accountant, and stated that the check had been paid. He further stated that the check had been subpoenaed from the files of the bank for the purpose of making comparisons of the rubber stamp indorsements on the reverse with similar indorsements on certain other checks. Witness identified another document as the bank record of the Puerto Rican Hurricane Relief Commission, contract number 1725, in the name of Baldomero de Leon Rosa, and stated that the check number 391 pertained to that account. The bank records pertaining to loan contract 1725, National City Bank of New York, San Juan Branch, were then received in evidence as Exhibit 128 (R. 113). The witness then read the stamped indorsement on the reverse side of the check, "Pay to the order of National City Bank of New York. This check is in payment of an obligation to the United States and must be paid at par. No protest. C. R. Fouts, F.D., Finance Officer". Upon the proposal of the prosecution to prove later that the accused had acknowledged the receipt of this check in his "account current" for July, 1932, and that the check was one of the physical constituents of a deposit made to the credit of the United States, pertaining to the account of the Puerto Rican Hurricane Relief Commission on May 28, 1932, the check was received in evidence and marked Exhibit 129. Witness then compared the indorsement on the back of this check (Ex. 129) with that upon the backs of certain other

checks handed him and stated that the wording of the stamped indorsement on this check was the same and appeared to have been made by the same stamp as that appearing upon the following checks:

National City Bank of New York, San Juan Branch, checks numbers: 38648 (Ex. 101); 466 (Ex. 97); 448 (Ex. 96); 42038 (Ex. 95); 41889 (Ex. 94); 34871 (Ex. 90); and 931 (Ex. 107).

Banco Comercial de Puerto Rico checks numbers: 28308 (Ex. 83); 28309 (Ex. 82); and 27226 (Ex. 79).

Banco Territorial y Agricola checks numbers: 4139 (Ex. 39); 3754 (Ex. 40); 4060 (Ex. 25); 4030 (Ex. 24); 3154 (Ex. 23); and 1854 (Ex. 18).

Credito y Ahorro Ponceno checks numbers: 15942 (Ex. 50); 15486 (Ex. 49); 14964 (Ex. 48); 14355 (Ex. 43); and 14129 (Ex. 42).

Banco de Ponce check, number: 15592 (Ex. 68). (R. 114-115.)

Witness then compared the handwriting of the accused on the signature card (Ex. 127) and in his letter to Colonel Behr (Ex. 13) with that appearing upon the reverse side of certain checks that had been received in evidence and stated that the handwriting which reads "pay to the order of" upon the following checks is the same as that appearing in the letter (Ex. 13):

National City Bank of New York, San Juan Branch, check number: 39416 (Ex. 91).

Banco de Ponce check number: 14620 (Ex. 66).

Credito y Ahorro Ponceno checks numbers: 14561 (Ex. 44); and 14562 (Ex. 45). (R. 116.)

Witness identified a ledger sheet of the current account department of the San Juan Branch of the National City Bank of New York for the account entitled "C. R. FOUTS (SPECIAL ACCOUNT)", and it was received in evidence and marked Exhibit 130 (R. 116). Witness stated that in his opinion this was not a government account. The only documents - on file with reference to the account and indicating its nature consisted of a signature card signed by accused, of the type used with

current accounts (R. 124). Witness examined each of five separate documents handed to him and stated that they were deposit slips of the National City Bank of New York, San Juan Branch, and that in his opinion the handwriting appearing at the top of each slip was the same handwriting as that of accused in the letter marked Exhibit 13. The deposit slips were received in evidence. The statements of the witness as to each of them and their numbers when received in evidence as exhibits may be summarized as follows (R. 117-119):

Date	Amt. of deposits	Account	Ex. No.
Oct. 20, 1931	$ 3,066.75	C. R. Fouts, Special	131
Oct. 28, 1931	662.00	" " " Special Account	132
Nov. 4, 1931	276.00	" " " " "	133
Nov. 20, 1931	1,208.00	" " " " "	134
June 28, 1932	1,317.00	" " " " "	135.

Witness explained that in using deposit slips to make deposits, the depositor completes the information on the slip, stating the name of the account to be credited and the total of the amount to be deposited, and then gives the slip, together with the money or checks, to the receiving teller, who revises it and gives a receipt for it by an entry in the depositor's pass-book. The slips are routed from the tellers' windows to the bookkeepers who make the entries on the ledger sheets.

Upon being handed various checks already received in evidence, witness made the following statements:

National City Bank check number 40230 (Ex. 102) was included in a deposit made to the account of C. R. Fouts, special account, on November 20, 1931 (R. 119).

National City Bank checks numbers 526 (Ex. 98), 674 (Ex. 99), and 523 (Ex. 103) were included in a deposit to the account of C. R. Fouts, special account, on June 28, 1932.

National City Bank check number 39994 for $79.00 (Ex. 92) was negotiated on October 28, 1931, and there is an item for a similar amount included in a deposit ticket of that date to the account of C. R. Fouts, special account. Both deposit and check were handled by the same teller.

Check number 40019 (Ex. 93) was negotiated on November 4, 1931 (R. 120), and there is a deposit on that date to C. R. Fouts, special account, which includes an item of $75.00, described on the deposit ticket as "T y A", which witness presumed was an abbreviation for "Territorial y Agricola". Check and deposit were handled by the same teller.

Check number 39416 (Ex. 91) for $55.00 was negotiated on October 20, 1931, and there is an item of $55.00 included in a deposit of that date to the account of C. R. Fouts, special account. Check and deposit slip were handled by the same teller.

Banco de Ponce check number 14620 (Ex. 66) was negotiated by the National City Bank of New York, San Juan Branch, on October 20, 1931, and there is a deposit on that date to the account C. R. Fouts, special account, which includes an item for the same amount $1,155.00 (R. 121).

Check number 2281 of the Banco Territorial y Agricola (Ex. 20) was negotiated on October 28, 1931, and collected on October 29, 1931. There is a deposit on October 28, 1931, to the account C. R. Fouts, special account, which includes an amount of $25.00, the amount of this check. The same teller handled both check and deposit slip.

Banco Territorial y Agricola check number 2270 for $84.00 (Ex. 19) was negotiated by the National City Bank, San Juan Branch, on October 28, 1931, and a similar item is included in a deposit of that date to the account of C. R. Fouts, special account.

Banco Territorial y Agricola check number 2296 (Ex. 21) was negotiated on November 4, 1931, by the National City Bank of New York, San Juan Branch, and a deposit similar in amount was made on that date to the account of C. R. Fouts, special account. The slip was handled by the same teller who handled the check.

Banco Territorial y Agricola check number 2297 (Ex. 22) was negotiated by the National City Bank of New York, San Juan Branch, on November 4, 1931 (R. 122), and there is a deposit made on that date to the account of C. R. Fouts, special, which includes an amount of $8.00, the amount of this check.

Credito y Ahorro Ponceno check number 14653 (Ex. 46) was negotiated by the National City Bank of New York, San Juan Branch, on October 28,

1931, and there is a deposit on that date to the account of C. R. Fouts, special account, which includes an item of $36.00, the amount of this check.

Credito y Ahorro Ponceno check number 14561 (Ex. 44) was negotiated on October 20, 1931, by the National City Bank of New York, San Juan Branch, and there is a deposit on that date to the account of C. R. Fouts, special, which includes an item of $174.00, the amount of this check.

Credito y Ahorro Ponceno check number 14562 (Ex. 45) was negotiated on October 20, 1931, by the National City Bank of New York, San Juan Branch, and there is a deposit on that date to the account of C. R. Fouts, special account, which includes an amount of $127.00, the amount of this check.

Credito y Ahorro Ponceno check number 14820 (Ex. 47) was negotiated on November 20, 1931, by the National City Bank of New York, San Juan Branch (R. 123), and there is a deposit on that date to the account of C. R. Fouts, special account, which includes an item of $25.00, the amount of this check.

(The prosecution stated that the total value of the checks to which reference had been made, known as Exhibits 103, 99, 98, 102, 47, 45, 44, 46, 22, 21, 19, 20, 66, 91, 92 and 93, is $2,229.00 (R. 124)).

The total amount deposited to the account of C. R. Fouts, special account, as shown by the ledger sheet (Ex. 130) is $8,490.75. This account was opened on October 20, 1931, and was closed on August 18, 1933. On December 17, 1932, the balance in the account was $6.54 (R. 125).

Witness identified a document as a deposit ticket to the account of the Treasurer of the United States, dated September 8, 1931, for a total of $15,634.40, and a paper attached to it as a treasury department form, called a "letter of transmittal", signed by accused with the same signature as that appearing on the signature card (Ex. 127). He also identified a document as a ledger sheet for the account of the United States Treasury with the National City Bank of New York, San Juan Branch, for the period from September 1, 1931, to September 17, 1931, and another document as a copy of the daily transcript for

September 8, 1931, which his bank, the National City Bank, was obliged to furnish to the Treasurer of the United States, showing the total movement of the account in the San Juan Branch. The deposit slip is made by the depositor and he delivers it with the funds to the teller who receives it and then passes it to the bookkeeper. There it is entered on the ledger sheet and each day the bank makes a transcript for the movement which passed on the preceding day on the open account of the Treasurer of the United States. In the opinion of witness the handwriting appearing on the deposit slip, dated September 8, 1931, is that of the person who wrote the letter (Ex. 13). These were records of the bank made in the regular course of business by employees whose duty it was to make them. The deposit slip, dated September 8, 1931, was received in evidence and marked Exhibit 136, the Transcript of Account of U. S. Depository, dated September 8, 1931, received and marked Exhibit 137, and the ledger sheet of the National City Bank, San Juan Branch, account of United States Treasurer, dated September 8, 1931, received and marked Exhibit 138 (R. 126-128).

Credito y Ahorro Ponceno check number 14129 (Ex. 42) was negotiated and deposited on September 8, 1931, at the National City Bank of New York, San Juan Branch. On the same date one deposit was made by accused at this bank and that to the Treasurer of the United States in the amount of $15,654.40 (R. 128). The Treasury Department form attached to Exhibit 136 designates the account for that deposit as follows: "On account of Army account of advances $14,641.38", and "miscellaneous receipts $993.02", a total of $15,654.40.

Banco Comercial checks numbers 28308 (Ex. 83); and 28309 (Ex. 82), and National City Bank check number 38648 (Ex. 101) were also negotiated on September 8, 1931, at the National City Bank of New York, San Juan Branch.

No deposits were made on that date to the credit of accused but he made the one deposit of $15,654.40 with the Treasurer of the United States through the National City Bank (R. 129).

Witness identified the ledger sheet of the account of the Treasurer of the United States with the National City Bank of New York, San Juan Branch, for the period from August 29, 1932, to September 13, 1932, and it was received in evidence as Exhibit 139. He also identified the deposit ticket to the account of the Treasurer of the United States, dated September 8, 1932, in the amount of $16,473.74, an itemized

adding machine slip attached thereto, and a Treasury form letter of transmittal giving the details of the deposit. The deposit slip and the other papers were received in evidence as Exhibit 140. Witness expressed his opinion that the signature "C. R. Fouts" appearing on the form letter of transmittal and the signature of accused on the standard signature card were signed by the same person. Witness identified another document as the "Daily Transcript of Account" kept for and a copy of which is furnished by the National City Bank of New York, San Juan Branch, to the Treasurer of the United States for the date of September 8, 1932, covering the movement of the Treasury account on that day, and it was received in evidence as Exhibit 141 (R. 130-131). The letter of transmittal states " to army account of advances, $15,722.72, miscellaneous receipts $751.02, total $16,473.74".

Royal Bank of Canada check number 2923 in the amount of $198.00 (Ex. 75), El Banco Territorial y Agricola check number 4272 for $322.00 (Ex. 38), and Banco de Ponce check number 16558 for $420.00 (Ex. 69) were negotiated on September 8, 1932, by the National City Bank of New York, San Juan Branch, and there are amounts of $198.00, $322.00, and $420.00, respectively, on the adding machine list attached to the deposit slip (Ex. 140).

(The prosecution asked the court to note that the total of these three checks, $198.00, $322.00, and $420.00, was $940.00. The trial judge advocate was asked by the law member to explain the purpose of introducing the last few checks in connection with the deposit slips of September 8, 1931, and September 8, 1932. He replied that the purpose was to show that the checks had been received and that they had been deposited to an account of which the accused was custodian. The four checks, Exhibits 42, 82, 83 and 101, were those which the banks involved had testified covered particular refunds which they had mailed to the disbursing officer (accused). These four checks were negotiated at the National City Bank of New York, San Juan Branch, on September 8, 1931. There was a deposit to the Treasurer of the United States made on that date as per Exhibit 136, and there was only one deposit made with the Treasury by the accused on that date. The three checks, Exhibits 69, 38 and 75, were negotiated at the National City Bank of New York, San Juan Branch, on September 8, 1932, and the deposit slip dated September 8, 1932, Exhibit 140, included similar amounts to the amounts represented by these checks. He proposed to show by subsequent

witnesses the identity of the account "army account of advances" and "miscellaneous receipts" (R. 134)).

Witness examined a number of documents and stated that they were fourteen ledger sheets for the current account of the Treasurer of the United States with the National City Bank of New York, San Juan Branch, over the period from March 28, 1931, to December 20, 1932, with certain gaps in between, made in the regular course of business by employees whose duty it is to make them, and they were received in evidence as Exhibit 142 (R. 135).

Witness examined a number of other documents and stated that they were fourteen "Daily Transcripts of Account" of U. S. Depository of the National City Bank of New York, San Juan Branch, made in the regular course of business by employees whose duty it was to make them, dated as follows: March 30, 1931; June 29, 1931; July 30, 1931; September 29, 1931; December 30, 1931; January 29, 1932; February 29, 1932; March 30, 1932; April 29, 1932; May 28, 1932; July 30, 1932; August 29, 1932; November 29, 1932; and December 17, 1932. The fourteen documents were received in evidence and marked Exhibit 143.

Witness examined another document and stated that it was a deposit ticket of the National City Bank, dated March 30, 1931, for a deposit of $2,092.54, to the account of the Treasurer of the United States (R. 136). The second sheet of the document was the Treasury form letter of transmittal, number 25, which detailed the deposit. The designation of the deposit as it appeared on the Treasury from stated "for credit, subject to check in the special disbursing account of C. R. Fouts, F.D., U.S.A., special disbursing agent, P.R.H.R.C., San Juan, P.R." In the opinion of the witness the signature appearing on the letter of transmittal and that on the standard signature card (Ex. 127) are signed by the same person, and the handwriting on the deposit slip is the same as that appearing on Exhibit 13. Thereupon the deposit slip dated March 30, 1931, and the attached letter of transmittal were received in evidence as Exhibit 144.

Witness examined a number of documents and stated that they were thirteen slips for deposits to the account of the Treasurer of the United States in the National City Bank, each accompanied by Treasury Department form letters of transmittal of certain dates, amounts and numbers. In his opinion the signature appearing on each of the

letters of transmittal is the same as that appearing on the signature card, Exhibit 127, and the handwriting on each of the thirteen deposit slips is the same as that appearing on the letter which is Exhibit 13. On the deposit slip dated July 30, 1931, there is no list of items attached or made by the machine; on the deposit slip for September 29, 1931, there is an adding machine list attached. It is the custom of the teller accepting the deposit to make such a list at the time he receives the deposit in order to prove the correctness of the deposit and to keep a record of the individual items that make up the deposit. On the remaining deposit tickets the adding machine run-up had been made on the ticket itself for the same purpose (R. 138). The thirteen deposit slips and the attached letters of transmittal were then received in evidence. The dates, amounts and numbers of each of these as stated by the witness and their numbers when received in evidence as exhibits are as follows:

Deposit slip date	Amount	Letter of transmittal no.	Ex. no.
June 29, 1931	$ 1,535.71	27	145
July 30, 1931	5,572.00	28	146
Sept. 29, 1931	3,271.08	30	147
Dec. 30, 1931	1,067.00	33	148
Jan. 29, 1932	3,317.70	35	149
Feb. 29, 1932	2,055.23	36	150
March 30, 1932	2,301.35	37	151
April 29, 1932	1,139.00	38	152
May 28, 1932	1,607.33	39	153
July 30, 1932	1,511.40	41	154
Aug. 29, 1932	6,091.85	42	155
Nov. 29, 1932	220.00	45	156
Dec. 17, 1932	700.21	47	157

National City Bank check number 34871 (Ex. 90) is a manger's check of the National City Bank of New York, San Juan Branch, and was paid by that bank on March 30, 1931. On that date there was but one deposit of $2,092.54, made by accused and that to the Treasurer of the United States. There appears on Exhibit 90 only a rubber stamp indorsement and witness concluded that it was not paid in cash, and consequently was deposited to some account. It appears to bear the same teller's stamp which is on the deposit ticket, Exhibit 144. The only deposit made by the accused on that date carried a reference on the letter of transmittal to "special disbursing account of C. R. Fouts, captain,

F.D., U.S.A., special disbursing officer, P.R.H.R.L.C." (R. 137-140).

Banco Comercial check, dated April 22, 1931, for $55.00 (Ex. 79), was negotiated on June 29, 1931, at the San Juan Branch of the National City Bank of New York. There is an item of $55.00 listed on the adding machine detail of the deposit slip of June 29, 1931 (see Ex. 145).

Banco Comercial check, dated July 22, 1931, for $101.00 (Ex. 80), was negotiated on July 30, 1931, by the National City Bank of New York, San Juan Branch, and from the "Daily Transcript of Account" for July 30, 1931, it appears that only one deposit was made by accused on that date.

Banco Comercial check number 27989, dated July 22, 1931, for $403.00 (Ex. 81) was negotiated on July 30, 1931, at the National City Bank of New York, San Juan Branch, and but one deposit was made by the accused to the Treasurer of the United States on that date (R. 141).

Credito y Ahorro Ponceno check number 14355, dated August 21, 1931, for $19.00 (Ex. 43) was negotiated on September 29, 1931, at the National City Bank of New York, San Juan Branch, and there is an item of $19.00 listed on the adding machine detail of the items which made up the deposit of that date (see Ex. 147).

Banco Territorial y Agricola check dated August 26, 1931, for $419.00 (Ex. 18) was negotiated on September 29, 1931, at the National City Bank of New York, San Juan Branch, and there is an item of $419.00 on the adding machine detail of the items which make up the deposit of that date (see Ex. 147).

Credito y Ahorro check number 14964, dated November 30, 1931, for $4.00 (Ex. 48) was negotiated on December 30, 1931, at the National City Bank of New York, San Juan Branch, and there is an item of $4.00 listed on the deposit ticket of that date (see Ex. 148) (R. 142).

Banco de Ponce check number 15287, dated January 15, 1932, for $34.00 (Ex. 67) was negotiated on January 29, 1932, at the National City Bank of New York, San Juan Branch, and there is an item of $34.00 listed on the deposit slip of that date (see Ex. 149).

National City Bank of New York, San Juan Branch, check number 42038, dated February 20, 1932, for $20.00 (Ex. 95) was paid on

February 29, 1932, by the bank on which it was drawn, and there is an amount of $20.00 itemized on the deposit ticket for that date (see Ex. 150).

National City Bank of New York, San Juan Branch, check number 41889, dated January 29, 1932, for $230.00 (Ex. 94) was negotiated on March 30, 1932, by the bank on which it was drawn, and there is an item of $230.00 on the deposit ticket for that date (see Ex. 151).

Banco Territorial y Agricola check number 3154, dated March 2, 1932, for $105.00 (Ex. 23), Credito y Ahorro check number 15486, dated February 24, 1932, for $49.00 (Ex. 49), and Banco de Ponce check number 15592, dated March 5, 1932, for $67.00 (Ex. 68), were negotiated on March 30, 1932, by the National City Bank of New York, San Juan Branch (R. 143), and there are items of $105.00, $49.00 and $67.00 on the deposit ticket for that date (see Ex. 151).

Credito y Ahorro Ponceno check number 15942, dated April 5, 1932, for $195.00 (Ex. 50) was negotiated on April 29, 1932, at the National City Bank of New York, San Juan Branch, and there is an item of $195.00 on the deposit ticket for that date (see Ex. 152).

National City Bank of New York, San Juan Branch, checks numbers 448, dated May 30, 1932, for $58.00 (Ex. 96), and 466, dated May 21, 1932, for $420.00 (Ex. 97), and Banco Territorial y Agricola check number 3754, dated May 26, 1932, for $68.00 (Ex. 40) were paid or negotiated on May 28, 1932, at the National City Bank of New York, San Juan Branch, and there are items of $58.00, $420.00, and $68.00 appearing on the deposit ticket for that date (see Ex. 153) (R. 144).

National City Bank of New York, San Juan Branch, check number 931, dated July 12, 1932, for $78.00 (Ex. 107), Banco Territorial y Agricola checks numbers 4030, dated July 5, 1932, for $77.00 (Ex. 24), 4060, dated July 7, 1932, for $186.00 (Ex. 25), and 4139, dated July 19, 1932, for $96.00 (Ex. 39), were all paid or negotiated on July 30, 1932, at the National City Bank of New York, San Juan Branch, and there are items of $78.00, $77.00, $186.00 and $96.00 on the deposit ticket for that date (see Ex. 154).

National City Bank of New York, San Juan Branch, check number 1102, dated August 5, 1932, for $476.00 (Ex. 104), Banco Territorial y Agricola

checks numbers 4255, dated August 5, 1932, for $80.00 (Ex. 26), and 4353, dated August 16, 1932, for $200.00 (Ex. 27), were paid or negotiated on August 29, 1932, at the National City Bank of New York, San Juan Branch, and there are items of $476.00, $80.00 and $200.00 appearing on the deposit ticket for that date (see Ex. 155) (R. 145).

Credito y Ahorro Ponceno checks numbers 17384, dated October 24, 1932, for $34.00 (Ex. 52), and 17383, dated October 24, 1932, for $38.00 (Ex. 51) were negotiated on November 29, 1932, at the National City Bank of New York, San Juan Branch, and there are items of $34.00 and $38.00 appearing on the deposit ticket for that date (see Ex. 156).

Royal Bank check number 4481, dated November 29, 1932, for $35.00 (Ex. 76), Credito y Ahorro Ponceno check number 17664, dated November 30, 1932, for $44.00 (Ex. 53), and National City Bank of New York, San Juan Branch, checks numbers 1973, dated November 21, 1932, for $61.00 (Ex. 100), 2187, dated December 14, 1932, for $250.00 (Ex. 105), and 2191, dated December 15, 1932, for $42.00 (Ex. 106), were paid or negotiated on December 17, 1932, at the National City Bank of New York, San Juan Branch, and the five respective amounts of $35.00, $44.00, $61.00, $250.00 and $42.00 appear separately on the deposit ticket of that date (see Ex. 157) (R. 146).

In each case the wording on the Treasury form letter of transmittal, attached to the deposit slips which are Exhibits 144 to 157, inclusive, is "for credit subject to check in the special disbursing account of C. R. Fouts, Captain, F.D., U.S.A., special disbursing officer, P.R.H. R.C., San Juan" (R. 147).

National City Bank of New York, San Juan Branch, check for $26.00, number 391 (Ex. 129), was paid on May 28, 1932, and there is an item of $26.00 on the deposit ticket for that date (see Ex. 153).

The amount deposited by the deposit slip introduced as Exhibit 136 is $15,634.40. This amount appears on the ledger sheet for that date, September 8, 1931, to the account of the Treasurer of the United States, and also appears on the "Daily Transcript" of the Treasury account for September 8, 1931. On the Treasury Department form attached to Exhibit 136 it is described as "Deposit on account of army advances $14,641.38, and miscellaneous receipts $993.02, total $15,634.40". There was only

one deposit by accused on September 8, 1931, which was in this amount. The four checks, Exhibits 101, 42, 82 and 83, were negotiated on September 8, 1931, at the National City Bank of New York, San Juan Branch (as previously testified by this witness - see R. 129), that is, the one check of the National City Bank was paid and the other three were negotiated. Since the indorsement on each of the checks is a rubber stamp it was "evident" to witness that they were not paid in cash but were deposited to an account on that date.

(To the question of the law member at this point, "Am I to understand that certain checks were deposited to the Treasurer of the United States and certain others to a special account", the prosecution replied: "The prosecution has brought out that all of the fifty-four checks concerned in this case have been deposited; that amounts similar to the amounts appearing on the checks appear on the deposit slips, and that on the dates they were deposited no other deposits but the one on the deposit slips were made by Captain Fouts. There is a big difference between the account of the Treasurer of the United States and the special account and we are going to explain more about that account later on. The two main divisions of the deposits are the Treasury account and that one other".)

Upon cross-examination by the defense witness testified as follows: Check number 40019 is for $75.00. He had testified the day before that there was an item of $75.00 appearing on the deposit slip for November 4, 1931. The abbreviation "T y A" in front of the $75.00 was commonly used for Territorial y Agricola. Check 40019 is a manager's check drawn by the National City Bank of New York, San Juan Branch. He had identified this check as the one entering in that deposit because the amount in both cases was $75.00, but there was nothing unusual about an amount of $75.00. The total amount of the deposit of Exhibit 140 (deposit slip of September 8, 1932) is $16,473.74, of which $11,753.74 is designated as checks (R. 150). The adding machine slip is attached thereto, the first three items of which are the currency gold and silver included in the deposit, and the rest of the items indicate the separate checks in the deposit. Upon being handed an undesignated check by the defense, witness stated that it went to make up a part of the deposit, and gave his reasons: It was negotiated at the bank on the date of the deposit; it was stamped in such a way as to indicate that it was in some way connected with treasury funds; the teller's stamp appearing on the ticket (deposit slip)

is the same which appears on the check; and the amount appears on the adding machine slip. While the check was not detailed by name on the slip all of the circumstances led the witness to reach the firm conclusion that it formed a part of the deposit. Handed another check by the defense the witness stated that all of his remarks as to the previous check applied to this one also (R. 152).

j. Jaime Gonzalez, warrant officer, U. S. Army, Post of San Juan, Puerto Rico, testified that he is chief clerk and cashier in the finance office, Post of San Juan, Puerto Rico, and has been performing that duty since 1920. During the period from February 1, 1931, to December, 1932, he was chief clerk in the finance office, Post of San Juan. He also did some work for the Hurricane Relief Commission. In both of his jobs accused was his immediate superior officer. His duties in connection with the hurricane relief work for accused as disbursing officer for the Commission were to prepare the cash book, the "account current" and the "schedules of collections". He got the data for these records from the Relief Commission office in writing (R. 161). He worked under accused for about four years and had seen accused signing, and his signature many times. He examined authenticated copies of "accounts current", "schedules of collections" and "schedules of funds received" for the period from February 1, 1931, to December 19, 1932, and expressed the opinion that the signature of accused appeared upon all of these documents. The documents were received in evidence as Exhibit 158.

Witness stated that he made an analysis of the "accounts current" and he identified a typed analysis as the one that he had made (R. 162). He obtained all the data on this typewritten sheet from the "accounts current". The figures shown correspond to the like amounts shown on the "accounts current" and are strictly correct. This analysis of the "accounts current", "schedules of collections" and "schedules of funds received" for the period from February 1, 1931, to December 19, 1932, was received in evidence and marked Exhibit 159. Referring to the analysis, witness stated that the amount for which accused reported himself accountable on February 1, 1931, is $490,476.69, the amount brought forward from the previous month's account. For the period from February 1, 1931, to December 19, 1932, accused received from the Treasurer of the United States $2,870,000.00, from local collections $55,142.02, and from adjustments $3,193.53, the latter book transactions transferring from one appropriation to another (R. 164). One check

was canceled and taken up again for $95.00. The total amount accused reported as having received as disbursing officer during that period was $2,925,237.42, not including the adjustments of $3,193.53. His total debits on December 19, 1932, were $3,415,714.11, his total credits $3,353,715.64, and his balance due the United States on December 19, 1932, was $61,998.47 (R. 164). Witness stated that the balance due the United States on December 19, 1932, would have been $70,181.47 if it were proved that during this period from February 1, 1931, to December 19, 1932, inclusive, the accused received into his possession, as special disbursing officer for the Puerto Rican Hurricane Relief Commission, an amount of $8,183.00 as collections and receipts in addition to the $55,142.02 which are reported. Witness also prepared for accused during the period from February 1, 1931, to December 19, 1932, the deposit slips for the deposit of funds to the military account and the special account for the relief commission. Witness identified copies of the certificates of deposits prepared by him and filed in his office as a part of the records of his office (R. 165). The copies of the certificates of deposit, account of C. R. Fouts, Captain, F.D., as special disbursing officer for the Puerto Rican Hurricane Relief Commission, from February 1, 1931, to December 19, 1932, were received in evidence as Exhibit 160. Witness had compared each of these deposit slips with the cash shown deposited on the "account current" for the month in which each deposit was made and had found the amount shown on each of the slips, added together, equal to the amount shown on each "account current", added together. He thought Exhibit 160 a complete file for the period from February 1, 1931, to December 19, 1932, inclusive, since he had examined these deposit slips and found that they compared with similar entries on the "accounts current". Among the deposit slips (Ex. 160) there was no deposit dated September 8, 1931. Witness examined the letter of transmittal attached to Exhibit 136 and stated that it said: "Post of San Juan, P.R., September 8, 1931, deposit number 53, C. R. Fouts, Captain, F.D., U.S.A., finance officer, has deposited with the National City Bank of New York, San Juan Branch, San Juan, P.R., fifteen thousand six hundred thirty-four and forty cents, on account of army account of advances $14,641.38, miscellaneous receipts, $993.02, total $15,634.40". "Army account of advances" is an appropriation which appears on the books of the Treasurer of the United States, and from which appropriation the funds are advanced to the various disbursing officers of the Army for disbursement (R. 166).

That pertained to the military account of accused that he carried as finance officer for the Post of San Juan. The "miscellaneous receipts", in that particular instance, also pertained to the military account. Witness examined the letter of transmittal attached to Exhibit 140 and read it as follows: "Post of San Juan, P.R., September 8, 1932. Deposit number 82. C. R. Fouts, Captain, F.D., U.S.A., F.O., has deposited with National City Bank of New York, San Juan Branch, San Juan, P.R., sixteen thousand four hundred seventy-three and 74/100 dollars, on account of Army account of advances $15,722.72, miscellaneous receipts $751.02, total $16,473.74". Witness had prepared the form he had just read. The "Army account of advances" and "miscellaneous receipts" pertained to the post or military account. Witness performed no duties in the actual offices of the special disbursing officer for the Hurricane Relief Commission, nor did he handle any funds, checks, or receipts of any kind pertaining to the Commission. Accused made the deposits for the military account, and witness believed that accused also made the bank deposits of the Hurricane Relief Commission funds.

Upon cross-examination witness testified that the "accounts current" were correct in every respect (R. 167). They had been inspected and found correct by the General Accounting Office in Washington.

Upon examination by the court witness stated that the book of deposit slips which had been introduced (Ex. 160) represented all the deposits made in connection with the "account current" (R. 168).

(Prosecution stated that it proposed to show that the checks received as refunds on the Hurricane Relief Commission loans were made the physical constituents of deposits made to another account (R. 169)).

k. Mr. Ira L. Wright testified by deposition (Ex. 161) that he is an auditor of the General Accounting Office, residing in Washington, D. C. He is familiar with the accounts of accused as special disbursing officer of the Puerto Rican Hurricane Relief Commission for the period February 1, 1931, to December 19, 1932. Witness' official position with the General Accounting Office is that of Supervisor of Receipts, Audit and Analyzing Unit, Accounting Section. His experience as an auditor of financial accounts has been that of auditing War Department accounts (exclusive of vouchers covering disbursements) for the past

fifteen years, and accounts of other departments and independent offices during the last seven years. With the exception of the vouchers covering disbursements of funds, the accounts of accused as special disbursing officer for the Puerto Rican Hurricane Relief Commission for the period February 1, 1931, to December 19, 1932, inclusive, were audited under his supervision. The audit was made, evidenced by certificates of settlement covering the period February 1, 1931, to December 19, 1932, inclusive, as follows:

Period	Certificate No.	Date
Jan. 1 to Mar. 31, 1931	G-5203-Ms	Jan. 12, 1932
April 1 to June 30, 1931	G-13004-Ms	March 29, 1932
July 1 to Sept. 30, 1931	G-18385-Ms	August 4, 1932
Oct. 1 to Dec. 31, 1931	G-26611-Ms	Nov. 19, 1932
Jan. 1 to March 31, 1932	G-34682-Ms	Jan. 12, 1933
April 1 to June 30, 1932	G-38359-Ms	March 14, 1933
July 1 to Dec. 19, 1932	G-53356-Ms	Oct. 20, 1933.

The records referred to in connection with the audit of these accounts are not voluminous, but approximately ten or twelve. Witness considered in his audit all "Accounts Current" (Standard Form 1022). "Schedules of Collection" (Standard Form No. 1026) and sub-vouchers pertaining thereto submitted by the accused as special disbursing officer of the Puerto Rican Hurricane Relief Commission for the period February 1, 1931, to December 19, 1932, inclusive, which records are in the files of the General Accounting Office. The result of witness' audit was ascertained by calculation and was considered in preparing the certificate of settlement No. G-53356-Ms dated October 20, 1933, a duly authenticated copy of which is attached to the deposition as Exhibit 1. This shows the status of the account on December 19, 1932, on which date the account was turned over to Captain Tunstall. The audit shows that accused should have turned over $61,998.47 to his successor, Captain Tunstall, on that date, and the records submitted by accused show that he did turn over to Captain Tunstall that amount on that date. In making this audit witness did not consider any collections made by accused as special disbursing officer of the Puerto Rican Hurricane Relief Commission during the period February 1, 1931, to December 19, 1932, inclusive, other than those reported on the "Schedules of Collections" (Standard Form No. 1026) submitted by accused for this period relative to this fund. If, in addition to the collections shown on the Schedules of Collections (Standard Form 1026) for the period February 1, 1931, to December 19, 1932, inclusive, other funds were collected by accused as disbursing

officer for the Puerto Rican Hurricane Relief Commission which were not reported collected on the "Schedules of Collections", this would have increased the audited balance due the United States by the amount of such collections. If it were shown that the proceeds of fifty-four checks aggregating $8,183.00 were received by accused during the period mentioned in his capacity as special disbursing officer of the Puerto Rican Hurricane Relief Commission and were not reported as received by him on the proper "Schedules of Collections", or otherwise accounted for, this would increase the audited balance due the United States by that amount (Ex. 161).

l. T. Perez Meri, merchant, San Juan, Puerto Rico, testified that he was employed by the Board of Alternates of the Hurricane Relief Commission from the end of February to the end of November, 1931, in the accounting section in the loan division of the Commission. Accused was disbursing officer during this period. Witness kept the loan book (R. 169) and recorded in it everything regarding the accountancy and refunds. He identified the "loan book" which he used to keep and it was received in evidence as Exhibit 162. The entries in it as to refunds from February, 1931, up to and including November, 1931, were in his own handwriting. At the end of the month accused gave him a note of all the refunds on a scratch pad and he entered that data correctly at the time. He handled no cash or checks (R. 170). It was his belief that accused made the deposits at the bank during this period (R. 170).

m. Rafael Perez Meri, clerk, San Juan, Puerto Rico, testified that he had been employed as a voucher clerk by the Board of Alternates of the Puerto Rican Hurricane Relief Commission since March 1, 1929. Accused was his immediate superior for the period of February 1, 1931, to December 19, 1932, and witness' desk was about four or five feet from that of accused. Witness' duties as voucher clerk were to make travel orders, receive reports, check all bills received, make out the voucher and submit it for signature and bring it to the accused for the check to be made out. Witness handled no cash or checks (R. 171). Both cash and checks were handled by accused and he kept them in a small lockbox inside the safe. Most everybody in the accounting office had access to the safe but accused only had access to the lockbox. Witness had seen accused writing and thought he would recognize accused's handwriting. Witness examined the loan book (Ex. 162) which he identified as such and said that in it were posted the

different payments made to borrowers, and the refunds, and any other notation in connection with the loan. In his opinion the entries of refunds were in the handwriting of accused for the months of December, 1931 (R. 172), January to September, 1932, inclusive, and November and December, 1932. There were no refunds in October, 1932. A loan card is a document on which all payments to borrowers through banks are entered with the notation of any refunds received in connection with the contract. Each card corresponds to a contract. Upon being handed fifty-three documents, witness stated that they were loan cards, each card representing a contract, and pertained to fifty-four loans made to fifty-three borrowers. The contract numbers of the cards were 15, 102, 128, 160, 166, 209, 228, 295, 437, 467, 555, 562, 694, 804, 864, 905, 982, 1013, 1048, 1162, 1208, 1237, 1316, 1427, 1532, 1612, 1655, 1686, 1689, 1741, 1751, 1764, 1826, 1849, 2030, 2064, 2076, 2089, 2148, 2362, 2403, (2419), 2446, 2480, 2491, 2575, 2643, 2910, 2918, 2920, 3016, 3057, and 3139. There were recorded on these loan cards all payments made to borrowers and all refunds received from the banks in connection with the contract. The fifty-three loan cards, as identified, were received in evidence and marked Exhibit 163. Witness identified some other documents as check registers from check number 3001 to check number 6000 and stated that when a check is made out it must be immediately entered on these blank forms coming with the same book. The check registers covering the record of checks numbers 3301 to 6000 were received in evidence as Exhibit 164 (R. 174).

Upon examination by the court witness testified that a copy of the loan card was sent to the bank but did not come back. The letter of credit was signed by the borrower when he got the money, and this was returned to the office when the full amount of it had been paid out (R. 175).

n. Frank F. Harding, Santurce, Puerto Rico, testified that he has been secretary of the Board of Alternates of the Puerto Rican Hurricane Relief Commission since March, 1929. Accused was disbursing officer for the Commission between February 1, 1931, and December 19, 1932, The office was a long room with witness' desk at one end and the accused's at the other, facing each other (R. 175). Witness had charge of the mail book. All moneys received through the mail were recorded in the mail book. He identified the mail book. Practically all of the entries were in his handwriting. He kept the book from August 6, 1931, the date of the first repayments, up to the present date, and

all the entries in the book were correct when they were made, in so far as he knew. The mail book was received in evidence and marked Exhibit 165 (R. 176).

o. Joaquin Berrios, San Juan, Puerto Rico, testified that he has been employed since March, 1929, as general utility clerk and ledger clerk at the Board of Alternates of the Relief Commission. His desk was next to that of accused. Accused made the bank deposits for the Commission. Witness had nothing to do with refunds. As ledger clerk for about three years he kept a daily record of all cash receipts and payments in the "repayment book". A "repayment" is money returned by a borrower to be credited to his account as a partial payment or full payment of his loan. All such money received was recorded in the "repayment book". He identified the "repayment book", and stated that the entries in it are in his handwriting (R. 177). The book was received in evidence and marked Exhibit 166. All entries in it for the period of February 1, 1931, to December 19, 1932, are in witness' handwriting and were correct when made. He handled the repayment money and gave it to accused who initialed the book as a receipt. The initials in the book were those of accused and witness saw him make them. During the period of February 1, 1931, to December 19, 1932, witness transmitted $18,965.73 to accused in the form of repayments. Witness was unable to find records of the physical form of the money prior to December, 1931, but from December, 1931, to December, 1932, he transmitted $6,960.73 to accused, of which $1,741.50 was in cash and the remainder in postal money orders or certified checks (R. 178).

p. William R. Ryan, San Juan, Puerto Rico, testified that he is chief clerk, Board of Alternates, Puerto Rican Hurricane Relief Commission. His duties are the general administration of the office, and in addition certain special duties in connection with the loans. He had more than twenty years of experience as an office manager. Accused's office was practically adjoining his own. Witness always had free access to the records of the disbursing officer for the Commission. He identified certain documents as office copies of the "schedules of disbursements" for various months from December, 1930, to July, 1932, as part of the records of the disbursing office of the Puerto Rican Hurricane Relief Commission, and they were received in evidence as Exhibit 167. He had checked the list of loans, already admitted in evidence as Exhibit 9, and had found that the deposits of

which the refunds therein listed were a part were all dropped on the "schedules of disbursements" (R. 180). The "schedules of disbursements" represent the disbursements made by the disbursing officer covering the months mentioned for loans and other purposes. Witness has been chief clerk in the Board of Alternates since March, 1929, has seen the handwriting of accused "practically daily", and has seen him write. In his opinion the handwriting on Exhibit 13 (letter written by accused) and that appearing on the face of deposit slips admitted in evidence as Exhibits 135, 131, 132, 134, 133, 140, 136, 145, 148, 146, 147, 155, 156, 154, 153, 152, 151, 150, 149, 144, and 157, is that of accused. In his opinion the handwriting of the indorsements on manager's checks, Exhibits 91, 93, 66, 44, 45, 21 and 23, is that of accused and the indorsements were made by him. The prosecution then handed the witness the following documents, all of which had been received in evidence:

Twelve (12) manager's checks drawn by Credito y Ahorro Ponceno, Exhibits 42 to 53, inclusive.

Four (4) manager's checks of the Banco de Ponce, Exhibits 66 to 69, inclusive.

Two (2) manager's checks of the Royal Bank of Canada, Exhibits 75 to 76.

Thirteen (13) manager's checks drawn by the Banco Territorial y Agricola, Exhibits 18 to 27, inclusive, check number 4272, Exhibit 38, check number 4139, Exhibit 39, and check number 3754, Exhibit 40.

Five (5) manager's checks of the Banco Comercial de Puertor Rico, Exhibits 79 to 83, inclusive.

Eighteen (18) manager's checks of the National City Bank of New York, San Juan Branch, Exhibits 90 to 107, inclusive.

Eighteen (18) letters of transmittal and documents inclosed, of the National City Bank of New York, San Juan Branch, admitted in evidence as Exhibits 109 to 126, inclusive.

Four (4) letters of transmittal and connected documents from Banco de Ponce admitted in evidence as Exhibits 70 to 73, inclusive.

Eleven (11) letters of transmittal of the Credito y Ahorro Ponceno covering twelve (12) loans, admitted in evidence as Exhibits 54 to 64, inclusive (R. 182).

Thirteen (13) letters of transmittal from the Banco Territorial y Agricola, received in evidence as Exhibits 15 to 17, inclusive, and 28 to 37, inclusive.

Five (5) letters of transmittal of the Banco Comercial de Puerto Rico, admitted in evidence as Exhibits 85 to 89, inclusive.

Two (2) letters of transmittal of the Royal Bank of Canada, admitted in evidence as Exhibits 77 to 78.

Witness stated that refunds are reported on the schedules of collections by the contract number, the name and the amount. The fifty-four checks just handed him were drawn from February, 1931, to December 15, 1932. They were paid between March, 1931, and December 17, 1932 (R. 181-183). He had compared minutely the fifty-four checks and the 53 letters of transmittal, and was able to line up each check with the letter of transmittal with which it was received and had ascertained therefrom the purpose for which the check was returned, the contract and the borrower to which it applied. In order to ascertain whether or not any of the fifty-four refunds, as evidenced by the fifty-four checks and the fifty-three letters of transmittal, were reported, he had audited the general accounting office copies of the "accounts current", "schedules of collections" and "schedules of funds received", for the period of February 1, 1931, to December 19, 1932, inclusive, and had found that none of the fifty-four checks had been accounted for. The total amount represented by these fifty-four checks is $8,183.00 (R. 184).

A repayment is the part of his loan repaid to the Commission by a borrower. Repayments come to the chief clerk in cash, in personal checks, and sometimes in money orders. He makes up a form notice to the ledger clerk, transmitting the money with the notice. The latter enters the amount in his ledger, posting the item in the receiving books called the "repayment book", and transmits the funds with the transmittal letter to the disbursing officer (i.e., the accused). Witness had checked the "mail book" (Ex. 165; R. 185), in which is recorded the receipts of money that come to the hands of the mail clerk, in order to determine whether any of the fifty-four checks, which apparently had not been accounted for, appeared in it, and had found that some of them had been entered and some had not. The book had not been carried on continuously. It was used in May, 1930, and again picked up in August, 1931. It was really an idea of the mail clerk himself.

Witness had checked the fifty-three loan cards covering fifty-four loans (Ex. 163) against the fifty-four refunds and had found no entry on them as to any of the refunds in question.

The prosecution stated at this point that it would like to complete some evidence promised earlier in the trial and that Mr. Norgard had testified that check number 391, Exhibit 129, in the amount of $26.00 was drawn by the National City Bank of New York, San Juan Branch, on May 11, 1932, to the order of C. R. Fouts, F.D., to cover a refund of Baldomero de Leon, contract number 1725, was paid by the same bank on May 28, 1932, and that a check of a similar amount was a physical constituent of a deposit made to the Treasurer of the United States by the accused on May 28, 1932. Earlier in the trial this check was used as a standard of comparison for the indorsement.

Upon being asked to examine the "schedule of collections" for July, 1932, and to state what reference is made on that "schedule of collections" to contract 1725 in the name of Baldomero de Leon Rosa, witness stated that there is an item showing that the National City Bank remitted a $26.00 refund under that contract number for that borrowed (R. 186).

Upon cross-examination by the defense witness testified that during the period covered by these "accounts current" the "schedules of disbursements" were in the general custody of the voucher clerk and witness had access to them. He was not a handwriting expert but would say that Mr. Perez' handwriting was very similar to that of accused. His own was not. He had never been a disbursing officer but he knew the actual construction of the "account current" with its "schedules of collections", and thought that he was qualified to testify as to the method used in reporting moneys disbursed by a disbursing officer. The "account current" shows both checks and cash but does not specify (R. 187).

Upon examination by the court, witness testified that he thought accused always entered the refunds on the loan cards since the entries were in accused's writing, according to witness' observation. The "schedule of collections" was the disbursing officer's duty. There were hundreds of refunds other than those represented by the checks in evidence before the court. While witness was chief clerk the clerks in the office of the disbursing officer were under the control of accused. There had been four such clerks but there was then one. The sections in the office were the "loan section", the "disbursing section", and the "engineer's office". When going at their peak

there were about fifty-one clerks in all the other sections (R. 190). The great bulk of clerks was in the "loan section", where there were about twenty-five. The mail clerk had instructions to send refunds to witness to keep the account of the loan record, and witness sent these refunds and the letters to accused with the check attached as per his (witness') memorandum. In some instances the letters did not come to him but went direct to accused. In every instance where witness had requested a refund he noted the fact of the refund. The office should have permanent records showing that fifty-four checks came in as refunds and also the records in the loan division.

To questions by the defense, witness testified that the "disbursement section" under the control of accused handled all the loans for the "loan division" (R. 191) and was responsible for some $11,000,000.00, practically all of which was disbursed through this section. Accused was always asking for more help which was given him and obtained back as his work eased off. This was not always experienced financial help but just what they could get with the means at their disposal. Most of the help was borrowed from the Insular government. They were said to be accountants, but they were overrated (R. 192).

q. Captain J. L. Tunstall, Finance Department, was recalled as a witness for the prosecution and, having been reminded that he was still under oath, testified that he was then special disbursing officer of the Puerto Rican Hurricane Relief Commission, having taken over the duties by transfer from accused on December 19, 1932, pursuant to War Department Special Orders of December 2d and 3d. When he took over the office accused delivered to him his official check on the Treasurer of the United States for $61,998.47. No cash was turned over at the time (R. 192). A few days after December 19, 1932, accused pulled three checks out of his shirt pocket and handed them to witness saying he had found them and since he had closed his account and it would require opening a new account to handle them, would witness take them and treat them as initial receipts of his own. The checks were manager's checks, one of the Royal Bank of Canada for $17.00 to apply against contract 566, one of the Credito y Ahorro Ponceno for $239.00 to apply against contract 609, and one of the National City Bank for $21.00 to apply against contract 3049. Witness took the checks and they were accounted for on his "schedule of collections" for December.

Witness was handed fifty-four checks introduced in evidence as follows: Banco Comercial checks, Exhibits 79 to 83, inclusive; Banco de Ponce checks, Exhibits 66 to 69, inclusive; Credito y Ahorro Ponceno checks, Exhibits 42 to 53, inclusive; National City Bank of New York, San Juan Branch, checks, Exhibits 90 to 107, inclusive; Royal Bank of Canada checks, Exhibits 75 and 76; and Banco Territorial y Agricola checks, Exhibits 18 to 27, inclusive, and 38 to 40, inclusive. He then stated that the three checks he had just testified about were not included among those handed him. Since the date on which accused turned over to him the three manager's checks referred to, accused had turned over no other funds whatever. Witness was handed the following letters of transmittal: from the National City Bank of New York, San Juan Branch, already admitted in evidence as Exhibits 109 to 126, inclusive; four letters of transmittal from the Banco de Ponce already admitted in evidence as Exhibits 70 to 73, inclusive; eleven letters of transmittal from the Credito y Ahorro Ponceno already admitted as Exhibits 54 to 64, inclusive; twelve letters of transmittal from the Banco Territorial y Agricola already admitted as Exhibits 16 and 17 and 28 to 37, inclusive; two letters of transmittal from the Royal Bank of Canada, already admitted as Exhibits 77 and 78; and five letters of transmittal from the Banco Comercial, already admitted as Exhibits 85 to 89, inclusive (R. 193). He then stated that each letter of transmittal identified a corresponding check. There are fifty-four checks and fifty-three letters of transmittal, one letter of transmittal carrying two checks. Witness was handed the documents received in evidence as Exhibit 158, comprising the "accounts current", "schedules of collections" and "schedules of funds received" for the period of February 1, 1931, to December 19, 1932, the signature on all of which had been identified as that of accused, and asked to describe the whole transaction of accounting made on those records by a disbursing officer. He replied that a disbursing officer takes up on his "schedule of funds received" and "schedule of collections" all receipts coming into his possession during the period covered by the corresponding "accounts current". All receipts are taken up on these forms except transfers to his credit by the Treasurer of the United States. The total receipts, as shown by the "schedule of collections", is carried to the "schedule of funds received", and from that schedule to the "account current", both front and back. All of the fifty-four checks handed him were drawn between February 27, 1931, and December 19, 1932, and apparently were paid by the banks on which they were drawn between March 30, 1931, and December 19, 1932. Refunds are identified on the

"schedule of collections" by date, reference or receipt number, name of remitter, the purpose, such as refund of balance remaining on loan, giving the contract number and name of borrower, the reason for the refund, and in the amount column the amount of each separate refund (R. 194). Witness had examined each of the "accounts current" and the supporting papers for the period of February 1, 1931, to December 19, 1932, inclusive, and had found that the totals shown by the "schedules of collections" and the "schedules of funds received" agreed each month with the corresponding "account current". In addition to examining them he had made an analysis of the "account current" and the supporting "schedules of collections" for that period, and had prepared and checked up, together with warrant officer Gonzalez , this analysis of accounts of accused already received in evidence as Exhibit 159. The result of the check showed that the analysis was correct. It showed that the cash collections for each month of the period is in monthly agreement with the cash deposits to accused's official credit during the same month. This means that his "account current" shows that he deposited each month the exact amount which the "account current" and the "schedule of collections" shows he received, and no "account current" carried any cash forward to the next month. The analysis made on the back of the "accounts current", which is what is known as the "cash analysis", shows that, for each month during the period, the cash vouchers, shown as credit in the cash analysis, are in exact monthly agreement with the total cash shown as having been received from the depository as a result of cashing official checks. Stated in words the court will clearly understand, the back of the "account current" in the "cash analysis" debits the cash collections and debits the cash obtained from the depository by cashing official checks. The total of the two then represents the total debit for which the officer (R. 195) is accountable on that "account current". Then the cash credits take credit for the total of the vouchers paid in actual cash and also the cash deposits to his official credit, the sum of the two representing the total of the officer's credits for the period, which is to say that on each of the "accounts current" the total debits of cash exactly compensated the monthly credits of cash, no cash accountability being carried forward and no cash on hand to close the month. Witness had made an investigation to ascertain whether any of the fifty-four refunds in question, as evidenced by the bank letters of transmittal and the checks themselves, were picked up on the schedule of collections for the

period of February 1, 1931, to December 19, 1932, and could not find that any of the fifty-four refunds in question had been picked up on the "schedules of collections" or the "schedules of funds received", or on the "accounts current". Therefore, in his opinion, no one of the fifty-four refunds had been accounted for. He knew as a matter of fact that the fifty-four refunds are not picked up on any of these three forms. He not only looked to see if they had been picked up directly, but to see if he could offset them in any way (R. 196). From his investigation there is nothing to indicate that they have been accounted for. He had checked the loan cards covered by the fifty-three contracts affected by the fifty-four refunds and no one of the fifty-four refunds had been picked up on the loan cards. The loan book is a longhand ledger to cover loan contracts, one line to each loan contract. It shows the amount of the loan, the name of the borrower, the various payments made to the payee through banks on such loan contract and refunds made by the banks against such contract. It does not show repayments. He had checked the loan book through twice to see if any of the fifty-four refunds in question had been picked up or shown in it, and at the time he completed both checks no one of the refunds was shown in the book. The printed wording of the certificate on each of the "accounts current" for the period from February 1, 1931, to December 19, 1932, inclusive, is the same on all the "accounts current". In plain English it means to a disbursing officer that the accountability carried on the "account current" is true according to the best of his knowledge and belief and the records available (R. 197). The "repayment book", admitted in evidence as Exhibit 166, is carried in the office of the Board of Alternates of the Relief Commission by Mr. Barrios who presents it to witness (disbursing officer) whenever he turns over to him a repayment from a borrower, and in which the witness enters his initials with the date to show that he received the payment. All the repayments shown in the book, excepting those carrying witness' initials, he had checked against the retained "accounts current" of accused for the entire period of his accountability, and he had found each one of the repayments which he checked picked up on accused's retained "schedule of collections" (R. 199).

Upon cross-examination by the defense witness testified that if one or more of the fifty-four checks had been used as the physical components or constituents of official deposits and had been deposited in addition to what accused admits as having been received in his

"account current", then he would have been out of balance by exactly that amount. No one of the fifty-four refunds as evidenced by the checks and the letters of transmittal, has been accounted for on the "account current". He could not say how many, if any, of the checks were used as the physical constituents of the various deposits shown on the "account current", but the checks and the letters of transmittal had not been accounted for (R. 204).

Upon examination by the court witness testified that in effecting a deposit through a depository to a disbursing credit with the treasurer three copies of the deposit slip are made out. They are of different colors, but the original, regardless of the colors, goes to the bank for transmittal to the Treasurer of the United States. The triplicate stays with the bank and the duplicate is delivered back to the disbursing officer as evidence of his deposit. The loan book is an administrative accounting record kept for the chairman of the Board of Alternates (R. 203½). It is not required by finance regulations.

The fifty-four checks represent refunds called for by the chairman of the Board of Alternates from the banks, from which, according to the loan contracts, the borrower receives his money. When the refund comes in, in whatever form it is, it is turned over to the disbursing officer, being official funds, and then it must be used either for the payment of cash vouchers or, in lieu of that, it must be deposited to his official credit. The refund money cannot be used for making new loans because that is an administrative action of the Board. Refunds show in the loan book. All the refunds shown on the retained copies of the accountancy papers of accused for the entire period of his accountability are shown in the loan book. No one of the fifty-four refunds in question is shown on either the loan book or the loan cards, and none of them is taken up on the "schedule of collections" (R. 204½).

Accused was special disbursing officer for the Commission and witness has the same title. So far as he knew accused's duties were the same as his. Witness disburses other funds than those of the Commission, but under separate symbol numbers. Upon being asked if there is such a thing as a special account in connection with the Relief Commission, if he has a special account in the same way as accused, or if there is any special account other than the government account, witness replied that he had no accounts for the Hurricane Relief Commission except his accountability at and with the United

States Treasury under a special symbol number assigned to him for his sole use in that office. All moneys received, whether refund or repayment or of whatever nature, should be deposited to the Treasurer of the United States, unless it is used to make cash disbursements. A refund of its very nature would not be in cash (R. 205½). Witness could not conceive how it could ever be anything but a manager's check. To use these funds for cash disbursements accused would have to cash the check. This could be done and would be proper but not customary. He could go to the bank and cash the check and go back and use the cash for cash vouchers. It would make no difference to the account. In either case the disbursing officer would debit the refunds and take credit for the amounts paid out or deposited or a combination of both. However, when a disbursing officer has official checks and a government depository is handy, it is not customary for a disbursing officer to cash such checks because at the same depository he could cash an official check. The loan book is administrative accounting and is not officially required by regulations. So far as the Chief of Finance and the General Accounting Office are concerned, they do not know that the loan book exists and they do not care. They look for refunds which are required to be shown on the "schedule of collections" and of "funds received", and carried to the "account current". The chairman of the Board of Alternates required that refunds be entered in the loan book so that by looking at it, as each line carries a separate loan, he can get the entire picture of the transactions, in addition to the loan card. If the chairman of the Commission looked at the loan book, or the loan card, he would get the impression that these refunds had not been made by the bank. The card shows the amount of money paid into the bank to the credit of the individual by voucher number and month, and by looking at this the chairman of the Board or anyone else can tell at a glance how much money has been paid into the bank to the credit of the borrower (R. 206). The loan cards also show the refunds. Unless he saw a refund marked on the card he would not know of any refund. Refunds show both on the loan card and the loan book. Repayments show in another place. The loan card, or a copy of it, goes to the bank. All the bank returns with a refund is the letter of transmittal and a form 20, together with their check for the refunded amount. Form 20 shows the receipt of the borrower for the moneys he has actually drawn from the bank. If you take any loan card and the corresponding form 20 you will see how much has been placed in the bank to the credit of the borrower. Subtracting therefrom the amount shown on the card as refunded before it reached the borrower,

then you would look for form 20, showing the receipts of the borrower for such amounts as he had received. Witness had audited the loan book and it was months before he could get it in balance because the total amount of refunds shown by the loan book did not agree with the refunds shown by the retained accounting papers of accused.

To questions by the defense, witness gave his opinion that he has approximately the same amount of work that the accused had during his last few months, but the "schedules of disbursements" showed that at one time the work for the Relief Commission was very heavy, several times larger than at present (R. 207).

r. Colonel F. J. Behr, Chairman of the Board of Alternates, Puerto Rican Hurricane Relief Commission, was recalled as a witness for the prosecution, and testified that the authority for the deposit of loan money at various banks in the island of Puerto Rico was conferred by Congress on the Commission, who in turn delegated it to the Board of Alternates by an order approved by the Commission which had previously received the approbation of the General Accounting Office. Witness identified some documents handed him, the first, an extract copy of a "radio" addressed to the chairman of the Board of Alternates stating that the procedure for the loans had been submitted to the General Accounting Office for its action and approval; the second, an extract copy of a "radio" addressed to the chairman of the Board of Alternates stating that the General Accounting Office had approved informally that procedure (R. 208); and the third, a true copy of the Commission order dated May 15, 1929, outlining the general procedure. The first "radio" is dated May 11, 1929, the second May 14, 1929, and the third May 15, 1929. The approval of the General Accounting Office had to be informal because that office does not actually approve any proposition other than on facts or transactions that have actually occurred. Witness is the custodian of the originals of the documents mentioned and his certificate appears on each one in his own handwriting. The three documents were received in evidence as Exhibit 168.

During the period accused was special disbursing officer, the distribution of the personnel in the office of the Board of Alternates was as follows: The accounting section of which accused was in charge consisted of four assistants besides himself. There were approximately between fifty and sixty other clerks in the office charged with the preparation, checking and completion of the applications so as to be in

a state to be approved and that payments could be made thereon. Each application had to pass through forty-three different hands for checking. That did not include correspondence to correct certain defects, or matters pertaining to legal subjects, such as title, mortgages, and so forth. So far as witness was aware accused never asked for additional help, but preferred to do certain parts of the work himself. Had he made a request for additional help he would have gotten it (R. 209). Witness was handed fifty-four manager's checks as follows: eighteen of the National City Bank of New York, San Juan Branch, Exhibits 90 to 107, inclusive; two checks of the Royal Bank of Canada, Exhibits 75 and 76; five checks of the Banco Comercial de Puerto Rico, Exhibits 79 to 83, inclusive; four checks of the Banco de Ponce, Exhibits 66 to 69, inclusive; twelve checks of the Credito y Ahorro Ponceno, Exhibits 42 to 53, inclusive; and thirteen checks of the Banco Territorial y Agricola, Exhibits 18 to 27, inclusive, and 38 to 40, inclusive. He stated that the total of these checks is $8,183.00. During the period of February 1, 1931, to December 19, 1932, inclusive, there was no authority of law or regulation for the accused to retain as salary, pay or emolument of any kind any portion of the funds coming into his possession as special disbursing officer, or any portion of the funds represented by these fifty-four checks.

When accused was relieved as special disbursing officer for the Commission, he left Puerto Rico close to the end of December, 1932. About February 14th or 15th there was an occasion to send a tracer from the Board of Alternates to one of the banks with reference to a refund check, and upon investigation it was ascertained that the two checks in question had been sent by the bank concerned, but had not been taken up, so far as witness could ascertain, at the time on accused's papers (R. 210). Witness sent a letter to accused outlining briefly what he had ascertained and stating that on account of his familiarity with the papers, due to his handling many of them personally, he believed accused could straighten out the accounts if he came to Puerto Rico. Witness identified a copy of the letter, dated March 11, 1933, that he sent to accused. It was offered in evidence by the prosecution but withdrawn upon objection by the defense that it was not good evidence since the witness who wrote it could testify in person. Witness thereupon refreshed his memory from the letter and testified that, in addition to what he had already stated of the contents of the letter, he had made, as chairman of the Board of Alternates, two propositions to accused in it, one that he come himself to Puerto Rico, and the second that witness take up the matter with the Commission

to request authority to send him down there in order to give him an opportunity, by having available all the records, to straighten out his accounts if possible, since it would be impracticable to send the records up to his station at that time, and in fairness to accused he wanted to give him every opportunity to adjust his accounts. Witness received a "radio" from accused accepting the second proposition (R. 211). Witness was permitted to refresh his recollection from a diary kept by him in shorthand, and then testified that accused arrived in Puerto Rico on the transport Chateau Thierry at 9 a.m. on April 3, 1933. On the same day there was a meeting of the Board of Alternates. Captain Tunstall and Mr. Ryan were also present at the request of witness (R. 212-213). Accused appeared before the Board, and, in the presence of Captain Tunstall and Mr. Ryan, "He was apprised of why he had come to Puerto Rico, advised of his constitutional rights and warned that anything he might state might be used against him" (R. 214). There were no minutes kept of the meeting of the Board on that date or of any meeting of the Board when accused was present, although they were official meetings called by witness. He read to accused a list outlining the steps followed in the office of the Board of Alternates as to the shortages that they could not account for, and handed him a list from six banks with the checks, asking him if he had anything to say. Accused looked at them and stated: "I think there is nothing to say but for me to make offer of restitution"; and a little afterwards he stated: "I think that the amount of the shortage is a little more than you have it". Upon objection by the defense to the admission of this testimony, on the ground that it had the "semblance of a confession" and was not voluntary, witness, in response to questions of the court and the defense, testified that no promise was made to the accused and there was no action on the part of witness that "would tend to have accused think" that he was forcing anything on him. He told accused in reference to his offer to make restitution that he would submit that proposition to the Commission with the recommendation of the Board that the proposition be referred to his chief of branch for such consideration as he saw fit to give it. The objection of the defense was properly overruled. Witness testified that he said to accused: "Then, when you signed your last account current for December, 1932, you knew you were short", to which accused replied: "Yes, I suppose I did". Accused was excused from any further statement on that day. On the following day he came to witness' office and asked for certain papers to be brought to him in order that he could check with the list as it had been prepared

by witness' assistants under his supervision. The total of the list prepared prior to accused's arrival was $8,038.00, but the result of the checking disclosed that the total amount of the shortage was $145.00 more, making a grand total of $8,183.00. Witness was handed the fifty-three letters of transmittal, which were described to him by their sources and their several exhibit numbers, and asked to state the date and the circumstances under which he first saw them. He stated that on the morning of April 4, 1933, when accused started to check the accounts he withdrew from his pocket a paper and asked that certain papers be brought to him that were in the office safe, stating that these papers were in a manila envelope without address. Witness directed Captain Tunstall to get this envelope which he did, and it was turned over to accused. The contents of the envelope were the letters of transmittal which had just been handed to witness. Accused used them in connection with certain of his papers. Witness then took possession of them and they remained in his possession under lock and key until he was requested to turn them over to the trial judge advocate (R. 215-219). The papers were used in checking payments for the accounts of borrowers, and refer to refunds. The fact that they were in the safe was not known to witness up to the time that accused asked that they be brought to him. They are papers that ordinarily would be in the records of the office accessible to all who have charge of those transactions, and of which witness was custodian.

Upon cross-examination by the defense witness testified that his office had a vault and a separate small safe in which they placed valuable papers. He was in charge of the office, and papers in the vault or safe are, in a sense, in his official possession. Accused did not take the letters which referred to the fifty-four checks with him when he left the island. It was ordinarily a usual proceeding to keep minutes of all official board meetings (R. 220), but they were not kept of the meetings described by witness out of consideration for accused and because two other men were present who were not members of the Board.

There was other work required of the section of which accused was head besides keeping papers since, as disbursing officer, "all papers pertaining to disbursements were done or carried out by the accounting section" (R. 221). Other money was spent in addition to that for loans. During the time of accused's accountability as disbursing officer of the Commission, a part of $100,000.00 was expended

for seeds and seedlings; part of $50,000.00 for administration; a part of $2,000,000.00 for schools and roads; and a part of $1,000,000.00 was expended for insular and rural roads. This was in addition to the money appropriated for loans (R. 222). The greater part of this had been disbursed by accused (R. 223).

Upon redirect examination witness testified that the letters of transmittal are supposed to be filed in the individual file of each borrower usually called "jackets", where all papers pertaining to a particular loan are kept. These "jackets" are filed in the file room of the office of the Board of Alternates (R. 227).

Upon examination by the court witness testified that the fifty-three letters of transmittal, which were discovered only after accused returned, came into the Commission's office through the regular procedure. They were filed in the mail book and referred to the file clerk who gets the jackets and papers concerned and takes them to the chief clerk. The chief clerk then transmits all the papers with the check to accused. These receipts as the letters came in with the checks were recorded in the mail book, showing the amount of money, the check number and the loan contract number (R. 228).

s. Captain J. L. Tunstall, Finance Department, was recalled as a witness for the prosecution and testified that the fifty-four checks (heretofore repeatedly described by exhibit numbers) totaled $8,183.00. He was present at the meeting of the Board of Alternates held on April 3d at the request of Colonel Behr. Colonel Behr said to accused: "I suppose you know the purpose or object of this meeting?" Accused replied: "I do" (R. 231). Colonel Behr then said to accused: "You don't have to make any statement unless you want to, or answer any questions", and then read to him the 24th Article of War. No inducement was offered accused and no threats were made to him. After these preliminaries and the reading of a statement the Colonel handed accused a batch of checks and a typewritten list of checks, bank by bank, for examination by accused. Accused took what the Colonel had handed to him and shuffled them rather casually. After a moment's pause Colonel Behr said: "Do you care to make any statement?" to which accused replied: "No, I don't suppose there is anything I can say except to make offer of restitution". Accused continued to finger the papers handed to him and then turned to witness and said: "Tunstall,

will you bring me the large manila envelope, unmarked, out of the office safe". Witness proceeded to the safe and found a large unmarked manila envelope which he brought in and handed to Colonel Behr. The latter handed it to accused who opened it and pulled some papers from it (R. 232-233). Accused then remarked: "I believe the shortage is a little more than you have made it". One of the statements witness heard at the meeting was that of Colonel Behr to the accused: "Then, Captain Fouts, at the time you signed your account current for December you knew you were short", to which accused replied: "Yes, I suppose I did". One afternoon in April towards the end of accused's visit he was in witness' car and said to witness: "Colonel Behr questioned me again today about these refunds. From his questions he seemed to be trying to find out what I did with these funds. I did not give him any satisfaction because I did not care to discuss this phase of it. All I do care to say is that I received no personal benefit from these funds and have none of them at present". Witness replied: "I don't see what that has to do with your failure to account for official receipts". Accused then changed the subject and it was not brought up again. Witness found the manila envelope in the lower part of the open compartments of the office safe (R. 234-235).

Specification, Charge III.

In addition to the evidence previously noted with respect to the "account current" and "schedule of funds received" for the period December 1 to 19, 1932 (part of Ex. 158), and to manager's checks, National City Bank of New York, San Juan Branch, number 2187, dated December 14, 1932 (Ex. 105), and number 2191, dated December 15, 1932 (Ex. 106), the further evidence under the specification of Charge III may be summarized substantially as follows:

t. William J. Ryan, chief clerk, Board of Alternates, testified that the signature to the certificate of the duly authenticated copy of the "account current", dated December 19, 1932 (part of Ex. 158), was, in his opinion, that of accused (R. 181). The various entries made on that "account current" for December 19, 1932, cover the period from December 1 to 19, 1932. December 19, 1932, is the date of the entry on the "schedule of funds received", dated December 1 to 19, 1932. The "schedule of collections" dated December 1 to 19, 1932, covers that period. The certificate at the bottom of the "account

current" dated December 19, 1932, reads: "I certify that the above is a true, full and correct account of all monies coming into my possession on account of the United States during the period stated under my official bond above mentioned excepting the amounts reported in the following accounts rendered under said bond, none; a balance of nothing is held as stated on the reverse hereof. San Juan, P.R., December 19, 1932. C. R. Fouts, Captain, F.D., U.S.A., special disbursing officer P.R.H.R.C." An examination of the transactions shown on the face of this "account current" shows that it is rendered for the period from December 1 to 19, 1932 (R. 182). National City Bank of New York, San Juan Branch, check number 2187 (Ex. 105) was drawn on December 14, 1932, and paid on December 17, 1932. This check could have been accounted for by having been taken up on the schedule of collections, which is the proper way, or turned over by the special disbursing officer (accused) to his successor (R. 184). No reference whatever to this check is made in the "account current" and the "schedule of collections". Having before him the letter of transmittal (Ex. 125) which goes with this check, and the check itself (R. 105), witness examined the "schedule of collections" and the "account current" for December, 1932, and stated that no reference whatever to the refund evidenced by check number 2187 (R. 105) appears thereon. Upon being handed National City Bank of New York, San Juan Branch, check number 2191 (Ex. 106) and National City Bank letter of transmittal of December 15, 1932 (Ex. 126), witness stated that the item does not appear in the "schedule of collections" or "account current" for December, 1932 (R. 185).

Upon cross-examination by the defense, Mr. Ryan testified that he could not find these two checks in the "account current" (R. 187). According to the checks they were negotiated at the bank on December 17, 1932. The final "account current" for December 19th balances. If these two checks were deposited to the Treasury account and were not reported on that "account current", there would be something wrong with that balance, "everything being in order". Supposing everything was not in order and an amount was deposited to the United States Treasurer that was not listed, the account would not then be out of balance if this amount had been put in to take up some other amount. If more money were deposited than shown as received the account would be out of balance (R. 188).

Upon redirect examination witness testified that the "schedule of collections" for December, 1932, reported the following items

received: refund, Banco Territorial y Agricola, of $115.00 of balance on deposit; a payment of balance of instalment due, in the amount of $225.00; a refund of Treasurer of Puerto Rico of 10% retained on a contract in the amount of $360.06; and a refund from the National City Bank of fifteen cents covering an overpayment made to the Puerto Rico Telephone Company; a total of $700.21. No reference whatever is made in the "schedule" to a refund on the contract of Jaime Enrique Vigueira Solivellas, or to a refund in the name of Juan Lopez Santiago, contract number 2419.

Upon recross-examination witness testified that he connected the check with the letter of transmittal because he had before him in the office the condition of this account, the name of the borrower, and the letter to the bank asking for the refund. He connected the particular check with the letter of transmittal because it was his own handwriting on the letter, and he transmitted it to accused after getting the check. The check belonged to the letter of transmittal because it came back with the letter of transmittal and the form (R. 190).

u. Captain J. L. Tunstall, Finance Department, testified that National City Bank of New York, San Juan Branch, check number 2187, in the amount of $250.00 (Ex. 105) was drawn on December 14, 1932, and negotiated on December 17, 1932 (R. 197). The refund as evidenced by this check and letter of transmittal dated December 14, 1932, for $250.00, against contract number 3139, is not shown on the "schedule of collections" or of "funds received" on the "account current" for December, 1932. The refund evidenced by National City Bank of New York, San Juan Branch, check number 2191, in the amount of $42.00 (Ex. 106), and the letter of transmittal dated December 15, 1932 (Ex. 126), pertaining to contract 2419, is not accounted for on the "schedule of collections" or of "funds received", or the "account current" for December, 1932. Witness read the certificate appearing on the "account current" for December, 1932 (quoted earlier herein) and said that in plain English it meant: "I certify that I am square with the United States" (R. 198). The transactions shown on the "account current" dated December 19, 1932, and the "schedule of funds received" and "schedule of collections", according to the dates thereon, occurred between December 1 and 19, 1932. Neither of the two National City Bank of New York, San Juan Branch, checks numbers 2191, in the amount of $42.00 (Ex. 106), and 2187 for $250.00 (Ex. 105), was ever

transferred to witness by accused (R. 199). The "schedule of collections" for December, 1932, shows the following receipts: December 17, 1932, cash, remitter, Banco Territorial y Agricola, purpose, refund of balance on deposit under contract 2944, amount $115.00; cash, remitter Antonio Passalaqua Costa, purpose, payment of balance $225.00; cash, Treasurer of Puerto Rico, purpose, refund of 10% retained under contract, amount $360.06; cash National City Bank of New York, San Juan Branch, purpose, balance remaining on deposit, amount fifteen cents. The total carried on the "schedule of collections" for the period of December 1 to 19, 1932, is $700.21. The cash analysis on the back of the "account current" for the same month, deposits cash collections, $700.21, and credits deposit to official credit, certificate of deposit number 47, National City Bank, $700.21. The amount of money reported on the account current for December, 1932, as having been disbursed in cash for that period is $758.71, and the same amount is reported as having been drawn in cash from the depository, cash from check number 6943 on the Treasurer of the United States, $758.71 (R. 200). Since the cash analysis of the "account current" shows (the amount) obtained from official checks exactly offsets the cash vouchers, there remains for deposit the total acknowledged collections of $700.21 (R. 201), it would have been only natural and normal that the physical constituents of the deposit of $700.21 would be made up of the same items carried on the "schedule of collections".

Upon cross-examination witness testified that the balance due the United States on the "account current" for December 1 to 19, 1932, is nothing. The "schedule of collections" says that the $700.21 are receipts during the month from four different sources. A disbursing officer can use the receipts to offset cash vouchers, but if he does not he is required to deposit them. A deposit of $700.21 to the Treasurer of the United States under certificate of deposit 47 is shown, which is the total amount that should have been deposited according to the "account current" and its supporting papers (R. 202).

Upon redirect examination witness testified that the check in the amount of $250.00, which is Exhibit 105, and the letter of transmittal, which is Exhibit 125, are not shown on the "schedule of collections" of December 19, 1932. The check is perforated as paid by the bank of issue on December 17, 1932. If this refund had been carried on accused's "schedule of collections" for December, 1932, then the total receipts as per schedule would have been $950.21. The refund, as

evidenced by check number 2191, which is Exhibit 106, and the accompanying letter of transmittal of the National City Bank of New York, dated December 15, 1932, which is Exhibit 126, are not picked up on the "schedule of collections" for December, 1932. If both of these refunds had been picked up on the "schedule of collections" then the total amount received would have been $992.21. The two checks numbers 2187 for $250.00 and 2191 for $42.00 amount to $292.00 (R. 205).

V. Major Howard Eager, 7th Field Artillery, testified by deposition (Ex. 169) substantially as follows: He was secretary of the Puerto Rican Hurricane Relief Commission for over four years from May 4, 1929, to June 29, 1933, and in charge of the Washington, D. C., office of the Commission and of such records of the Commission as were filed in that office. He was also the channel of communication between the Commission and the Board of Alternates, its operating agency in Puerto Rico. The "accounts current" (Standard Form No. 1022) prepared by the special disbursing officer of the Commission passed through the office of the secretary while he was secretary. The original of the photostatic copy of the "accounts current" for the period December 1, 1932, to December 19, 1932 (Standard Form No. 1022), purporting to have been prepared by accused, attached as Exhibit 1, was received by him as Secretary of the Commission either late in December, 1932, or early in January, 1933. The original of this Exhibit 1, together with certain inclosures, was received by registered mail from the office of the special disbursing officer of the Puerto Rican Hurricane Relief Commission, San Juan, Puerto Rico, and presumably from accused who held that office until December 19, 1932. The original, together with accompanying papers, was transmitted by witness to the office of the Chief of Finance, War Department, which office was charged with making an administrative examination of the account, as required by law. After completion of this examination, the account was returned to witness' office and transmitted by him on January 24, 1933, by registered mail to the Chief, Audit Division, General Accounting Office, Washington, D. C. Witness is familiar with the signature of accused. The latter's accounts and correspondence bearing his signature passed through witness' office for approximately four years. To the best of witness' knowledge and belief the signature "C. R. Fouts", which appears below the certificate on sheet 1 of Exhibit 1, is in the handwriting of accused. At the time the original of Exhibit 1 was received

by witness as secretary of the Commission, he accepted the signature of accused appearing thereon as meaning that accused reported that the cash collections reported were all the cash collections coming into his possession as special disbursing officer of the Puerto Rican Hurricane Relief Commission for the period December 1, 1932, to December 19, 1932 (Ex. 169).

w. George Robert Taylor testified by deposition (Ex. 170) that in the office of the Chief of Finance he is chief of the Division of Estimates and Fiscal Control, which duties he had performed since January, 1920, was performing in December, 1932, and in January, 1933, and was then performing (Oct. 30, 1933). His office is that of chief of division in the office of the Chief of Finance. In his division are kept bookkeeping records containing data taken from "accounts current" of the officer of the Finance Department of the United States Army on duty as special disbursing officer, Puerto Rican Hurricane Relief Commission. "Accounts current", Standard Form 1022, prepared by the special disbursing officer of the Puerto Rican Hurricane Relief Commission are received by the secretary of that Commission in the Munitions Building at Washington, D. C., and are transmitted informally to the office of witness, where they are examined and certain bookkeeping data extracted for the use of the Commission. Witness could not swear that the original of the photostatic copy of the "account current" (Standard Form 1022) purporting to have been prepared by accused, for the period December 1 to 19, 1932, as special disbursing officer of the Puerto Rican Hurricane Relief Commission, attached to the deposition as Exhibit 1, was received in the office of the Chief of Finance. All "accounts current" are supposed to be sent to his office by the secretary of the Commission, and he presumed that this one was also received. Bookkeeping records in his office tally with the figures on Exhibit 1, indicating in all probability that an "account current" for the period December 1 to 19, 1932, a copy of which is attached as Exhibit 1, was received in the office of the Chief of Finance. The original of Exhibit 1 was received from the secretary of the Puerto Rican Hurricane Relief Commission, Washington, D. C., and was forwarded to the General Accounting Office (Ex. 170).

The prosecution then rested its case (R. 238).

4. The defense moved under paragraph 71 d, Manual for Courts-Martial, that the court find the accused not guilty of all specifications

and charges because the prosecution had failed to introduce the necessary evidence to convict. The motion was not sustained (R. 238).

5. In opening the case for the defense, counsel explained that the original charges set out the amount of $8,183.00, the amount of the fifty-four checks, but that during the investigation accused pointed out that he had paid from his own personal funds to the Treasurer of the United States the amount of $270.00 to make good a check on a closed bank, and that, although accused thought the money had been recovered, it had never been returned to him. The charges were then changed to set out the amount of $7,913.00, the remainder after deducting the sum of $270.00 from the original amount.

The evidence for the defense is substantially as follows:

a. Captain J. L. Tunstall, Finance Department, recalled as a witness for the defense, read from a memorandum he had written on September 30, 1933, to be attached to the "schedule of collections" of his accounts for the month of September, 1933. In this memorandum he had invited attention to refund item of $19.00 under contract number 2958 and $270.00 under contract number 699, received by virtue of a court decision from the receiver of the Banco Comercial de Puerto Rico. The memorandum continued as follows:

> "Schedule of collections of Captain C. R. Fouts, F.D., U.S.A., S.D.A., for the month of October, 1931, carries a refund of $270.00, under contract No. 699, and his schedule of collections for February, 1932, carries a refund of $19.00 under contract No. 2958.
>
> Although Captain Fouts carried these refunds, the checks for $270.00 and $19.00 issued by the Banco Comercial de Puerto Rico were never deposited.
>
> The fact that the two refund checks were not presented by Captain Fouts prior to the closing of the bank enabled the board of alternates to secure refund from the receiver for the bank by delivering over the two uncashed manager's checks.
>
> The refunds of $270.00 against contract 699, and of $19.00 against contract 2958, are the only refunds called for and made under these loan contracts, and the presumption must be that the carrying of these refunds

on the above mentioned schedules of collections was in error', and further, that the depositing of the total of $289.00 by Captain Fouts is to be credited against the total of $8,183.00 involved in embezzlement charges."

Witness further testified that the two original checks described were never presented or turned into money by accused. The sum of $289.00 recovered from the Banco Comercial by witness was deposited to his own official credit in September, 1933. He thought that while the accused had received the refunds, as stated on his schedule, the deposit to make good these uncashed refunds must have been made out of his own pocket (R. 239-241).

Upon cross-examination by the prosecution witness expressed his opinion that the $8,183.00 should be reduced by an equity credit of $289.00, although there are fifty-four checks for refunds in the total amount of $8,183.00 that have not been accounted for (R. 242).

b. Oscar Norgard, bank employee, San Juan, Puerto Rico, was recalled as a witness for the defense.

The defense announced that it intended to prove by this and the next witness the ultimate disposition of the entire fifty-four checks, the subject matter of the trial, the total amount of which is alleged to have been embezzled, and that it also intended to open for the court the much discussed "C. R. Fouts Special Account" and trace every withdrawal from the date it was opened until the date it was completely closed (R. 242).

Witness testified that he is a sub-manager with the National City Bank. To the best of his knowledge the San Juan Branch of this bank is the only United States depository in San Juan, and there is but one United States Treasury account kept in this bank. He had prepared an affidavit, sent to Colonel Behr, showing the result of his investigation as to the ultimate disposition of the fifty-four checks in question. Refreshing his memory by consulting this paper the witness stated the disposition of each of the fifty-four checks which may be summarized as follows:

(1) Deposited to the Treasurer of the United States.

	Check number	Bank	Amount
1.	34871	National City Bank of N.Y.,S.J. Br.	$ 138.00
2.	38648		50.00
3.	41889		230.00
4.	42038		20.00
5.	448		58.00
6.	466		420.00
7.	931		78.00
8.	1102		476.00
9.	1973		61.00
10.	2187		250.00
11.	2191		42.00
12.	27226	Banco Comercial de Puerto Rico	55.00
13.	27988		101.00
14.	27989		403.00
15.	28309		140.00
16.	28308		504.00
17.	1854	Banco Territorial y Agricola	419.00
18.	3154		105.00
19.	3754		68.00
20.	4030		77.00
21.	4060		186.00
22.	4139		96.00
23.	4255		80.00
24.	4272		322.00
25.	4353		200.00
26.	2923	Royal Bank of Canada	198.00
27.	4481		35.00
28.	14129	Credito y Ahorro Ponceno	238.00
29.	14355		19.00
30.	14964		4.00
31.	15486		49.00
32.	17384		34.00
33.	17383		38.00
34.	17664		44.00
35.	15942		195.00
36.	15287	Banco de Ponce	34.00
37.	15592		67.00
38.	16550		420.00
			$5,954.00

(2) Deposited to C. R. Fouts, Special Account.

	Check number	Bank	Amount
1.	39416	National City Bank of N.Y.,S.J. Br.	$ 55.00
2.	39994		79.00
3.	40019		75.00
4.	40230		6.00
5.	523		90.00
6.	526		247.00
7.	674		18.00
8.	2270	Banco Territorial y Agricola	84.00
9.	2281		25.00
10.	2297		8.00
11.	14561	Credito y Ahorro Ponceno	174.00
12.	14562		127.00
13.	14653		36.00
14.	14820		25.00
15.	14620	Banco de Ponce	1,155.00
			$2,204.00

Witness testified that he believed he had accounted for each and all of the fifty-four checks. (He omitted to account for Banco Territorial y Agricola check number 2296 for $25.00, deposited November 4, 1931, to the account of C. R. Fouts, special account (Ex. 21)). He identified the ledger sheet of the "C. R. Fouts Special Account" with the National City Bank, San Juan Branch (Ex. 130), and stated that his investigation included the disposition of the withdrawals from that account up to and including December 19, 1932, the date accused was relieved (R. 242-247). (The prosecution demanded that the checks disposing of this account be produced as the best evidence of the disposition made of it, and stated that there was no objection to the testimony of the witness if it were proved that the canceled checks could not be produced. The defense admitted that the checks were mailed to the man who had the account (i.e., accused), but stated that accused did not know where they were and that they could not be produced. The objection of the prosecution was overruled.) Witness then testified as to the withdrawals from this "Special Account" and the disposition of such withdrawals. On October 30, 1931, there was a withdrawal of $3,152.75. He found an item of that amount included in a deposit to the Treasurer of the United States on that date. On November 28, 1931, there was a withdrawal of $1,996.00, and he found on that date a deposit to the

Treasurer of the United States made by accused which included an item of the same amount (R. 247-249). On January 11, 1932, there was a withdrawal of $41.00, and he found a deposit to the Treasurer of the United States account made by accused on that date included an item of $41.00. On January 18, 1932, there was a withdrawal of $13.00, but no record was found of that check. On February 5, 1932, there was a withdrawal of $98.00 and the records indicate that the check was received by the National City Bank in clearance from the Banco Territorial y Agricola. On February 29, 1932, there was a withdrawal of $1,560.00, and he found an item of that amount included in a deposit to the Treasurer of the United States by accused. On April 26, 1932, there was a withdrawal of $216.00, and the records indicate that the check came to the National City Bank in clearance from the Banco Territorial y Agricola. On June 30, 1932, there was a withdrawal of $1022.00, and an item of that amount appears included in a deposit to the Treasurer of the United States by accused on that date. On July 30, 1932, there was a withdrawal of $292.40, and an item of that amount was found included in a deposit to the Treasurer of the United States account on that date. On December 17, 1932, there was a withdrawal of $43.06 and he found a deposit to the Treasurer of the United States account on that date made by accused included an item of the same amount (R. 250). The entry of $73.24 on November 14, 1931, on both the debit and credit side of the ledger sheet is a bookkeeping entry to correct an error. The ledger sheet shows a deposit of $50.00 on January 11, 1933 (R. 251). After this deposit the ledger sheet shows withdrawals as follows: January 17, 1933, $0.86; January 24, 1933, $10.61; February 17, 1933, $15.00; February 21, 1933, $10.00; May 2, 1933, $10.00; and August 18, 1933, $10.07, which closed the account. Witness had testified to all withdrawals from the "C. R. Fouts Special Account" at the National City Bank of New York, San Juan Branch, from October 30, 1931, the date it was opened, until August 18, 1933, the date it was closed.

Upon cross-examination by the prosecution witness testified that deposit slip dated September 8, 1931, marked Exhibit 136, was the document from which he reached the conclusion that National City Bank of New York, San Juan Branch, check number 38648 in the amount of $50.00; Banco Comercial checks numbers 28309 in the amount of $140.00, and 28308 in the amount of $504.00; and Credito y Ahorro Ponceno check number 14129 in the amount of $238.00, total $932.00, were deposited to the credit of the Treasurer of the United States (R. 252).

The letter of transmittal attached to that deposit slip reads: "Post of San Juan, P.R., September 8, 1931, deposit 53. Name of depositor, C. R. Fouts, F.D., has deposited with the National City Bank of New York, San Juan Branch, $15,634.40, on account of army account of advances $14,641.38, miscellaneous receipts $993.02, total $15,634.40. To the above named bank or to treasurer of U.S. Herewith you will receive the deposit described above. Please observe the instructions printed on each accompanying copy of Form 1, C. R. Fouts, depositor". Witness understood that the four checks were deposited as stated in the letter of transmittal. There was only one account at the San Juan Branch and the bank simply transmitted this information in order to enable the treasury to make the proper entry to the particular account designated that these four checks be credited to. The document admitted as Exhibit 140 was the one from which he got the information that check 4272 of the Banco Territorial y Agricola, check 2923 of the Royal Bank of Canada, and check 16558 of the Banco de Ponce were deposited to the credit of accused with the Treasurer of the United States on September 8, 1932. The letter of transmittal attached to this deposit slip (Ex. 140) reads: "Post of San Juan, P.R., September 8, 1932. Deposit number 62. C. R. Fouts, Captain, F.D., U.S.A., F.O., has deposited with National City Bank of New York, San Juan Branch, San Juan, P. R., $16,473.74, on account of Army account of advances, $15,722.72, miscellaneous receipts $751.02, total $16,473.74. To above named Bank or to Treasurer U.S. Herewith you will receive the deposit described above. Please observe the instructions printed on each accompanying copy of Form 1, C. R. Fouts, depositor" (R. 253). Witness took the amounts of the withdrawals from accused's special account and located them in a subsidiary check journal kept by the bank for current accounts, which gives the name of the drawer of the check, the last indorsement and the amount. Generally a check signed by the depositor would actually evidence a physical withdrawal from the account. He did not know where the checks were which concerned this account of accused "special". They were not at the bank. Canceled vouchers are usually sent to the person who has the deposit, with a statement. The total value of the 16 checks that were deposited to the "special account" was $2,229.00 (confirming correction of this list noted above). The total of the withdrawals from this account that went to the Treasurer of the United States was $8,107.21, subject to error (R. 254).

Upon examination by the court witness testified that there was nothing on the ledger sheet of the special account to indicate whether

the $50.00 deposit of January 11, 1933, was a cash or check deposit. In addition to the total of $2,229.00 of refund checks deposited in the special account there were deposits of some $6,000.00 of other funds. A check drawn on the regular account of the Treasury is known as a "Treasurer of the United States check". The "special account" was not regarded by the bank as a treasury account, but as "just C. R. Fouts" account. No reports on that account were made to the treasury (R. 255). Witness believed that each time one of "these checks" (i.e., those of "C. R. Fouts Special Account") was deposited they formed part of larger deposits, and it was his understanding that all of the deposits of these checks to this special account had been introduced in evidence. The deposits do not correspond to the amounts of the checks, only the total deposits for the day, but taking the deposit slips it is found that the amount of the items correspond to these checks.

To questions of the prosecution witness testified that the balance in the "C. R. Fouts Special Account" on December 17, 1932, was $6.54. A deposit in the account was made after December 19, 1932, but witness did not know whether it was made by accused or by someone else for his account. Sums of money were withdrawn from the account which must have been drawn by checks signed by accused (R. 256).

c. Frank Harding, Secretary of the Board of Alternates, Puerto Rican Hurricane Relief Commission, San Juan, Puerto Rico, was recalled as a witness for the defense, and testified that after accused had left the island he (witness) made a deposit of $50.00 on January 11, 1933, to the credit of "C. R. Fouts" at the National City Bank of New York. The duplicate deposit slip, which he produced and read from, made no mention of "special account". The money belonged to witness and was deposited to accused's account because he had left his automobile with witness to be sold, and, while he had trouble in selling it, he deposited his own check for $50.00 because he knew that accused needed the money (R. 257). Afterwards he sold the car and received the money back again. (The defense then introduced the following evidence with respect to the withdrawals from the "C. R. Fouts Special Account" described by Mr. Norgard, one of $13.00 to the National City Bank, and one of $98.00 and another of $216.00 to the Banco Territorial y Agricola.) Witness identified a letter of the Board of Alternates, dated January 16, 1932, to the National City

Bank of New York, San Juan Branch, which was received in evidence as Exhibit 171. This letter recited in substance that the bank, pursuant to instructions from the Board, had stopped payment to Mariano Cardona Marquez and refunded $13.00, and further stated that the Board then desired to resume payments to this borrower and was inclosing therewith the check of its disbursing officer for $13.00 (R. 258-259). At the date of the letter accused was disbursing officer. Witness identified another letter of the Board of Alternates, dated February 1, 1932, to the Banco Territorial y Agricola which was received in evidence as Exhibit 172. This letter recited in substance that the bank had been requested to stop payment to Agapito Medina Torres and had refunded $98.00, and further stated that the Board was requesting the Accounting Section to forward to the bank funds to cover, and requested that the bank resume payments to this borrower (R. 260). Witness identified a third letter, this from the Banco Territorial y Agricola, San Juan, Puerto Rico, to the Board of Alternates, San Juan, Puerto Rico, dated April 26, 1932, which was received in evidence as Exhibit 173. This letter stated that it was in answer to the Board of Alternates' letter of April 25th which accompanied its check to the bank's order for $216.00, with notice to continue paying the monthly payments of the letter of credit in the name of Tomas de Mari, payments which had been suspended on the 14th day of March, 1932 (R. 261).

d. Oscar Norgard, recalled as a witness for the defense, testified that the $50.00 deposited on January 11, 1933, could only have got into the "special account" of accused because the deposit ticket which reached the bookkeeper read "C. R. Fouts Special Account", or because it read just "C. R. Fouts" and that was the only account open at that time in his name (R. 262).

e. Colonel F. J. Behr, Chairman of the Board of Alternates, Puerto Rican Hurricane Relief Commission, recalled as a witness for the defense, testified that the Banco Comercial de Puerto Rico closed on Monday, October 19, 1931. The date opposite the entry that opened the account, as shown on Exhibit 130, is October 20, 1931. (Ex. 130 is the ledger sheet of account of "C. R. Fouts (Special)", National City Bank of New York, San Juan Branch.) Witness recalled that accused reported having some Banco Comercial checks in his possession when that bank failed, the amount of which was later recovered and belonged to the

United States (R. 263). Nearly a year later the Banco Territorial y Agricola failed.

Upon cross-examination witness testified that during the period of February, 1931, to December 19, 1932, the National City Bank of New York, San Juan Branch, was always open and ready to receive deposits (R. 264).

f. Teodoro Perez Meri, merchant, recalled as a witness for the defense, testified that during the month of October, 1931, he was working in the accounting section of the Hurricane Relief Commission at San Juan. The Banco Comercial de Puerto Rico failed about the 19th of October, 1931. He thought accused had some refund checks of that bank in his possession at that time. Everybody then knew that all the banks were very bad. He thought that accused was also holding refund checks on other banks. There were many cases where it was necessary to hold refund checks, and where payments on loans were stopped and then restored. He did not think accused had sufficient time and help to first deposit these refund checks and then go through the whole procedure again to return the money back to the banks for the same loan. Accused continued to hold the Banco Comercial checks in his possession when the bank failed about October 19, 1931 (R. 265).

g. Warrant Officer Jaime Gonzalez, Finance Department, Post of San Juan, recalled as a witness for the defense, testified that when a finance officer reports the amount of public money he is responsible for at the end of the month these amounts represent cash. If the deposit to the credit of the Treasurer of the United States is made up of checks and cash that fact is not necessary to be shown, nor is it customary to show it. The amount is always called cash. The General Accounting Office is not interested in whether it is checks, cash, bills, gold, or anything. If a check included as collections in a deposit to the Treasurer of the United States is protested, the finance officer does not receive credit for it (R. 269). He can protect himself against such bad checks by cashing the check, finding out for himself if the drawer has sufficient funds, or by "certifying the check" (i.e., having it certified). Checks received as collections during the month can be used by the finance officer for disbursements. Witness thought that while accused was finance officer at the Post of San Juan checks were drawn payable to the finance officer and some may have been drawn to his name. While accused was finance officer he and witness made

out the monthly deposit forms for the Post of San Juan. During the time that accused was special disbursing officer for the Hurricane Relief Commission witness made out the letters of transmittal and the monthly deposit forms for that account (R. 270).

h. Oscar Norgard, recalled as a witness for the defense, testified that he could identify the two checks, Exhibits 105 and 106, as constituent parts of the deposit slip received in evidence as Exhibit 157. These two checks were deposited in the National City Bank at San Juan to the credit of the United States Treasury on December 17, 1932. There appears on the daily transcript of that bank of December 17, 1932 (part of Ex. 143), a deposit to the Treasurer of the United States for the amount shown on the deposit slip (R. 271-272).

(The defense then announced that it intended to prove by the next group of witnesses that the volume of work given accused was so great that it would be superhuman to perform it all without the possibility of grave errors, and that the records of the office of the Commission were in such condition that errors were not only possible but probable.)

i. Colonel F. J. Behr, Chairman of the Board of Alternates, Puerto Rican Hurricane Relief Commission, recalled as a witness for the defense, testified that the Hurricane Relief Commission had an item of $2,000,000.00 for the repair of schoolhouses and roads. About seven hundred schoolhouses were constructed and repaired with that money. This work was done, a part by "force account", and part by contract. "Force account" is work done by administration, not by contract, and through the Department of the Interior of Puerto Rico (R. 272). The supervision was performed by men of the various technical departments of the Department of the Interior, and the work done on the basis of cost previously determined, but not by contract. Accused disbursed the money for these projects, and these disbursements required careful and accurate handling by the accounting section of witness' office. Payments on contracts were made on the basis of the percentage of the work performed, usually at the end of each month. That is, if ten per cent of the work of the contract had been performed and certified to by the inspector's office, then ten per cent of the contract, less a certain amount kept back for safety sake, would be paid over to the contractor. These disbursements were made by accused through the Treasurer of Puerto Rico. When the latter prepared vouchers or statements, accused

would pay them. The items of these vouchers were carefully checked by witness' assistant engineer as well as by accused and his assistants. This necessitated some work in the accounting section as well as in the administrative section. The construction part of road repair work was carried out or performed by administration, and the purchase of material usually by contract (R. 273). Accused disbursed this money through the Treasurer of Puerto Rico. The disbursement of the appropriation of $100,000.00 for seeds and seedlings was made by the accused through the usual channels (R. 274).

Upon cross-examination witness testified that accused had made no requests through him for additional help to handle this work. Accused made the statement about having too much work to do, as all of them did who had "lots of work to do", but not in the sense that he could not do it.

To a question of the court witness stated that he was naturally the person to whom accused would have made a request for additional help had he wanted it (R. 275).

j. Rafael Perez Mari, employee of the Board of Alternates, recalled as a witness for the defense, testified that he was at that time employed by the Puerto Rican Hurricane Relief Commission as a voucher clerk. He had been employed by the Commission while accused was disbursing officer. While special disbursing officer, accused made the disbursements for all of the loans of the Commission. There were about six hundred such loans made the first year, and approximately 3,025 in all while accused was disbursing officer. Other than for loans, accused made disbursements for schoolhouses, repairs and construction of insular and municipal roads, seeds and seedlings, and administration expenses, all of which required a great deal of detail and work. In 1931, the office had about 600 vouchers. About the end of November, 1931, the only clerk connected with loans was discharged. He was called back for fifteen days, and then for fifteen days more because they needed him (R. 276-277).

k. Warrant Officer Jaime Gonzalez, Finance Department, Post of San Juan, recalled as a witness for the defense, testified that during the period of February 1, 1931, to December 19, 1932, accused was disbursing officer for the Post of San Juan, special disbursing agent for the Hurricane Relief Commission, and property auditor of Puerto

Rico. He was also treasurer and handled the funds of the 42d Infantry, and he had an account for the Colonial Exposition in Paris, France, of which account he was disbursing officer. Witness thought that accused's duties were too much for one man to handle properly. Accused requested the commanding officer to relieve him from the job of disbursing the funds of the 42d Infantry, but he was not relieved (R. 278). In September, 1932, because of damage done by a hurricane, accused made from that welfare fund (i.e., "funds of the 42d Infantry") from 150 to 200 loans to members of the 65th Infantry which he handled personally by checks drawn in the name of the borrower for small amounts of from $5.00 to $15.00. These loans were repaid in monthly instalments of from $2.00 to $5.00 collected each pay day by the finance officer, and an entry had to be made for each payment.

Witness kept the cashbook for the account of the Hurricane Relief Commission. Congress, in six different appropriations, appropriated $10,150,000.00 for the Commission (R. 279). Accused disbursed more than $9,500,000.00 of this money. In some months the disbursements amounted to $400,000.00. The average monthly disbursement of the finance officer of the Post of San Juan is from $80,000.00 to $100,000.00. Accused was also property auditor for all property accounts in Puerto Rico. Other than regular Army and Post accounts, these were accounts of the National Guard, the University of Puerto Rico, and the College of Agriculture at Mayaguez. The larger portion of accused's time was required for this work as property auditor. He was required to audit twice a year. He also disbursed the National Guard funds on the island.

Upon cross-examination witness testified that in speaking of the total disbursements made by accused he was referring to his entire period of accountability, and not merely the period from February 1, 1931, to December 19, 1932 (R. 280).

(The defense then announced that it intended to prove by the next group of witnesses that the assistance given accused to disburse $10,150,000.00 was quite inadequate and that all efforts to obtain trained help brought no results.)

1. Warrant Officer Jaime Gonzalez, recalled as a witness for the defense, testified that accused had four clerks to assist him in

disbursing for the Hurricane Relief Commission. In the work he did to assist accused, witness noticed that the schedules of daily disbursements were many times incorrect, and he had to send them back for correction. Based on the errors contained in the papers presented to him, witness was of the opinion that the clerks who were used to make these daily reports of disbursements were not trained finance personnel (R. 281). The amount disbursed by the accused as special disbursing officer for the Commission was much larger than the disbursements in the finance officer of the Post of San Juan. Six clerks are employed in the latter office most of whom have been in the finance school in Washington. Accused did not have sufficient competent help to properly perform his duties as special disbursing officer for the Relief Commission. At the time accused assumed the extra duty as special disbursing officer for the Relief Commission a letter was written by him to the Chief of Finance requesting that a warrant officer or noncommissioned officer of one of the first three grades be sent to the office of the disbursing officer of the Commission to act as chief clerk, but the request was not granted.

Upon cross-examination witness testified that he did not spend much time in the office of the disbursing officer of the Relief Commission. His opinion as to the quality and quantity of the personnel in that office was based on the reports he received, but he had no personal knowledge of what transpired there. He had no contact with them. He was there several times but they did not work under his supervision (R. 282-283).

Upon examination by the court witness testified that accused's Army account was audited once a year by the inspector general from the States. Not one discrepancy had ever been found in it.

m. W. F. Ryan, chief clerk, Board of Alternates, Puerto Rico Hurricane Relief Commission, recalled as a witness for the defense, testified that while accused was special disbursing officer he had four clerks assigned to assist him when the work was greatest, and at other times this was reduced to one. One man trained in finance work remained continuously. Witness understood that accused asked for additional help on several occasions. Witness considered the assistant permanently assigned to accused sufficient to handle the "enormous amount of detail entailed in the disbursing of several million dollars". The work was not particularly burdensome. "Lots

of it went out in vast sums", so that the large amount of money disbursed was not a fair indication of the work involved in the disbursing of it (R. 284-285).

n. Teodoro Perez Meri, recalled as a witness for the defense, testified that while employed by the Hurricane Relief Commission he had very frequently worked at night, especially when he first came to work for it (R. 285). He had very often seen accused at work at night in the office of the Relief Commission. At the beginning when it was necessary to have the work done as soon as possible witness "worked forty days and nights to straighten it out". When he took over the loan records they were not in good condition. Application numbers and contract numbers were confused.

Upon cross-examination witness testified that the name of the borrower was the same in one department or the other (R. 286-287).

o. Rafael Perez Meri, clerk, Board of Alternates, Puerto Rican Hurricane Relief Commission, testified that while accused was special disbursing officer he (witness) had to work at nights or on holidays because he wanted to have his "things up to date". He had to work "most every night and on holidays and Sundays", and, sometimes, instead of going home at four-thirty he had to stay without any supper or going to bed until the next morning at eight-thirty. Many times he and accused worked on holidays and at night. Witness felt that the amount of work he had to do was too much, and that there should have been more people on the work that he did (R. 288).

Upon cross-examination witness testified that the legal department used to work at nights also, and that the chairman of the Board of Alternates worked not only many nights but every night (R. 289).

p. Major Holmes E. Dager, 65th Infantry, Post of San Juan, a witness for the defense, testified that he was ordered to make an inspection of the money accounts of accused at the Post of San Juan about July 10, 1933. His instructions were to audit the military accounts of accused from September 1 to December 19, 1932, inclusive, and to examine all vouchers for receipts and for disbursements. The reason given for this period was that the General Accounting Office had cleared all accounts for all periods up until that time. The inspection showed that the accounts were in balance with the General

Accounting Office and with the statements from the Chief of Finance as to amounts which should be on hand at the close of each month and on hand at the close of December 19th. Accused's vouchers were correct and in proper form, and there was no evidence of any irregularity.

Upon cross-examination witness testified that in making this inspection of the accounts of the accused he did not go to the banks, nor did he examine the bank deposit slips or the treasury department form which accompanied each deposit slip, but he took the balances furnished by the General Accounting Office, showing the amounts to be on hand at the end of each month or period named (R. 290). His inspection would not reveal as to what money accused had actually used to deposit to the account at the bank, and revealed nothing except the entries or receipts from certain sources to make up a deposit. Witness knew nothing of the physical constituents of the deposits which were made at the bank (R. 291).

(The defense announced that it intended to prove by the deposition of Colonel William McK. Lambdin, U. S. Army, Retired, who made an inspection of finance activities while in charge of the Second Corps Area, in Puerto Rico, that the Regular Army finance system was modified and adopted by accused for this Commission work, and was highly approved by the General Accounting Office.)

q. Colonel William McK. Lambdin, U. S. Army, Retired, testified by deposition (Ex. 174) that from March, 1930, to January, 1932, he was Finance Officer, Second Corps Area, and while in the performance of such duty he had occasion in 1930 and 1932 to make inspections of the finance activities in Puerto Rico. During each inspection he visited the disbursing officer of the Puerto Rican Hurricane Relief Commission. He considered the accounts of accused very satisfactory. Witness' inspection was an administrative one. Checking of funds was done by the inspector general. The system used by accused in handling these accounts of the Relief Commission was one he devised and had approved by the General Accounting Office. It was based to some extent on Army accounting methods, the Army forms being changed to meet the particular requirements of the case. Witness considered the system an excellent one. In witness' report of the inspection he made in 1930 he commented upon the system devised by accused and stated that he had shown a comprehensive knowledge of accounting methods and that his

work deserved highest commendation. Witness considered accused was exceptionally well equipped for the job he was performing for the Puerto Rican Hurricane Relief Commission (Ex. 174).

(The defense announced that it intended to prove by the deposition of Major General Robert U. Patterson, U. S. Army, Surgeon General's Office, Washington, D. C., that most officers suffer impairment of efficiency by prolonged service in the tropics, and that an officer would not be as mentally alert in his seventh year of such service as in the first or third.)

r. Major General Robert U. Patterson testified by deposition (Ex. 175) that in his opinion, and in that of most authorities on tropical medicine and hygiene, continuous service in the tropics in excess of three years by a man born and raised in a temperate climate slows him up physically and mentally. Some individuals are affected much more adversely, to wit: develop definite physical and mental disorders as "sprue, dysentery, anemia, neurasthenia, psychasthenia, etc." Witness believed that most officers suffer definite impairment of efficiency and usefulness as the result of prolonged service in the tropics. He regarded seven years as prolonged service. He would not consider an officer in his seventh year of continuous tropical service to be as mentally alert and physically fit as in his first three years of tropical service (Ex. 175).

Thereupon the defense announced that the accused had had his rights explained to him fully, and that the defense rested its case. The accused did not take the stand to testify in his own behalf, and remained silent (R. 291).

5. The prosecution announced that it proposed to call in rebuttal Captain Tunstall, who had qualified himself as an expert finance officer, in order to ask him certain hypothetical questions based upon the evidence. Objection of the defense to the introduction of Captain Tunstall as an expert was properly overruled upon condition that he first be qualified as such (R. 292).

a. Captain Tunstall, Finance Department, recalled as a witness for the prosecution in rebuttal, was asked to state to the court his experience as a finance officer of the United States Army. Before

he could reply the law member stated that this had already been brought out and was in the record. The court thereby having accepted the witness as an expert, he was asked by the prosecution: "What constitutes accounting by a disbursing officer?" Defense objected to this question on the ground that it had brought out nothing in its case that could be rebutted by an answer to such a question. To this the prosecution responded that while the defense had not made a direct statement as to accounting it had introduced evidence to show that the proceeds of the fifty-four checks reached the Treasury of the United States, which evidence the prosecution had already produced, and that, in order to rebut any inference that might be given by this evidence, the prosecution wished to show what the regulations call for when an accounting is made by a disbursing officer (R. 293). The objection of the defense was overruled, and the witness was permitted to answer the question, which he did as follows: "A finance officer effecting collections proceeds in the following manner: he shows that collection on his daily report for that day; his cash blotter is debited and he identifies that receipt on his "schedule of collections". The total of his "schedule of collections" and "schedule of funds received" is carried on the back of the "account current" as a debit, which is to say, that he has enumerated on one paper or another and identified each separate receipt or collection coming into his possession during the period covered by the "account current". So much for debiting. On the credit side he must show what he has done with the total receipts which he has admitted, by which is meant he must show one of three things; either that he deposited those receipts to the Treasurer, that he has used them to effect the payment of cash vouchers, or that he admits having the balance as cash on hand, the accountability for which to be carried forward on his next month's "account current". An officer may either deposit all his admitted receipts as identified, he may use them to pay cash vouchers, or there may be a combination of the two. For instance, his accounts may admit a receipt of five hundred dollars from various sources. He may use three hundred to pay cash vouchers, showing two hundred either deposited or as cash on hand carried forward to his next account; which is to say that when the final accounting through the various papers, beginning with the daily record, reaches the back of the "account current", the debits of cash must equal the credits of cash" (R. 294). The prosecution then propounded the following questions to the witness to which answers were made as appear below:

"Q. If a check is received by a disbursing officer and its receipt is not acknowledged but the check itself is deposited to the disbursing officer's official credit, what would be the effect on the balance of the disbursing officer's account?
A. If the disbursing officer receives a check in any amount which he does not charge himself with the receipt of but yet he physically deposits that check then the disbursing officer is out of balance with the treasury for the exact amount of that check.
Q. What could that disbursing officer do under those circumstances to make his account remain in balance with the Treasury?
A. There is only one physical method by which the disbursing officer could avoid being out of balance with the treasury, that he should withdraw from the receipts which he had charged himself with an amount exactly equal to this check which was deposited." (R. 297.)

6. In the preceding summary of the evidence an effort has been made to set out, as briefly as consistent with thorough statement, all the material facts established by the prosecution, and to cover adequately the evidence presented by the defense. The case for the prosecution was based upon a considerable volume of documentary evidence, much of it highly involved and very technical in nature, all of which was presented by the prosecution with a masterly grasp of it as a whole, and with the most painstaking care and accuracy as to detail. The proof is so complicated and extended by the necessity of following through the same procedure, in the case of each of the fifty-four separate refunds that, by its very mass, it tends to obscure the facts which it establishes. These facts may be conveniently stated as follows:

Accused, a captain in the Finance Department of the United States Army, was appointed special disbursing officer of the Puerto Rican Hurricane Relief Commission on March 7, 1929. This Commission was established by Congress for the purpose of disbursing United States funds for the relief of residents of Puerto Rico, and functioned through a Board of Alternates in San Juan, Puerto Rico. Accused entered upon the performance of his duties at San Juan, Puerto Rico, upon his appointment and continued in the performance of them until

they were taken over by his successor on December 19, 1932. After accused's relief and return to the States he was called back to San Juan in April, 1933, to explain why he had not taken up on his accounts two checks which had been sent to him as such disbursing officer. He appeared before the Board of Alternates at San Juan on the day of his arrival and was handed a list of checks from six different banks and the checks themselves which aggregated $8,038.00 in amount. Upon being advised that anything he might say might be used against him and asked if he had anything to say he looked at the checks and said: "I think there is nothing to say but for me to make offer of restitution". He was then asked: "Then, when you signed your last account current for December, 1932, you knew you were short?" To this he replied: "Yes, I suppose I did." On the following day at a second meeting of the Board accused asked that a large manila envelope be brought to him from the office safe so that he could check the list of checks. As he opened this he remarked: "I believe the shortage is a little more than you have made it". He then produced from the envelope fifty-three letters of transmittal which had carried to the Board from six different banks fifty-four separate manager's checks and certificates of deposit. These letters of transmittal should have been distributed among the jackets of the several loan contracts to which they pertained, but evidently had been collected by the accused and placed in the safe without the knowledge of others in the office. The checks described by the letters and transmitted by them aggregated $8.183.00 in amount, $145.00 more than the amount of the checks the Board had placed before accused.

The Hurricane Relief Commission extended relief to residents of Puerto Rico who had suffered loss or damage through hurricanes and did this by granting them loans of money upon their application. Upon approval of such an application by the Board of Alternates in San Juan, accused placed the money to the borrower's credit at some designated bank and the bank paid the borrower each month the amount fixed by the Board of Alternates. Over three thousand such loans were opened. Borrowers made repayment to the Commission by currency, money orders, and personal or certified checks. Certain circumstances, such as the death of a borrower, the sale of his farm, or his failure to comply with the loan regulations, made it necessary at times to terminate the arrangement for the loan. Such a determination having been reached by the Board, a "stop-payment letter" was sent to the bank in

which money stood to the credit of this particular borrower. To this the bank responded by a so-called "letter of transmittal" in which it acknowledged the receipt of the "stop-payment letter", and transmitted either a manager's check or a certificate of deposit for the amount of the unused balance to the credit of the borrower, together with the individual loan card showing payments already made to the borrower signed for by him, and the letter of credit pertaining to the loan. These manager's checks and certificates of deposit were drawn payable to accused.

Accused was required to account to the General Accounting Office through the Secretary of the Commission and the Chief of Finance, and it was his duty to receive, disburse and account for all moneys placed to his credit. His official bank account was in the National City Bank of New York, San Juan Branch, to the account of the Treasurer of the United States. Accused also had another account in this bank entitled "C. R. Fouts (Special Account)", which he maintained from October 20, 1931, until it was closed on August 18, 1933. This was not a government account. It appears to have been authorized by the Commission to the amount of one and one-half million dollars. This money was a part of the loan money and had been directed to be left in the bank for the accused to draw against instead of drawing on the Treasury.

Accused, as a special disbursing officer, was required to submit monthly to the Comptroller General through the Commission and the Chief of Finance an account of all his financial activities on a standard form known as his "account current". This form carries with it various supporting papers including a "schedule of collections", a "schedule of disbursements", and a "schedule of funds received". He was required to pick up all his receipts on the "schedule of funds received" or the "schedule of collections", and the sum of the two upon his "account current". In the accounts rendered by accused in those instances where he reported the receipt of money from banks upon the refund of loan accounts, he reported them in detail upon his "schedule of collections", showing the name of the bank making the refund, the date of receipt, the loan contract number, name of borrower, reason for refund, voucher number and date of loan. The total of these collections was shown in his "schedule of funds received" and included in the "receipts" of his "account current". Accused was required to

effect withdrawals from the Treasury account and to make deposits to the Treasurer of the United States through the National City Bank of New York, San Juan Branch, the designated government depository. He made deposits to his official credit by the preparation of three forms presented with the deposit, the original of which is forwarded to the Treasury with the transmittal of the deposit, the duplicate copy signed by the bank and returned to the accused for his files as evidence of the deposit, and the triplicate copy is retained by the depository. Upon the form appears the name and symbol number of the accused, the amount of the deposit, and the account to be affected by it. The Act of Congress of June 10, 1921, requires the General Accounting Office, of which the Comptroller General is the head, to settle all such disbursement accounts after an administrative examination of them by the chief of the department concerned.

Accused's accounts for the period from February 1, 1931, to December 19, 1932, had been duly audited, and showed that he should have turned over on the latter date to his successor, Captain Tunstall, the sum of $61,998.47. On that date he did turn over to Captain Tunstall his official check on the Treasurer of the United States for this amount. In making this audit the auditor considered no collections made by accused other than those reported by him for this period on his "schedule of collections". Had other funds been collected by the accused in his official capacity and not been reported upon his "schedules of collections", the audited balance due the United States would have been increased by the amount of such funds.

During the period from February 27, 1931, to December 19, 1932, there were sent to the Board of Alternates in payment of refunds directed by the Board to be made by the several banks certain manager's checks and certificates of deposits, among others, as follows:

Bank		Amount
National City Bank of N.Y., San Juan Br.	18 checks	$2,393.00
Banco Comercial de Puerto Rico	5 "	1,203.00
Banco Territorial y Agricola de P. R.	13 "	1,695.00
Royal Bank of Canada	2 "	233.00
Credito y Ahorro Ponceno	12 certificates of deposit	983.00
Banco de Ponce	4 checks	1,676.00
Totals	54	$8,183.00

These fifty-four separate instruments were all made payable to accused and were received by him in his official capacity. Twenty-five of them are indorsed with accused's signature, and four of them are indorsed by stamp and in his handwriting. Of the remainder, twenty-two are indorsed by a stamped indorsement similar in language and form to that used by accused upon checks the receipt of which he had acknowledged, and four were indorsed by a stamp bearing his name and office. Sixteen of these checks or certificates, aggregating $2,229.00 in amount, were deposited by accused in the "C. R. Fouts, Special Account", seven, aggregating $1,872.00 in amount, were deposited to the account of the Treasurer of the United States designated "Army account of advances" and "miscellaneous receipts", and the remaining thirty-one, aggregating $4,082.00, were also deposited to the account of the Treasurer of the United States, but "subject to check in the special disbursing account" of accused. These fifty-four manager's checks and certificates of deposit were paid by the several banks from which they came between March, 1931, and December 17, 1932. None of them are accounted for on the "accounts current", "schedules of collections" or "schedules of funds received" submitted by accused during the period, nor are they otherwise accounted for. They conveyed to the accused, as special disbursing officer, public money of the United States which he was not authorized to retain as salary, pay, or emolument.

A "loan book" was kept in the office of the Board of Alternates in which an employee of the loan division recorded everything pertaining to refunds. It shows the amount of the loan, the name of the borrower, the various payments made to the payee through the bank on the loan contract, and the refunds made by the bank against such contract. The entries in it concerning refunds from February, 1931, to and including November, 1931, are in the employee's own handwriting. His source of information was a note of all refunds which accused gave him at the end of each month. The entries of refunds for the months of December, 1931, January to September, 1932, inclusive, and November and December, 1932, are in the handwriting of accused. There were no refunds in October, 1932. None of the refunds evidenced by the fifty-fourt manager's checks or certificates of deposit are shown in this "loan book".

The Board of Alternates also kept a "loan card" for each loan contract on which was entered all payments to the borrower through

the bank and all refunds in connection with the contract. Such a card was kept for each of the loan contracts upon which the fifty-four refunds were made. All entries upon these "loan cards" are in accused's handwriting, but none of these fifty-four refunds are shown upon the cards.

Under the specification of Charge III there is additional evidence as follows: Accused on December 19, 1932, at San Juan, submitted an "account current" for the period from December 1 to December 19, 1932, to which he appended the certificate that it was a "true, full and correct account" of all moneys coming into his possession on account of the United States during that period, as set forth in this specification. That "account current", like the others to which reference has been made, was submitted to the Comptroller General of the United States through the Secretary of the Hurricane Relief Commission and the Chief of Finance. Accused received and deposited during this period to the account of the Treasurer of the United States two checks of the National City Bank of New York, San Juan Branch, one for $250.00, drawn on December 14, 1932, and payable to him (Ex. 105), and another for $42.00, drawn on December 15, 1932, and payable to him (Ex. 106). Both checks were paid on December 17, 1932, at the bank on which they were drawn, and both were in payment of refunds on loan contracts. While both checks were received by the accused, deposited by him, and paid during the period covered by his "account current" of December 19, 1932, neither of them is accounted for in that "account current" or the appended "schedule of collections".

7. By way of defense the following was shown. In his "schedule of collections" for the month of October, 1931, accused had accounted for a refund of $270.00 received by check of the Banco Comercial, and in his "schedule of collections" for February, 1932, he had accounted for a refund of $19 received by check of the same bank. These checks were not presented for payment prior to the closing of this bank, but were later delivered to the receiver by the Board of Alternates and the amount recovered in September, 1933. Accused's deposit upon accounting for these uncashed checks was made from his own funds. (It will be noted that the amount of $8,183.00, the sum of the fifty-four refund checks not accounted for, is reduced by $270.00 to $7,913.00 as set out in the specifications of Charges I and II.)

Of the fifty-four separate checks and deposits, amounting to $8,183.00, thirty-eight amounting to $5,954.00 were deposited to the account of the Treasurer of the United States, and fifteen amounting to $2,204.00 were deposited to the "special account" of the accused. (Proof as to one check of $25.00 deposited to the latter account was omitted.) Withdrawals from this "special account" aggregating $8,323.21 were made between October 21, 1931, and December 17, 1932, all of which were included as items in deposits to the account of the Treasurer of the United States. Three other withdrawals amounting to $327.00 were made to supply banks with funds to resume payments on loans. The balance of the account on December 17, 1932, was $6.54. A deposit of $50.00 was made in this bank by a third party to the credit of accused on January 11, 1933, and credited to this "special account". Thereafter six separate withdrawals were made and the account was finally closed with the last withdrawal on August 18, 1933.

The two checks, Exhibits 105 and 106 (referred to in the specification of Charge III), were deposited in the National City Bank at San Juan to the credit of the United States Treasury on December 17, 1932.

The Puerto Rican Hurricane Relief Commission disbursed $2,000,000.00 for repair of schoolhouses and roads. About seven hundred schoolhouses were constructed and repaired. Payments were made by accused on vouchers or statements prepared by the Treasurer of Puerto Rico. An appropriation of $100,000.00 for seeds and seedlings was disbursed by accused. During the entire period of accused's accountability as "special disbursing officer" of the Commission, he disbursed more than $9,500,000.00 of funds appropriated by Congress, the disbursements in some months amounting to more than $400,000.00. In addition to these duties he was disbursing officer of the Post of San Juan and disbursed all National Guard funds on the island. The average monthly disbursements of the Post of San Juan were from $80,000.00 to $100,000.00. He handled the funds of the 42d Infantry and had an account for the Colonial Exposition in Paris, France. He was also property auditor for all property accounts in Puerto Rico. Other than Regular Army and Post accounts, these also included accounts of the National Guard, the University of Puerto Rico, and the College of Agriculture at Mayaguez. The larger portion of his time was required for this work as property auditor. He was required to audit twice a year.

The chairman of the Board of Alternates stated that in so far as he knew accused never asked for additional help to do the work of the accounting section of which he was in charge. The chief clerk of the Board understood that accused asked for help on several occasions, but stated that the work was not particularly burdensome since the money went out in vast sums, and the amount of money disbursed was not a fair indication of the work involved in disbursing it. Employees of the Commission and accused often worked at night. The chairman of the Board worked "not only many nights but every night".

The military accounts of accused from September 1 to December 19, 1932, as disbursing officer for the Post of San Juan, were audited about July 10, 1933, and were found to be in balance with the General Accounting Office and with the statements from the Chief of Finance as to the amounts which should be on hand at the close of each month and on December 19, 1932.

The system used by accused in handling the accounts of the Hurricane Relief Commission was one he had devised, based to some extent on Army accounting methods, and had approved by the General Accounting Office. Colonel William McK. Lambdin, Finance Officer, Second Corps Area, from March, 1930, to January, 1932, considered the system an excellent one. In commenting upon it in 1930 he had stated that accused showed a comprehensive knowledge of accounting methods and that his work deserved highest commendation. He considered accused exceptionally well equipped for the job he was performing for the Puerto Rican Hurricane Relief Commission.

Major General Robert U. Patterson, U. S. Army, Surgeon General's Office, testified that in his opinion, and in that of most authorities on tropical medicine and hygiene, continuous service in the tropics in excess of three years by a man born and raised in a temperate climate slows him up physically and mentally. Most officers suffer definite impairment of efficiency and usefulness as a result of such prolonged service and he regarded seven years as prolonged service. He would not consider an officer in his seventh year of tropical service to be as mentally alert and physically fit as in his first three years.

8. In rebuttal the prosecution through the expert testimony of Captain Tunstall, Finance Department, outlined again the procedure

of accounting by a disbursing officer. This fact was emphasized that if a disbursing officer receives a check in any amount, the receipt of which he does not charge himself with, but physically deposits the check to his official credit, then he is out of balance with the Treasury for the exact amount of that check. There is then only one physical method by which he can bring his account in balance with the Treasury, and that is to withdraw from the receipts with which he has charged himself an amount exactly equal to the check which he has deposited.

9. It is provided by Federal statute that:

> "Except as otherwise provided, every officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument, shall render his accounts monthly. Such accounts, with the vouchers necessary to correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the bureau to which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the General Accounting Office for settlement. ***" U.S.C. 31: 496.

And further provided that:

> "Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years." U.S.C. 18: 176; sec. 90, Federal Penal Code of 1910.

Under the statutes just quoted it was the duty of accused to render his accounts monthly for the public money that he received in the form of manager's checks and certificates of deposit from these Puerto Rican banks. The evidence is clear and conclusive that he received such funds not only to the amount of $7,913.00, as alleged in the specifications of Charge II, but actually to the amount of $8,183.00,

and that he wholly failed to charge himself with, or to account for, any of these fifty-four separate items, aggregating $8,183.00 in amount. It is immaterial that this money may ultimately have been deposited to the account of the Treasurer of the United States. That the accused "wilfully, wrongfully and unlawfully" failed to render his accounts for this money, as it is alleged, is established by his own admissions, and by the additional facts that upon the receipt of these refund remittances by letter of transmittal from the several banks he departed from the customary office procedure in order that none of these refunds should appear upon the "loan book" or upon its appropriate "loan card", and not merely prevented the letters of transmittal from being filed with their related papers but carefully collected the entire file of fifty-three and concealed them in the office safe.

The evidence is also clear and conclusive that accused made a false and untrue certificate on his "account current" for the period from December 1 to 19, 1932, wherein he wholly failed to account for two checks which he had received and deposited to his official account during that period. There can be no question but that this omission was with his knowledge and by his intention, since accused was thoroughly familiar with the requirements of his office. And there were during this period so few transactions to be recorded that the omission to enter these two refund checks can by no means be attributed to oversight or neglect in the press of heavy duties. There is but one inference from the facts, which is that the accused made this certificate deliberately and with full knowledge that it was false and untrue.

No substantial defense was presented. It was shown, apparently as a defense to the charges, that the proceeds of each of the fifty-four refund checks and certificates of deposit had either been immediately deposited by the accused in his official account with the Treasurer of the United States or had ultimately reached that account. Much of this had already been shown by the prosecution as a part of its case. The accused had not been charged under Charge I with the embezzlement of the proceeds of these instruments but with the embezzlement of a sum of money equivalent in amount to such proceeds, less the amount of one check upon a closed bank which he had evidently replaced with his own funds. It was conclusively shown that regardless

of the fact of the deposit of these instruments in his official account he did not account for them and was short in his accounts in the amount alleged in the specification of Charge I. The conclusion inevitably follows that he had embezzled an equivalent amount of official moneys, and the evidence warranted a conviction under Charge I.

In the specification of Charge II accused was charged with failing to account for the public money he received in the form of refund checks and certificates of deposit. The prosecution having shown that he had received and deposited this money, but that he had wholly failed to render any account of it in his official accounts, it is difficult to conceive by what theory of defense the showing that the money had been deposited in accused's official account was again presented.

Some effort was made by the defense to show that the accused was not given adequate and competent personnel to accomplish properly the great volume of work required of his office, apparently to prove that the omissions in accounting were for this reason unavoidable and excusable. This proof was not convincing, and the very circumstances of the case make it quite untenable as an element of defense.

The making of false official statements to superiors, with knowledge of their falsity, has long been recognized in the service as conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. M.C.M., par. 151; Winthrop's Military Law and Precedents, Reprint 1920, p. 713.

10. There remains for consideration the question of whether or not the validity of the proceedings in this case is affected by the following provisions of the 39th Article:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided that for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitation upon trial and punishment by court-martial shall be three years: * * *."

This question was not raised at the trial nor discussed by the staff judge advocate in his review of the record of trial, and is here raised for the first time.

Accused was arraigned on December 4, 1933. The statute of limitations is two years for the offenses of which he was convicted, and consequently does not apply to the conviction under Charge III of an offense committed on December 19, 1932. The offense of which he was convicted under Charge II is alleged to have been committed during the period from February 27, 1931, to December 19, 1932, and the proof supports the allegation. It is by no means a continuing offense but includes a repetition of successive separate offenses each one of which is complete in itself, that is, the failure of accused to account for each one of these fifty-four separate manager's checks and certificates of deposit, upon its receipt, deposit, and payment, may be considered as a separate offense. Each such offense might have been separately alleged, but for convenience in pleading they have, not inappropriately, been grouped together as one offense. The date of the commission by the accused of each of these several offenses is the date on which each of the several instruments conveying public money to him should have been picked up on his accounts but was not. In each instance this date may be considered as the date on which he submitted an "account current" purporting to cover his official transactions of the previous calendar month during which he received government funds which he failed to pick up. He submitted an "account current" on November 23, 1931, and one on December 21, 1931, each purporting to cover the transactions of the previous month. The latter date is within two years of December 4, 1923, the date of his arraignment, but the former is not. The checks which he received and cashed prior to November 1, 1931, are as follows:

Five checks, Banco Territorial y Agricola, aggregating	$	528.00
Six certificates, Banco Credito y Ahorro Ponceno,	"	594.00
One check, Banco de Ponce,	"	1,155.00
Five checks, Banco Comercial,	"	1,203.00
Three checks, National City Bank,	"	272.00
		$3,752.00.

To the charge of "wilfully, wrongfully and unlawfully" failing to render his accounts for the sum of $3,752.00, conveyed to him by these instruments, the accused might have successfully pleaded the statute of limitations since there was no manifest impediment to the bar of such a plea.

In the Federal courts the bar of the statute of limitations is a matter of defense. Capone v. Aderhold, 65 F. (2d S.) 130. Accused persons may avail themselves of this statute by special plea or by evidence under the general issue. United States v. Cook, 84 U.S. 168, 179; United States v. Kissel, 173 Fed. Rep. 823, 829. In courts-martial procedure the bar of the statute of limitations is also matter of defense only (Winthrop's Military Law and Precedents, p. 253), and in appropriate cases may be pleaded in defense by a special plea in bar of trial. Par. 67, M.C.M. An accused may also avail himself of this statute by evidence under the general issue, as in the Federal courts. Winthrop's Military Law and Precedents, p. 253; Dig. Ops. JAG, 1912, p. 172, C III D. (A mere plea of not guilty without evidence of the statute of limitations and its applicability as a defense has not been considered to have interposed the statute as a defense.) CM 190497, Smith. The accused in the instant case did not avail himself of the defense of the statute of limitations either directly by a plea of the statute in bar of trial or by evidence under his plea of not guilty, and there is nothing in the record to show that he was advised by the court or by his counsel that the statute of limitations was in any manner applicable to the offenses with which he was charged or available to him as a defense.

The question must, therefore, be considered whether the failure of the record to show affirmatively that the accused was so advised renders the record legally insufficient to support in their entirety the findings of guilty under Charge II and its specification. The sentence is otherwise supported and its legality is not affected by this question.

Prior to the time that the Manual for Courts-Martial of 1917 became effective, the explanation by the court to an accused of his right in an appropriate case to plead the statute of limitations in bar of trial does not appear to have been required. In the Manual of 1898, page 31, and again in that of 1908, page 34, the following appears:

> "The statute of limitation (103d) is not prohibitory as to jurisdiction, but is properly a matter of defense, which, to be effective, must be pleaded and proved, or, in some express manner, taken advantage of on the evidence."

In the Manual of 1917, paragraph 149 h, it was provided:

> "In each case tried by a general court-martial in which, upon the face of the record, it appears that the accused might successfully plead the statute of limitations but in which he has not interposed such plea, it shall be made to appear of record that the president of the court advised the accused of his legal rights in the premises."

And the record was required to show that in a proper case the accused was so advised. Par. 357, sub-par. 20½. The Manual of 1921 contained the same provisions with the added provision that the explanation might be made in the alternative by the law member, and that "such advice of the president or law member and the response of the accused thereto will appear in the record". Par. 149 (3)(g), M.C.M., 1921; id. par. 357, sub-par. 21; id. App. 10, p. 620.

Under these provisions of the Manuals of 1917 and 1921, in those cases where the record of trial failed to show that the accused was duly informed of his right to plead the statute of limitations in bar of trial and did not plead it, where it might successfully have been pleaded, it was held that his substantial rights had been injuriously affected. Dig. Ops. JAG, 1912-30, sec. 1261 (1)(2)(3)(4).

The provisions of the 1921 Manual upon this subject were substantially changed and superseded by the following provisions of the present Manual of 1928:

> "If it appears from the charges themselves that the statute has run against an offense charged or (in the case of a continuing offense), a part of an offense charged, the court may bring the matter to the attention of the accused and advise him (through the president, or the law member, if the president so directs) of his right to plead the statute. This action should, as a rule, be taken at the time of the arraignment.
>
> With respect to pleading this statute in bar of punishment, see 78 a (Statute of Limitations)." Par. 67, M.C.M., 1928.

"If by exceptions and substitutions the accused is found guilty of an offense against which it appears that the statute of limitations (A.W. 39) has run, the court may advise the accused in open court of his right to plead the statute in bar of punishment if he so desires. If the accused does plead the statute, the matter will be determined in substantially the same manner as provided for the determination of a plea of the statute in bar of trial." Par. 78 a, last sub-par., M.C.M., 1928. (Underscoring supplied.)

"When the defense is not in charge of a counsel of the accused's own selection the duties, etc., of the defense counsel are those of a military counsel of the accused's own selection." Par. 45 b, M.C.M., 1928.

"An officer, or other military person, acting as individual counsel for the accused before a general or special court-martial, will perform such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case.

* * * *

Before the trial he will explain to the accused * * * in an appropriate case, his right to plead the statute of limitations (see 67 and 78). These explanations will be made regardless of the intentions of the accused * * * as to how he will plead." Par. 45 b, M.C.M., 1928.

Prior holdings of the Board of Review under the provisions quoted above, concurred in by The Judge Advocate General, are noted as follows:

(1) In CM 188778, Allen (1929), accused pleaded not guilty to the charge of fraudulent enlistment on two separate dates, each more than two years prior to the date of his arraignment, and of desertion. He was found guilty of all offenses. Although the charges on their face indicated that the accused might successfully plead the statute of limitations in bar of trial for the fraudulent enlistments, the record did not show that the court advised the accused of his right so to plead. Information was obtained outside of the record that the right

to plead the statute of limitations was not extended to the accused and that he was not informed of the same under paragraph 45 b, Manual for Courts-Martial, by either the defense counsel, trial judge advocate or the president of the court. It was held by this office that, since it was established that the accused could successfully have pleaded the statute of limitations in bar of trial for the two fraudulent enlistments, and that neither the defense counsel, as prescribed by paragraph 45 b, M.C.M., nor the court explained to the accused his right to plead the statute, the sentence should not exceed the maximum authorized for the desertion of which the accused stood convicted.

(2) In CM 190497, Smith (1930), accused pleaded not guilty to specifications alleging offenses of fraudulent enlistment purporting to have been committed more than two years prior to his arraignment and, it appearing that there was no manifest impediment to the bar of the statute of limitations, the statute could, therefore, have been successfully pleaded in bar of trial for these offenses. The Board of Review held that, since it did not appear that accused was in any manner advised by the defense counsel (par. 45 b, M.C.M., 1928) of his right to plead in bar, and since the record shows that the court did not so advise him, it could not be said, under all the circumstances of the case, that accused intended to or did waive his rights in the premises, and, such being the case, his trial upon these specifications, in plain violation of the provisions of the 39th Article of War, was erroneous and unauthorized.

(3) In CM 195388, Flanagan (1931), the court, upon an accusation of desertion, to which the accused pleaded not guilty, by exception and substitution, found the accused guilty of an absence without leave commencing more than two years prior to his arraignment. The record of trial failed to show that accused, either on the arraignment or at any subsequent stage of the trial, including that of the findings and sentence, was advised by either defense counsel, trial judge advocate, or the court, in respect to his right to invoke the statute of limitations in bar of trial or punishment for that offense. For this reason the Board of Review held the record of trial legally insufficient to support the finding of guilty of absence without leave.

(4) In CM 195863, Zukosky (1931), the accused pleaded guilty to the offense of fraudulent enlistment. of which offense he was

found guilty. At the time of the arraignment more than two years had elapsed since the commission of the offense charged, and, the record of trial disclosing no facts to take the case out of the statute of limitations, trial was barred by the statute. The Board of Review expressed in part the following opinion:

"4. The statute of limitations is a defense and must be asserted at the trial by the defendant in a criminal case. Biddinger v. Commissioner, etc., 245 U.S. 128; United States v. Brown, Fed. Case No. 14665 (2 Lowell 267). The defense may be raised by a special plea in bar of trial (United States v. Kissel, 173 Fed. Rep. 823) or by a plea of not guilty (United States v. Cook, 84 U.S. 168, 179. Whether or not a plea of not guilty asserts the defense in those cases where the bar of the statute is apparent from the pleading is not necessary to decide in this case, and decision on that point is expressly withheld. In the instant case the accused failed to assert the defense either by a special plea or by a plea of not guilty. Instead of asserting the defense he pleaded guilty. Whether the plea of guilty be considered as a waiver of the right of the accused to avail himself of the defense accorded him by the statute or as an admission by the accused that facts exist which take the case out of the statute, the result is the same, namely, a valid sentence on the plea of guilty.

5. The Board of Review has not overlooked the fact that the Attorney General, in several opinions, has held that a court-martial has no jurisdiction, even with the consent of the accused, to try a case which is barred by the statute (1 Ops. Atty. Gen. 383; 6 id. 239; 13 id. 462; 14 id. 265; 16 id. 170 (1878)). Careful consideration of these cases shows that they are essentially based on the assumption that the bar of the statute of limitations affects the jurisdiction of the court. Thus the Acting Attorney General, Mr. Bristow, states:

> 'It has been held that the 88th Article of War, above quoted, is a limitation upon the jurisdiction of courts-martial and presents an absolute bar to the trial * * * which can not be waived even by the accused. (13 Ops. Atty. Gen., supra.)

But the theory that the statute affects the jurisdiction of the court is expressly denied by the Federal courts. In re Davidson, 21 Fed. Rep. 618 (1884); Biddinger v. Commissioner, etc. (1917), supra. As the Federal courts have power to inquire into the jurisdiction of courts-martial (Carter v. Roberts, 177 U.S. 496), their decisions on questions of jurisdiction are authoritative and should generally be followed by the Board of Review.

6. In view of the intimation by various Attorneys General that the bar of the statute may not be waived by the accused, consideration of that point is necessary. Assuming, as appears to be the fact, that the opinions of the Attorneys General cited above are based upon a conclusion that the statute of limitations contained in the Articles of War affects the jurisdiction of the court to hear and determine a case, the conclusion that an accused may not waive the bar of the statute is of course logical and consistent with the ruling on jurisdiction. It is conceded that jurisdiction can not be conferred by waiver. However, the Federal courts having overruled, in effect, the opinions of the Attorneys General that the statute affects the jurisdiction of the court, no sound reason is seen for now following these opinions that the bar of the statute may not be waived. It has been held that the protection afforded by the 5th and 6th Amendments to the Constitution may be waived (Levin v. United States, 5 Fed. (2d) 598 (certiorari denied, 269 U.S. 562); Grove v. United States, 3 Fed. (2d) 965 (certiorari denied, 268 U.S. 691)), and no sound reason is seen why the protection afforded by the statute of limitations may not likewise be waived.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the sentence. However, it appears that the staff judge advocate, the members of the court, the trial judge advocate, and the defense counsel, overlooked the fact that the statute of limitations might have been pleaded in this case. The Board of Review, while sustaining the validity of the sentence, feels that the equities of this case demand that the sentence be remitted in accord with the policy established in C. M. 188778 (Allen). Appropriate action looking to the remission of the sentence is recommended."

(5) In CM 197237, Rodgers (1931), to a charge of desertion the accused pleaded guilty of absence without leave and was found guilty of absence without leave commencing more than two years prior to his arraignment. There is nothing in the record of trial to show that the right of the accused to plead the statute of limitations in bar of trial or punishment was brought to his attention. In his review of the record of the trial of this case the staff judge advocate, after quoting the pertinent matter from the Manual of 1928, which has been quoted above, continued in part as follows:

> "It is thus seen that under the provisions of the present Manual, there is no mandatory requirement that the record of trial shall contain a statement that the accused was advised of his right to plead the statute of limitations. Under the 1921 Manual the record of trial was required so to show. Under that Manual it was the mandatory duty of the president of the court, or of the law member, to make such explanation. Under the present Manual no such duty devolves upon the president, the law member, the Trial Judge Advocate, or any other member of the court; but the positive duty is upon the defense counsel to make to the accused an explanation with regard to his right to plead the statute of limitations. In the instant case the provisions of the present Manual are controlling, and under it, as has been seen, the court may make the explanation but is under no mandatory duty to do so.
>
> There is a presumption of legality attendant upon the proceedings of courts-martial (1912 Dig. Ops. J.A.G. 557, XIV E 5; id. 570 XV C), and there is a presumption that the accused knows the law, and also a presumption that the officer representing him as defense counsel performed his full military duty (1912 Dig. Ops. J.A.G., 529 XI A 2; Par. 112 a, P. 110, M.C.M., 1928).
>
> There is no more reason under the present Manual, it seems to me, for requiring the record of trial to show that the defense counsel advised the accused of his right to plead the statute of limitations than there is that the record of trial should show that the defense counsel 'immediately upon the charges being referred for trial to the court', informed

'the accused of that fact and of his rights as to counsel', which the defense counsel is also required to do under paragraph 43 b, page 34, of the present Manual.

* * * *

Under all the facts and circumstances disclosed by the record of trial in this case, it seems to me, since there is no positive mandate of law or of the Manual which requires that there be embodied in the record of trial an explanation to the accused of his right to plead the statute of limitations, that it cannot be said that the record of trial is legally insufficient to support the sentence. * * *"

The prior holdings of the Board of Review in the cases of Flanagan, CM 195388, and Zukosky, 195863, were cited and considered by the examiner of the Rodgers case and that case was held legally sufficient and passed to file with the approval of The Judge Advocate General.

The above comment of the staff judge advocate is quoted with entire approval. The Board of Review is of the opinion that the statute of limitations may be set up by an accused as a bar to his trial or punishment either by a special plea, or by evidence of the statute and its applicability introduced under a plea to the general issue, but that without such evidence a plea of not guilty, as in the instant case, does not assert the bar of the statute. Under the present Manual for Courts-Martial it is no longer mandatory, as it was under the Manuals of 1917 and 1921, that it appear of record that the president of the court (1917 and 1921) or the law member (1921) advised the accused of his legal rights as to the statute of limitations in each case tried by general court-martial in which, upon the face of the record it appeared that he might successfully plead the statute, but had not done so. The present requirement for the protection of the rights of the accused under such circumstances is merely the directory one that the military counsel of his own selection, or the defense counsel, will, before the trial, explain to the accused in an appropriate case his right to plead the statute of limitations, and that such explanation will be made regardless of the intentions of the accused as to how he will plead. There is no requirement that it appear of record that such a duty was properly performed by military counsel for the defense, and, in the absence of such a

requirement, the prescription that it be performed "before the trial" removes it entirely from the record. In the absence of an affirmative showing to the contrary, it may be presumed that such military counsel performed not only this duty but the other general duties of his office prescribed by paragraphs 43 b and 45 b, Manual for Courts-Martial, since the law presumes that public officers duly perform their official functions, and this presumption continues until the contrary is shown. Dig. Ops. JAG, 1912, p. 529, XI A 2.

The Board of Review, in its holdings in CM 188778, Allen (1929), 190497, Smith (1930), and 195388, Flanagan (1931), mentioned above, although the provisions of the Manual for Courts-Martial of 1928 were then in effect, appears to have still been under the influence of the provisions of the Manuals of 1917 and 1921. In each of these cases findings of guilty were disapproved under specifications to which the accused had pleaded not guilty and to which he might successfully have interposed the plea of the statute of limitations, and disapproved for the reason stated that the record did not show that the accused was advised of his right so to plead either by the court, the defense counsel or the trial judge advocate. In CM 195863, Zukosky (1931), a Board of Review of which but one member had participated in CM 195388, Flanagan (1931), departed from the influence of the earlier Manuals and held the record legally sufficient to support the sentence notwithstanding the fact that the record failed to show that the accused was advised of his right to plead the statute of limitation where he might have pleaded it successfully. The accused had pleaded guilty, however, and it was held that there was a valid sentence on a plea of guilty. But the Board, still moved by the provisions of the Manuals of 1917 and 1921, while it sustained the validity of the sentence, felt that the equities of the case demanded that the sentence be remitted in accord with the policy established in CM 188778, Allen, and so recommended, because it appeared that the staff judge advocate, the members of the court, the trial judge advocate, and the defense counsel had overlooked the fact that the statute of limitations might have been pleaded.

In CM 197237, Rodgers (1931), the record of trial was held legally sufficient and passed to file although it appeared that the accused might have pleaded the statute of limitations successfully and there was nothing in the record of trial to show that his right so to plead was brought to his attention. He had, however, pleaded guilty to the charge and specification of which he was convicted.

In the instant case the accused pleaded not guilty to all charges and specifications and there is nothing in the record to show that he was advised that he might successfully have pleaded the statute of limitations in bar of a part of the offense charged in the specification of Charge II and that Charge. He was defended by a major of seventeen years service and by a captain of sixteen years service. In the absence of an affirmative showing to the contrary, it may be presumed that these officers performed their full duty in the defense of the accused and advised him of his right to plead the statute. Since no evidence of the statute of limitations and its applicability to the facts of the instant case was presented under the plea of not guilty, the bar of the statute was not asserted. And the failure of the record to show affirmatively that the accused was advised by the court or by his counsel that the statute of limitations was in any manner applicable to the offenses with which he was charged, or available to him as a defense, is held not to have affected the sufficiency of the record to support in their entirety the findings of guilty under Charge II and its specification.

11. At the time of the trial accused was 41 years of age. The statement of his service, as it appears in the Official Army Register, is as follows:

> "Pvt. sgt. and sup. sgt. Co. B 1 Inf. N. Dak. N.G. 19 June 16 to 14 Feb. 17 and from 5 Aug. 17 to 14 Aug. 17 2 lt. Q.M.C. N.A. 15 Aug. 17; accepted 15 Aug. 17; 1 lt. Q.M.C. N.A. 12 June 18; accepted 18 June 18; vacated 15 Sept. 20.---1 lt. F.D. 1 July 20; accepted 15 Sept. 20; capt. 1 July 20."

12. 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 and the sentence, and warrants confirmation thereof. sentence of dismissal is mandatory on conviction of violation of the 95th Article of War.

N. A. Turnbull, Judge Advocate.

H. R. Fitzing, Judge Advocate.

Theodore Yale, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201563

MAY 15 1934

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Lewis, Washington,
Lieutenant Colonel ARTHUR	)	December 18, 1933, January
J. DAVIS (0-1935), Quarter-	)	18, 19 and 20, 1934. Dis-
master Corps.	)	missal.

OPINION of the BOARD OF REVIEW
TURNBULL, KING 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 Lieutenant Colonel Arthur J. Davis, Quartermaster Corps, did, at Fort Lewis, Washington, between the dates, on or about April 15, 1931, and on or about December 22, 1931, wrongfully present and introduce in social intercourse to the officers of the Army and their families on said post a woman, one Mildred Good, as his cousin, when in fact said woman was not his cousin and he, the said Lieutenant Colonel Davis, was maintaining her on the post for an immoral purpose.

Specification 2: In that Lieutenant Colonel Arthur J. Davis, Quartermaster Corps, did, at Fort Lewis, Washington, between the dates, on or about April 15,

1931, and on or about December 22, 1931, wrongfully and unlawfully cohabit with one Mildred Good, a woman not his wife, by living with and maintaining her in the Government quarters assigned to him and by falsely representing that the said Mildred Good was his cousin.

Specification 3: In that Lieutenant Colonel Arthur J. Davis, Quartermaster Corps, did, at Fort Lewis, Washington, between the dates, on or about April 15, 1931, and on or about December 22, 1931, wrongfully and unlawfully cohabit with one Mildred Good, a woman not his wife, by haying illicit sexual intercourse with the said Mildred Good with the result that she became pregnant with child by him, the said Lieutenant Colonel Davis.

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

Specification: In that Lieutenant Colonel Arthur J. Davis, Quartermaster Corps, being at the time a lawfully married man, did, at Fort Lewis, Washington, and between Fort Lewis, Washington, and San Francisco, California, between the dates, on or about April 15, 1931, and on or about December 25, 1931, live in a state of adultery with one Mildred Good, a woman.

He interposed pleas in bar of trial and in abatement and when these in turn were denied he pleaded not guilty to all charges and specifications. He was found guilty of Specifications 1, 2 and 3, Charge I, and of Charge I; and of Specification, Charge II, "except the words 'and between Fort Lewis, Washington, and San Francisco, California', and except the words 'on or about December 25, 1931'; substituting therefor the words 'on or about December 22, 1931'; and of the excepted words 'not guilty' and of the substituted words 'guilty'", and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence in the record is satisfactorily summarized in the excellent review of the staff judge advocate. This summary is adopted by the Board of Review and reads as follows:

"Undisputed evidence shows that from about April 8, 1931, to December 22, 1931, Miss Mildred Good, an unmarried woman then about 33 years of age, not related by blood or marriage to accused, lived in the quarters assigned to him at Fort Lewis, Washington, and that with the exception of a few nights (not to exceed 7 or 8) accused also occupied the quarters. No other person resided in the quarters (two different houses) during this entire period, except that a sister of accused, Miss Edna Davis, visited there for one or two days and nights in August or September, 1931. Miss Good was introduced by accused to the Commanding General, Fort Lewis, and his wife and to other officers and ladies of the garrison, as the cousin of accused and she was received as such. She accompanied him to dinners, dances and like social functions on the post. Together with accused she made calls and received callers at his quarters. Just prior to her departure from the post on December 22, 1931, she and accused together called on the Commanding General of the post. She was allowed to reside in the quarters of accused because of representations by accused to the post commander that she was the cousin and housekeeper of accused (R. 37, 54, 55, 61, 70, 80, 115, 116, 119, 122-126; Pros. Exs, 29, 30). While she was residing in accused's quarters the post adjutant, to whom she had been introduced as a cousin of accused, remonstrated with accused concerning the living arrangements. The adjutant testified:

> 'I went to Colonel Davis and said that I desired to speak to him unofficially about a matter that concerned him, and I stated that he was being criticized by certain people for having Miss Good stay with him in his quarters. He replied that that was perfectly ridiculous, that Miss Good was a relative of his, that she had no money and that he was helping her out; that she was making things more comfortable for him, and that he had reached the age where he had no interest in anything other than a purely friendly relation.' (R 115).

Miss Good became pregnant in July or August, 1931; on April 23, 1932, a daughter was born to her at Los Angeles, California (R 56, 69;

Pros. Exs. 30, 31, 32). In September or October, 1931, accused consulted a physician in Seattle, Washington, as to the possibility and means of bringing about an abortion (R 57, 166). Miss Good left Fort Lewis on December 22, 1931, and up to December, 1933, accused, through his sister, Mrs. Estelle Herrick, every month sent money to her. Seventy dollars per month was paid in the beginning but later the amount was reduced to $45, then to $35, then to $30, and then to $25 per month (R 66, 69, 104, 147, 170; Pros. Exs. 25, 26). During her stay at Fort Lewis she cooked for the accused and did certain of the housework. He gave her small amounts of money from time to time, and purchased clothing for her. Just before she left, in December, 1931, he presented her with a coat and a wedding ring (R 60, 62, 73, 96).

Accused was married to Muriel Ingalls Davis on April 2, 1907, and this marriage continued until October, 1933, when accused obtained a divorce in Pierce County, Washington (Pros. Ex. 28). His wife did not reside with him after early in 1927 (R 39; Pros. Ex. 28). (He remarried on October 23, 1933, the same day his divorce decree was entered (R. 176)).

Accused first met Mildred Good, through a mutual acquaintance, in New York City in the spring of 1928 (R 37). Thereafter he wrote affectionate letters, in endearing terms, to her (Pros. Exs. 1 to 10 incl.). In the fall or winter of 1928 the two became intimate and thereafter frequently had illicit intercourse in accused's apartment in New York (R 53). Their relations continued until December, 1930, when accused received orders transferring him to Fort Lewis. The woman was not employed after the spring of 1930. She accompanied him across the continent in his automobile, arriving in Los Angeles, California, in the latter part of December, 1930. Illicit intercourse took place between them at least once during this trip (R 54, 65, 86, 182). After the two reached Los Angeles they parted, accused going on to Alameda, California, to visit his mother and Miss Good remaining with relatives in Los Angeles. Accused left his automobile with her, and when she went to Seattle, Washington, in April, 1931, she brought it with her. They corresponded by letter in the early part of 1931, and he paid at least $15.00 towards transportation to Seattle, by sea, for her and the car (R 54, 174).

About a year before leaving New York City, accused made Miss Good beneficiary under life insurance policies to the extent of about

$7666.00. After she left Fort Lewis the policies were changed to eliminate her as beneficiary (R 56; Pros. Ex. 17). When leaving Fort Lewis, the woman left her trunks and various personal possessions in the quarters of accused. This property was some weeks later shipped to her in Los Angeles by accused (R 61, 111; Pros. Exs. 17, 20, 27). On December 21, 1931, accused made a holographic will referring to the articles left in his quarters and to others belonging to her but left in his safe deposit box, and bequeathing to her various articles of personal property including rugs, other household items and a pet dog. In this will he stated that the contents thereof 'expresses my free will and desire and any change therein as to disposition of property mentioned above is against my wishes' (R. 71; Pros. Ex. 15).

The child born to Miss Good was exhibited to the court (R 69). On February 28, 1932, Mrs. Herrick, the sister who had been instructed to communicate with Miss Good in behalf of accused, wrote to Miss Good detailed suggestions as to the future care and disposition of the child when born (R 177; Pros. Ex. 14).

Mildred Good testified that accused had sexual intercourse with her in his quarters at Fort Lewis 'several times a week' during the period from April 8 to December 22, 1931,--'from the night of my arrival to the night I left' (R. 38, 39). They habitually occupied a single room and the same bed during the entire period (R 37, 38, 88). Accused had intercourse with her on the morning and night of December 20, and on the night of December 21, 1931 (R 38). After intercourse she habitually used contraceptives (R 101), but in August, 1931, believed that she had become pregnant, and by September was certain of it (R 56). Accused, upon learning of her pregnancy, was angry and bitter, and she tried to bring about a miscarriage (R 57, 59). Later he consulted a physician, but was afraid to have her go to a doctor for an illegal abortion (R 57). Together they made arrangements whereby she was to go to Portland before her pregnancy became physically apparent and to remain there until after the birth (R 59). On the whole he appeared to become reconciled, and with brief and infrequent exceptions treated her with kindness and affection during all her stay at Fort Lewis (R 94). When the sister of accused, Edna, visited the post in September, she upbraided accused for having witness with him,

and suggested that witness leave, whereupon accused said that if his mother and other sisters should learn of their relations they might cause him trouble by reporting the matter to the authorities. In November, 1931, he received a letter from his mother apprising him of her knowledge that witness was living with him, forbidding his marriage to her and threatening exposure and court action. Accused 'cried bitterly' over this letter but did not exhibit lasting antagonism towards her, telling her 'up to the last that he cared just the same' for her (R 61). After the two departed from Fort Lewis in December, accused parted from her with manifestations of affection while on the train at Oakland, California. From that point she again went to Los Angeles, expecting to rejoin him in Oakland in a few days and return to Portland, Oregon (R. 63). But a few days later witness received a letter from accused asking her to send him her ticket back to Portland which he had purchased for her. She never succeeded again in seeing or communicating with him, but his sister, Mrs. Herrick, asked that communications be carried on through her (R 64; Pros. Ex. 11).

Miss Good testified further that accused proposed marriage to her while they were in New York, that she accepted, and that it was their understanding at all times thereafter and prior to her departure from Fort Lewis that they were to be married as soon as he could secure a divorce from Mrs. Muriel Davis. After her pregnancy became known, accused stated that he would go to Reno, Nevada, and secure a divorce whereupon he would marry her before the birth of the child (R 39, 54, 60, 86, 92). Accused was the father of her child (R 70), and he never 'questioned the paternity of it' (R 77). She associated with no other man during the time she was at Fort Lewis (R 70, 95). During the period from December, 1930, to April, 1931, accused provided her with money and she went to Fort Lewis at his behest (R 54). Upon her arrival there he took her to his quarters and

> 'told me he was afraid to live alone in that house down there as it was very lonely, and he did not like it at the officers' club, and he begged me to stay at his house, and he asked me to stay and he said he would tell everybody that I was his cousin, his second cousin, so he could explain how he could marry me later, that not being a too close blood relationship for marraige' (R 55).

Witness further testified that prior to the time she left Fort Lewis she did not in any way threaten to prosecute or otherwise threaten accused (R 74, 75), and she did not insist on staying in his quarters (R 104). She did not assault accused and did not threaten the sister of accused (R 89). When witness talked to Mrs. Herrick in January, 1932, the latter said that her family would never consent to the marriage of witness and accused, that they would prefer his resignation from the Army rather than such a course; and that witness must remain south of San Francisco thereafter (R 64). Mrs. Herrick agreed that witness should receive money for her expenses and support until the birth of the child, and upon the understanding that no charges against accused be made (R 66). In December, 1933, the payments for the support of the child having been decreased, and the time having been reached when it would be too late to expect successful prosecution of accused should he fail to support the child, she went to the Corps Area Commander and reported the facts in the hope that accused would be required to make proper provision for the child (R 90, 91, 97). She still desires to marry accused in order that the child may be legitimatized (R 77, 79). After her report was made to the Corps Area Commander she was questioned by the District Attorney of Los Angeles, California, as to possible blackmail on her part, but the matter was dropped (R 76).

Captain A. L. Gorby, Medical Corps, testified that he had taken blood tests of accused, Mildred Good and her child, and had found that the blood of each fell into 'Group O', of the Landsteiner blood test system for the determination of parentage. Under this system blood is divided, according to characteristics, into four groups. Group O includes about 45% of all persons. The test proved that the blood of the father of the child was in Group O, but did not prove otherwise that accused was the father (R 105-111).

Dr. Robert Good, father of Miss Good, testified that accused came to his home in New York before his daughter left that city and said that he wished to marry Miss Good as soon as he could get a divorce (Pros. Ex. 33).

Accused testified that he is 53 years of age. Early in his acquaintance with Miss Good she told him of intimacy with a married

man at a time when she was about 20 years old and thereafter, in New York, he suspected intimacy on her part with another man. However, he had affection and 'sympathy' for her (R 167, 168, 183). She proposed coming to the West with him, and there being the friendly feeling between them, he consented (R 157). He had no immoral purpose in bringing her with him (R 182). He left his car in Los Angeles because it had been damaged in a collision. He did not request her to come to the neighborhood of Fort Lewis, but met her at the dock in Seattle and took her to Tacoma. At this time, 'I was glad to see her. But I certainly had no real interest in her and certainly not as to any marriage' (R 162). At her suggestion they came to Fort Lewis. At Fort Lewis they had dinner at the club and accused told her of his spacious quarters, which he may have previously described to her by letter (R 160, 175). She suggested they look at the quarters and they went there. After listening to the radio for a short time he suggested that they return to Tacoma, but she said that she wished to remain in the quarters. Accused demurred but she insisted on staying and told him, 'I have got you just where I want you. You brought me across the country, didn't you?' Accused still objected to her remaining, whereupon she suggested that she stay as a distant relative, a cousin, and said that she would take care of the house. Accused became fearful of prosecution under the Mann Act and permitted the woman to stay, yielding to her demands that she be introduced socially as his cousin (R 160, 161). As time went on, Miss Good made known her intention to marry accused. At one time she threatened him with a paper knife. At another she threatened to go to the Commanding General's quarters and scream (R 165). He had such loathing and fear of her that he could not and did not have sexual intercourse with her while she was at Fort Lewis (R 168, 169). He called on his sisters for help and together they planned to have Mrs. Herrick assist in getting rid of Miss Good and in keeping her quiet (R 163, 164, 177). He paid money to Miss Good to induce her to refrain from prosecuting him and because of her threats (R 170). He did not propose marraige to her (R 172, 173). He consulted the physician about a posaible abortion, because the woman 'was in the house with me' (R 166). He was not the father of the child. Miss Good was 'accessible every day and all day when I was away, and on all of her trips to Tacoma'. On one occasion he spoke to her about talking too freely with a soldier or soldiers who had come to the quarters to help train a dog he had

(R 179, 180). He said to her--

> 'Since you are living in an officer's house and have the status of being my cousin or relative, I do not think you should be very intimate or talk too much with these soldiers.

She replied that they were only talking about the dog (R 180). At times Miss Good went to Tacoma for the day (R 181).

Miss Edna Davis, sister of accused, testified that at the invitation of accused she visited him at Fort Lewis in the latter part of August, 1931, at which time he asked her help in getting Miss Good to leave his quarters. She remonstrated with Miss Good, and the latter told her that she would remain, that accused would marry her because he 'brought me across the country with him and he is going to do exactly as I tell him'. A few days later she again discussed the subject with Miss Good and Miss Good intimated that she might leave if she had any means of support but later suggested that witness and accused were trying to 'double cross' her and threatened to 'throw acid' in their faces if such were done (R 138-141). After witness left Fort Lewis she and Mrs. Herrick conceived the plan of having the latter, who had had experience in social service work, ingratiate herself with Miss Good and by placating means and falsely pretending efforts to effect a reconciliation between accused and Miss Good, keep her quiet, once she could be induced to leave the post. Mrs. Herrick succeeded by some means in inducing Miss Good to leave Fort Lewis (R 142-146). When witness was present at Fort Lewis accused appeared to be 'enduring' Miss Good, but he was neither friendly or abusive toward her (R 148).

Mrs. Anna B. Davis, mother of accused, testified in substantial corroboration of her daughter's testimony with respect to the plan formulated to effect a separation between accused and Miss Good (R 149-151)."

4. In his review the staff judge advocate discusses the evidence as follows:

"The allegations of each specification are supported in all respects by the positive and explicit testimony of Mildred Good, the

woman involved. The accused officer admits having deceitfully maintained the woman in his quarters and of having deceitfully introduced and caused her to be received socially as his cousin. He denies that he acted with an immoral purpose, and contends, in effect, that his wrongful actions were induced and continued because of implied or express treats by the woman of exposure of previous acts which might lead to criminal prosecution for interstate transportation of a female for an immoral purpose. The defense was allowed the fullest latitude in its presentation of evidence, and the court of mature and experienced officers (at least four of the five concurring), after observing the chief witnesses and after having seen the child resulting from sexual relations which must have occurred during the period of cohabitation of accused and Miss Good, has found that accused did in fact cohabit and live in adulterous relations with the woman during the period alleged, and that he maintained her on the military post for an immoral purpose.

It would, indeed, have taxed credulity had the denial of accused of an immoral purpose been accepted. The woman who bared her intimacies with accused may be conceded to have been resentful of his repudiation of her, but it is equally apparent that whatever chances she might have of securing further financial aid from accused would be lessened by his conviction upon the present charges and that she knew when testifying that she was doing so contrary to her own interests. The testimony of accused was of course animated by strong motives of self-interest.

Every material circumstance in the case points to the conclusion that Miss Good's installation and maintenance in the quarters at Fort Lewis was but a continuation of the illicit affair that had been going forward for many months. Accused at least helped to finance Miss Good's journey to Fort Lewis, he permitted her to live in his quarters, he falsely pretended that she was his relative, he took her with him on calls and to social functions on the post, he gave explicit assurances of the proprieties and restated the fictitious relationship to the Post Adjutant when questioned and told of suggestions of scandal, he admonished Miss Good that friendly relations with a soldier were unbecoming her position as an alleged relative and member of his household, he sought means of bringing

about an abortion when the woman became pregnant, he took her with him to the Commanding General's quarters for a call of courtesy upon her departure from the post, he bought and gave her a wedding ring just before her departure, he permitted her to leave the bulk of her possessions in his custody when she departed, he wrote a will making her a beneficiary, even bequeathing to her a household pet, he allowed her to remain a beneficiary under his life insurance policies while residing on the post, and he paid her expenses after her departure.

If some of his actions may be susceptible of explanation as actuated by fear, all of his actions are consistent with and indicative of an immoral purpose and adulterous relations.

He contends that she threatened him with prosecution for violation of a federal statute if he did not maintain her in his quarters and if he did not marry her or at least agree to do so, but that prosecution never materialized despite the lapse of some two years at the beginning of which he had sent her from the post and had repudiated any promise of marriage he may have made. She did in fact finally leave the post at the suggestion of accused, but without the exposure or prosecution alleged to have been threatened. That threats might have induced accused to pay money to the woman can be understood, but that they could have coerced him into the relationship shown to have existed at Fort Lewis in 1931, and that they did prevent him from a continuation of the illicit relations theretofore acceptably established, is hardly worthy of belief.

There is not in the record any evidence meriting discussion that the woman had sexual intercourse with any man other than accused during the summer in which the child was conceived. There is no evidence that accused, prior to the trial, denied or suggested that he was not the father of her child. On the other hand, he provided for its support.

That accused was incensed and frightened by Miss Good's pregnancy there can be little doubt, and it may be inferred that following discovery of this condition some recriminatory and perhaps threatening

statements passed between the two, but there is nothing in this circumstance to justify a conclusion that there were no immoral relations between accused and Miss Good during the period in which she resided with him at Fort Lewis."

The Board of Review concurs in this statement.

5. Though the evidence supports the findings of guilty, it is necessary to consider certain questions of law before arriving at a conclusion as to the legal sufficiency of the record of trial to support the sentence. This consideration may be confined to matters raised at the trial, and/or at a hearing before the Board of Review at which Samuel T. Ansell, Esq., appeared as counsel for accused, made a lengthy argument and filed a brief. They involve the jurisdiction of the court and the question whether or not errors have been committed injuriously affecting the substantial rights of accused. Certain facts bearing on these issues, which appear in the record of trial and accompanying papers and/or in statements and affidavits filed since the record reached the Board of Review, may be summarized as follows:

During the morning of December 13, 1933, Miss Mildred Good came to the office of Colonel E. S. Hartshorn, General Staff, Chief of Staff, Ninth Corps Area, presented letters of introduction to Major General Malin Craig, Commanding General, Ninth Corps Area, and made certain accusations in writing against accused. The latter consisted of a letter dated December 13, 1933, addressed to General Craig and signed by Miss Good, which was accompanied by a statement of facts and exhibits comprising in all one manuscript and fifteen typewritten letter-sized pages of matter. On the same day Miss Good's letter and its inclosures were referred to the Commanding General (Brigadier General Henry W. Butner), Fort Lewis, Washington, for investigation and report. Miss Good did not see General Craig during her visit to his headquarters (or at any time since), but Colonel Hartshorn reported to him the administrative reference of her complaint to General Butner. The papers reached General Butner on December 15th, and after making a preliminary investigation of the accusations he telephoned General Craig that he believed accused guilty of

violations of the Articles of War, that offenses he intended to charge, as disclosed by the investigation, might be barred by the statute of limitations within a few days, and that he considered himself to be in the position of an accuser and intended on that account to forward the charges to General Craig. Later the same day or the following day, General Butner reported by telephone to General Craig that he had signed or was about to sign charges against accused. Whereupon General Craig told him that if and when the charges were filed they should be referred to a disinterested, experienced officer for investigation. After a consultation with his staff judge advocate (Colonel Hugh C. Smith, J.A.G.D.), General Craig also advised General Butner that in view of the fact that the statute of limitations was about to bar the offenses, the charges, report of investigation, substance of the evidence taken at the investigation and recommendation of the investigating officer should be transmitted by telephone to his staff judge advocate. On December 16th General Butner read to the staff judge advocate over the telephone the charges, report of investigation and substance of the evidence produced thereat and stated that the investigating officer recommended trial. The staff judge advocate then informed General Craig of the substance of the charges, the evidence in support of same and the recommendation of the investigating officer, and General Craig, after receiving the advice of his staff judge advocate, determined that trial was advisable, gave orders for the appointment of the general court-martial and reference thereto of the charges, and directed that such orders and reference be transmitted by radio. The order appointing the court was duly issued and communicated to the Commanding General, Fort Lewis, Washington, by a radiogram which also advised him that members of the court had been directed by radio to report to him pursuant to the order, instructed him to notify personnel at his station of their appointment, and informed him that copies of the order were being transmitted to him by air mail for delivery to the members of the court on arrival. A little later a radiogram was sent to the trial judge advocate of the court officially referring the charges to the court for trial, and still later another radiogram was sent to the trial judge advocate advising him of the reference, that the court would convene Monday, December 18th, at ten o'clock in the forenoon for the purpose of arraigning the accused, that it was not necessary to wait five days for arraignment after

service of charges, but that the case might be continued for trial after arraignment if prosecution or defense was not prepared to proceed, and that charges including copy of radio reference for trial, should be served on accused that day. Accused was placed in arrest on December 15th and the charges were served on him on December 16th.

The court met at Fort Lewis, Washington, at 3:05 o'clock P.M. on December 18th. At the beginning of the trial the defense objected to proceeding (R. 5) and contended that the charges had not been properly prepared, investigated and referred to the court for trial but stated that the charges were preferred and investigated in haste, that upon the investigation accused was denied the opportunity of calling certain witnesses from the City of Portland, Oregon, because they were not available, and that he was denied sufficient opportunity because of lack of time to digest the evidence against him. The court overruled the objection and directed the trial judge advocate to proceed with the arraignment of accused. He was then arraigned (R. 11).

The defense then interposed a plea in bar of trial (R. 13) based upon the contention that the statute of limitations was applicable as to certain of the acts charged as having occurred more than two years prior to arraignment. This plea having been denied by the court the defense waived its right under the 70th Article of War to object to accused being brought to trial within the period of five days subsequent to the service of the charges upon him and interposed a plea in abatement "in order that the charges may be amended to include only the dates for which the accused may be held liable" (R. 18). This plea was also based on the statute of limitations and was also denied. These pleas were denied by the court upon the theory that the offenses charged were continuing ones and that therefore the statute did not begin to run until termination of the wrongful conduct.

After the above mentioned special pleas were denied the court adjourned to meet at 2:00 o'clock P.M. on January 15, 1934. However, it did not meet until 2:00 o'clock P.M. on January 18th. In the interim accused was ordered before a board of medical officers appointed to examine into and report upon his mental condition and

this board found him "sane, and mentally competent and responsible". When the court reconvened on January 18th, the accused asked for a continuance upon the ground that a civilian counsel named could not attend because of other engagements. The accused was represented by the regularly detailed defense counsel and assistant defense counsel, individual military counsel, and by other civilian counsel. The court denied the continuance. There appears to have been no abuse of discretion in this action. See par. 52, Manual for Courts-Martial.

To be considered with the above mentioned questions raised at the trial is the argument of counsel for accused made at the hearing before the Board of Review. In both his argument and brief counsel contended that the proceedings, findings and sentence of the court-martial in this case are null and void for the following reasons:

> "(1) Because the convening authority was the accuser or prosecutor and as such was without jurisdiction to appoint the court for the trial of this officer, and
>
> (2) Because statutes prescribing indispensable conditions for the exercise of courtmartial jurisdiction were deliberately and flagrantly violated and ignored.
>
> (3) Because the proceedings were unduly influenced by military power and accused was denied a fair and impartial trial."

If General Craig, the convening authority, was the accuser or prosecutor in this case then he was without authority to appoint the general court-martial and such court was without jurisdiction. Article of War 8. General Craig did not order the charges preferred, he did not sign them nor dictate the form they should take; he did not know their exact nature until advised thereof by General Butner, who did sign and swear to the charges; and he ordered the charges referred for trial only after he had been made acquainted with their form and nature, the evidence in support of them and the recommendation of the investigating officer, and had received the advice of his staff judge advocate. The fact that there was unusual expedition in handling the case to stop the running of the statute of limitations and that such

action was authorized by General Craig does not warrant an inference that he was the accuser or prosecutor. The contention of counsel that General Craig was the accuser or prosecutor is without merit.

It is true that the investigation of the charges was expedited and that the accused did not approve of such expedition but this in itself does not indicate that the investigation was not thorough and impartial. The investigating officer had before him the detailed statement of the complaining witness and there appeared to be no necessity for procuring any further testimony from her. She was in San Francisco or vicinity and he had no way of compelling her attendance at the investigation, so that she was not available for cross-examination by the accused if he desired to question her. The report of investigation shows that accused was given the opportunity to cross-examine other witnesses who testified in the investigation but that he did not avail himself of this right. He accepted the opportunity extended to him to make a statement in his own behalf. The statement he made is as follows:

> "Owing to the fact that charges were preferred by the Commanding Officer without my being allowed to read any of the statements by my accusers and owing to the fact that since the charges were preferred and shown to me I was allowed only twenty-five minutes to read the testimony submitted which consists of many pages of details by Mildred Good, I do not feel that I have been given sufficient opportunity to rebut these witness' statements, nor have I had an opportunity to produce witnesses to substantiate my rebuttal. These witnesses are in California and Oregon, and are relatives of mine who know all about this case. I therefore will content myself with a complete and full denial of all words and phrases in the specifications pertaining to immoral purposes, unlawful cohabitation, illicit sexual intercourse, pregnancy by me, and adultery. I respectfully request that I be furnished true copies of all letters and documents submitted to the Commanding General in order that I may study same and prepare a complete denial of all false and misleading statements

contained therein which will probably give to the convening authority a wrong impression of the merits of my case."

In an affidavit verified April 16, 1934, and filed by counsel at the hearing before the Board of Review, accused described the preliminary steps in the case as follows:

"That on the 15th day of December 1933, at about 3:30 P.M. I received word to report to the Commanding General at his office and that upon arriving there, Brig. Gen. Henry W. Butner, U.S.A., Comdg. Gen. 3rd Div. and Post Commander, asked me whether I knew Mildred Good. He said that she claimed that I was the father of her child and asked me what I was going to do about it. I denied any paternity and stated that I had been blackmailed by her for over two years. He arose from his desk and walked back and forth to the window and pointed to a letter which he said he had just received from Hqrs. 9th C.A. San Francisco, Cal. I asked him to allow me to read the complaint which was in the letter on his desk but he did not do so. He asked me whether I wished to resign for the good of the service to which I replied that I did not. No chance or offer was made to me to handle the complaint in a personal manner. Up to this time my official and social relations with General Butner had been most pleasant and satisfactory and I felt that he was a friend. There was nothing I could do as long as I had not been able to read the complaint. I asked again to read it but my request was ignored. I saluted and left the office feeling that nothing would be done until I had had a chance to read the complaint. In a few minutes, however, I knocked on the door and was admitted again and asked whether any further action was to be taken. Gen. Butner replied that he did not know and said 'you see, I am on the spot'. I asked for the third time to read the complaint but no notice was taken of it. I asked whether there would be any further investigation and Gen. Butner replied that he did not know. I had received no warning from anyone that such

a letter was to be submitted against me and was taken entirely by surprise when placed in arrest that same evening by the Adjutant who had been hunting for me for some time. At about 8:30 A.M. the next morning I was directed by telephone to report to Col. F. W. Clark for investigation and at 9:30 the investigation began, on Saturday December 16th. Col. Clark then informed me that I could only have 25 minutes to read the complaint as he had been instructed to finish the investigation by 11 A.M. if possible. I could not read the complaint in the time allotted me as by tests made later by my counsel it required more than an hour. The investigation was ended at 12 noon. I had no Counsel and my request to have my sister appear was denied although she lives at Portland, Oregon, about 4 hours distant."

The preliminary investigation by General Butner was simply such as to satisfy himself that he could properly sign and swear to charges. No special procedure was prescribed. The investigating officer did not attempt to procure the attendance of or statements from witnesses located in California and Oregon whom accused desired to testify in his own behalf. The investigating officer could not compel the attendance of such witnesses or pay them fees for attendance and it is clear that they were not reasonably available. He was not obligated to defer or delay his investigation in an attempt to secure the attendance of or procure statements from witnesses over whom he had no control. Furthermore the witnesses from California and Oregon who testified on behalf of accused at the trial were accused's sister, Miss Edna B. Davis, and his mother, Mrs. Anna B. Davis. The mother's testimony is nearly all hearsay and immaterial. That of Miss Davis contains much matter inadmissible because immaterial or consisting of self-serving declarations by the accused. However, the testimony of these witnesses, even including much that was inadmissible, failed to prevent the court from convicting accused; and it is inconceivable that it would have induced the investigating officer to recommend against trying accused or the convening authority from referring the charges. It is therefore obvious that no harm was done accused through failure to summon these witnesses.

Accused was not entitled to be represented by counsel at the investigation and there is no showing he requested such counsel. The investigating officer would have been derelict in his duty had he delayed or continued his investigation and allowed the statute of limitations to run against the offenses charged. Accused's contention that he was given only twenty-five minutes to read Miss Good's complaint and that he has been advised by his counsel that such reading would require more than an hour is believed to be without merit for Miss Good's letter of complaint and the inclosures thereto were read by a member of the Board of Review in fifteen minutes. Assuming that everything in accused's statement to the investigating officer and in his affidavit, quoted above, is true, it cannot be said that any of accused's statutory rights were denied him at the investigation.

The 70th Article of War and paragraph 35, Manual for Courts-Martial, contemplate that in a case of this kind the report of the investigating officer will be reduced to writing and forwarded to the convening authority for his consideration and the advice of his staff judge advocate before trial is ordered. The purpose of these provisions is to prevent trial unless there is a prima facie case against an accused. This purpose was accomplished in the instant case when General Butner transmitted by telephone to the staff judge advocate the charges, substance of the testimony taken and the recommendation of the investigating officer, and this information was passed on to the convening authority with the advice of his staff judge advocate. Though the transmission by radio of the order appointing the court and the order of reference was unusual, it was not unauthorized and does not affect the legal sufficiency of such action. In view of the foregoing it is the opinion of the Board of Review that the investigation of the charges and their reference for trial was substantially in compliance with the provisions of the 70th Article of War and of the Manual for Courts-Martial.

The objections as to the form of the charges made by counsel at the trial and also by counsel in his brief are without merit. In the opinion of the Board of Review the offense charged in each specification was a continuing one and the language used fairly apprised accused that a continuing offense was charged. A continuing

offense is defined by Winthrop (Reprint 1920, p. 255) as "one which per se and without regard to the intent, if any, of the offender, involves injury to individuals or the public so long as it is not abated, and is thus viewed as committed indifferently on every and any day of its maintenance". See also In re Snow, 120 U.S. 274, 281, 285, 286; Armour Packing Company v. United States, 209 U.S. 56, 77. Each offense charged in this case grew from a prolonged and continuous course of action, the very prolongation and continuation of which was the gravamen of the wrongdoing alleged. It has been held that cohabitation with more than one woman, an offense closely analogous to the wrongful cohabitation, living in a state of adultery and the wrongful masquerading of the woman as a relative, as herein charged, is a continuing offense. In re Snow, supra. It has also been held by the highest authority that where the offense is in its nature a continuing one the statute commences to run only upon the termination of the wrongdoing. Hyde v. United States, 225 U.S. 347, 369; see also 16 C.J. 225. Inasmuch as none of the continuing offenses charged in this case ended more than two years prior to arraignment, the pleas based on the 39th Article of War were properly denied. The offenses being continuing ones there could be no reasonable basis for requiring the prosecution to elect under any specifications as to any particular act of adultery on which he intended to ask conviction, as suggested by the defense (R. 77).

By Specification 3, Charge I, it is alleged that the unlawful cohabitation and illicit sexual intercourse resulted in pregnancy of the woman, and it appears from the proof that the particular act of illicit intercourse which caused the pregnancy occurred more than two years before arraignment. It is believed that the gist of the offense charged under this specification was wrongful cohabitation, a continuing offense, and that the isolated act of intercourse suggested by the allegation of pregnancy was but an allegation of an incident of the continuing offense charged and a pleading of evidence. In neither case would the applicability of the statute of limitations be affected.

The contention that accused was brought to trial within a period of five days subsequent to the service of charges upon him, in violation of the 70th Article of War, is likewise without merit.

Paragraph 62, Manual for Courts-Martial, states:

> "The fact that the service of the charges was within five days of the arraignment (see A. W. 70) does not prevent the arraignment even though the accused objects on that ground to the proceeding, but such fact is available as a ground of valid objection to any further proceedings in the case at that time."

Thus it follows that when this accused was arraigned on December 18th on charges served on him on December 16th he was not thereby brought to trial within a period of five days subsequent to the service of charges upon him within the meaning of the final sentence of the 70th Article of War. CM 169250, Foley. And it must be remembered that though the defense at first objected to arraignment within the five day period (R. 6), it later waived its rights in this connection when it interposed the plea in abatement (R. 18).

There were introduced over objection by the defense (R. 52) proof of acts of adultery committed by accused and Miss Good prior to the acts charged. Immoral purposes and adulterous disposition were some of the many issues in the case and proof of the early relations of accused and Miss Good were material to these issues. Thus there was no legal impropriety in receiving this evidence. Par. 112 b, M.C.M., p. 112; 16 C.J. 592. Neither was there any legal impropriety in receiving in evidence ten letters (Pros. Exs. 1 to 10, incl.) written by accused to Miss Good in August and September, 1928, showing the early relations between the two.

Objection was made to certain of the correspondence between Mrs. Herrick and Miss Good after the latter's departure from Fort Lewis (R. 65). It appears that accused had authorized Mrs. Herrick to represent him in communicating with Miss Good and it was proper to receive in evidence such admissions as the letters embodied.

Miss Good's child was exhibited and the prosecution invited the court to note "any features common to the child and its alleged putative father" (R. 69). In the brief submitted to the Board this is assigned as error. The fact that no objection to the introduction

of the child was made at the time is believed a sufficient answer to counsel's argument. Furthermore, the weight of authority allows such comparison of features, at least in a child as old as this, one year and nine months at the time of trial. Wigmore on Evidence, 2d Ed., secs. 166, 1154 (2).

In view of all the facts and circumstances of the case the contention of counsel for accused "that the proceedings were unduly influenced by military power and accused was denied a fair and impartial trial" is not well founded.

6. At the time of the trial accused was 52 10/12 years of age. His service is shown by the Official Army Register as follows:

> "Lt. col. Q.M.C. U.S.A. 14 Oct. 18; accepted 15 Oct. 18; hon. dis. 30 Oct. 19.--Cadet M.A. 19 June 00; 2 lt. of Cav. 15 June 04; trfd. to Inf. 22 Apr. 08; 1 lt. 11 Mar. 11; capt. 1 July 16; maj. (temp.) 5 Aug. 17; Q.M.C. 5 Nov. 17; hon. dis. maj. (temp.) 14 Oct. 18; reld. Q.M.C. 30 June 20; maj. 1 July 20; trfd. to Q.M.C. 30 July 20; lt. col. 1 Aug. 28."

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 sentence and warrants conviction 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.

W. A. Trumbull, Judge Advocate.

Dissent by King, Judge Advocate.

Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201563

MAY 15 1934

UNITED STATES	)	NINTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, December 18, 1933, January 18, 19 and 20, 1934. Dismissal.
Lieutenant Colonel ARTHUR J. DAVIS (0-1935), Quartermaster Corps.	)	

MEMORANDUM by KING, Judge Advocate.

1. By Specification 3, Charge I, it is alleged that accused did

> "between the dates, on or about April 15, 1931, and on or about December 22, 1931, wrongfully and unlawfully cohabit with one Mildred Good, a woman not his wife, by having illicit sexual intercourse with the said Mildred Good with the result that she became pregnant with child by him, the said Lieutenant Colonel Davis."

I concur with the majority of the Board in believing that the offense thus charged was wrongful cohabitation and sexual intercourse, a continuing offense, which both the allegation and the proof show continued until December 21, 1931, within the period of limitation. The statute of limitations is not therefore a valid defense to the specification as a whole; but, as the evidence shows that the particular intercourse which caused the pregnancy must have occurred more than two years before the arraignment, it is my opinion that the statute furnishes a valid defense to so much of the specification as refers to the pregnancy. The court should therefore have excepted the last clause, beginning with the words "with the result", from its findings of guilty, and the record is in my opinion insufficient to support so much of the finding of guilty as relates thereto.

2. It is contended in the brief filed with the Board (p. 27 et seq.) that accused was brought to trial within five days subsequent to the service of charges upon him, in violation of the last sentence of the 70th Article of War. It is to be noted that that sentence contains the phrase "against his objection". At the very beginning of the hearing the defense objected to trial on this very ground (R. 6), but later the defense explicitly said (R. 18), "the defense desires to waive its five day period". The defense thereupon filed a plea in abatement and, when that was overruled, a plea of not guilty. It was permissible for the defense to withdraw its original objection, waive the five day requirement, and plead, which it did. This express waiver makes it unnecessary to decide the point raised by the original objection and by counsel's argument and discussed by the majority of the Board, namely, that the words "brought to trial" in Article of War 70 refer to the commencement of the hearing and not to the trial on the facts. I prefer to express no opinion on that point and to rest my concurrence in the action of the Board in this respect solely on the ground of waiver.

3. Except in so far as above stated, I concur in the opinion of the Board of Review. Specifically, I concur in the view that the record is legally sufficient to support the sentence and warrants its execution.

Archibald King

Archibald King,
Major, J.A.G.D.

1st Ind.

War Department, J.A.G.O., JUN 1 1934 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Lieutenant Colonel Arthur J. Davis (O-1935), Quartermaster Corps (CM 201563), together with the foregoing opinion of the Board of Review signed by two of its three members; a memorandum of the third member concurring in the conclusion of the majority that the record is legally sufficient to support the sentence; a file of correspondence originating with a letter to you from Samuel T. Ansell, Esq., Washington, D. C., counsel for accused, dated March 10, 1934, with indorsements and inclosures thereto, relating to the contention of counsel that the convening authority was in fact the accuser or prosecutor of accused and so without jurisdiction to appoint the court; brief of Mr. Ansell, affidavit, statement and letter of accused, and affidavit of A. O. Burmeister, Esq., Tacoma, Washington, also counsel for accused, filed by Mr. Ansell with 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. 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.

4. Also inclosed is my separate memorandum relating to requests for clemency made on behalf of accused. This memorandum also includes a statement of accused's service in the Army. As indicated above, I do not recommend the granting of any clemency in this case.

A. W. Brown,
Major General,
The Judge Advocate General.

9 Incls.
Incl. 1-Record of trial.
Incl. 2-Memo. by 3d member of B/R.
Incl. 3-File of correspondence.
Incl. 4-Brief filed by Mr. Ansell.
Incl. 5-Affidavit, etc., of accused.
Incl. 6- " of Mr. Burmeister.
Incl. 7-Memo. for Secy. War from J.A.G. & inclosures.
Incl. 8-Draft of let. for sig. Secy. War to Pres.
Incl. 9-Form of executive action.

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

Board of Review
CM 201596

MAR 3 1934

UNITED STATES	)	EIGHTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, January 29-30, 1934. Forfeiture of Ten Dollars ($10) of his pay.
Private 1st Class, Specialist 4th Class, CLAUD F. SIGLER (6241425), Battery C, 76th Field Artillery.	)	

OPINION of the BOARD OF REVIEW
TURNBULL, BITZING 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 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 84th Article of War.

Specification: In that Private First Class, Specialist 4th Class, Claud F. Sigler, Battery C, 76th Field Artillery, did, at Fort Francis E. Warren, Wyoming, on or about December 20, 1933, unlawfully sell to Garland Roberts one pair of boots leather laced, property of the United States, of the value of $3.02, issued for use in the military service of the United States.

He pleaded not guilty to the Charge and Specification thereunder and was found guilty of the Specification except the words "unlawfully sell", substituting therefor the words "unlawfully disposed of", and

guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to forfeit Ten Dollars of his pay. The reviewing authority approved the sentence and directed its execution. The sentence was published in General Court-Martial Orders No. 26, Headquarters Eighth Corps Area, February 16, 1934.

3. It will be noted from the foregoing that the accused was tried upon the specification laid under the 84th Article of War alleging that he unlawfully sold a pair of boots issued for use in the military service, and that the court by exceptions and substitutions found him not guilty of having unlawfully sold the boots in question but guilty of having unlawfully disposed of them. The offense of which the accused was thus found guilty is not an offense lesser than and included in the offense charged, but is a separate and distinct offense. CM 138679, Frisbie; 143500, Avala; Dig. Ops. JAG 1912-30, 1597 (3). In the Frisbie case, The Judge Advocate General (Crowder) said:

> "To wrongfully dispose of property in a manner not stated is a separate and distinct offense from wrongfully selling said property. The substituted words, 'dispose of', might mean any one of many acts, either lawful or unlawful. * * * The expression 'to dispose of' is very broad and signifies more than to sell. Selling is but one mode of disposing of property. (Phelps v. Harris, 101 U.S., 380; Hill v. Sumner, 132 U.S., 123; Noyes v. Lane, 1 S. Dak., 125.) * * * It is the opinion of this office, therefore, that the findings of the court that the accused did not wrongfully sell the property described amounts to an acquittal of the accused of the offense charged, and that the court did not find the accused guilty of the offense charged or of a lesser included offense. (C. M. No. 138334, Haynes, May 26, 1920.) Authority to find guilty of a lesser included offense does not justify the conviction of the accused of an offense entirely separate and distinct in its nature. (C. M. No. 107490, O'Rourke; C. M. No. 135412, Girard.)"

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

N. A. Cornhill, Judge Advocate.
H. K. Dilzing, Judge Advocate.
Theodore Hall, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201648

MAR 10 1934

UNITED STATES	)	THIRD CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Humphreys, Virginia, February 6, 1934. Dishonorable discharge and confinement for six (6) months. Fort Humphreys, Virginia.
Private HAROLD L. STATSICK (6826977), Company D, 13th Engineers.	)	

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 specification under the Additional Charge alleges that the accused willfully disobeyed the lawful order of a private first class, duly appointed acting corporal in charge of quarters, this in violation of the 65th Article of War. In the opinion of the Board of Review, the word "noncommissioned officer", as used in Article of War 65, does not include an "acting" noncommissioned officer.

3. For the reason stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the finding of guilty of the Additional Charge as involves a finding of guilty of a violation of the 96th Article of War in the manner alleged in the specification, and legally sufficient to support the sentence.

W. A. Turnbull, Judge Advocate.
H. R. Bitzing, Judge Advocate.
Theodore Hall, Judge Advocate.

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

Board of Review
CM 201678

MAR 21 1934

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Alcatraz, California, February
Second Lieutenant JAMES W.	)	20, 1934. Dismissal and con-
ANDERSON (0-261400),	)	finement for one (1) year.
Infantry, Reserve.	)	

OPINION of the BOARD OF REVIEW
TURNBULL, BITZING and HALL, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant James W. Anderson, Infantry, Reserve, while on active duty, did at Camp Challenge, F-53, Challenge, California, on or about December 1, 1933, desert the service of the United States and did remain absent in desertion until he surrendered himself at Oakland, California, on or about December 29th, 1933.

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

Specification 1: In that Second Lieutenant James W. Anderson, Infantry, Reserve, while on active duty, being at the time Camp Exchange Officer, Company 919, CCC, Camp Challenge, California, and, as such, custodian of the moneys of the Camp Exchange of said

Company, did, at Camp Challenge, California, on or about December 1, 1933, feloniously embezzle by fraudulently converting to his own use moneys in the sum of $549.36, property of the said Camp Exchange, which moneys came into his possession by virtue of his said office.

Specification 2: In that Second Lieutenant James W. Anderson, Infantry, Reserve, while on active duty, did at Camp Challenge, F-53, Challenge, California, on or about December 1, 1933, feloniously embezzle by fraudulently converting to his own use money of the value of $50.00, the property of the United States, intrusted to him for payment of enrollees by his Company Commander, First Lieutenant Charles Steele, Infantry, Reserve.

Specification 3: In that Second Lieutenant James W. Anderson, Infantry, Reserve, while on active duty, being at the time official custodian of the orchestra fund, Company 219, CCC, Camp Challenge, California, and, as such custodian of the moneys of the orchestra fund of said company, did, at Camp Challenge, California, on or about December 1, 1933, feloniously embezzle by fraudulently converting to his own use, moneys in the sum of $8.75, property of said orchestra fund, which moneys came into his possession by virtue of his office as custodian of said fund.

Specification 4: (Finding of not guilty).

Specification 5: In that Second Lieutenant James W. Anderson, Infantry, Reserve, while on active duty, did at Camp Challenge, F-53, Challenge, California, on or about December 1, 1933, feloniously embezzle by fraudulently converting to his own use money of the value of $25.00, the property of enrollee Frank R. Lee, CC-9-97805, intrusted to him by the said Frank R. Lee.

Specification 6: (Finding of not guilty).

Specification (Finding of not guilty).

CHARGE III: Violation of the 96th Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to Charge I and its Specification but guilty to absence without leave in violation of the 61st Article of War (this plea was changed to not guilty by the court, R. 29), and not guilty to the remaining charges and specifications. He was found guilty of the Specification, Charge I, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", not guilty of Charge I, but guilty of violation of the 61st Article of War; guilty of Specification 3, Charge II, except the figures "$8.75", substituting therefor the figures "$7.75", not guilty of Specifications 4, 6 and 7, Charge II, but guilty of the remaining specifications of the charge and of Charge II; and not guilty of Charge III and the specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of one year. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The place of confinement has not been designated.

3. The evidence of the prosecution as to the offenses of which accused was found guilty may be summarized as follows:

The accused, a Second Lieutenant, Infantry, Reserve, has been on active duty since May 16, 1933 (R. 39) and was stationed at Camp F-53, Challenge, California, on duty with CCC Company 919 (Ex. A). On November 30, 1933, he was given a pass by his commanding officer until noon, December 1, 1933, and was absent without leave from December 1, 1933, until December 29, 1933, at which time he surrendered to the civil police at Oakland, California (Ex. A; R. 9).

When leaving the camp on November 30th, accused had in his possession a sum of money amounting to between $500 and $640.47, which had come into his possession as custodian of the funds of the Camp

Exchange, and which consisted largely of funds realized from company collections made by him on that day (Exs. A,B,C). In addition to the Camp Exchange funds, accused also had in his possession the following sums: $50 intrusted to him by the company commander for the purpose of paying four enrollees who had been absent from the pay table (Ex. A); $7.75 belonging to the orchestra fund of the company which had come into his possession as custodian of the fund (Ex. A; R. 13); and $25 intrusted to him by Enrollee Frank R. Lee (CC-9-97005) for safekeeping (Ex. E).

During the night of November 30-December 1, 1933, accused stayed at the Western Hotel in Marysville, California, and in the course of the evening visited a night club and had several drinks (R. 15). On the morning of December 1st he was in Sacramento and purchased an automobile, making a down payment of $189.90 (Ex. D). When he surrendered in Oakland on December 29th accused had only a few cents in his possession (R. 10). At that time he stated to the police sergeant that he was wanted for embezzlement and desertion (R. 9,14) and that he had left Marysville with about $700 in his possession, had started drinking, had made a down payment on an automobile, driven to Los Angeles, where he continued to drink, and had become so drunk that someone had "rolled" him for the greater portion of the money (R. 9).

The sum of $50, which had been intrusted to accused by the company commander (Spec. 2, Charge II), and the sum of $25, belonging to Enrollee Lee (Spec. 5, Charge II), were repaid out of funds sent by Captain J. B. Anderson, Retired, father of the accused (Ex. A; R. 13).

4. The accused was sworn as a witness in his own behalf and his testimony may be summarized as follows:

He had been on duty at Camp Challenge from May 16, 1933, to November 30, 1933, and enjoyed his work. He had had prior service as an enlisted man, having served from June, 1922, to July, 1925, and was discharged as a sergeant from the 4th Infantry. He reenlisted in January, 1926, but was discharged by purchase in May, 1926 (R. 18). Pay day at Camp Challenge in November fell on the 29th and as the 30th was a holiday accused could not deposit his collections in the bank until Friday, December 1st (R. 20). On the evening of November 30th accused went to Marysville, taking with him his pay check amounting to $105.55, $25 in cash, in addition to the intrusted funds in his

keeping (R. 20,26). At Marysville he drank more than he should and next morning went to Sacramento where he purchased a car (R. 21). From Sacramento he drove to Hollywood where he continued his drinking. On the morning of December 6th he found that about $300 of the money in his possession had been stolen. He reported it to the police but none of the money was recovered (R. 22). Accused continued to stay in Hollywood until after Christmas, when he decided to go to Oakland where he had friends and attempt to borrow enough money to make good the sum he had taken with him (R. 22). Finally, however, he could not bring himself to ask his friends for the money and having only twelve cents in his pocket he surrendered to the Oakland police (R. 22).

5. The evidence is legally sufficient to support the findings of guilty. The accused admitted most of the facts, but denied any intention to embezzle the funds. The court was fully justified, however, by all the facts and circumstances of the case in finding the accused guilty.

The finding of the court on the Specification of Charge I was irregular. This was corrected later by means of a certificate signed by the president and trial judge advocate under the provisions of paragraph 87, page 75, Manual for Courts-Martial, 1928. It does not appear that it was impracticable or inconvenient to reconvene the court, and it is believed that the better practice is to reconvene the court for proceedings in revision to correct the record when it is not impracticable to do so. However, in this case, the substantial rights of the accused were not injuriously affected by the action taken.

6. The court was legally constituted. The accused, a reserve officer on active duty, is subject to military law. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and warrants confirmation thereof, and the designation of the Disciplinary Barracks or a military post as the place of confinement. Dismissal is authorized for a violation of the (93d) Articles of War.

N. A. Trundell, Judge Advocate.
H. R. Ditzing, Judge Advocate.
Theodore Reed, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201710

APR 2 1934

UNITED STATES	)	THIRD DIVISION
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, March 6, 1934. Dishonorable discharge and confinement for three (3) years. Penitentiary.
Private THOMAS R. REYNOLDS (6756825), Battery B, 10th Field Artillery.	)	

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 93d Article of War.

Specification: In that Private Thomas R. Reynolds, Battery B, 10th Field Artillery, did, at Fort Lewis, Washington, on or about February 13, 1934, feloniously take, steal, and carry away two golf bags, twenty-one golf clubs, and one dozen golf balls, value about one hundred twenty-five dollars, the property of Captain C. L. Ellis, Infantry.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction by special court-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 five years. The reviewing authority approved the sentence but reduced the period of confinement to three years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. For the purpose of this holding the evidence may be outlined as follows: About noon, February 13, 1934, Captain Carrol L. Ellis, Infantry, placed two bags of golf clubs and some balls, all valued at about $75, in the garage of his quarters at Fort Lewis, Washington, leaving the doors of the garage open, which permitted the interior to be visible from the road in the rear of his quarters, and on the following day when he went to get his clubs he found them gone (R. 8). On the afternoon of February 13th the accused was a guard in charge of prisoners on the police truck which passed in the rear of Captain Ellis' quarters (R. 11). On the evening of February 13th the accused was heard to tell one Elsie Larsen that he did not have any money, as he had just bought some golf clubs (R. 13). About nine o'clock that same evening (February 13th) accused asked Earl Raynor, a civilian truck driver for the post tailor, for a ride to Tacoma, and said he wanted to take some golf clubs along. He was told that he could ride as far as South Tacoma. En route accused borrowed $5 from Mr. Raynor and gave some golf clubs as security. Mr. Raynor did not see accused put the clubs in the truck but they were there and were shown to him at the time the loan was negotiated (R. 14,15). About ten o'clock that same night accused came to the home of a Mrs. Bruner in South Tacoma looking for Elsie Larsen, saying that he had some money for her (R. 20). On the Saturday following, Mr. Raynor overheard a conversation about some missing golf clubs, and immediately reported to Major MacKenzie to find if anyone was short some clubs. Later the clubs in Raynor's possession, which had been obtained from the accused, were identified by Captain Ellis as his property and were returned to him (R. 15).

The accused took the stand on his own behalf and testified in part as follows:

> "About a mile and a half out on the highway it was, Earl Raynor was giving me a ride into South Tacoma, and he brought up the subject. He asked me if I'd like to earn two dollars, and I said 'Yes. What do I have to do?' and he turned to me and said, 'When I get down to the lake if anyone wants to know where I got the clubs, you not being known down at the lake, if any one asks you about it say I got them from you. It won't make any trouble for you on the post.' So I said I would take the two dollars. All this was on the way. When we got

> to South Tacoma he turned on the light in the back of the truck and there was two golf bags and he showed them to me; he lifted them up, and it looked like there was about twelve or fifteen golf clubs, and I asked him what the idea of so many golf clubs was and he said he was taking it home and that he played golf, but there was five or six clubs in this set he did not have that he desired to have, and when he let me out at South Tacoma he stopped the truck and stayed there a few minutes just before the street car came. * * * After that I left him." (R. 22,23.)

At the close of the case for the defense, the prosecution stated that inasmuch as the accused had attacked the character of the witness Raynor, Lieutenant Keeley would be put on the stand as a character witness for Raynor (R. 28). This was done, the defense making no objection.

4. It is well settled that the introduction of character testimony to support the character of an unimpeached witness is reversible error. Ford v. U.S., 3 F. (2d) 104; Harris v. U.S., 16 F. (2d) 117; CM 190259, Sheffield; 195687, Stansbury; 196371, Steenberg; 198865, Sosebee. However, the staff judge advocate in his able review of the case argued:

> "It is my view, however, that the testimony of accused, when compared with the testimony of witness Raynor is such that it must be conclusively inferred that the accused did not attribute error in any form to the testimony of witness Raynor and that the accused intended the only inference by the court from his testimony to be that witness Raynor had testified falsely and that witness Raynor himself was the thief, or the one upon whom the burden of explaining the recent possession of the stolen property should fall. It is further my view that under such circumstances proper evidence in support of the character of witness Raynor could have been received by the court."

The staff judge advocate also advanced the argument that the defense made no objection to the testimony of Lieutenant Keeley and therefore it may be considered that the objection, if valid, was waived.

5. In the Sheffield case, above cited, there was a sharp conflict of testimony. The principal witness for the prosecution was shown to have had equal opportunity with the accused in committing the larceny charged, and the prosecution introduced witnesses to the good character of that witness to bolster up his testimony. The Board of Review held that such testimony injuriously affected the substantial rights of the accused within the meaning of the 37th Article of War.

Similarly, in the Federal courts, in the Harris case, cited above, the accused was charged with offering a bribe to a police officer. At the trial testimony was offered by the defense to the effect that the police officer had offered "to fix it up" for a consideration. The government offered in rebuttal testimony as to the official integrity of the police officer concerned. The Circuit Court of Appeals, 6th Circuit, said:

> "This was clearly incompetent, for the reason that it tended to give undue weight to the evidence of a witness whose general reputation had not been attacked. The witness had voluntarily stated that defendants offered him a bribe. They denied it, asserting that what occurred was that he had suggested that they offer one. This was not such an impeachment as authorized the introduction of evidence of his good character or reputation for truth and veracity."

The question as to whether or not the defense by failing to object to character testimony respecting an unimpeached witness waived such objection was also considered in the Sheffield case. There the Board of Review said:

> "It is true that the defense did not object to the admission of the testimony as to Rathel's veracity or as to Pettis' acts, but there is nothing whatever in the record to indicate that the defense understood its right to object, and it follows that the mere failure to object did not amount to a waiver of the legal rights involved (Par. 126 c, M.C.M.)."

The Board of Review is of the opinion that the instant case is governed by the principles laid down in the Sheffield case. Indeed, it is not seen how the two cases can be distinguished. Here, as in the Sheffield case, the character of the witness was not impeached and the introduction

of character evidence to support his testimony was reversible error.

6. For the reasons stated above, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

H. A. Trumbull, Judge Advocate.
H. R. Bitzing, Judge Advocate.
Theodore Hall, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 4 1934 - To the Commanding General, Third Division, Fort Lewis, Washington.

1. In the case of Private Thomas R. Reynolds (6756825), Battery B, 10th Field Artillery, I concur in the foregoing holding of the Board of Review, and, for the reasons therein stated, recommend that the findings and sentence be vacated. The record of trial is returned herewith for a rehearing or such other action as may be proper.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this case in this office is 201710. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order as follows: (J.A.G.O. No. 201710).

A. W. Brown,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

RECEIVED OFFICE J.A. 3RD DIVISION APR 9 1934

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

Board of Review
CM 201765

APR 10 1934

UNITED STATES	)	FIRST CAVALRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Bliss, Texas, March 9, 19 and 23, 1934. Dishonorable discharge and confinement for three (3) years. Penitentiary.
Private 1st Class JOHN F. SCHRIEBER (R-861029), Veterinary Detachment, Fort Bliss, Texas.	)	

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 and found to be legally sufficient to support the findings of guilty of Charges I and II and their specifications, and Specification, Charge III, and the sentence.

2. The only question requiring consideration is whether or not Specification, Charge III, alleges perjury in violation of the 93d Article of War, or of some other Article of War. The specification, which is laid under the 93d Article of War, reads as follows:

> "In that Private 1st Class John F. Schrieber, Veterinary Detachment, Fort Bliss, Texas, having taken an oath in a duly ordered investigation before Major H.J.M. Smith, Inspector General's Department, the officer detailed to make the investigation, that he would testify truly, did, at Fort Bliss, Texas, on or about January 24, 1934, willfully, corruptly, and contrary to such oath testify in substance that the four (4) hams and three (3) slabs of bacon which he, the said Schrieber, did cause to be removed from the Post Commissary, Fort Bliss, Texas, on January 20, 1934, were his own personal property which had been given to him since January 1, 1934, by the Armour Packing Company and the Wilson Packing Company,

respectively, which testimony was a material matter and which he did not then believe to be true."

Perjury as an offense under the 93d Article of War is defined in paragraph 149 i, Manual for Courts-Martial, as follows:

> "Perjury is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry."

It is obvious that the offense alleged in the specification does not come within this definition of perjury.

Section 125, Federal Penal Code of 1910 (U.S.C. 18: 231), provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2000 and imprisoned not more than five years."

Section 183, Revised Statutes, as amended (U.S.C. 5: 93), provides:

> "Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Coast Guard, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Coast Guard board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation."

It appears from the specification in question and the record of trial that the investigation referred to in the specification was for the purpose of looking into frauds on, or attempts to defraud, the Government, and that it involved an inquiry into irregularities or misconduct of officers and agents of the United States. The officer detailed to conduct the investigation had authority to administer an oath to any witness attending to testify in the course of such investigation. The investigation constituted a case in which a law of the United States authorized an oath to be administered and a false statement of a material matter made by a witness under oath in the course of such investigation amounted to perjury within the purview of section 125, Federal Penal Code of 1910, supra. Such perjury is embraced in those crimes, not capital and not made punishable by another Article of War, which are denounced by the 96th Article of War.

The holding of the Board of Review in CM 198262, Miller (Sec. 1582, Supplement II, Dig. Ops. JAG, 1912-30), has not been overlooked. That case is distinguishable from this in that the false testimony therein was not given in a case in which a law of the United States authorizes an oath to be administered.

3. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges I and II and their specifications, but legally sufficient to support only so much of the findings of guilty of Charge III and its Specification as involves findings of guilty of perjury as alleged in the specification, in violation of the 96th Article of War, and legally sufficient to support the sentence. Penitentiary confinement is authorized by Article of War 42 and section 125, Federal Penal Code of 1910, supra.

H. A. Trumbull, Judge Advocate.
H. R. Bitzing, Judge Advocate.
Theodore Hall, Judge Advocate.

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

Board of Review
CM 201814

APR 21 1934

UNITED STATES	HAWAIIAN DIVISION
v.	Trial by G.C.M., convened at Schofield Barracks, T. H., March 20, 1934. Dishonorable discharge and confinement for three (3) years. Penitentiary.
Sergeant WILLIAM W. BROWN (6353606), Company H, 21st Infantry.	

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 and found to be legally sufficient to support the findings of guilty.

2. Confinement in a penitentiary in this case is not authorized under the 42d Article of War, no offense of which accused is convicted being punishable by confinement for more than one year by any statute of the United States or by the law of the District of Columbia. CM 196922, Killalea.

3. For the reason hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and so much of the approved sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years at a place other than a penitentiary.

W. A. Turnbull, Judge Advocate.
H. R. Bitzing, Judge Advocate.
Theodore Hall, Judge Advocate.

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

Board of Review
CM 201878

JUN 2 1934

UNITED STATES v. Second Lieutenant IRA BASHEIN (0-19214), 26th Infantry	FIRST DIVISION Trial by G.C.M., convened at Plattsburg Barracks, New York, April 5, 1934. Dismissal.

OPINION of the BOARD OF REVIEW
TURNBULL, KING 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 Charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Ira Bashein, 26th Infantry, then assistant to the Secretary of the Officers' Club at Plattsburg Barracks, New York, and whose duty as such assistant it was at the time to prepare the bills of members of the Club for the month of January, 1934, did at Plattsburg Barracks, New York, on or about February 6, 1934, with intent to defraud the said Officers' Club, willfully, wrongfully and fraudulently change and alter the total amount af the bill due by him, the said Lieutenant Bashein, to the said Officers' Club for the month of January, 1934, from $29.47 to $20.72.

Specification 2: In that Second Lieutenant Ira Bashein, 26th Infantry, then assistant to the Secretary of the Officers' Club, at Plattsburg Barracks, New York, and whose duty as such assistant it was at the time to prepare the bills of members of the Club for the month of January, 1934, did, at Plattsburg Barracks, New York, on or about February 6, 1934, with intent

to conceal from the Secretary of the Club and the members thereof the fact that he had wrongfully changed and altered his own Club bill for the month of January, 1934, from $29.47 to $20.72, wrongfully and willfully destroy Club chits for the month of January, 1934, in the total amount of $8.75, signed by him, the said Second Lieutenant Ira Bashein, or by his authority, and which represented the money value of supplies purchased by him from the said Officers' Club during the said month of January, 1934.

Accused pleaded not guilty to the specifications and the Charge, but was found guilty of them. 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. There is little, if any, dispute as to the facts of the case. The evidence for the prosecution may be summarized as follows:

The officers and employees of the Officers' Club, Plattsburg Barracks, New York, so far as material to the present case, at the time of the alleged offenses were as follows:

First Lieutenant Henry L. Lnongo, 26th Infantry, secretary-treasurer;
Second Lieutenant Ira Bashein, 26th Infantry (accused), assistant secretary-treasurer;
Sergeant Roe W. Garland, Company H, 26th Infantry, steward;
Private 1st Class Edward R. Elvin, Company G, 26th Infantry, janitor.

The detail of accused as assistant secretary-treasurer was, as he knew, by authority of the post commander (R.33). The business of the club, so far as material to the present case, appears ordinarily to have been conducted as follows: Sergeant Garland, the steward, handled the canteen or bar, from which he sold beer, tobacco, candy, and the other merchandise. Sales were also sometimes made by the janitor, Elvin. Cash was sometimes paid, but chits were usually signed by the purchaser or by Garland or Elvin in the purchaser's name. At the end of each month the steward added the chits of each purchaser on the adding machine and turned over to accused as assistant secretary-treasurer the chits themselves, the adding machine tally, and a pencil memorandum showing the total amount

of cash sales and the amounts owed by each purchaser on credit (R.6,7). It was the duty of accused then to verify the steward's charges, draw up a collection sheet, prepare and send bills to each debtor of the club, assist the secretary-treasurer in collecting them, make deposits in bank, and prepare the club council book, verify and submit it to the auditor (R.33,34).

The collection sheets in evidence show accused to have had a much larger bill at the club than most other officers. On one occasion near the end of the month of January he asked the steward how much his bill was up to that time. The steward informed him that it was $25 and some cents. Accused then told the steward not to let him have any more beer that month. Later the same day, accused ordered another glass of beer and the steward said, "You remember what you told me," accused answered "That's all right. I can fix that anyway. I will fix the bill up" (R.53).

At the end of the month of January the steward, in accordance with his usual custom, handed to accused all chits signed by members of the club, with the adding machine tallies and with a penciled summary of them on two sheets of yellow foolscap paper. On that statement appeared the name of accused as a debtor of the club and opposite his name an amount. Shortly thereafter accused came to the steward and showed him that he (accused) had been overcharged $10.00 in error (R.7,13). The steward admitted the error and started to erase and change the figure, but accused said never mind, he would fix it. The next morning the steward, Sergeant Garland, and the janitor, Private 1st Class Elvin, went to the room of accused in the club to get some glasses to be washed. The steward started to pick up one of the glasses and it stuck to the paper on which it stood. He glanced at that paper and noticed that it was the monthly collection sheet of the club, and further that the sum set opposite accused's name was not as great as in the statement turned in by him. The steward reported the matter to First Lieutenant Edward J. F. Glavin, 26th Infantry, who was sick in his quarters in the club and who was the first officer whom the steward saw. Lieutenant Glavin advised the steward to report the matter to the secretary-treasurer of the club, Lieutenant Luongo, which he did soon thereafter (R.14,18,23,25). Upon receiving this report, Lieutenant Luongo asked accused for the club collection sheet and the chits for the month of January and received them from him. He requested Lieutenant Glavin to assist him in the investigation which he was then making. On the collection sheet opposite the name of accused appeared the sum of $18.72 under the heading "Canteen", and $2.00 for dues, a total of $20.72. The two officers noted that the adding machine tally which usually accompanied the chits was not with those

of accused. They added the chits and found that they corresponded with the total charged against the accused on the collection sheet for canteen purchases, namely, $18.72. They asked accused what had become of the adding machine tally and he said that he had thrown it away as scrap paper (R.34-36,26). They then went to the steward and asked him if he had any record of the total amounts charged to each officer, and he mentioned the penciled report on two sheets of yellow paper which had been delivered by him to accused. Lieutenants Luongo and Glavin then went to accused's room, found him absent, entered it, were unable to find the pencil report or adding machine tallies in his desk in the place where Lieutenant Luongo knew accused habitually kept club records; but, remembering accused's statement that he had thrown the adding machine tallies away as scrap paper, they looked into the waste basket in his room. There they found several pieces of torn yellow paper and torn chits. They took these to Lieutenant Luongo's room where the two officers spent four hours piecing together the torn papers (R.37,38,26,27). When thus pieced together, the scraps of paper were found to be the report or statement submitted by the steward to accused and a number of chits bearing accused's name, amounting in all to $8.00. There were also a few scraps of paper which the two officers were unable to piece together (R.37,38,26,27; also Exs. A,C, and F). The two officers then went to accused's room, saw him, and Lieutenant Luongo asked him if the collection sheet was correct. Accused asked what was meant by being correct. Lieutenant Luongo asked if it was correct in its entirety. Accused said that the collection sheet was correct except for the amount set opposite his name, but that that amount was $8.00 less than what was actually supposed to be there. Lieutenant Luongo warned accused of his rights after he had asked him if the collection sheet was correct in its entirety. Accused further stated that he had deducted that amount from his bill because he believed that such a practice was common in the Army; and that he considered that amount sufficient for his services as assistant secretary of the Officers' Club. When asked to substantiate his belief by a concrete example, he was unable to do so. Lieutenant Luongo thereupon reported the circumstances to higher authority (R.39,40,45,46,29).

The steward testified that the sum now appearing opposite accused's name on his report, $20.72, and the totals, have been changed by some other person from the figures put down by him. That such erasures and substitutions have been made is obvious from an inspection of the paper (R.10; Ex. A). The steward kept a memorandum of his own from which he refreshed his memory and testified that the total sales of the canteen for the month of January were $184.97 on credit, and $22.20 cash. The totals now appearing on Exhibit A, the steward's report, which, according to his testimony and the appearance of the paper, have been altered, are now $178.22 credit, and $22.20 cash.

There was also introduced in evidence the following statement voluntarily made by accused, after warning of his rights, to the investigating officer, of which the important part is as follows:

"Lieut. Howarth, while in conversation with me at a time when I was in doing work connected with the fund made the following statement to me. He said 'that the person who took care of the fund should not have to pay the dues as a member of the Officers' Club inasmuch as previous secretaries of the club who have had charge of the fund did not pay dues themselves.' I was told also that he believed that the officer who had charge of the fund who did the work connected with it should be able to or have the privilege of getting the things which he bought at the bar at cost, that is, that he should not be required to pay any profit above the cost of the articles which he had purchased at the bar during the time that he had to work in connection with the fund. He also told me that during the time that he had to work in connection with the fund during the summer of 1933 while he was messing at the camp reserve mess that neither he nor Lieut. Luongo nor Lieut. D'Orsa had paid their mess bill for a part of one month. When the time came for me to complete the Fund for the month of January and turn it over to my successor it occurred to me at the time that I was making out the collection sheet that I was justified in deducting a certain amount from my own bill, such amount to be an amount which I conceived to be the profit which had been made on the purchases I made at the bar during the time I had the fund. (Bar sales of mine for the three months during which I had charge of the fund). I therefore decided that inasmuch as I had spent $46.50 at the bar during the three month period of November 1st to February 1st that I was justified in deducting the amount of $8.00 which I roughly estimated to be the profit made on those sales to me during that time. I performed this operation by selecting a number of chits of my own which amounted to $8.00, I tore the chits and threw them into the waste basket. So far as the total slips for the various sums of chits go and the yellow total chits submitted to me by Sergeant Garland, the Club Steward, it was a custom of mine to make up the collection sheet for a given month and to simply destroy those papers and throw them into the waste basket. I did this since I knew that the

collection sheet had been made out correctly to the best of my knowledge and belief and that there was no reason for keeping the yellow foolscap chits which contained the total of the various chits nor the adding machine totals which I used to scribble on or to make some additions with. When I deducted the amount of $8.00 from my club bill, I did so with a free conscience and with the idea that I was justified in taking such a course, and that I was not tampering with the club funds in any way. I never had talks with anyone in regard to dues besides Lieut. Howarth. I had no scheme or intent of defrauding the club and was fully convinced that I had kept the fund as accurately as one of my inexperience could keep it. The officers club fund was the first fund I'd had charge of."

4. The evidence for the defense may be summarized as follows:

Accused graduated from the United States Military Academy in June, 1933, and had therefore had only about eight months commissioned service at the time of the alleged offenses. His first company commander gave him some instruction in keeping funds and testified that in his opinion accused understood the mechanics of that duty but had not had quite enough experience to know what would be a proper or an improper expenditure (R.56,57). It was also shown by three former secretary-treasurers of the club that it had been for some time the practice for the holder of that office not to pay dues, although no written authority for the practice existed in the constitution of the club or elsewhere. It was not, however, the practice for the secretary-treasurer to buy supplies from the club at any less price than that paid by other members (R.58,62).

Second Lieutenant Albert E. R. Howarth, 26th Infantry, an officer who graduated from the Military Academy in 1932, and had therefore had only one year more service than accused, testified to a conversation between himself and accused concerning the funds of the Officers' Club. Accused stated that he had a large beer bill, and Lieutenant Howarth told accused that he should think accused should get his beer at cost, that the secretary-treasurer of the club did not pay dues, and that he did not believe that all post exchange officers paid their percentage on what they bought from the post exchange (R.63-64). Lieutenant Howarth admitted that this was "purely a personal view" (R.65).

Accused, at his own request, was sworn and testified. His testimony was substantially the same as his voluntary statement hereinbefore quoted. The following abstract of it will only mention a few important points deemed worth repetition and such matters as were not contained in his previous voluntary statement.

Accused repeated his conversation with Lieutenant Howarth, quoting the latter as saying that accused "should have the privilege of getting things at the bar at cost," inasmuch as accused was doing the clerical work connected with the club fund. Accused thought himself entitled to this discount. He made a rough estimate of the profits of the bar on his purchases during the three months that he had been assistant secretary-treasurer, and figured that $8.00 would be a reasonable deduction to make to account for the profit on beer sold him during that time (R.68). Accused deducted this amount from his bill. He extracted a number of his own chits amounting to $8.00 (R.69). Accused had previously submitted his resignation for the good of the service, but had withdrawn it because his conscience would not allow him to resign, as he was innocent of intention to commit any offense (R.71). Accused's attention was called to the testimony of the steward that he (the steward) turned in $184.97 in chits at the end of January. Accused was asked how he accounted for the difference between that sum and $176.22 on the collection sheet, a diference of $8.75. He answered that he deducted $8.00 from his bill for that month but was unable to account for the remaining seventy-five cents discrepancy. Accused admitted having said to Lieutenant Luongo that he had not asked his approval of his action because he felt that Lieutenant Luongo would disapprove. Accused admitted tearing up chits and the steward's report and the reduction of his bill to be deliberate acts on his part, and not the result of carelessness (R.76). In consequence of his conversation with Lieutenant Howarth, accused paid no dues during November and December (R.77). Accused admitted that his only basis for the justification that he has in his own mind for his action in destroying his chits and reducing his bill is his conversation with Lieutenant Howarth (R.78).

5. Two officers were recalled as witnesses for the court, but the only evidence given by them which requires mention is a statement by Lieutenant Luongo, the secretary-treasurer of the club, that at the time when he entered accused's room he considered that he was acting as secretary-treasurer of the club, responsible for its funds and records to its members and to the commanding officer (R.83).

6. Objection was made by the defense in several forms and on different occasions (R.9,86, and elsewhere) to the admission of a memorandum of the amounts due from officers to the club and of certain

chits, all of which had been torn up, presumably by accused, and were found by Lieutenant Luongo in the scrap basket of accused's quarters in the club and pasted together. It is alleged that in entering accused's quarters and taking these fragments from the scrap basket Lieutenant Luongo committed an unlawful search and seizure in violation of the Fourth Amendment to the Constitution, and that evidence so obtained is inadmissible. The Board is of the opinion that the above objection is without valid foundation for several reasons, any one of which alone is sufficient.

a. The Judge Advocate General has held that the commanding officer of any person subject to military law, by virtue of the authority and control which he has as commanding officer, may enter the quarters of an officer or soldier on a military reservation without permission of the accused and conduct a search therein, and that evidence so obtained is admissible. JAG 250.413, July 23, 1930; CM 171626, Cutchin. In other words, the protection which the Constitution throws around the dwelling of a private individual or even of a military person off a reservation does not extend to public quarters on a military reservation. Though Lieutenant Luongo was not accused's commanding officer, yet he was his superior officer in so far as concerned the affairs of the Officers' Club, since the one was secretary-treasurer and the other assistant secretary-treasurer of that club. The Board is therefore of opinion that so far as concerns any search for evidence concerning the affairs of the Officers' Club Lieutenant Luongo was in a position analogous to that of accused's commanding officer and had the same rights.

b. The papers which were thus obtained were not the private personal papers of accused, but were papers which came into his possession by virtue of his detail as assistant secretary-treasurer of the Officers' Club. That club was an authorized activity of the post, under the supervision of the post commander, and papers having to do with its affairs thus coming into the possession of an officer of the club were not private papers but were of a public character. The case is analogous to Bacon v. United States, 97 Fed. 35, certiorari denied, 175 U.S. 726. In that case defendant had been president of a national bank. A locked box bearing his name and marked "Private Papers" was found among the files of the bank and was opened without his authority, and from it there was obtained a letter from the Comptroller of the Currency to him as president of the bank, which letter was offered in evidence against him. The court admitted that the opening of the box was unlawful, but said that the paper so obtained was not a private paper, but one of a public character addressed to him as president, and therefore

not within the protection of the constitutional amendment. The Board is of the opinion that the same principle applies to the papers here in question.

c. It is further to be noted that accused's quarters were not a separate house, but a room in the Officers' Club, that the door of that room was open at the time the search was made, and that according to the testimony of Lieutenant Luongo, accused and other officers residing in the club were accustomed to enter each others' rooms freely whether or not the officer to whom the room was assigned was present. Furthermore, the papers in question were not taken, as in the Bacon and other cases, from a locked or closed receptable, but in a torn condition from a scrap basket. The action of accused in tearing up the papers and throwing them into a scrap basket was obviously an abandonment of possession and control by him of the papers, after which he cannot be heard to complain if another takes possession of them. The Board is therefore of opinion that there was an implied consent to Lieutenant Luongo to enter the room, arising from the relations of the officers inhabiting the building and the fact that the door was left open, and that the papers in question had been abandoned by accused and cannot be said to have been in his possession at all at the time they were taken.

d. Furthermore, in the closing argument (R. foot of p. 80) the defense in substance abandoned its objection to the introduction of the papers in evidence and said that it regarded them as "favorable to the accused and their consideration is important to disprove the charge against him."

e. Lastly, accused's testimony before the court (R.67, et seq.) constitutes an admission of all the facts which the papers in question tended to prove and renders any error in admitting them, if such there was, of no consequence.

7. As a matter of law there is sufficient evidence in the record to support the view that accused is insincere in his contention that he honestly and conscientiously believed himself entitled to deduct $8.00 from his bill and to tear up his chits. The weight of such evidence was a matter for the court and the reviewing authority, and they considered it convincing. The Board concurs in considering it so. The conversation with Lieutenant Howarth mentioned by accused as the sole basis for his mental justification for his action (R.78), when closely examined, scarcely supports him. Lieutenant Hawarth, neither according

to his own version of the conversation nor according to that of accused, said that in his opinion accused was then and there authorized to deduct from his bill a sum equal to the profit of the bar on accused's purchases of beer. All that he said was that accused "should", i.e., ought to, get his beer at cost (R.65,68). Furthermore, accused relies on his own inexperience, and then attempts to justify his action by a conversation with an officer of but little more experience than himself. Accused's good faith is also impugned by his statement that he omitted to take up the question of the reduction in his bill to the wholesale cost of the articles purchased by him with Lieutenant Luongo because he felt that Lieutenant Luongo would disapprove. Finally, it is to be noted that accused did not undertake to secure this discount to which he claims that he felt himself entitled by entering it as a credit on his bill, but instead he destroyed the chits chargeable to himself, a procedure clandestine and dishonorable in its very nature and inconsistent with a frank and honest claim to credit.

8. At the time of the trial accused was 26 4/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

> "Pvt. A.C. 26 Mar. 28 to 30 June 29; cadet M.A. 1 July 29; 2d Lt. of Inf. 13 June 33."

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 and the sentence and warrants confirmation thereof. A sentence of dismissal is mandatory on conviction of violation of the 95th Article of War.

W. A. Trumbull, Judge Advocate.

Archibald King, Judge Advocate.

Theodore Neal, 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 Second Lieutenant Ira Bashein (0-19214), 26th Infantry, together with the opinion of the Board of Review. There are also transmitted two separate memoranda, one bearing my own signature, stating the service of Lieutenant Bashein and referring to certain correspondence with respect to clemency, and the other signed by the Board of Review recommending that, before the record is laid before the President for his action, an opportunity be afforded Lieutenant Bashein to resign for the good of the service. I concur in this recommendation.

2. I concur in the opinion of the Board of Review; and, if the recommendation that Lieutenant Bashein have an opportunity to resign be not approved, or if he shall decline to resign, I recommend for the reasons stated in the Board's opinion that the sentence be confirmed. For use in that event, there are inclosed herewith a draft of a letter for the signature of the Secretary of War transmitting the record to the President for his action, and a form of executive action designed to confirm the sentence should it meet with the President's approval.

William Cattron Rigby

William Cattron Rigby,
Colonel, J.A.G.D.,
Acting The Judge Advocate General.

5 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Draft of let. for sig. of Secy. War to President.
Incl. 3 - Memo. for J.A.G. from B/R.
Incl. 4 - Memo. for the Secy. War from J.A.G.
Incl. 5 - Form of executive action.

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

Board of Review
CM 201955

JUN 13 1934

UNITED STATES	)	FIRST CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Headquarters First Corps Area, Boston, Massachusetts, May 8 and 19, 1934. Dismissal.
	)	
Captain ROSCOE B. ELLIS (0-7189), 13th Infantry.	)	

OPINION of the BOARD OF REVIEW
TURNBULL, KING 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 61st Article of War.

Specification 1: In that Captain Roscoe B. Ellis, 13th Infantry, did, at Fort Devens, Massachusetts, on or about August 1, 1933, fail to repair at the fixed time to the properly appointed place of assembly for General Court-Martial meeting.

Specification 2: In that Captain Roscoe B. Ellis, 13th Infantry, did, at Fort Devens, Massachusetts, on or about August 1, 1933, fail to repair at the fixed time to the properly appointed place of assembly for Post Exchange Council meeting.

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

Specification: In that Captain Roscoe B. Ellis, 13th Infantry, was, at Fort Devens, Massachusetts, on or about August 1, 1933, drunk in quarters.

He pleaded not guilty to all charges and specifications, and was found guilty of all charges and specifications. Evidence of one previous conviction was introduced. This was upon a charge of being drunk in quarters at Fort Devens, Massachusetts, on or about August 2, 1932, of which he was convicted by a general court-martial at Headquarters First Corps Area, Boston, Massachusetts, and for which he was sentenced to be reduced on the promotion list fifty (50) files. This sentence was announced on September 5, 1932, was duly approved and ordered executed, and was published in General Court-Martial Order No. 77, Headquarters First Corps Area, Boston, Massachusetts, September 9, 1932 (Ex. 7). The evidence of this previous conviction having been considered by the court, he was then sentenced to be dismissed the service of the United States. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The court was first convened on May 8, 1934. An adjournment was taken at the request of the prosecution after the accused had been arraigned and had pleaded to the general issue. The court reconvened on May 19, 1934. The defense then asked for a continuance on the ground that the physical condition of the accused was such that "he could not properly listen to testimony" in his case, and requested that before the trial proceed further the court hear the testimony of Major Thomas, who was then treating the accused at Fort Banks, and that of Captain Mudgett, who was familiar with accused's record at Fort Devens. Thereupon, the court directed that testimony be heard from medical officers concerning the present physical condition of the accused and the propriety of his being brought to trial at that time.

Major Robert E. Thomas, Medical Corps, Fort Banks, Winthrop, Massachusetts, testified that he had examined accused that morning and that accused had presented the following conditions: "He has a fine tremor in the extended fingers. He is pale. His eyes are congested and he shows some increased lachrymation. His pulse ranges between 90 and a hundred. His blood pressure is approximately 142 over 92." Accused complained of a very severe headache, more prominent over his forehead and extending towards the back of his head. His prostate showed an enlargement of the isthmus or bar - prostatic bar (R. 9). The gland was very sensitive to touch, but showed no nodules and was firm. Accused had been under witness' observation at the hospital at

Fort Banks since May 2, 1934. The only time under present conditions that accused would be able to cross-examine and conduct his trial would be between his attacks of headache. Witness was unable to say just when these severe attacks were coming or how long they were going to last, but did not believe that accused was then in condition to conduct his defense.

Upon cross-examination witness testified that the headache from which the accused was then suffering was a typical migrane. There were positive symptoms of it other than the statement of the accused (R. 10). These were a congestion of the eyes, "a partially dilated pupil on both sides", and a marked pallor, a symptom complex usually associated with attacks of migrane. In the last three or four days accused had had at least two headaches. During the eighteen days that witness had known him there had sometimes been three or four days without a headache. From the history of his case it appeared that the symptoms began about three years before and that the attacks had been coming on more frequently. Witness could not judge the severity of the pain, but every attack had shown increased "tearing" or water in the eyes, the congestion of the eyes, and the other symptoms mentioned (R. 11). There seemed to be a relation between the history of the prostatic condition and the symptoms of migrane which could associate the two. No other forms of infection had been found to exist. If accused were suffering from an enlarged prostate only, witness did not think that any medication or palliative treatment would cure it, and, after operation, it would be approximately four months before he would be ready for full military duty. While they had to depend entirely upon accused's statement as to his feeling of pain, there were positive indications of an upset of the sympathetic nervous system when he had one of the attacks (R. 12).

To questions of the court witness testified that accused was admitted to the hospital at Fort Banks on April 24, 1934. No other cause for accused's headaches had been found although he had a very thorough examination at Walter Reed General Hospital to determine focal infection. He was discharged in February, 1934 (R. 13), and returned to full military duty. Medicine had been found to give him temporary relief which he would begin to feel in about half or three-quarters of an hour, with gradual improvement until the disappearance of the

headache. There would then be an interval of well-being for a day or more. The drug acted as a sedative to the nervous system and tended to make him rather less keen mentally. The migrane itself was an upset nervous condition probably due to the prostatic condition (R. 14). Accused had migrane the morning before, for which witness gave him a sedative. Accused was in fairly good condition the afternoon before but had a very poor night. Witness had purposely given him no sedative that morning (R. 15). In the opinion of the witness the present physical condition of the accused was such that he would not understand questions and answers to such an extent as to enable him logically to cross-examine witnesses (R. 16).

Captain Charles S. Mudgett, Medical Corps, Fort Devens, Massachusetts, testified that accused looked very pale that morning. He claimed that he had a headache, a severe headache all night. The conjunctiva of both eyes were injected. He looked as though he were in pain. His blood pressure was 154 over 92, his pulse 112. His heart and lungs were apparently normal, and his prostate was somewhat firm, more firm than normal, and tender on the right side. There was an enlargement in the region of the median bar, and evidence of chronic prostatitis and enlargement of the median bar of the prostate. He had a moderate coarse tremor of the hands, fingers extended. It was the opinion of witness that accused could not with a full degree of his normal intelligence listen to the testimony of witnesses and intelligently cross-examine these witnesses as to events and circumstances that had taken place last August. Accused stated that he was in pain. His facial expression was drawn and he looked as if he were in some pain. The statement could be untrue but witness did not believe that the facial expression could be simulated very well (R. 17). Accused was in the hospital at Fort Devens from August 1, 1933, to August 10th for acute alcoholism. It was decided that this was cured and he was then held under observation for psychosis. This was the reason he was sent to Walter Reed. He was there, and on leave, until he returned to Fort Devens at some time in February or March, 1934. On March 20, 1934, he complained of his prostate trouble and was admitted to the hospital at Fort Devens, from which he was sent to the hospital at Fort Banks on April 20, 1934, under observation and treatment for enlargement of the median bar of the prostate. The first report of migrane or headache

appears on October 14 to 19, 1932, when he was a patient at the hospital. During his last admission to the hospital he required treatment on a number of occasions for severe headache which occurred perhaps two or three times a week, most frequently during the late afternoon or evening.

Upon cross-examination witness testified that migrane is a severe headache for which there is no apparent cause, coming on periodically and lasting for a prolonged number of hours. Except for the appearance of pain and of being uncomfortable the patient shows no objective symptoms. Physical examination does not disclose a temperature or a rapid pulse, and one must rely considerably upon the word of the subject as to whether or not the migrane exists (R. 18-20).

Having heard the testimony of the medical witnesses, the court decided that there was "no impairment of the interests of the accused" in proceeding to trial at that time, and directed that the prosecution proceed with the case (R. 21).

4. The evidence for the prosecution is clear and undisputed, and may be summarized as follows:

Accused was relieved from "Regimental Staff Unassigned" and assigned to Company K, 13th Infantry, by order of the regimental commander dated August 8, 1932 (R. 22; Ex. 1). It was provided by a memorandum of the Headquarters, Fort Devens, dated November 10, 1932, that a daily bulletin would be furnished all officers at 11:30 a.m., in which, among other matters, there would be announced the meetings of courts, boards, and post exchange councils, and that all officers would be responsible for the receipt of this bulletin (R. 22-23; Ex. 2). This system was employed on August 1, 1933 (R. 35). Bulletins were sent out not later than 10:30 every morning (R. 28). They were distributed to the officers in the boxes provided for their communications, and officers were required to visit the headquarters between 11:30 and 12:30 for the purpose of receiving such instructions (R. 35). Accused was on a duty status on August 1, 1933 (R. 34). During the month of July, 1933, he was commanding Company K, 13th Infantry, and Company K, C.M.T.C. (R. 25; Ex. 6). The camp (C.M.T.C.) had officially closed on July 29, 1933 (R. 27), but on August 1, 1933, the officers on duty with it had not

been relieved and were engaged in closing out their accounts and winding up its affairs (R. 30). During the camp copies of bulletins for officers on duty with the C.M.T.C. were sent to the camp and there distributed by the camp adjutant. But it was accused's custom to come and get his daily bulletin at post headquarters (R. 26). Accused was a member of a general court-martial appointed by order of the Commanding General, First Corps Area, dated May 24, 1933, to meet at Fort Devens, Massachusetts, at the call of the president (R. 23, 29, 32; Ex. 3). Company K, which accused commanded, held shares of the post exchange at Fort Devens (R. 34), and organization commanders were members of the council when their organizations held shares in the post exchange (R. 35). The daily bulletin of July 31, 1933, carried the announcement that the post exchange council meeting would be held Tuesday, August 1, 1933, in the post exchange building at 3:00 p.m., and the bulletin of August 1, 1933, that the general court-martial would meet at 1:00 p.m. on that day at the officers' assembly room (R. 24-25; Exs. 4, 5). The general court-martial met at the place announced, the customary meeting place, at 1:00 p.m., on August 1, 1933. Accused had not been excused from this meeting, but he was not present. A short case was tried and the court adjourned at 2:00 p.m. (R. 29, 32, 34, 37). The post exchange council met at 3:00 p.m. on the same day at the customary place of meeting just above the post exchange. Accused, although a member, was not present (R. 31), and he had not been excused (R. 34). Nothing had been intimated that because of his duties with the C.M.T.C. he would be excused from the usual activities, such as general courts and post exchange council meetings (R. 34).

The absence of accused from the meeting of the general court-martial having been reported to the post commander, the latter directed the provost marshal, Lieutenant Kane, to find him and bring him to the commander's office (R. 35). Lieutenant Kane started to look for accused at about 3:00 p.m. and found him in his quarters after about twenty minutes or half an hour. He testified that accused was then drunk. He took accused to the commanding officer's office (R. 38-39). The commanding officer testified that accused then walked unsteadily, was incoherent in his speech, his eyes were glassy, and an odor of alcohol or some other narcotic was detected. In his opinion accused was drunk. He sent for the medical officers, Captain Mudgett and Dr. Hanson (R. 36).

Captain Charles S. Mudgett, Medical Corps, testified that he was called from the post exchange council meeting by the post commander at about a quarter of four in the afternoon of August 1, 1933, to come over to the latter's office. He found accused sitting in the office and was directed by the post commander to examine accused to determine his sobriety. At the commander's direction he admitted accused to the hospital and took him there immediately. At the hospital Dr. Hanson, a contract physician with the Civilian Conservation Corps at Fort Devens, and witness examined accused. It was witness' opinion at the time that accused was drunk (R. 39).

Upon cross-examination by the defense witness testified that accused had a marked alcoholic odor on his breath and was uncoordinated in his actions. He talked with a thick voice and he could not get his words out quite properly. In leaving witness' office accused took witness' cap instead of his own campaign hat and riding crop. Both were lying on the desk together. Later he undressed very slowly and had to be urged. He picked up a glass of water and could not get it to his mouth without spilling half the contents. He was extremely friendly with witness, more so than normally, and witness "was the best friend in the world he had" (R. 40).

Dr. Harold E. Hanson testified that he was a contract physician since May 2, 1933, with station at Fort Devens, residence at Ayer, Massachusetts. At the request of Captain Mudgett, witness saw accused for a physical examination at about 4:00 o'clock on August 1, 1933, in his room at the hospital. He noticed in accused a definite thickness of speech and a tremor of the hands. Accused was smoking a cigarette in bed and made no attempt to brush off the ashes that he dropped into the bed. There was a staggering gait when witness saw him passing through the hall on his way to the room. There was a distinctly alcoholic odor to accused's breath (R. 41).

5. Accused took the stand at his own request and testified substantially as follows:

On August 1, 1933, he was commanding Company K, 13th Infantry. The C.M.T.C. was completed at Fort Devens on Saturday, July 28th (R. 46). After they paid off the C.M.T.C. company on the morning of discharge,

Major Sherrard had a company commanders' meeting and directed that they be not relieved until further orders, and also assigned areas to be cleared. Accused worked at the C.M.T.C. area on Thursday, August 1, 1933. Before he went to lunch he went to the C.M.T.C. headquarters, took some mail out of his box, and drove home to lunch. After lunch he drove back to the C.M.T.C. at about half past one and did not leave until about 3:00 o'clock. From there he drove through the National Guard Camp, where he stopped at an artillery regiment (R. 47), and saw some officers with whom he stayed about half an hour. He then went home where Lieutenant Kane found him.

Upon cross-examination by the prosecution, accused testified that he was "for duty" August 1, 1933, having come to duty Friday before the close of the C.M.T.C., after he had been on sick report seven or eight days. He was then a member of a general court. He did not get any notification of a general court beginning on the afternoon of August 1, 1933, and did not attend. He was in command of Company K on August 1, 1933, and as such commanding officer was a member of the post exchange council. He did not attend a meeting of the post exchange council on the afternoon of August 1, 1933, the same day of the court (R. 48). While he had been on duty with the C.M.T.C. he had been receiving at the C.M.T.C. headquarters the daily bulletins published from the headquarters at Fort Devens. He was responsible that he received them, and should either have called the sergeant major or got another bulletin belonging to some other officer. Lieutenant Kane came to his quarters on an official matter on the afternoon of August 1, 1933. Accused was not then under the influence of liquor. He had had some drinks. He had driven his car down from the National Guard area and had only been in his quarters a few minutes. He reported to Colonel Foreman. Captain Mudgett came over about fifteen minutes later and accused got into a car with him, went to his quarters for a bag, and then to the hospital by order of the colonel. Dr. Hanson came in after accused was in his room. Some time later Captain Mudgett came in and asked him how he felt. Accused on that date was familiar with the meeting place for courts-martial (R. 49). They ordinarily met in the same place. This was also true of the meeting place of the post exchange council and he was familiar with that place.

Upon examination by the court accused testified that the mail he obtained at the C.M.T.C. headquarters on August 1, 1933, was only some personal letters. If the daily bulletin did not get to the officers

they were responsible to find out the contents of it. He did not call anybody and did not fulfill that responsibility on that date (R. 50).

6. The record of trial presents the question whether or not the court abused its discretion in denying the motion of the defense for a continuance upon the ground that the physical condition of the accused was such that "he could not properly listen to testimony" in his case. The medical witnesses testified that the accused then complained of a headache and that there were symptoms corroborating his statement. One witness expressed the opinion that he was not then in condition to conduct his defense, and the other that he could not do this with a full degree of his normal intelligence. It further appeared from their testimony, however, that nine months had elapsed since the date of the alleged offenses for which he was then brought to trial, and that during that period he had been hospitalized at Walter Reed General Hospital, at the post hospital at Fort Devens, and at the hospital at Fort Banks, where he was then a patient. Accused's disability had been diagnosed as an enlargement of the prostatic bar, which, in the opinion of one of the witnesses, could only be cured by an operation, and, after such an operation, it would be four months before accused would be ready for full military duty. The court was undoubtedly moved by these considerations in refusing a continuance. Accused's testimony as a witness in his own behalf was complete and lucid, and indicated without question that he was then in physical and mental condition to conduct his defense. The evidence against him was of such a nature as to compel a conviction. In view of all these circumstances it is the opinion of the Board of Review that the refusal of the court to grant a continuance did not injuriously affect the substantial rights of the accused.

The evidence is clear and conclusive that the accused failed to repair at the fixed time to the properly appointed place of assembly for the meeting of a general court-martial and of the post exchange council, and that he was drunk in quarters, as alleged. These offenses under the 61st Article of War are comparatively minor in nature, and even with the offense of being drunk in quarters would scarcely warrant the imposition of so severe a punishment as dismissal from the service were it not for the fact that the accused had been convicted of being drunk in quarters one year before.

7. At the time of the trial accused was 42 5/12 years of age. The statement of his service as contained in the Official Army Register is as follows:

> "2 lt. Inf. Sec. O.R.C. 15 Aug. 17; accepted 15 Aug. 17; active duty 15 Aug. 17; vacated 12 Nov. 17.---Pvt. Co. H, 21 Inf. 19 Apr. 12 to 18 Apr. 15; 2 lt. of Inf. 26 Oct. 17; accepted 12 Nov. 17; 1 lt. (temp.) 26 Oct. 17; 1 lt. 11 Dec. 18; capt. 1 July 20."

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 authorized upon conviction of violation of the 96th Article of War.

W. A. Trumbull, Judge Advocate.
Archibald Ck, Judge Advocate.
Theodore Kell, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 201960

JUN 19 1934

UNITED STATES	)	NINTH CORPS AREA
v.	)	Trial by G.C.M., convened at March Field, California, May 11, 1934. Dishonorable discharge and confinement for six (6) months. March Field, California.
Private FRANK J. CINKOWSKI (6695265), 9th Bombardment Squadron.	)	

HOLDING by the BOARD OF REVIEW
TURNBULL, KING and HALL, Judge Advocates.

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

2. The charges and specifications so far as material are as follows:

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

Specification: In that Private Frank J. Cinkowski, 9th Bombardment Squadron, AC, did, at March Field, California, on or about March 16, 1934, desert the service of the United States and did remain absent in desertion until he was apprehended at Porterville, California, on or about March 21, 1934.

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

Specification 1: In that Private Frank J. Cinkowski, 9th Bombardment Squadron, AC, did, at March Field, California, on or about March 7, 1934, feloniously embezzle by fraudulently converting to his own use one top coat of the value of twenty two dollars and

fifty cents ($22.50), the property of Private Howard E. Morgan, intrusted to him for wear by Private Howard E. Morgan.

Accused was acquitted of other specifications. He pleaded not guilty to the specifications above quoted. With respect to Charge I and the Specification thereunder, the findings of the court are as follows:

"Of the Specification, Charge I: Guilty except the words 'desert' and 'in desertion', substituting therefor, respectively, the words 'absent himself without leave from' and 'without leave', of the excepted words not guilty, of the substituted words guilty.

Of Charge I: Not guilty but guilty of the 61st Article of War."

The finding with respect to Charge I is irregular in that the words "violation of" immediately preceding "the 61st Article of War" have been omitted. It is obvious that this omission was inadvertent and as the sense is clear the Board considers this irregularity of no consequence.

3. The court found accused guilty of Specification 1, Charge II, and Charge II. The reviewing authority approved only so much of the finding of guilty of Specification 1, Charge II, as involved a finding that accused feloniously embezzled by fraudulently converting to his own use the topcoat described, of some value not in excess of $20.00, the property of Private Morgan, intrusted to accused for wear by Private Morgan. The court sentenced accused to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence and withheld the order for its execution pursuant to Article of War 50½.

4. The evidence with respect to the specification last mentioned shows that Private Morgan, a fellow soldier of accused, lent him a topcoat (R. 45, et seq.). Two or three days later accused went to a taxicab office at Riverside, California, presumably near the post, and asked to be driven to San Bernardino "on the cuff", meaning presumably on credit. Upon this being refused, he offered to pawn Morgan's topcoat with the proprietor of the taxicab office for $5.00, from which he

would pay for the proposed ride. The offer was accepted. He asked the taxicab proprietor not to sell the coat and said he would return in a day or two to redeem it. Two days later accused went absent without leave and remained absent five days until he was apprehended. After his apprehension he stated where he had left the coat and it was recovered (R. 37, et seq., 86).

5. In CM 138357, Wryk, accused was charged with embezzling civilian clothing in substantially the same circumstances. The specification alleged fraudulent conversion to accused's own use and benefit of civilian clothing, property of Darold Rinedollar, intrusted to accused by Rinedollar for use. In its opinion the Board of Review said that embezzlement involved some fiduciary relationship, that none such was alleged in the specification, the averments of which were consistent with a mere relation of lender and borrower, which is not a relation of trust recognized by law. The Board referred to the Code of the District of Columbia, defining embezzlement and particularly to that passage of it requiring that the intrusting of the money or article embezzled be "for the purpose of applying the same for the use and benefit of the owner or the person delivering the property". The Board said that the Wryk case obviously did not come within any of the classes of embezzlement mentioned in the District of Columbia Code. It concluded that the specification did not allege embezzlement under the 93d Article of War, although it did allege a fraudulent conversion in violation of the 96th Article of War.

There is no substantial difference on the facts between the Wryk case and the present. If that case is to be followed, the finding of the court in the present case of guilty of Charge II, violation of the 93d Article of War, is not supported by the record of trial.

There has been some variation in the opinions of The Judge Advocate General's Office as to the proper definition of embezzlement as that word is used in Article of War 93. In M.C.M., 1917, the first edition of the Manual published after the revision of the Articles of War in 1916, embezzlement was thus defined (M.C.M., 1917, par. 443 (VII), p. 264):

> "Embezzlement is a fraudulent appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come. It differs from larceny

in that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. (Cyc., vol. 15, p. 488.)."

In M.C.M., 1921, par. 443 (VIII), p. 430, it is said that there is no section of the Federal Penal Code defining for general purposes the crime of embezzlement and that courts-martial will be governed by sections 834, 835 and 851 b of the Code of the District of Columbia, which are quoted in full. Section 834 denounces embezzlement by an agent, attorney, clerk or servant. Section 835 refers to embezzlement of a promissory note or other like evidence of debt, and section 851 b, though in more general terms, requires that the original delivery to the person charged with embezzlement must have been "for the purpose of applying the same for the use and benefit of the owner or person so delivering it". It is obvious that such a conversion as occurred in the Wryk case and in the present case does not fall within any of the above sections. If, therefore, the Code of the District of Columbia is to be taken as containing the authoritative definition of embezzlement as that word is used in Article of War 93, the decision in the Wryk case was correct and a like decision must be made in the present case, namely, that no offense in violation of Article of War 93 was either pleaded or proved. Although the Wryk case was decided in July, 1920, prior to the publication of the Manual of 1921, yet it takes the same view as to what constitutes embezzlement as that Manual.

Since then another edition of the Manual for Courts-Martial has been published, that of 1928, which does not mention the definitions of embezzlement in the District of Columbia Code, but returns to the definition given in the 1917 Manual. The 1928 Manual says, par. 149 h, p. 173:

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

The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the

property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship."

Applying this definition to the present case, the Board of Review believes that an offense was alleged and proved within the meaning of the word "embezzlement" as used in Article of War 93. The loan of a topcoat by one friend to another, though an informal transaction, involves an element of trust in the borrower by the lender. Pawning it or selling it is a breach of that trust and constitutes embezzlement. To hold otherwise, as was done in the Wryk case, places too narrow an interpretation upon the word "trust".

6. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. The approved opinion of the Board of Review in CM 138357, Wryk, digested in Dig. Ops. JAG, 1912-30, par. 1471 (1), is modified, so far as inconsistent with what is here said.

W. A. Trumbull, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 201976

JUN 14 1934

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Presidio of San Francisco,
Private GAYLORD BARTLEY	)	California, May 11, 1934.
(6536408), Headquarters,	)	Dishonorable discharge and
Headquarters Battery and	)	confinement for two (2) years.
Combat Train, 1st Battalion,	)	Disciplinary Barracks.
9th Field Artillery.	)	

HOLDING by the BOARD OF REVIEW
TURNBULL, KING 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. Accused was tried upon the following charges and specifications:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Gaylord Bartley, Headquarters Headquarters Battery and Combat Train, 1st Battalion, 9th Field Artillery, did, at Fort Lewis, Washington, on or about March 6, 1934, desert the service of the United States and did remain absent in desertion until he surrendered himself at Lincoln, California, on or about March 9, 1934.

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

Specification: In that Private Gaylord Bartley, Headquarters Headquarters Battery and Combat Train, 1st Battalion, 9th Field Artillery, did, at Fort Lewis, Washington, on or about March 6, 1934, feloniously

embezzle by fraudulently converting to his own use One Bag Barrack 60¢, One Locker Trunk with key $5.26, One Holster, pistol M-1916 $1.67, One Magazine, pistol, extra Cal. 45 $1.66, One Pistol, Automatic, Cal. 45, $26.38, One Mattress cover $1.38, Two Sheets, cotton 84¢, a total value of $37.79, the property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to all charges and specifications, and was found by the court as follows:

"Of the specification of the Charge: Guilty, except the words 'surrendered himself', substituting therefor the words 'was apprehended', of the excepted words, not guilty, and of the substituted words, guilty.
Of the Charge: Guilty.

Of the specification of the Additional Charge: Guilty, except the words '$1.66', substituting therefor the words '$.83', of the excepted words, not guilty, and of the substituted words, guilty.
Of the Additional Charge: Guilty."

No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to Article of War 50½.

3. The only point requiring discussion is whether the exception and substitution made by the court with respect to the specification to the original charge were permissible. In the Manual for Courts-Martial, paragraph 78 c, it is said:

"Exceptions and Substitutions.--One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute

an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense." (Underscoring supplied.)

4. In CM 145316, Haynes, accused was charged with the embezzlement of a pistol of the value of $14.65. The evidence showed that the pistol was worth $23.60 and the court by exceptions and substitutions so found. The Board of Review held that since the maximum punishment for the embezzlement of property of the value found by the court exceeded that for embezzlement of property of the value charged, the court was not justified in making the exceptions and substitutions as it did. It therefore held the record legally sufficient to support only so much of the finding as involved a finding of guilty of embezzlement of a pistol of the value of $14.65. The principle of the above case is applicable to the present.

5. In Winthrop on Military Law, pages 582, 583, Reprint, page 383, it is said:

"It need scarcely be noted that while a court-martial may always convict of a lesser kindred offence, it is not empowered to find a higher or graver offence than the one charged, nor an offence of a different nature. * * * And this though the evidence clearly shows that the greater or the distinct offence was the one actually committed; for a party cannot be convicted of an offence of which he has not been notified that he is charged and which he has had no opportunity to defend."

The last sentence quoted from Winthrop is directly applicable to the present case. The purpose of requiring a certain amount of detail in a specification is to inform accused with the commission of what offense he is charged and to give him an opportunity to make a timely and intelligent defense. Accused was informed by the specification to the original charge that he was accused of desertion terminated by

surrender. He was therefore put upon notice to produce all the evidence that he could with reference to the fact of his absence and his own intent as to returning. He was, however, justified in assuming that it was unnecessary for him to introduce any evidence concerning the manner of termination of his absence, since the specification in that respect was worded in the way most favorable to himself. It is impossible to say whether, if apprised that he was charged with desertion terminated by apprehension, accused might not have introduced evidence offsetting that brought forward by the prosecution and showing that he did in fact surrender.

6. For the reasons above indicated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification, Original Charge, as involves a finding that the accused did, at the time and place alleged, desert the service of the United States, and did remain absent in desertion until his absence was terminated in a manner not stated at Lincoln, California, on or about March 9, 1934. The Board also holds the record of trial legally sufficient to support the sentence.

N. A. Trumbull, Judge Advocate.
Archibald King, Judge Advocate.
Theodore Hull, Judge Advocate.

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

Board of Review
CM 201990

JUN 18 1934

UNITED STATES	)	SEVENTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	The Cavalry School, Fort Riley,
Private LESTER D. TEMAN	)	Kansas, March 12 and May 1,
(6815671), Troop B, 13th	)	1934. Dishonorable discharge
Cavalry.	)	and confinement for one (1)
	)	year and eight and one-half (8½)
	)	months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TURNBULL, KING 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 and found legally sufficient to support the findings of guilty of the charges and specifications, but presents the question of whether or not it is legally sufficient to support the sentence in its entirety.

2. Under the table of maximum punishments (M.C.M., p. 99), the maximum punishment at hard labor which may be imposed for the offense of which the accused was convicted under Charge I and its Specification (causing a false claim against the United States to be presented for approval) is one year. The offense of which he was convicted under Charge II, and Specification 2 thereof, is closely related to that of embezzlement of property of the value of less than $20 under the 93d or 94th Article of War, for which the limit of confinement at hard labor that may be imposed is six months.

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

N. A. Turnbull, Judge Advocate.

_____, Judge Advocate.

Theodore Hall, Judge Advocate.

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

Board of Review
CM 201997

JUL 30 1934

UNITED STATES)	SECOND CORPS AREA
v.	Trial by G.C.M., convened at Governors Island, New York, May 8 and 9, 1934. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Master Sergeant JAMES F. MELLON (R-2028774), DEML.	

HOLDING by the BOARD OF REVIEW
TURNBULL, KING, and HALL, Judge Advocates.

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

2. In the view which the Board takes of the present case it is unnecessary to set out the specifications verbatim, but they may be thus abstracted -

CHARGE: Violation of the 96th Article of War.

Specification 1: Unlawfully promising Lieutenant Israel, Infantry, Res., at Governors Island Island, New York, June 16, 1933, to assist him in obtaining orders to active duty for a sum of money.

Specification 2: Unlawfully accepting from Lieutenant Israel, at the place above, September 8, 1933, $25 in accordance with the above agreement.

Specification 3: Unlawfully accepting from Lieutenant Israel, at the place above, November 9, 1933, $25 in accordance with the above agreement.

201997

Specification 4: Unlawfully transmitting, at the place above, August 5, 1933, through the United States Post Office, a letter to Lieutenant Israel demanding money in accordance with the previous agreement.

Specification 5: Unlawfully transmitting, at the place above, May 15, 1933, through the United States Post Office, a certain letter to Lieutenant Zinn, QM-Res., demanding money for assisting in obtaining orders to active duty for him in accordance with a previous unlawful agreement.

Specification 6: Unlawfully transmitting, at the place above, July 10, 1933, through the United States Post Office, a certain letter to Lieutenant Zinn demanding money in accordance with the above agreement.

Specification 7: Unlawfully accepting $25 from Lieutenant Zinn, at the place above, June 3, 1933, in accordance with the above agreement.

Specification 8: Unlawfully accepting $25 from Lieutenant Zinn, at the place above, July 24, 1933, in accordance with the above agreement.

The court found accused guilty of all specifications and the charge, and sentenced him to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, as the place of confinement, and forwarded the record pursuant to Article of War 50½.

3. Pursuant to stipulation, the defense introduced in evidence twenty-nine letters of commendation of accused (pp. 194, 201, 202; Ex.14, last whole paragraph on p. 3; Ex. S; Defendant's Ex. 25). The prosecution called to the stand Brigadier General H. L. Laubach, who testified unfavorably to accused's general reputation. Such testimony was admissible both as rebuttal of the defense's character testimony and as an impeachment of accused as a witness; but the prosecution went farther and then offered and had identified by General Laubach a memorandum or report which had been addressed to him as Commanding General, 14th Division, during the war, by Colonel F. G. Knabenshue, Chief of Staff of that Division, reporting on two official papers, namely, the resignation of the present accused as an Army field clerk, and a recommendation that he

be commissioned. The report was received in evidence as Exhibit 26 over the vigorous objection of the defense. This report by Colonel Knabenshue contained a number of general statements unfavorable to the character of the accused. The prosecution argued that the defense had been permitted to put in letters and other unsworn papers and that it should have the same privilege. The defense, on the other hand, contended that it had the right to cross-examine Colonel Knabenshue on the statements contained in his report and that he was not present for that purpose.

In general, an unsworn written statement may be received only by stipulation. The fact that the defense was permitted by such a stipulation to introduce numerous unsworn complimentary letters and reports does not, as a matter of law, authorize the admission over the objection of the defense of a like unsworn paper unfavorable to accused. The Board thinks the argument of the prosecution based on reciprocity of treatment is unsound, and that Exhibit 26 ought not to have been admitted.

4. The prosecution next called David S. Carter and W. Andrews, civilians, who testified that the general reputation of Lieutenant Israel for truth and veracity was excellent (R.211-218). The defense had made no attack on Lieutenant Israel's general reputation, though his testimony had been contradicted by that of accused. The rule is that evidence favorable to the general reputation of a witness may not be introduced until and unless he is impeached, and that mere contradiction of his testimony does not constitute impeachment. No objection was made by the defense to Carter's and Andrews' testimony on this ground, though objection was made to Andrews' evidence for another reason, namely, that Andrews did not know Israel's general reputation, which objection was overruled (R.216-218). The record does not support the objection.

5. A few authorities may be noted exemplifying the general rule of the law of evidence above stated: Louisville & Nashville R.R. Co. v. McClish, 115 Fed. 268, before the Circuit Court of Appeals for the Sixth Circuit in 1902, was an action to recover damages for the wrongful death of a man killed while walking along a railroad track. The principal witness for the plaintiff, Wright, testified that he was at work on a telephone pole hear the scene of the fatal accident at the time of it. Three witnesses for the defendant testified to seeing Wright at that time at the opera house in town. The plaintiff then introduced over objection evidence to establish the good reputation of Wright for veracity.

The court said (p. 270):

"Did the contradiction of Wright by the witnesses who claim that he was not where he says he was, and consequently could not have seen what he attempted to describe, put in issue the general character of the witness for truth, and thereby justify the introduction of witnesses to sustain it? Greenleaf, who goes farther upon this subject than many of the authorities are willing to follow in admitting this class of testimony, supports the doctrine that the contradiction of a witness by other testimony does not lay the foundation for the introduction of other testimony supporting his general reputation for truth. Greenl. Ev. Sec. 469, and notes. What more is there in this case than the contradiction of Wright by other testimony? It is true that the contradiction is of that character that admits of no reconciliation of the testimony upon any theory of honest mistake or failure of memory. This is often true of witnesses whose general character for truth is unassailable. If, in every case where the witnesses are in direct and irreconcilable conflict, general character proof can be introduced, the disputed issues of fact will be lost sight of in a mass of testimony sustaining or impeaching the various witnesses in the case. The present case affords a striking illustration of the effect of the introduction of this class of testimony, for we find no less than six other witnesses at the trial whom it was deemed necessary to sustain by proof of general reputation. If this practice is to be followed, as is said in Russell v. Coffin, 8 Pick. 142, 'great delay and confusion would rise; and, as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted, and, indeed, it would be a trial of the witnesses, and not of the action.' An attentive consideration of the cases and of the reasons upon which they are founded leads us to the conclusion that the introduction of this class of testimony should be confined to cases where an attack has been made upon the character of the witness by some method which tends to impeach his general character for truth. It is true that contradicting testimony may have an effect indirectly to impeach in the mind of the trior the character of the witness contradicted, but that is not the purpose of the testimony. It does not matter how much a witness may be contradicted, his general character is presumed good until it is assailed by some recognized method of impeachment. This may be undertaken by showing that the general reputation of the witness for truth is bad, by showing by direct proof or upon cross-examination

that he has been convicted of an infamous crime. In these instances the attack is made upon his character, and is not so much upon his testimony in the particular case as upon his unreliability as a witness. When his character is thus assailed, the attack may be repelled by proof of general good reputation for truth. Until it is impeached it is not in issue, and we think the ends of justice will be subserved by confining the testimony to the issues of fact essential to the determination of the controversy before the court. While, as we have said, the cases are by no means uniform upon this subject, the conclusion reached is sustained by many well considered cases; among others; Wertz v. May, 21 Pa. 274; Brann v. Campbell, 86 Ind. 516; State v. Ward, 49 Conn. 429; Webb v. State, 29 Ohio St. 351; State v. Archer, 73 Iowa, 320, 35 N.W. 241; Russell v. Coffin, 8 Pick. 142; Brown v. Mooers, 6 Gray, 451; Gertz v. Railroad, 137 Mass. 77, 50 Am. Rep. 285; Stevenson v. Gunning's Estate, 64 Vt. 609, 25 Atl. 697; People v. Gay, 7 N.Y. 378; Tedens v. Schumers, 112 Ill. 263."

The opinion from which the above quotation is taken was written by Day, Circuit Judge, afterward a Justice of the Supreme Court of the United States. It is characterized by Professor Wigmore as a "good opinion" (Wigmore on Evidence, Sec. 1109, note 1). Circuit Judge Lurton, also later a Justice of the Supreme Court, concurred in it.

Ford v. United States, 3 Fed. (2d) 104, before the Circuit Court of Appeals, Fifth Circuit, was a prosecution of certain prohibition officers for embezzling liquor in their possession. The principal witness against them was Doe, another prohibition officer. Defendants, without attacking Doe's general reputation, testified denying their guilt, contradicting Doe, and throwing the blame for the disappearance of the whisky on him. The prosecution in rebuttal offered evidence of Doe's good character generally. The court said (p. 105),

"* * * Although there is a conflict in the authorities, we think the better rule is that the character of a witness does not become an issue in the case unless and until it is attacked. A contradiction of testimony, although irreconcilable, is not an attack upon the character of the witness who gave it. The admission of character evidence to sustain one witness, who has not been impeached, would require the admission of like evidence to sustain all such witnesses. Such

evidence would lead to a confusion of issues, and might easily result in injustice whenever a prominent witness, whose reputation is well known, is contradicted by an obscure witness, whose reputation is unknown, or not so well known.

"By the great weight of authority, as well as upon principle, as it appears to us, testimony of character witnesses, introduced simply to add weight to the testimony of a witness who has been contradicted, but whose character has not been attacked, is inadmissible, * * *."

The views of the two leading authors on evidence are to the same effect, Greenleaf, Secs. 469, 469 a; Wigmore, Sec. 1109. See also the leading English case on the subject, Bishop of Durham v. Beaumont, 1 Campbell 206; Harris v. United States, 16 Fed. (2d) 117, and many other cases collected in note 1 to the above section in Wigmore. The holdings of The Judge Advocate General and the Board of Review are in accord with the foregoing. CM 190259, Sheffield; CM 195687, Stansbury; CM 198865, Sosebee; CM 201710, Reynolds.

6. It might seem that the second error, namely, the admission of testimony as to the reputation of Lieutenant Israel, could at most affect the validity of the findings of guilty of the specifications dealing with transactions with that officer, namely, specifications 1, 2, 3, and 4; but the Board does not believe that this is so. The remaining specifications, 5, 6, 7, and 8, each charged mailing a letter requesting money or receipt of money from Lieutenant Zinn, in pursuance of a previous unlawful agreement for the use of accused's influence to have Lieutenant Zinn ordered to active duty. That the letters were in fact mailed and the money received was proved and admitted by accused. The only matter in dispute is, quo animo was this done, innocently, in the collection of a just debt, as the defense maintains, or pursuant to a corrupt agreement, as the prosecution contends. In solving such a problem a court is not restricted to evidence concerning the particular transaction; it may receive and consider evidence regarding similar transactions, as throwing light on the intent and design with which accused acted. In Wood v. United States, 16 Peters 342, a criminal prosecution for undervaluation of imports in fraud of the customs, evidence was offered of twenty-nine invoices other than that covered by the indictment which had been undervalued by defendant. The Supreme Court, speaking through Justice Story, said (p. 359 et. seq.) -

"Passing from this, the next point presented for consideration is, whether there was an error in the admission of the evidence of fraud deducible from the other invoices offered in the case. We are of opinion that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the

intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent, or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. The treatise on evidence by Mr. Phillipps and Mr. Starkie contain many illustrations to this effect. See Starkie on Evidence, vol. 1, p. 64, vol. 2, p. 220, 221, second London edit., 1833; Phillipps on Evidence, by Cowen, vol. 1, ch. 7, s. 7. p. 179, 180, vol. 2, p. 452, note 333, p. 465, note 352, edit. 1839.

"They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily imbodied in the very substance of the rule; for whatever does legally conduce to establish the points in issue is necessarily embraced in it, and therefore a proper subject of proof, whether it be direct, or only presumptive. This doctrine was held in a most solemn manner in the case of the King v. Wyles, 4 Bos. and Pull. 92, where upon an indictment for disposing and putting away a forged bank note, knowing it to be forged, evidence was admitted of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. The same doctrine has been held in cases of uttering of bad money and spurious notes; and also in cases of conspiracy. The same doctrine was affirmed and acted upon by this Court in the case of the United States v. Wood, 14 Peters' Rep. 430, in the case of a prosecution for perjury.

"Cases of fraud present a still more stringent necessity for the application of the same principle; for fraud being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy. * * *."

Bryan v. United States, 133 Fed. 495, in the Circuit Court of Appeals for the Fifth Circuit, was an indictment in five counts. Counts 1, 2, 3 and 5 charged uttering or having in possession counterfeit five cent pieces; count 4, having in possession a mould for making counterfeit 25-cent pieces. In the course of the trial the fourth count was withdrawn and dismissed, and the defense then requested the court to withdraw the moulds as evidence and to direct the jury not to consider the testimony relative to them. This motion was denied and the court also stopped defense counsel from arguing that the evidence as to the moulds was out of the case.

The court said (p. 499) -

> "* * * It seems to have been the theory of the counsel for the defendant that all the proof with reference to the tool chest" (which contained the mould)"and its contents, as testified to by the witnesses who examined the same, was admitted and could only have been properly admitted under the fourth count in the indictment, and that, when that count had been dismissed by the government, this proof which had been admitted in its support was necessarily by that dismission withdrawn from the case. In reference to that count and the admission of this evidence, the counsel suggests that when the testimony was admitted it was in the nature of direct evidence introduced for the purpose of convicting plaintiff in error on the count No. 4 of the indictment. That may very well be one of the grounds on which this testimony was admitted at the time it was admitted, and it may be conceded that it was in the nature of direct evidence to support that count of the indictment; but it by no means follows that, because it was in the nature of direct evidence to support one count in the indictment, it thereby had, or for any other reason shown in this record, lost its character as indirect evidence to illustrate the intent, and from which, with other circumstances, the jury could deduce the intent of the defendant in doing the acts otherwise fully established against him, charged in the counts Nos. 1, 2, and 3. * * *."

In Guthrie v. United States, 16 Neb. 667, 21 NW 455, a city marshal was indicted for accepting a bribe to protect a gambling house. Evidence of other similar transactions with other gambling houses was held admissible. Other cases illustrative of the principle are State v. Ames (Minn.), 96 NW 330; Commonwealth v. Kennedy, 170 Mass. 18, 48 NE 770;

Carroll v. Commonwealth, 84 Pa. 107; Hester v. Commonwealth, 85 Pa. 139; Wilson v. State (Texas), 55 SW 68. See also M.C.M., par. 112 b; Wigmore on Evidence, Sec. 302; and cases collected there and in 62 L.R.A. 193, note.

7. The bearing of these authorities upon the present case is this, that the court lawfully might, and presumably did, consider the testimony of Lieutenant Israel, not merely with reference to the first four specifications to which it directly related, but also with reference to the last four concerning alleged bribery of accused to have Lieutenant Zinn ordered to active duty. With respect to those latter specifications, the court might and presumably did consider Lieutenant Israel's testimony as tending to negative the defense's theory that the payments demanded of and made by Zinn were in satisfaction of an innocent loan, and to support the prosecution's theory that accused's intent was corrupt in respect thereto and that he was employed in a scheme to use his position as a means of extorting money from reserve officers. Hence, when the weight of Lieutenant Israel's testimony was wrongfully enhanced by the inadmissible testimony of Carter and Andrews praising Israel's general reputation, the error affected all specifications, and not merely those to which his testimony was expressly directed.

8. The question remains, what weight is to be attributed to this and the other erroneous admission of testimony? Did they injuriously affect the substantial rights of accused? If is to be noted that in the four cases previously before the Board of Review and The Judge Advocate General (cited, ante, end of par. 5) wherein the same error was committed, it was held fatal. No ground of distinction is seen between those cases and the present. It cannot be said that the evidence was compelling in the present case. On the contrary, the case is one requiring the court to balance the credibility of accused on the one hand and the two principal witnesses for the prosecution on the other. It is therefore peculiarly a case where the erroneous admission of character evidence was liable to do harm. Under all the circumstances the Board is of the opinion that the two errors in the introduction of evidence hereinbefore mentioned did injuriously affect the substantial rights of accused.

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

W. A. Trudell, Judge Advocate.

Archibald King, Judge Advocate.

[illegible], Judge Advocate.

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

Board of Review
CM 202027

JUL 31 1934

UNITED STATES	EIGHTH CORPS AREA
v.	Trial by G.C.M., convened at Fort Sam Houston, Texas, May 11, 1934. To be reduced on the promotion list one hundred and fifty (150) files.
Captain JOHN J. McELROY (0-11069), 9th Infantry.	

OPINION of the BOARD OF REVIEW,
TURNBULL, KING, and HALL, Judge Advocates.

1. The record of trial in the case of the officer 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. Accused was tried on four specifications in violation of the 95th Article of War. He was acquitted of specification 1; found guilty of specifications 2, 3, and 4 with exceptions and one substitution; and found not guilty of violation of the 95th Article of War but guilty of violation of the 96th Article of War. The specifications and the modified findings thereunder by the court will be set out as each is discussed. The court sentenced accused to be reduced on the promotion list one hundred and fifty files. The reviewing authority approved the sentence and directed that it be executed, and the findings and sentence were announced in General Court-Martial Order No. 89, Eighth Corps Area, June 5, 1934.

Upon examination in the Military Justice Section of The Judge Advocate General's Office the conclusion was reached that none of the three specifications of which accused was convicted, as altered by the court, stated an offense.

In setting out the specifications, words excepted by the court will be inclosed in parentheses and those substituted will be underscored.

3. Specification 2 is as follows:

> In that Captain John L. McElroy, 9th Infantry, United States Army, did, at Fort Sam Houston, Texas, on or about October 18, 1933, (with intent to deceive his superior officers, his regimental commander and the commanding General, Second Division and Fort Sam Houston, officially, falsely) state in writing by his third indorsement on letter of Citizens Loan Association, Chicago, Illinois, dated October 10, 1933, as follows:
>
> > "1. This account has been settled in full this date."
>
> which said statement was false and untrue (and was known by the said Captain John L. McElroy to be false and untrue,) in that such account had in fact not been paid and settled in full on that date.

Words are imperfect instruments in that many of them sometimes mean one thing and sometimes another. What meaning is to be assigned to an ambiguous word is determined from the subject under discussion, the context, and the circumstances attending its use. The specification, as it stands after amendment by the court, contains the words "which said statement was false and untrue." The word "false" in many instances means "known to be untrue" and implies an intent to deceive. If that is its meaning in the clause just quoted, it may well be argued that the specification as amended states an offense. It is, however, impossible to suppose that the court considered the word, when here used, to have the meaning above stated, since the court struck from the specification the allegations that the statement was made with intent to deceive, and that it was known by the officer concerned to be false and untrue. The Board concludes, therefore, that in the clause quoted the word "false" can mean no more than "not in accord with the facts." So construed, specification 2 clearly states no offense.

4. Specification 3 is as follows:

> In that Captain John L. McElroy, 9th Infantry, United States Army, having, at Fort Sam Houston, Texas, on or about January

> 5, 1934, made and uttered to the Citizens Loan Association, Chicago, Illinois, a certain check drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, in the amount of $200.00 in partial payment of a loan to him from the Citizens Loan Association, did, at San Antonio, Texas, on or about January 10, 1934, (dishonorably and) wrongfully fail and neglect to maintain on deposit in said National Bank of Fort Sam Houston, San Antonio, Texas, funds sufficient to pay said check when the same was duly presented for payment thereat in the ordinary course of business.

A court has the right in a proper case to change a specification so as to allege an offense under the 96th rather than the 95th Article of War. In so doing it must act in closed session, speedily, without opportunity for reflection or consultation of authorities other than the Manual for Courts-Martial. Among the members there is seldom a lawyer. Under the circumstances the Board of Review thinks that it ought not to be too technical in weighing the words retained, eliminated, or substituted by the court. To do so would defeat the ends of justice and tend to make the court-martial system impracticable and unworkable. What the court obviously meant to do in the present case was to strike from the specification all allegations of conduct unbecoming an officer and a gentleman, but to say that the action of accused was culpable to a less degree. The Board can not say that the court failed to achieve its purpose. On the contrary, the word "wrongfully", which it retained, is well adapted thereto. In the present context it obviously means contrary either to law or to accused's duty or obligation in the premises. It means that in the court's opinion his conduct in the respects set out in the specification was of a nature to bring discredit upon the military service. AW 96; par. 152 b, MCM.

In CM 195772, Wipprecht, mentioned in the memorandum of the Military Justice Section, the opinion of the Board of Review dealt with the question whether specification 7 to Charge II stated an offense under Article of War 95, and it was held that it did. See opinion, top page 22. The case is therefore not an authority against the validity of the present specification. The fact that it was later held that the evidence did not support the findings of guilty of that specification (opinion,p. 24) does not seem material. The cases in Dig. Ops. JAG 1912-30, par. 1475, are also believed consistent with the position here taken. The Board considers that specification 3 states an offense in violation of the 96th Article of War.

5. It is also suggested that the evidence is insufficient to support conviction of specification 3 in that it is not proved that accused failed to maintain in the bank funds sufficient to pay the check for $200 mentioned in the specification. Mr. Bowles, cashier of the bank on which the check was drawn, was examined at length (R.25-37). Two questions and answers at the very beginning of his testimony are sufficient alone to support the allegation. They are (R.26) -

> "Q. Will you examine the statement of his account for January 1934, and state whether or not there was, at any time during the Month of January, a sum of two hundred dollars?
>
> A. (Examing document) One day — the last day of the month.
>
> Q. What caused that account to rise to that total?
>
> A. A deposit on that date."

It further appears that a deposit was made January 2, 1934, of $240.27 (R.27), presumably accused's pay check, but that there appears a debit of $100 the same day for which no check tax was paid, indicating that this charge probably represented payment of a note (R.32,33). The witness also testified -

> "We make a service charge of twenty-five cents whenever a check is returned. A service charge of twenty-five cents appears on this account on January 10th. (R.26)
>
> * * *
>
> A. The only thing I can say in answer to that question is that we have on this account a charge of twenty-five cents on January 10th. That twenty-five cent charge has no tax on it, which indicates that it was an arbitrary charge by the bank, and I assume it was a service charge for a returned check. I can't say a check was returned that day, but this record indicates there was a service charge for a returned check.
>
> Q. You don't know which check?
>
> A. No, sir, but we only make twenty-five cent service charges for returned checks — no other service." (R.34,35).

Mr. Otterstrom, Assistant Manager of the Citizens Loan Association, payee of the check, also testified that on January 5, 1934, a check for $200 was received from accused, payment of which was refused by the National Bank of Fort Sam Houston, on which it was drawn, "account insufficient funds," and was protested. (Ex. 4, qq. 9, 10). Since the loan association was in Chicago and the drawee bank in San Antonio, it may be inferred that the witness did not present the check in person, but the testimony is admissible at least to show that the check was returned to the loan association unpaid. To that extent it corroborates the testimony of Mr. Bowles, the cashier, and supports the inference that this was the check on account of whose non-payment a service charge of twenty-five cents was made against accused's account on January 10th.

The Board considers the foregoing testimony sufficient to support the allegation.

6. Specification 4 is as follows:

> In that Captain John L. McElroy, 9th Infantry, United States Army, did, at Fort Sam Houston, Texas, on or about February 10, 1934, in a fourth indorsement to the Commanding Officer, 9th Infantry, Fort Sam Houston, Texas, complying with a second indorsement of February 3, 1934, from the Headquarters 2nd Division and Fort Sam Houston, Texas, officially make the statement, "Complied with.", and inclose with said fourth indorsement a carbon copy of a letter as follows:
>
> "HEADQUARTERS COMPANY NINTH INFANTRY. JLM/frm.
>
> Fort Sam Houston, Texas.
> February 10, 1934.
>
> CITIZENS LOAN ASS'N.
> Chicago, Ill.
>
> Gentlemen:
>
> Inclosed find cashiers check for $201.83, to apply on my account.
>
> Remainder of account will be settled by February 28, 1934.
>
> JOHN L. McELROY,
> Captain, 9th Infantry,
> Commanding."

said indorsement (and said letter being then and there written and made with intent on the part of him, the said Captain John L. McElroy, to deceive his superior officers, the Commanding Officer, 9th Infantry, Fort Sam Houston, Texas, and the Commanding General, 2nd Division and Fort Sam Houston, Texas, said statements in said fourth indorsement and said enclosed letter to the Citizens Loan Association being false and untrue and were then and there known by the said Captain McElroy to be false and untrue,) being improper, in that he had not complied with the instructions in the second indorsement to reply direct to writer, said Citizens Loan Association, and in that said letter of February 10, 1934, to the Citizens Loan Association and said cashiers check for $201.83 were not then and there mailed and sent to the said Citizens Loan Association by said Captain John L. McElroy.

Does the specification as modified by the court state an offense? For reasons stated (ante, par. 4), the Board does not believe that it should be too technical in weighing the words used by a court in making a substitution in a specification. Here, as in dealing with specification 3, the court was obviously trying to find words excluding fraud and deceit but consistent with a less degree of culpability. Can it be said that it failed? As already stated (ante, par. 3), in construing an ambiguous word such as "improper", one must examine the context to discover its meaning. It is suggested by the Military Justice Section that the word "improper" means no more than "not appropriate, suitable, or becoming." Even if such a construction be accepted, it is by no means clear that no offense is alleged, since officers are held to a certain standard of propriety and becomingness. Even a soldier may be tried for appearing in improper uniform. See Appendix 4, MCM, margin opposite specification 124. But when preceded, as here, by an allegation that accused signed an indorsement "Complied with," and followed by an allegation that accused had not complied with instructions, the word "improper" obviously means more. When falling from the lips or pen of a man of military training, in such a connection it clearly means "wrongfully", "contrary to his military duty", and therefore states an offense.

7. For the reasons hereinbefore stated, the Board of Review is of opinion that the record is legally insufficient to support the finding of guilty of specification 2, but legally sufficient to support the findings of guilty of specifications 3 and 4 and the charge and legally sufficient to support the sentence.

8. The Board considers it not improbable that, had the court found accused guilty of but two offenses rather than three, it would have imposed a lighter sentence. It therefore suggests that The Judge Advocate General recommend a mitigation of the sentence to a loss of 100 files on the promotion list. Such action may be taken by the President alone under the 50th Article of War.

W. A. Turnbull, Judge Advocate.

Archibald King, Judge Advocate.

Thomas Tate, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 202117

JUL 19 1934

UNITED STATES v. Private 1st Class STEWART OSWALD (6656751), Quartermaster Detachment, Fort Hayes, Ohio.	FIFTH CORPS AREA Trial by G.C.M., convened at Fort Hayes, Ohio, June 19, 1934. Dishonorable discharge and confinement for six (6) months. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TURNBULL, KING and HALL, Judge Advocates.

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

2. Accused was tried under a single charge and specification as follows:

CHARGE: Violation of the 65th Article of War.

Specification: In that Private First Class Stewart Oswald, Quartermaster Detachment, Fort Hayes, Ohio, did, at Fort Hayes, Ohio, on or about May 31, 1934, strike Private Frelyn L. Keckler, Acting First Sergeant, Quartermaster Detachment, an Acting Non-Commissioned Officer, who was then in the execution of his office, in the face and eye with his fist.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. In the opinion of the Board of Review, the words "non-commissioned officer", as used in Article of War 65, refer to a person legally appointed a noncommissioned officer and do not include an acting noncommissioned officer. It was so held in CM 201648, Statsick. The Board is of the opinion nevertheless that the specification states an offense in violation of Article of War 96.

3. Paragraph 3 e, AR 245-5, July 20, 1923, authorizes the appointment of acting noncommissioned officers and provides that they will be obeyed and respected as such. The record of trial shows that on March 12, 1934, Private Keckler was properly appointed Acting First Sergeant, Quartermaster Detachment, Fort Hayes, Ohio, by the commanding officer thereof (Ex. A), and that at the time of the commission of the alleged offense he was on duty as such (R. 10) and accused knew he was so detailed (R. 37).

4. The next question which presents itself is, what is the maximum punishment authorized for the offense stated in violation of Article of War 96. If that offense be considered simple assault and battery, the maximum punishment authorized is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. M.C.M., par. 104 c. But the offense is something more than a simple assault and battery since it is also an attack upon an individual clothed with definite military authority and is a wrongful interference with the execution of that authority.

5. The Board is therefore of the opinion that striking an acting noncommissioned officer in the performance of his duty as such is an offense in violation of Article of War 96, for which no maximum punishment is prescribed in the table. The most closely related offense found therein is striking a noncommissioned officer in the execution of his office, for which the maximum punishment is dishonorable discharge, total forfeitures and confinement at hard labor for one year.

6. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of the 96th Article of War in the manner alleged in the Specification, and legally sufficient to support the sentence.

N. A. Turnbull, Judge Advocate.

Judge Advocate.

Judge Advocate.

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

Board of Review
CM 202137

AUG 13 1934

UNITED STATES)	SEVENTH CORPS AREA
)	
v.)	Trial by G. C. M., convened at
)	Fort Leavenworth, Kansas, June
Captain FRANCIS H. JACK,)	27, 1934. Dismissal.
Jr. (0-10550), (Infantry))	
Quartermaster Corps.)	

OPINION of the BOARD OF REVIEW
TURNBULL, KING 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 93rd Article of War.

Specification 1: In that Captain Francis H. Jack, Jr., (Infantry) Quartermaster Corps, being at the time custodian of the General Mess Restaurant Fund, Fort Leavenworth, Kansas, did at Fort Leavenworth, Kansas, on or about July 28, 1933, feloniously embezzle by fraudulently converting to his own use the sum of Twenty One Dollars and Eighteen Cents ($21.18), property of the said General Mess Restaurant Fund, entrusted to him, the said Captain Francis H. Jack, Jr., by virtue of his office as custodian of said fund.

Specification 2: In that Captain Francis H. Jack, Jr., (Infantry) Quartermaster Corps, being at the time custodian of the General Mess Restaurant Fund, Fort Leavenworth, Kansas, did at Fort

Leavenworth, Kansas, on or about October 4, 1933, feloniously embezzle by fraudulently converting to his own use the sum of Two Hundred and Thirty One Dollars and Thirty One Cents ($231.31), Property of the said General Mess Restaurant Fund, entrusted to him, the said Captain Francis H. Jack, Jr., by virtue of his office as custodian of said fund.

Specification 3: (Embezzlement of the sum of $14.96, property of the General Mess Restaurant Fund. - Finding of not guilty.)

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

Specification 1: In that Captain Francis H. Jack, Jr., (Infantry) Quartermaster Corps, did at Fort Leavenworth, Kansas, on or about December 31, 1932 wrongfully fail and neglect to report the General Mess Restaurant Fund, of which he was custodian, to Major Clarence B. Lindner, Coast Artillery Corps (D.O.L.), for audit, as required by Special Orders No. 281, The Command and General Staff School, Fort Leavenworth, Kansas, December 20, 1932.

Specification 2: (Wrongful failure and neglect on or about September 30, 1933, to report the General Mess Restaurant Fund for audit, as required by Special Orders.- Finding of not guilty.)

Specification 3: In that Captain Francis H. Jack, Jr., (Infantry) Quartermaster Corps, did at Fort Leavenworth, Kansas, on or about November 26, 1933, wrongfully fail and neglect to preserve the vouchers subsequent to June 30, 1932, the bank statements and paid checks of the General Mess Restaurant Fund, of which he was custodian, as required by paragraph 18 b (1) Army Regulations 210-50, and to retain the council book of said fund as required by paragraph 18 a (1) Army Regulations 210-50.

He pleaded not guilty to all charges and specifications, and was found guilty of Specifications 1 and 2, of Charge I, and of Charge I, and of Specifications 1 and 3, of Charge II, and of Charge II, and not guilty of Specification 3, of Charge I, and Specification 2, of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution under the specifications of which the accused was found guilty may be summarized substantially as follows:

During the period from October 1, 1932, to October 5, 1933, within which the offenses are alleged to have been committed by the accused, he was the company administrative officer of the Guard and Service Company at Fort Leavenworth, Kansas (R. 17-18). Prior to that time, in 1929, at the breaking up of the Disciplinary Barracks, the Guard and Service Company had taken over the barracks, together with the other troops of the post, and the group made up the General Mess. There was then a little establishment, formerly a sub-exchange of the Disciplinary Barracks, selling cigarettes, tobacco, toilet articles, and such things as a soldier needs, which was carried as a part of the General Mess and accounted for in its funds until early in March, 1932, when Major Lindner, who made the quarterly audit, recommended that the two funds be made separate and distinct, the funds of the former sub-exchange being designated as the General Mess Restaurant Fund, and the other as the General Mess Fund (R. 34). On February 24, 1932, a separate account was opened in the Army National Bank for the General Mess Restaurant Fund (R. 51). At that time accused was custodian of both funds, and he remained the custodian of both throughout the period from October, 1932, to October, 1933 (R. 25-26,35). In compliance with post regulations requiring that organizations designate an officer as their pay agent, the commander of the Guard and Service Company had so designated accused and had reported to post headquarters that he would be the pay agent for this company. As such pay agent he had the direct payment of the men, the handling of the collection sheet, and the deposit of the funds. Accused acted in this capacity throughout the period from October, 1932, to October, 1933 (R. 21-22,25-26). The General Mess Restaurant was inventoried on September 25, 1932, and its stock and fixtures then sold to the Camp Post Exchange (R. 51).

Accused left Fort Leavenworth under orders late in November, 1933. He was relieved by Captain Brinson, who took over the fund of the Guard and Service Company (R. 57,63) and that of the General Mess. No mention was made of the General Mess Restaurant Fund and Captain Brinson thought nothing about it since it was supposed to have been closed out the year before (R. 60,63). In checking over the property of the Guard and Service Company he found that certain refrigerating coils formerly used by the General Mess Restaurant and sold by it to the Post Exchange in 1932 were a part of the property of the Guard and Service Company for which that company had never been paid. He then instituted a search to get this money (R. 29). During the leave in August and September, 1932, of Major Blair, commanding officer of the Guard and Service Company, the sale of the General Mess Restaurant to the Post Exchange had been effected, and upon Major Blair's return in October, 1932, accused had assured him that the property involving the Guard and Service Company had been taken up and paid for and the Restaurant Fund closed (R. 25). This property was mentioned specifically at that time. Accused said a board had been appointed and had appraised it, and that it had been purchased by the Post Exchange and paid for. Major Blair received no money at the time but was under the impression that the funds had been turned over during his absence. He examined the council book when Captain Brinson, who had assumed responsibility as company commander during his absence (R. 25), turned the funds back to him, but only to satisfy himself as to the money on hand, and that the total was correct (R. 32). There was, however, no record in the council book of the Guard and Service Company for the month of the sale, or for any other month, that the company had received this payment (R. 32-33,61). Both Major Blair and Captain Brinson made a thorough search for records of the accounts of the General Mess Restaurant Fund, looking carefully in every conceivable place where they might have been, but the only records they found were the vouchers from February 24, 1932, when it was opened as a separate account, to and including June 30, 1932. No bank statements, check stub books or canceled checks were found (R. 41,61).

It having been shown to the court, as just mentioned, that the records of the General Mess Restaurant Fund since February 24, 1932, had not been found after exhaustive search and could not be produced in court, the prosecution made formal demand upon the accused for the council books, vouchers and bank statements of the General Mess Restaurant Fund from September 1, 1932, to October 5, 1933. To this demand accused replied that he had no records, did not know where they were,

was unfamiliar with the manner of their disappearance, and assumed no responsibility therefor. The prosecution then proceeded to introduce secondary evidence as to some of the entries in the council book.

Major Lindner testified that on October 21, 1932, in compliance with orders, he inspected and audited the funds of the General Mess Restaurant Fund for the period from July 1, 1932, to September 30, 1932, and that he made a report to the Commandant as a result of that audit. He identified this report, and it was received in evidence as Exhibit 5 (R. 42). The data contained in the report were obtained from the council book, check book stubs, canceled checks, bank statement, vouchers and other papers submitted at that time (R. 43). Among other matters, the report showed that on September 30, 1932, the cash assets of the fund consisted of $252.83 cash in bank, and $14.96 cash in personal possession of the custodian, and that the cash liabilities, consisting of accounts payable reported, amounted to $250.20. The net cash worth of the fund to be turned over to the General Mess Fund when the fund was closed out was found to be $17.59 (Ex. 5). Major Lindner did not obtain a receipt from the person who called for the records after the audit, nor could he say who received them other than that it was accused or "some known representative of his" (R. 48).

Accused appeared before a board of officers on May 28, 1934, and, having been fully warned of his rights as set out in the 24th Article of War, stated that he had made no transactions through the General Mess Restaurant Fund between October 1, 1932, and October 4, 1933 (R. 67). He stated further that on October 1, 1932, he was the custodian of the General Mess Restaurant Fund and of the sum of $267.79 (R. 68).

Upon the records of the Army National Bank, where the account of the General Mess Restaurant Fund was carried, accused was the custodian of this fund, and had not been succeeded by any other person. The ledger sheet of the Army National Bank for the General Mess Restaurant Fund for the period from February 24, 1932, to October 5, 1933, was identified by the Assistant Cashier of the bank (R. 7) and received in evidence as Exhibit 1. This ledger sheet showed that on October 1, 1932, the status of the fund was a balance of $252.53, and that on October 4, 1933, its status was an overdraft of two cents. The transactions which reduced the account to an overdraft were as follows: A debit of four cents on October 29th, apparently a tax on checks; a debit of $21.18 on July 28, 1933; and a debit of $231.33 on October 4,

1933 (R. 9). A deposit slip of the Army National Bank for $21.18, dated July 27, 1933, was identified by the Assistant Cashier and received in evidence as Exhibit 2 (R. 8-9). The word "us" appeared upon the deposit slip in the handwriting of one of the officers of the bank, indicating that the check deposited was drawn upon the bank. The Assistant Cashier testified that he was familiar with the handwriting on the deposit slip (R. 10). It appeared to be accused's (R. 11,20,46,51-52). He also identified another deposit slip of $151.81, dated October 4, 1933, which was received in evidence as Exhibit 3 (R. 9). This slip showed that checks to the amount of $1580.69 recited thereon were brought to the bank, cash to the amount of $1428.80 returned to the depositor, and $151.89 deposited to the Company Fund, Guard and Service Company. Among the checks listed on the deposit slip is one for $231.33. The handwriting on this deposit slip appeared to be accused's (R. 11-12,20,46,52).

Major George Blair, Infantry, the commanding officer of the Guard and Service Company, identified a sheet of check stubs as that of the Guard and Service Company Fund covering entries numbered 221, 222 and 223, and the sheet was received in evidence as Exhibit 4. The entry on stub 222, dated July 27, shows a deposit of $21.18 and bears the initial "J". Major Blair testified that the entire entry on this stub, including the initial "J", was made by accused, and that he had required accused to make all the entries in that check stub book. Witness had been the custodian of the Guard and Service Company Fund since October 1, 1932. From that date to the present time no payment had been made by the General Mess Restaurant Fund to the Guard and Service Company for any property or other indebtedness (R. 17-20,52,60-61).

The tabulation of the balances of the collection sheet of the Guard and Service Company, Voucher No. 1 for July, 1933, was identified by the custodian of the books of the company and received in evidence as Exhibit 9. This was the collection sheet for the last ten-day period of June, 1933, and showed that $48.84 in cash should have been deposited in the bank early in July (R. 53). A bill of the Elliot Arms Company amounting to $27.66 was paid on July 27, 1933, and $21.18 was deposited in the bank on the same day by accused who handled the collections of the company (Ex. 2, R. 22,54). To bring the fund up to the proper balance it was necessary that the sum of $21.18 be deposited. It was deposited in the form of a check (R. 56). The custodian also identified the tabulation of the balances of the collection sheet of the

Guard and Service Company, Voucher No. 1, for the month of October, 1933, and it was received in evidence as Exhibit 11 (R. 55). The amount of cash to be deposited as the result of this collection was $152.72, and it was necessary that this amount be deposited to bring the account to a balance. There was then deposited $151.81 (later changed to $151.89) (R. 56, Ex. 3, R. 12). This sheet shows that the amount collected on September 30, 1933, was $1291.33 and that the amount paid out was $1138.61, leaving $152.72 to be deposited, as stated above (R. 55-56). A deposit of ninety-one cents was made later to cover the remainder on the collection sheet (R. 65).

Under Specification 1 of Charge II, the evidence shows that Special Orders No. 281, The Command and General Staff School, Fort Leavenworth, Kansas, December 20, 1932, detailed Major Clarence B. Lindner, Coast Artillery Corps (D.O.L.), to audit, among other special funds, the fund of the General Mess, and further directed that any fund not listed on the order be reported by the custodian thereof to Major Lindner for audit. The General Mess Restaurant Fund was not listed in the order. Accused was then the custodian of both of these funds. In compliance with this order he submitted for audit the General Mess Fund but he did not submit the General Mess Restaurant Fund (R. 43-44, Ex. 6).

Under Specification 3 of Charge II, the evidence recited above shows that accused was the custodian of the General Mess Restaurant Fund from the date of its inception until he was relieved from duty at Fort Leavenworth and left that station on or about November 26, 1933. The evidence also shows that after his departure a thorough search failed to disclose any vouchers, bank statements, paid checks, or the council book of this fund, all of which were required by paragraphs 18 b (1) and 18 a (1), Army Regulations 210-50, of which the court took judicial notice (R. 68), to be retained three years from the date of the payment of the accounts covered by them or from the date of the last entry in the council book.

4. When the case for the prosecution was completed the defense moved for a finding of not guilty under Charge I and the specifications thereunder, upon the ground that the prosecution had "failed to submit evidence of those elements of proof which are required in the Courts-Martial Manual for the charge of embezzlement." In reply the prosecution presented a recapitulation of the evidence against the accused, and the court thereupon overruled the motion of the defense.

5. The evidence for the defense was confined to character testimony which may be summarized briefly as follows:

George W. Parker, Cashier, Army National Bank, Fort Leavenworth, Kansas, testified that he had known accused for six and one-half or seven years and during that time had had a great many transactions with him, both personal and with these company funds. Everything had been handled in a straightforward way to the entire satisfaction of the bank. Nearly every month they had given him on his "I.O.U." about $500 to make change and had not taken it from his account. He always brought this back as soon as he had made his collections. Witness believed in accused's financial honesty and probity and would never question it (R. 71-72).

Major Lewis A. Pulling, 10th Cavalry, testified that accused served as Assistant Exchange Officer under him from September, 1932, to June, 1933, and had complete charge of the sub-exchange in the Guard and Service Company Barracks, formerly the General Mess Restaurant. His department operated very satisfactorily and made a nice profit. Witness "placed a lot of confidence" in accused (R. 73), and from his experience and close association with him had every reason to believe in his honesty and probity. The records showed that he was honest and trustworthy in every respect (R. 74).

Major Francis T. Bonsteel, Cavalry, testified that accused was Assistant Post Exchange Officer under him as Post Exchange Officer since May, 1932, and in charge of a branch exchange which was formerly the General Mess Restaurant. Accused's management of that branch was always satisfactory and he performed his duties in a most efficient manner. The Post Exchange had a most exacting system of records pertaining to the branch exchange but no irregularities of any kind were discovered under the charge of accused. Accused had been most reliable in all duties that had come under witness' observation (R. 74-75).

First Lieutenant Frank S. Frickelton, Quartermaster Corps, testified that since August, 1932, he had almost daily business dealings with accused for considerable amounts through the Sales Commissary and accused's organization mess. These transactions were highly satisfactory from the standpoint of efficiency (R. 75-76).

Major Pearson Menoher, 10th Cavalry, testified that he had known accused very intimately for about seven years, their relations being

both personal and official. He had never had any reason to believe that accused's honesty was other than the highest type. It had never been questioned (R. 76-77).

There was received in evidence a letter addressed to accused, dated November 20, 1933, signed by seven commanders of organizations participating in the General Mess at Fort Leavenworth, expressing their appreciation for the splendid manner in which the General Mess had been operated by him during the past four years, and for his hearty cooperation with the organization commanders. The letter bears the 1st Indorsement of Major General S. Heintzelman, Commandant, Command and General Staff School, stating in part that the General Mess was the best enlisted men's mess that he had had anything to do with, and that he was really concerned with the replacement of accused in order to maintain the standard (R. 77, Defense Exhibit 1).

Additional evidence of the good character of the accused is found as follows in the testimony of the witnesses for the prosecution under cross-examination by the defense:

William J. Reardon, Assistant Cashier, Army National Bank, testified that he had had considerable dealings with accused over the period of the past six years. During the period that accused was in the Guard and Service Company witness handled "quite a bit of his accounts". He had always found accused to be an excellent man. In all his transactions he was absolutely honest and "aboveboard". Witness had overpaid him and he had returned the money. They let accused have money for his payrolls "on his own say so". In one transaction he overpaid accused and the latter called him up the next day, "kidded" him about it, and returned the money which amounted to $100. In the "change rolls" witness would sometimes give him a roll too much of halves or quarters and to his knowledge they had always been returned (R. 16-17).

Major Blair testified that he had always considered accused honest (R. 22).

Accused made an unsworn statement substantially as follows:

He was stationed at Fort Leavenworth with the Disciplinary Barracks from April, 1927, until September, 1929. In the latter part of November, 1929, he was assigned as Mess Officer of the General Mess of the Guard

and Service Company at Fort Leavenworth, and to administrative duties with the Company. The mess was a large one of some three hundred and fifty men regularly for meals. They had a very nice mess and good equipment but no source of funds outside of making assessments on the difference organization members of the mess. During his four-years as Mess Officer, however, no such assessments were made. To get funds for other necesssary equipment they needed some source of income, so in the spring of 1930 authority was granted to open a "so-called" restaurant, where they served short orders and sold tobacco and toilet articles. This was continued until September, 1932.

Until March, 1932, this activity was carried in the funds of the General Mess, but on that date it was made a separate fund and called the General Mess Restaurant Fund, for accounting purposes only. This was under his supervision as Mess Officer and under that of the council of the General Mess. During these four years they made a nice profit. With the approval of the council he bought a great number of articles, including a mechanical refrigerator costing about $900, a gas range, and other equipment, at a total cost of above $5,000. Their receipts would average close to $4,000 a month.

In September, 1932, the Commandant directed that this General Mess Restaurant be discontinued as such, and that its activities be taken over by the Post Exchange. Accused was appointed as Assistant Exchange Officer to continue their operation. An inventory was made of the stock about the same time. A board of officers appraised the value of the stock and fixtures held by the General Mess Restaurant Fund. On September 30 (1932), at the end of the quarter, the fund was properly balanced. Accused was custodian of the fund at the time. It was submitted to Major Lindner, the Post Inspector, for audit at some time after September 30. From that date to the present accused did not recall of having or having seen the books. If they were returned to him he did not know it. He did not get them himself. Any transactions that had been made on that fund from that date, October 21, or whatever date it was, he did not know about. There was a balance showing some fourteen dollars and odd cents on hand. Undoubtedly he had this money on hand. He had a safe in the office where he kept this fund. He had money in the safe of all kinds, not any big amount, but always some. If this money came into his personal possession he did not use it. He did not believe that he had it. It might have been picked up in several ways.

He got his orders to leave the post on a Sunday, and he was supposed to be at his new station the following Saturday. He had to get all of his packing done inside of a week.

He did not hear of this investigation of any discrepancy until in January when he received a letter from Major Blair asking him about this particular property. Since he had been back there during the investigation by the board he had tried to "picture the happenings" on these certain dates. He had tried to get evidence and facts that would clear the whole thing up but he had not been able to do so. He could tell no more about it then than he could a month before. He did not know that he ever would. He did not sign any checks and he did not get the money in his personal possession for his own use. He had a record he was very proud of. "It is just too bad, that is all." (R. 78-81)

6. From the preceding summary of the evidence the following facts stand out clear and uncontradicted. Accused was the custodian of the General Mess Restaurant Fund, and, by his own admission, had $267.79 of that fund in his possession on October 1, 1932, of which $252.83 was on deposit in the Army National Bank in his account as such custodian, and $14.96 in his hands in cash, according to the audit of October 21, 1932. The bank records show that the sum of $252.53 was then on deposit, differing slightly from the report of audit. In his unsworn statement before the court accused says that he did not get the books of this fund after they were audited and did not recall having or having seen them after that time. He knew nothing about any transactions made on that fund since the date of audit. From his admissions and statements it might reasonably be expected that the sum of $252.53 still stood to his credit in the bank as custodian, and that he held the remainder of the fund in cash. He offers no explanation as to its disposition. It appears, however, that under special orders of the Command and General Staff School, under date of December 20, 1932, he should have presented the fund to Major Lindner for audit, but did not do so. The fund dropped from sight and apparently was forgotten. The amount in the bank remained intact for some months, from October, 1932, until July, 1933. The bank knew no custodian other than accused and continued to hold the deposit in his name. While the audit of October 21, 1932, showed accounts payable to the amount of $250.20, as reported by the custodian, and a "net cash worth" of only $17.59, there are no records to show that any such bills were ever paid. On July 28, 1933, however, the bank paid a check for $21.18 drawn upon this fund and debited that amount against the fund. Presumably the bank honored no check

other than one purporting to have been drawn by accused, the custodian of the fund. There is no suggestion of a forged check and had there been such a check it would have come to the hands of the accused in due course after payment and the forgery discovered. Again, on October 4, 1933, the bank paid a check for $231.33, drawn upon this fund, and debited that amount. This exhausted the amount held by the bank to the credit of the fund. In fact, it brought about an overdraft of two cents. The presumption is very strong that accused drew this check, as well as the first. If there were no other evidence against the accused, his failure to account for or produce the money admittedly in his possession in October, 1932, and the depletion of the fund by checks presumably drawn by him in July and October, 1933, would be consistent with his guilt of the embezzlement charged but perhaps would not be wholly inconsistent with any other reasonable hypothesis. However, it is not necessary to speculate upon this for there is other and very compelling evidence quite inconsistent with any possible theory of innocence.

Accused, while he remained the custodian of the General Mess Restaurant Fund after that fund was audited in October, 1932, and then apparently forgotten, was also the company administrative officer of the Guard and Service Company and had been designated by the commanding officer of that company as its pay agent. As such he had the responsibility for the payment of the men of the company, the handling of the collection sheet, and the deposit of the funds. The collection sheet of this company for the last ten day period of June, 1933, showed $48.84 in cash in the hands of the pay agent, the accused, which should have been deposited in the bank early in July. A bill of $27.66 was paid in cash from this money on July 27, 1933, and there remained $21.18 to be deposited. On the same day a check on the Army National Bank for $21.18 was deposited to the credit of the Guard and Service Company by a deposit slip in the handwriting of accused. And the bank on the following day, July 28, debited the account of the General Mess Restaurant Fund with a like amount. Accused, at the time the check was deposited to the credit of the Guard and Service Company, entered it in his own handwriting as a credit upon a stub of the check book of that company. Again on the 4th day of October, 1933, there was presented to the Army National Bank a deposit slip in accused's handwriting upon which were listed a number of checks of the total value of $1580.69, and it was indicated upon the slip that of that amount the sum of $151.81 was to be deposited. This was done by the bank, and the remainder given

to the depositor in cash. In this list of checks deposited is one for $231.33. The collection sheet of the Guard and Service Company, voucher No. 1 for the month of October, 1933, shows that the amount collected on September 30, 1933, was $1291.33 and the amount paid out $1138.61, thus leaving $152.72 to be deposited by the accused as pay agent. A deposit of ninety-one cents was made later to cover the remainder on this collection sheet. On the same day that this check for $231.33 was cashed, October 4, the bank debited the account of the General Mess Restaurant Fund with a like amount. It further appears that from October 1, 1932, to the date of the trial, no payment had been made by the General Mess Restaurant Fund to the Guard and Service Company for any property or other indebtedness.

The checks for $21.18 and $231.33, which were debited by the bank against the account of the General Mess Restaurant Fund, on July 28 and October 4, 1932, respectively, have not been found and are not in evidence. It cannot be seriously questioned but that both checks were drawn by accused. The bank officers were entirely familiar with his signature, would have honored checks signed by no other person, and it is unlikely that they would have been deceived by a forged signature. But had the signature been forged, the check in due course would have come to the hands of the accused, as mentioned before, and the forgery discovered. The further evidence that these checks could not have been forged is that they were actually handled by the accused, deposited in the one instance, and cashed in the other. While this evidence is entirely circumstantial, it is of compelling force because of the remarkable coincidence in the dates and the unusual and odd amounts of these checks. There can be no reasonable doubt that the check for $21.18, which the bank debited against the account of the General Mess Restaurant Fund on July 28, 1933, is the check for $21.18 upon the same bank which the accused deposited on the day before to the credit of the Guard and Service Company Fund. And the same thing must be said of the check for $231.33 which the bank debited against the account of the General Mess Restaurant Fund on October 4, 1933, and the check for the like amount which the accused cashed at that bank on the same day.

The conclusion is inescapable that, notwithstanding the unsworn denial of the accused that he had made any transaction in the fund of the General Mess Restaurant after October 21, 1932, the date of

the last audit, he did after that date draw two checks to exhaust this fund, and converted their proceeds to his own use. Evidently he used these proceeds to replace funds of the Guard and Service Company which he had used after he had collected them at the pay table. This fund is intact and without shortages but the fund of the General Mess Restaurant which he admits having in his possession in October, 1932, is gone, and he offers not the slighest explanation as to where it went.

Some sixteen years ago, the Board of Review, with the concurrence of The Judge Advocate General, held substantially as follows:

> "Any adult man who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or turn them over when his stewardhip terminates, can not complain if the natural presumption that he has spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence." CM 123488 (1918); Dig. Ops. JAG, 1912-30, Sec. 1563-2.

This principle has since been followed by the Board of Review and is applicable with added weight in the instant case where the accused, the custodian of funds, which he admits that he had in his possession, offers no explanation at all as to what has become of them.

7. At the time of the trial accused was 47 6/12 years of age. The statement of his service, as it appears in the Official Army Register, is as follows:

> "Pvt. Btry F 333 F.A. 19 Sept. 17 to 27 Dec. 17; 2 lt. Engr. Sec. O.R.C. 17 Sept. 17; accepted 28 Sept. 17; active duty 28 Dec. 17; 1 lt. C.E.N.A. 14 June 18; accepted 22 June 18; capt. C.E., U.S.A. 13 Sept. 18; accepted 25 Sept. 18; hon. dis. 29 Oct. 19.-1 lt. of Inf. 1 July 20; accepted 27 Sept. 20; capt. 9 Jan. 31; Q.M.C. 25 Nov. 33."

8. 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 and the sentence, and warrants confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of the 93d or 96th Article of War.

W. A. Trumbull, Judge Advocate.
Archibald Hill, Judge Advocate.
Theodore Hull, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 202212

SEP 26 1934

UNITED STATES	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sam Houston, Texas,
Captain HAROLD K. COULTER	)	July 2, 3, and 5, 1934.
(0-5736), 23d Infantry.	)	Dismissal.

OPINION of the BOARD OF REVIEW
TURNBULL, KING and HALL, Judge Advocates.

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

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

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

Specification 1: In that Captain Harold K. Coulter, 23d Infantry, United States Army, during all of the hereinafter specified time having a lawful wedded wife, to-wit: one Frances Biddle Coulter, did, at 300 Alameda Circle, Olmos Park Estates, Bexar County, Texas, on sundry and various occasions, between the 1st day of January, A.D., 1934, and the 1st day of April, A.D., 1934, willfully, deliberately, dishonorably, unlawfully and wrongfully occupy the same bedroom with and have illicit sexual intercourse with a woman, to-wit: one Alice T. Morgan, said Alice T. Morgan not being then and there married to said Captain Harold K. Coulter.

Specification 2: In that Captain Harold K. Coulter, 23d Infantry, United States Army, during all of the

hereinafter specified time having a lawful wedded wife, to-wit: one Frances Biddle Coulter, did, at a ranch near Campbellton, Atascosa County, Texas, on or about the 1st day of February, A.D., 1934, willfully, deliberately, dishonorably, unlawfully and wrongfully occupy the same bedroom with and have illicit sexual intercourse with a woman, to-wit: one Alice T. Morgan, said Alice T. Morgan not being then and there married to said Captain Harold K. Coulter.

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

Specification 1: In that Captain Harold K. Coulter, 23d Infantry, United States Army, did, at San Antonio, Bexar County, Texas, on or about the 1st day of December, A.D., 1933, dishonorably, wrongfully and knowingly fail and neglect to pay to Dr. Moody's Sanitarium, a corporation, the sum of $480.00, then and there owing by him, the said Captain Harold K. Coulter on his promissory note dated in August, 1933, in favor of said Dr. Moody's Sanitarium, a corporation, for balance of rent due for a house of said Dr. Moody's Sanitarium, a corporation, at 511 Brackenridge Avenue, San Antonio, Texas, from the month of May, A.D., 1930, to the month of August, A.D., 1933, rented by the said Captain Harold K. Coulter, he, during all of said period that he rented said house, having received from the United States, money allowance for the rental of said quarters in the sum of $68.00 for each and every month.

Specification 2: In that Captain Harold K. Coulter, 23d Infantry, United States Army, did, at Fort Sam Houston, Bexar County, Texas, on or about the 28th day of February, A.D., 1934, willfully, unlawfully and wrongfully cause and direct two enlisted men of the United States Army, to-wit: Corporal George R. Perry, Company M, 23d Infantry, and Private First Class Ben E. Creel, Company M, 23d Infantry, the said Captain Harold K. Coulter

being then and there the Commanding Officer of said Company M, 23d Infantry, to obtain and procure from the supply sergeant of their said company two automatic pistols, caliber .45, property of the United States Government, and thereafter to remove from the military reservation said two pistols, and being armed with said pistols to act as guards and watchmen at premises, 300 Alameda Circle, Olmos Park Estates, Bexar County, Texas, on the night of February 28-March 1, 1934, said premises being private property of a citizen and not government property.

Specification 3: (Finding of not guilty.)

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

Specification: In that Captain Harold K. Coulter, 23d Infantry, United States Army, during the hereinafter specified time having a lawful wedded wife, to-wit: one Frances Biddle Coulter, did, at a ranch near Campbellton, Atascosa County, Texas, on or about the 5th day of November, A.D., 1933, willfully, deliberately, dishonorably, unlawfully and wrongfully occupy the same bed with and have illicit sexual intercourse with a woman, to-wit: one Alice T. Morgan, said Alice T. Morgan not being then and there married to said Captain Harold K. Coulter.

ADDITIONAL CHARGE II: Violation of the 69th Article of War. (Finding of guilty disapproved by reviewing authority.)

Specification 1: (Finding of guilty disapproved by reviewing authority.)

Specification 2: (Finding of guilty disapproved by reviewing authority.)

He pleaded not guilty to all charges and specifications, and was found guilty of Specifications 1 and 2 of Charge I, and of Charge I; of Specifications 1 and 2 of Charge II, and of Charge II, Original Charges; of the Specification of Charge I, and of Charge I; and of Specifications 1 and 2 of Charge II, and of Charge II, Additional Charges. He was found not guilty of Specification 3 of Charge II, Original Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Additional Charge II and Specifications 1 and 2 thereunder, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution under the specifications of which the accused was found guilty, and such findings not disapproved by the reviewing authority, may be summarized substantially as follows:

Specification 1, Charge I, Original Charges.

Colonel D. H. Biddle, U. S. Army, Retired, testified that accused married his daughter, Frances, about nine years ago at Fort Des Moines, Iowa, and that they were still married (R. 10-11).

Mrs. D. L. Jensen, residing at 416 Resaca Street, Corpus Christi, Texas, testified that she is a housewife and had been in the employ of Mrs. Alice Morgan at 300 Alameda Circle from October 1, 1933, until about March 1, 1934. Witness' husband made the appointment with Mrs. Morgan for this employment. He was also employed by Mrs. Morgan and went to work on the same day.

Witness saw accused at Mrs. Morgan's house on the first day she went to work there (R. 12). He had a key to the house and frequently had his meals there and slept there, on some of which occasions he was not accompanied by his wife. Witness had waked accused and Mrs. Morgan in bed together in the "pink room" in the latter's house at 300 Alameda Circle on or about February 25 (1934). On this occasion Mrs. Morgan's nine year old son, "Billy, Jr.," had asked witness if he could go to Sunday school with another little boy. She knew that this little boy went to a Catholic school and that Mrs. Morgan did not want her son to go to a Catholic church, so she went to the "pink room" to ask her about it. The "pink room" was distinguished from the other rooms by the cover on

the bed and was the only room that had a double bed (R. 17). She knocked on the door of this room and it opened about six inches because it was not securely fastened. She saw Mrs. Morgan and accused in bed together from where she stood, about three feet from the bed. Both called out her name and she recognized them by their voices (R. 18). She did not see their heads but saw their bodies from about the shoulders down. Mrs. Morgan was on the other side of accused. He was wearing the upper part of his pajamas and Mrs. Morgan a nightgown. She told Mrs. Morgan she was sorry and did not mean to disturb her. Mrs. Morgan said it was her own fault because she did not have the door locked but thought she did. Witness could not describe what the two were doing because she turned and walked away (R. 19).

At another time, between January 1 and April 1, 1934, Mrs. Morgan asked witness one night to go to the "pink room", where accused was asleep, and ask him to come down to her bedroom. She could not wake accused, who was hard to wake, and so asked her husband to go back and wake him (R. 20). She saw accused pass their bedroom on his way to Mrs. Morgan's bedroom but did not see him coming back. This occurred not merely once but several times (R. 21). Quite often between these dates she had found accused in the double bed in the "pink room" of the Alameda Circle house with Mrs. Morgan and had waked him up to see that he got to work on time. They were dressed in nightgown and pajamas, the pajamas those of Mrs. Morgan's divorced husband (R. 22). Mrs. Morgan's child could have seen these peculiar actions on the part of his mother and accused. He never walked in on his mother but would come to witness' room, wake her and ask where his mother was (R. 23-24). During witness' employment in the home of Mrs. Morgan she observed that the guests of the house "would never wake up in the same bed they would go to sleep in" (R. 38).

Witness accidentally shot her husband on March 17, 1933, at 1504 West Ashby Place, San Antonio. She had not been prosecuted nor punished and was still living with him. She had never been paid by Mr. Morgan nor had she received anything to testify in the case, neither promise nor offer from anyone (R. 24).

Upon cross-examination by the defense, Mrs. Jensen testified that she had lived in San Antonio for twenty-six years (R. 24). Prior to her marriage to Mr. Jensen about five and one-half years ago her name

was Dora Louise Rohmer. Before she was employed by Mrs. Morgan she had worked in a telephone office eight or nine years, and at one time had done extra work for Mr. Wilson Southwell. Her husband got her the job at Mrs. Morgan's. The family then consisted of Mrs. Morgan and her son "Billy". They lived in a large house of "around 21 rooms" at 300 Alameda Circle. A great many people came out to see Mrs. Morgan (R. 25). On the night of February 25 (1934) Mrs. Coulter was at Fort Clark. She and her two children came out to Mrs. Morgan's "quite a bit", and stayed two or three days at a time. At one time she came from the hospital and stayed about a week. Accused came with her to visit and stayed at night quite frequently. Mrs. Morgan's boy was a couple of years older than accused's children. There were two guest rooms in the Alameda Circle house that were occupied almost all of the time by various people from town (R. 27). Witness knew that Mrs. Morgan was divorced from her husband and she had met him about two or three weeks after she went to work for Mrs. Morgan. It was two or three months later when he first talked to her at 300 Alameda Circle. On March 1 (1934) she and her husband left Mrs. Morgan's and went to Houston with "Billy" and Mr. Morgan, where they lived with Mr. Morgan at the Lamar Hotel for the next three weeks (R. 32). There Mr. Morgan paid her husband the salary Mrs. Morgan owed him. Mrs. Morgan had never discharged them (R. 33). She would not let the child go to Houston unless witness went with him. At Houston she told Mr. Morgan that she did not think "Billy" was being "raised up proper, in the proper atmosphere". Mr. Morgan "wasn't fussing" about getting the child (R. 34), but was trying to get him raised properly (R. 33). While at the Lamar Hotel she and her husband were receiving a salary from Mrs. Morgan but Mr. Morgan was paying the expenses there (R. 36). Mr. Morgan did not give her a hundred dollar bill in the presence of his boy (R. 34). She had received no money from him since she left Mrs. Morgan's employ. After leaving Houston she went to San Antonio and had not since been employed (R. 35), nor had she been to Mrs. Morgan's house at Alameda Circle or seen her (R. 36). Her salary at Mrs. Morgan's was $35 a month (R. 37).

When they got in the car and were leaving for Houston, witness told Mr. Morgan what she had seen and that she "did not think Billy was being raised in a proper atmosphere". He told her that he wanted her to see Colonel Arrowsmith and took her before him where she made a statement

that day under oath. Mr. Morgan did not give her money to make this statement. She never did see accused and Mrs. Morgan in the act of sexual intercourse. She "couldn't see exactly what they were doing" (R. 41-42).

While staying at the Lamar Hotel in Houston as the guest of Mr. Morgan, her husband always remained at the hotel with her throughout the night, and she denied that Mrs. Morgan had ever caught her in the hotel with Mr. Morgan at 5:00 o'clock in the morning (R. 43).

Mr. T. L. Jensen, residing at 416 Resaca Street, Corpus Christi, Texas, testified that he entered the employ of Mrs. Morgan on October 21, 1933, and remained in her employ as a general utility man until March 2, 1934 (R. 50-51). He worked at her house at 300 Alameda Circle. He had seen accused go to her room there at night. One night there after the first of the year, at the request of his wife, he had waked accused in the "pink room" some time after midnight to go down to Mrs. Morgan's room. This room had the only double bed in the house. He had first gone there to see who was in the bed and had then told his wife that Mrs. Coulter was in there and that he had better not wake accused. His wife said that Mrs. Coulter was in the "blue room". He went back and switched on the light to find accused and his little boy there. He told accused to go to Mrs. Morgan's room and accused turned off the light and walked out. Accused was in his underclothes. Witness took him by the hand and showed him the way to go. Accused understood what witness woke him for. Witness saw him pass his own door, the second room from Mrs. Morgan's, and when last seen he was going toward Mrs. Morgan's room (R. 53-54).

Witness took breakfast to Mrs. Morgan and accused in the "pink room" one morning around the 16th of February (1934). He knocked on the door, told them he had their breakfast, and Mrs. Morgan opened the door. She was in her nightgown, accused in pajamas. Mrs. Coulter was not in the house at the time but had told him that she was going to Fort Clark (R. 55).

Accused first had a master key to open everything in Mrs. Morgan's house. Witness was asked by Mrs. Morgan to get this key from accused

since they had no key to the house. Accused told him that he would have a key made for himself. Accused did not contribute to the upkeep or expenses of this property. He stayed and slept out there "a good deal", but his wife was not there all of the time when he was (R. 72).

When witness saw Mr. Morgan yesterday or the day before it was because the prosecution had him there as one of its witnesses. The prosecution had asked Mr. Morgan to keep in touch with him when he moved, and when Mr. Morgan had telephoned him and he had come up Mr. Morgan had said he was telephoning for the prosecution (R. 70-71).

Mr. Morgan gave Mrs. Morgan a Cadillac and a Plymouth car for Christmas, both new cars. Accused had one of the cars for awhile (R. 71).

Witness testified twice at Colonel Arrowsmith's investigation. At the first time he did not know what it was all about and he did not say anything because he did not want to bring Mrs. Morgan in (R. 57). He had never been in Mr. Morgan's employ. Mrs. Morgan paid his salary. He and his wife had fifty or sixty dollars coming to them when they left on March 2d and went to Houston. When they got there he asked Mr. Morgan if he "minded" paying him and getting the money from Mrs. Morgan, and Mr. Morgan paid him the fifty dollars due him (R. 58). Mr. Morgan had never offered him any inducement to testify, nor had anybody else (R. 59). They went to Houston because Mrs. Morgan asked them to go. Mr. Morgan wanted to take "Billy" there and she would not let him go unless witness and his wife went along (R. 58).

Upon cross-examination by the defense, Mr. Jensen testified that since he was discharged from the Army he had been with the San Antonio Public Service Company for eight years as a bus driver and trainman. He married first in 1925, and again in 1929. He got the job at Mrs. Morgan's through the Alamo Employment Agency and went to work there on October 21, 1933.

People did not stay very often at the residence at Alameda Drive. Mrs. Coulter and her children were out there a great many times. Accused came with them. Other people came out and spent the night (R. 61). There were two guest rooms in the house but they were not occupied all of the time. He could not say how many times he saw accused out there, "it

happened so frequently". Witness first met Mr. Morgan at the house three or four weeks after he went to work there. At some time in December Mr. Morgan asked him about the "awful mess out at the house". He told Mr. Morgan he did not want to say anything about it and Mr. Morgan said that he did not have to say anything, he knew enough without being told (R. 62). This conversation occurred when he took Mr. Morgan to town in the car and then to the post to talk to Colonel Arrowsmith. Colonel Arrowsmith called witness in and swore him as a witness. He testified in the morning and said that he did not care to answer the questions (R. 63). He refused to answer because he did not want to implicate Mrs. Morgan. He did not know that he was coming there as a witness. He had told Mr. Morgan that something was going on at the house, but Mr. Morgan was not paying him for this information, and he was giving it although in the employ of Mrs. Morgan who was paying his salary. He knew there was ill feeling between the two (R. 65). Mr. Morgan had told him that he wanted the child and he was giving this information to help him get the child (R. 66). When he came back from Colonel Arrowsmith's that morning, he told Mrs. Morgan that he did not answer the questions.

At Houston Mr. Morgan gave him the $50 that Mrs. Morgan owed him, and after the three weeks gave him $65 for his salary. At the time of trial he was employed by Mr. J. C. Hetridge, Receiver, Gulf Coast Oil Company (R. 57). Mr. Morgan had called Mr. Hetridge and the latter had got him the job. The last time he had talked to Mr. Morgan was the day before at the Quadrangle. He had seen Mr. Morgan twice since his trip to Houston (R. 68). Mr. Morgan had not written him since he moved to Corpus Christi and he had no letters that Mr. Morgan had written him. When he went to Houston and asked for a job he had no money and Mr. Morgan gave him $50 to go down to Corpus Christi until he got paid (R. 69). He borrowed this and expected to pay it back. Mr. Morgan had never given him $100 in the presence of the Morgan child (R. 70).

Specification 2, Charge I, Original Charges.

Joe Mesa, residing at 1419 St. Augustine, Laredo, Texas, testified that in February, 1934, he was at Mr. Morgan's ranch "on this side of Pleasanton", where he took care of the house and cooked for Mr. Morgan. He saw accused and Mrs. Morgan come down there alone in the Cadillac

"about 6 to 7" on February 20 or 22, 1934. They slept "over in big house". Mrs. Morgan was in the middle room. He changed "one bed" in the middle room and in the evening saw accused and Mrs. Morgan in one bed together. Accused told him he wanted breakfast at 7 o'clock, but he did not see accused in the morning since they left the ranch at 4:00 or 5:00 o'clock (R. 74-75). He did not talk very good English but did talk Spanish (R. 79). He did not know that he was going to have to testify, but Mr. Morgan had told him to "tell the truth" (R. 81).

Upon cross-examination he testified that he had been employed for a year and two months by Mr. Morgan to stay on the ranch and take care of the house. The ranch is 19 miles from Pleasanton (R. 75). He lived in a little house about 30 feet from the "big house". Mr. Grady Peeler was at the ranch when accused and Mrs. Morgan came there at that time. Accused and Mrs. Morgan drank two bottles of whisky. At 1:00 or 2:00 o'clock witness saw the light still burning (R. 76), and he went to the "big house" to turn off the lights. He opened the door of the room where accused and Mrs. Morgan were and saw them together in bed. The lights were then burning and he could not turn them off and they ran all night and were still burning when accused and Mrs. Morgan left at 4:00 or 5:00 o'clock in the morning (R. 77). He had told Mr. Morgan about everything he had seen in that room. Mr. Morgan had given him no money to come there and he was not working for Mr. Morgan but for the Hamilton Hotel for the last two months (R. 80).

Grady Peeler testified that he was a ranchman and last February was on what is known as the "Morgan Ranch" at Campbellton in Atascosa County. He had on the ranch at that time a Mexican by the name of "Mesa" (R. 82). Accused and Mrs. Morgan came to the ranch one afternoon around February 20. They were just getting out of their car and walking into the main building when he came by the house from the pasture and spoke to them. Later when he was around the house looking after the lighting plant and the "water still", they were sitting in the kitchen (R. 83). He saw nobody else there. The car that accused and Mrs. Morgan were driving, a new one belonging to Mrs. Morgan, the only car there, left the house the next morning between 5:00 and 6:00 o'clock. Witness saw them in the distance but could not see who was in the car (R. 84).

Upon cross-examination by the defense, he testified that this ranch house is on the top of a hill. The garage and servants' quarters are in a small building next to the main dwelling. He first saw accused and Mrs. Morgan getting out of the car around 5:00 or 6:00 o'clock in the afternoon. The house he lived in was just west of the main dwelling (R. 85). There were lights in the ranch house during the night. When he got up in the morning it was dark and the lights in the ranch house were not on before accused and Mrs. Morgan left, but he could only see those on the west side of the ranch house (R. 86).

Specification 1, Charge II, Original Charges.

Under this specification the evidence shows that in May, 1930, accused rented from Dr. Moody's Sanitarium, a corporation, a house in which he still lived. During the past year the rent had been $30 a month, but before that it was $40. He had been very much in default and on August 31, 1933, he owed $480, for which he gave a note (R. 119-120, 123). This note was due on November 28 (1933) (R. 120, 123). From the date of the note until March 10, 1934, he paid the current rent on the premises, but paid nothing on the note. On the latter date he paid $50 and there was a great deal of controversy from then on as to how much of his payments were to be applied on the rent and how much on the note (R. 120-121). At the time of the trial he owed more money to his landlord than he did in August, 1933 (R. 122). Accused had been notified of his default upon the note (R. 123), and two letters in regard to the matter had been written to the military authorities, one to The Adjutant General in January, 1934 (R. 124). The prosecution asked the court to take judicial notice that accused was receiving a rental allowance of $68 per month during this period (R. 125).

Specification 2, Charge II, Original Charges.

Under this specification the evidence shows that on February 28, 1934, accused called by telephone Corporal George R. Perry of Company M, 23d Infantry, which company accused commanded, and asked if there were two men who would like to volunteer to make some extra money by guarding a house for a friend of his (R. 99). He told Perry to get two Government pistols from the supply sergeant at the supply room, which Perry did

without signing for them upon telling the sergeant that the accused had told him to get them (R. 100). Private First Class Ben E. Creel, of the same company, agreed to go with Corporal Perry (R. 105). Perry gave Creel one of the pistols (R. 100), and the latter went with accused and Mrs. Morgan in a taxi to Mrs. Morgan's home. There Creel guarded the place from around 9 o'clock that night (R. 105) until about 7 o'clock the next morning, for which he was paid $5 by accused (R. 106, 57). Mrs. Morgan paid this (R. 152). Perry went out later to Mrs. Morgan's large house on Alameda Circle taking the other pistol (R. 100-101). Both Perry and Creel were about the house during the evening (R. 57). Each had received instructions from accused to pick up people loitering about the place and to find out who they were (R. 103, 105). Accused had indicated to them that Mrs. Morgan's house was to be guarded because of threats made to kidnap her child (R. 103, 106). Both of them wore civilian clothes (R. 107, 108). The services they rendered were voluntary (R. 104, 106). Accused's first communication to Perry was a request and not an order. Perry returned the pistols to the supply room on the following morning (R. 102).

Specification, Charge I, Additional Charges.

Mrs. D. L. Jensen testified that she had taken a trip about November (1933) to a ranch near Campbellton, Atascosa County, Texas, in which Mrs. Morgan had some interest (R. 13). There were a number of people on this trip but those who spent the second night at the ranch were Mrs. Morgan, accused and Mrs. Coulter, the three children, witness and her husband. "They were drinking rather heavily" and were intoxicated. Mrs. Morgan was sleeping in the front room and accused in the middle room. About 2:00 or 3:00 o'clock in the morning after they had gone to bed Mrs. Morgan came to witness and asked her to get accused. She found accused in the double bed in the middle room and got him for Mrs. Morgan, and accused and Mrs. Morgan then went back in the middle room together (R. 14). Mrs. Morgan asked her to watch between the bedroom where Mrs. Morgan then was and that where Mrs. Coulter was asleep to see that Mrs. Coulter did not wake up and surprise her. Witness could see Mrs. Coulter by a small bedlight between the two double beds and watched her for about thirty minutes while accused and Mrs. Morgan were in bed together in the middle room. Mrs. Coulter wakened and called Mrs. Morgan by name but received no response. Witness then took Mrs. Morgan by the arm and brought her out on the

sleeping porch. Mrs. Morgan and accused had then been together "just about one hour", and she was in bed with him when witness took her out. She was in a nightgown and accused was in pajamas (R. 15). There was no light in the room and she felt for Mrs. Morgan. In doing so she felt accused. She knew it was he because she had taken them in the room together (R. 39). She "couldn't say what they were doing" in bed. Mrs. Morgan went out on the sleeping porch to sleep but insisted that accused come out there with her. He took a quilt and a pillow out on the front porch and laid down in the swing. Witness wanted him to go back inside and asked him if he would not try to get Mrs. Morgan to go to bed. He sat on the edge of the bed and talked to her for ten or fifteen minutes. Then they left and went back to bed and witness went to bed. This was around the 5th of November. She fixed the day because she knew it was two weeks after they went to work for Mrs. Morgan on October 21 (R. 16).

Upon cross-examination by the defense, Mrs. Jensen testified that in this house in Atascosa County there were a sleeping porch, bedroom right next to it, front bedroom with two double beds, and a center bedroom with one double bed. On November 5 accused and Mrs. Coulter, Mrs. Morgan, the three children, witness and her husband retired around midnight. Mrs. Coulter was sleeping in the front room where the two double beds were. To watch her witness went to the lower hall between the two bedrooms and was then dressed in a nightgown (R. 29). Her husband had gone to bed and she was sleeping on the sleeping porch with him and the three children. Mrs. Morgan, accused and Mrs. Coulter were drinking that night and were intoxicated. Mrs. Morgan staggered when she walked. Witness and her husband were not drinking. Mrs. Coulter went to bed first, accused a short time after (R. 30). Mrs. Morgan retired about the same time. The nearest light was in the room where Mrs. Coulter was sleeping, the door of which was closed. There was a small hall between this room and Mrs. Morgan's, and no light in Mrs. Morgan's room. Witness opened the door of this room and closed it after she got in. She could not see accused and Mrs. Morgan in bed together but knew they were there since she had taken them in together around 1:00 or 2:00 o'clock in the morning (R. 31). She watched Mrs. Coulter because she was working for Mrs. Morgan (R. 37).

Mr. T. J. Jensen testified that there was a party out at the Morgan ranch near Campbellton around November 5, 1933, about two weeks after he

went to work for Mrs. Morgan. Those who were there on the second night were accused and Mrs. Coulter, Mrs. Morgan, "Billy" Morgan, and accused's children, witness and his wife. The Mexican there was Joe Mesa. Witness went to bed that night around 12:00 or 1:00 o'clock (R. 51) on the first bed on the sleeping porch. There are three bedrooms. Mrs. Jensen brought Mrs. Morgan into the bedroom adjoining the sleeping porch around 1:00 or 2:00 o'clock in the morning. There are big double glass doors between, both wide open, and he could see the bed his wife took Mrs. Morgan to. There had been a good deal of drinking but neither he nor his wife had been drinking. Accused came out after witness' wife brought Mrs. Morgan out (R. 52). He sat down on the bed and talked to Mrs. Morgan for about ten or fifteen minutes or so, and "petted her and quieted her down". Then both left together. Mrs. Morgan was in a nightgown (R. 53).

Upon cross-examination by the defense, Mr. Jensen testified that all he saw was that his wife brought Mrs. Morgan out and that accused came out, sat down, and talked for about five minutes (R. 59). His own wife was dressed. There was a light burning in the kitchen. Mrs. Coulter "was supposed to be in the room facing the lake" and Mrs. Morgan was "supposed to stay" in the room with her. He could not see that room, and he did not see Mrs. Coulter at any time that night after he went to bed (R. 60-61).

4. The evidence for the defense may be summarized substantially as follows:

Mrs. Alice T. Morgan testified that she was a housewife and lived at 300 Alameda Circle. She was legally divorced from Mr. Morgan by decree dated July 17, 1933 (R. 144). The divorce was obtained by her upon grounds of incompatibility and mental and physical cruelty. She had one child of nine years of age, William Ferguson Morgan, Jr., the custody of whom was given to her. A financial settlement was made by division of the community property and the payment to her of a certain amount of money as her separate estate (R. 145). Mr. Morgan at a later date had tried to change the financial settlement by trying to force her to give him a part of her property that he had settled upon her at the time of the divorce (R. 146). He had taken away from her a ranching property at Campbellton in Atascosa County, Texas. After her divorce she continued to live in her old residence at Alameda Circle. Before her divorce she had entertained officers there

and had served them with food and drinks. Mr. Morgan knew of these parties and participated in them. After the divorce there were quite often quarrels and disturbances between them. He threatened to sue her for the child, kidnap the child, shoot her, burn down her house, and "turn the underworld loose" on her (R. 147). He said it would only cost $25 to have her killed.

Accused's family, consisting of Mrs. Coulter and her two children, came out quite often to visit her and her child both before and since the divorce. This friendship between her family and accused and his family had been going on over a period of years. Accused's children were congenial and played together with her boy (R. 148). On some occasions she went to accused for advice about the automobiles, or furnishing the house, or something that she did not know anything about. She did not know that Mr. Morgan was jealous of this friendly association between the two families. About Christmas of last year she had Dora and Tom Jensen as servants in her house. Later on she discharged them because she heard they were testifying and "lying against" her. She could not "recommend their truth or veracity" and would not believe them under oath. She indulged in intoxicating drinks, but did not know if she ever lost the mental control of her faculties by such indulgence (R. 149).

Witness denied that between the dates of January 1 and April 1, 1934, accused had ever occupied a room with her at her home at 300 Alameda Circle in San Antonio, Texas, and while occupying this room, had improper relations or sexual intercourse with her. She denied that about February 1, 1934, accused had ever occupied the same room with her at a ranch house near Campbellton, Atascosa County, Texas, or had illicit relations or sexual intercourse with her there. And she further denied that she had ever had improper sexual relations with accused either at Alameda Circle or at a ranch house at Campbellton, Texas. She had made a trip to her ranch house at Campbellton with accused and Mrs. Coulter, one of their children, and her own child, and had spent the night there. The lighting system used at the ranch made it impossible to turn on one light and have it burn (R. 150). Two or more lights must be turned on before the system will operate. She thought many times that her son would actually be kidnapped and she had asked accused if he could get someone to watch the house because people

had been seen around there. Most of all she feared that Mr. Morgan would take her child. She was surprised that Mr. Morgan came to the Corps Area Commander and made complaints against accused (R. 156). Mr. Morgan had remarked to her referring to accused's transfer: "God damn it, I got the job done". And he said that he would put accused "on his feet" if he resigned.

Witness made a trip with accused down to the ranch near Campbellton about the latter part of February, 1934, in her Cadillac car. She went to Tilden, stopped by the ranch on the way back to San Antonio, hunted for about an hour, came in to the kitchen to drink a bottle of beer, and then came to town. On this visit they saw Mr. Peeler on the back porch at dusk (R. 155). Shortly after that they left. Mr. Peeler was foreman for Mr. Morgan on the ranch. At the time of the trial he was working for Mr. Morgan's brother, Mr. T. P. Morgan. She knew a Mexican boy by the name of Joe Mesa who worked for Mr. Morgan on the ranch. She denied that on that trip she occupied a room with accused and had sexual intercourse with him.

Upon cross-examination witness testified that she knew accused was charged with adultery with her (R. 155), and that the charge was made at Alameda Circle and also at the ranch near Campbellton. Mr. Morgan paid $2,500 for the divorce and it was "more or less" by mutual agreement. She first met accused three or four years ago, and he started coming to her house a year or two ago (R. 156). When she and Mr. Morgan "split up domestic relations", he gave her the house at Alameda Circle and a note for $100,000. In his contract he was to give her $5,000 cash also. She got an additional amount but not that amount. She got a Cadillac car at Christmas. Mr. Morgan gave her the Plymouth car.

Witness was in Chicago last week. Mr. Morgan paid for that trip, and when she wired him for enough money to come back he sent it to her (R. 157).

Mr. Peeler, the foreman of the ranch, had a one-fourth interest in the cattle, the Southern Cattle Company operating it at that time. It was in the latter part of February that she made the trip to the ranch, drank a bottle of beer, and came back. She had made quite a number of trips to that ranch and accused and various other people had been with

her (R. 159). That was the only trip in February. She remembered going down in February with a lady and gentleman. That was another trip but was on the same date. She and accused came into town and went back to the ranch with other people. That was the only date in February. She was then asked by the prosecution and replied as follows:

> "Q. Didn't you go down at 11 or 12 o'clock at night; didn't you run out of gas; didn't Captain Coulter go in the ranch and get gas; didn't you stay there that night; didn't you hunt there?
> A. Yes."

Mr. Morgan told her about going to see General MacArthur in Washington to stop this trial, and also mentioned Senator Sheppard and Senator Connally. She inferred from his remark, "God damn it, I have got the job done", that he was satisfied with the transfer of accused away from there (R. 160). He told her that he did not like "the atmosphere at the house for his child". Under the divorce agreement he had the right to see the child at certain times, but she had denied him the child when it interfered with his schooling or he was not well. She frequented the night clubs, "The Metro Bar" and "Shadowland", a good deal. Accused had taken her to many parties at those two places. She had never paid the checks. When in Chicago the two weeks before, she had received one telegram and one note from accused, both of which she had destroyed (R. 161). She notified him that she could not appear in this court and testify unless it was a closed trial, and he agreed to get a closed trial for her. She had been out to "the little brown house on Burr Road", the "Brackenridge house", with accused and with other people. She did not know who owned the house (R. 162). She was there once with accused playing poker (R. 163)

Upon redirect examination witness testified that Mrs. Coulter and her children had been over to her house on Alameda "Drive" several times a week. "Many times" accused would come with her. She had "many times" visited Mrs. Coulter at her home and quite often accused would be there. Mr. Morgan agreed to pay for the divorce to get it (R. 164). Since the divorce there had been constant friction and ill feeling between them, particularly over the custody of the child. Mr. and Mrs. Jensen started to work for her on October 21, 1933, and worked until the middle of

March, she thought. She learned at Houston that Mr. Morgan was "having communications" with them after he brought them over to the post. They stayed one week in Mr. Morgan's hotel in Houston while her "baby" was there. She got her "baby" and understood that they stayed two weeks longer. They had not worked for her since. The "brown house on Burr Road" was some little house Mr. Wilson Southwell had for the public (R. 165). She went there once or twice with accused, one day to a poker game when there were six or seven guests. Mr. Morgan wanted to get her out of town before the trial, and paid her way to Chicago to get her out of town. She came back because she was subpoenaed. He told her that if she came out here and testified, Captain Scott (trial judge advocate) promised to tear her to pieces. He also told her that he would stop payments on the note if she came out here and testified, and she had not received her payment that month (R. 166).

Upon recross examination (by Captain Scott), she testified that she recalled the conversation he had with her at the office of her attorney, Mr. Douglas Lawley, at which Captain Parmley and Mr. Morgan were present. She recalled that he told her he did not want to embarrass and humiliate her by putting her on the stand, and that he would let her go, as far as he was concerned, but that his subpoena would hold good until the time she left. And she recalled that Mr. Lawley called her up and told her the defense would need her, and that Captain Scott had told Mr. Lawley she could not leave (R. 167).

Upon examination by the court witness testified that Mrs. Coulter and her baby were at her home the day before.

Upon recross examination witness testified that since accused had been restricted to the limits of his quarters and the post of Fort Sam Houston, she had quite often visited his quarters at night. She spent the night there before she went to Chicago, and had been in constant communication with him. He called her up after the charges were served on him, and she and her little boy called Captain Scott.

Upon redirect examination witness testified that Mrs. Coulter was present at the house with accused when she spent the night there (R. 168).

Upon recross examination witness testified that last year at a party at "Shadowland", Mrs. Coulter, in public before accused, Captain Voss,

the latter's present wife, Nell White, and various others, accused her of infidelity. At the time Mrs. Coulter was not well, she was just released from the hospital and was drinking, and was very much in a hysterical condition. She was then recuperating in witness' home from a recent operation. She visited witness' house the next day and apologized for having created a scene. She said she did not know what she said. That satisfactorily explained the matter to witness (R. 169).

William T. Morgan, Jr., said that he did not understand the meaning of an oath, but did understand what it was to tell the truth, was going to tell the truth, and knew what happens to little boys that do not tell the truth. Upon this qualification he was sworn and testified that he was the son of Mrs. Alice Morgan and lived at 300 Alameda Circle. He knew the accused (R. 170). He was in the "low 4th" grade at school and could read and write. He remembered going out Alameda Drive in a car with his father and Mrs. Jensen. That morning his "daddy" gave Mr. Jensen some money, and in the afternoon he saw his "daddy" give Mrs. Jensen some money. He could see only the top of the bill, but thought it was a hundred dillar bill (R. 171).

Thereupon the prosecution (Captain Scott) stated that in view of the pitiful situation in the case, and in view of the fact that he thought it "utterly reprehensible and contemptible" to put a little child on the stand on an occasion of this sort, he was not going to cross-examine him. The defense then stated that the reason the child was called in was because his mother's honor was at stake; that it was better for him to be called and testify to the passing of money between his father and the servants than to have his mother's honor questioned; and that the defense in bringing him up as a witness had done so realizing that a child of that age knows nothing but to tell the truth (R. 172). To this the prosecution replied that it was within the knowledge of the court the influence that can be brought to bear on a small child living under this unfortunate domestic situation, and the pressure that can be brought to bear; and that it was "perfectly outrageous" to put a child of his age on the stand, a thing he had never seen done in a military court before and hoped never to see done again.

Upon examination by the court, the witness testified that he would be ten years old in August (R. 173).

Mrs. Arthur F. Shell testified that she lives at 602 East Guenther, San Antonio, Texas, and knows accused. She will have been employed sixteen years by the San Antonio Rubber Stamp Company on August 1. She employed Mrs. Jensen in the shop for two days. In the early fall of 1933 she received a telephone call for Mrs. Jensen from Mr. Morgan, who left a note for her (R. 174).

Upon cross-examination she testified that she "took it for granted" it was Mr. Morgan because he said that was his name.

Upon redirect examination she testified that Mrs. Jensen was employed at the shop either two or three days about the first of September. The telephone conversation was about two weeks after she left.

Upon recross-examination witness testified that she remembered this so well because she made a note of the phone call. Shortly after Mrs. Jensen worked for her she tried to locate her for work and could not find her. Witness' employer, Mr. Wilson Southwell, reminded her of this (R. 175).

Frances Biddle Coulter testified that she is the wife of accused and resides at 511 Breckenridge Avenue, San Antonio, Texas. She has known Mrs. Morgan about four years, and very well since her divorce. She has visited her house very often, mostly after her divorce. There is a friendship between her family and Mrs. Morgan's. They have many interests together. Their children play together. Mrs. Morgan has been a very lonesome woman and has asked accused for advice on different things. These included the ranch Mr. Morgan wanted to take away from her; furniture in her home which cost about a hundred dollars a month, and which he "regulated" and "cut down expenses"; automobiles out of order which he had sent to the shop and cared for; and he trained her son in his riding class. She had seen no change in the character of Mrs. Morgan's conduct since the absence of her husband after her divorce. She knew Mr. Morgan very slightly. She had attended parties when Mr. and Mrs. Morgan were present. Mrs. Morgan gave one large party at which Mr. Morgan and his brother, Mr. T. P. Morgan, became drunk and objectionable and were asked to leave. Witness had attended parties at the "Shadowland" night club. Upon being asked if she had become hysterical on one occasion at this club, and if so, to explain the circumstances, she said that a short time before that she had been operated on and was "very nervous and hysterical and very sick" after

coming from the operation. She had two violent nervous chills (R. 177) and Mr. Morgan came to her shortly after she had gotten out of bed and made the remark that "they were having an affair". He "poisoned" her mind against her husband and Mrs. Morgan, her friend. If she said anything unkind it was because Mr. Morgan told her a lie, and if she "had been sober" she "would have thrown it out as rubbish which it is". She had noticed "absolutely nothing but friendly relations" between accused and Mrs. Morgan. She had never seen accused alone in a bedroom with Mrs. Morgan at 300 Alameda Circle or elsewhere. The children were with them "practically always" when they visited at the Morgan house. Nothing had ever happened before the eyes of the children in the Morgan house detrimental to their welfare (R. 178). She had never heard accused make derogatory remarks about Mr. Morgan in the presence of Mrs. Morgan's child, and, furthermore, Mrs. Morgan would not allow it (R. 180). Witness, accused, their child, and Mrs. Morgan and her child made a visit to the Morgan ranch at Campbellton about the 4th or 5th of November, 1933. There was a large party the day before and most of the people went home. Accused left in the afternoon to play polo and came back tired. He had been up all the night before pulling an automobile out of a ditch. After he came back they sat in the kitchen and later on all went to bed. Witness and Mrs. Morgan slept in the front room, accused in the middle room, and the children in the back with the maid. Mrs. Morgan went to bed at the same time witness did and did not leave the room that night to go to the other rooms. Witness went to the other room during the night when it was dark and Mrs. Morgan was then asleep in the bed next to her (R. 181). Nothing improper happened between accused and Mrs. Morgan. Witness was in a position to know that nothing happened.

Upon cross-examination witness testified that she did not think Mrs. Morgan left the room (R. 182) but that she could not say positively. She could hardly be expected to like Mr. Morgan after what he had done to her family. She was away from home from May 4 to 13 (1934), and from November 30 to December 13 (1933). She went to Fort Clark this year and stayed three weeks (R. 183).

Accused was sworn at his own request and testified that he knew Mrs. Morgan (R. 184) "fairly well". She got a divorce from her husband on the grounds of "mental cruelty". There had been a friendship existing between

the Coulter and Morgan families for a period of over four years. They have been on numerous parties together at the Army post and at 300 Alameda Circle. Mrs. Morgan had come to him for advice about certain business affairs.

About the last day of February Mrs. Morgan called him up about 9 o'clock. She was crying and was frightened. The servants were going out that night and she did not want to leave the house alone. People had been loitering around there. She had seen them and other people had seen them. "Most everybody around there had seen them." She was in a very hysterical mood (R. 185). He called his company and asked if there were some men who wanted to make some money, and engaged one man there as a guard from about 9:30. Mrs. Morgan got in his car and they went to pick up this man and took him to Alameda Circle where they told him what he was supposed to do. It was a "voluntary proposition" that the soldiers came out. Mrs. Morgan gave him $5, and he gave it to the soldier (R. 186).

About Saturday noon, November 4, his family and Mrs. Morgan's family made a trip to Mrs. Morgan's ranch at Campbellton. They hunted birds that afternoon, had dinner, and retired that night about 1 o'clock. He was awakened by a wreck on the Campbellton road and helped get a car back on the road, after which he did not go to bed. He played a polo game that afternoon at San Antonio and returned to the ranch after dark, about 8 or 9 o'clock, at which time all the guests were gone except his wife and her son, Mrs. Morgan and her son, and the two servants, the Jensens (R. 189). The lighting system there is a Kohler system, and two or more lights are necessary to get light.

He denied that on this occasion he had "any dishonorable, unlawful, wrongful sexual intercourse with Mrs. Morgan". The two ladies slept in the front room.

In the latter part of February, Mrs. Morgan had a new car on which she wanted to get some mileage, and she wished to get some air. He was going to Tilden, a matter of a hundred miles, to look at a polo horse. They left about 1 or 1:30, drove to Tilden, saw the horse, and stopped in at the ranch about 4 o'clock. They went in, "filled several guns", and went out to shoot some birds in the station wagon (R. 190). They

came back in, got a couple of bottles of beer, and were in the kitchen when Mr. Peeler came in and talked to Mrs. Morgan for a few minutes. The main reason for stopping in there was to get a saddle for Mrs. Morgan to take home and to secure a hunting dog which belonged to her. They left for San Antonio bringing the dog with them. There they went to her home and then back to town, stopping in at the "Metro" about 11:30 that night. This was the only occasion since the first of the year that she had been at the ranch and she wanted to get a number of her personal effects that had been out there for about a year. They did not have much time in the afternoon and "the sorting of books and such effects required quite a bit of time". He denied that on this visit he had illicit sexual intercourse with Mrs. Morgan.

He denied that he had illicit sexual intercourse with Mrs. Morgan at her home, 300 Alameda Circle, between the dates of January and April, 1934 (R. 191).

He was present on or about Christmas of last year when Mrs. Coulter became hysterical. Mrs. Coulter had attended the party, the first one after returning from the hospital, and probably should not have gone, but after she was there she had several drinks and became slightly intoxicated and hysterical. She straightened the matter out the next day (R. 192).

Upon cross-examination witness testified that he had settled the debt to the Moody Sanitarium satisfactorily to Mr. Moody. The money he was charged with owing last August he had paid with a note renewed at their request the previous Saturday (R. 193).

The trip to the ranch with Mr. Brady and a lady was five or six hours after the trip around February 20, when it is alleged he and Mrs. Morgan spent the night there, and was practically on the same day. He was not down there alone over night. His wife at the time was in Fort Clark (R. 194).

He told the men who were guards about Mrs. Morgan's house to get pistols. He was the custodian of the pistols and had the responsibility for them (R. 195).

While his wife was at Fort Clark he escorted Mrs. Morgan at several parties and was spending a great deal of time in her house. While his wife was in the hospital from November 30 to December 13, 1933, he was at Mrs. Morgan's house when they had occasion to go somewhere. They went to night clubs three or four times and out to visit friends several times. He spent a good deal of time at the "Metro" with Mrs. Morgan (R. 200).

5. Before entering upon a discussion of the evidence, certain miscellaneous matters relating to the trial may be mentioned.

When the court convened on the morning of July 5, 1934, for the last day of the hearing, the trial judge advocate announced that he had a communication which he believed should be read to the court. He then made a statement substantially as follows: On the evening of July 3 the defense requested certain witnesses they desired, one of whom was General Hagood (the appointing authority), and, as General Hagood was presumed to be leaving, the defense counsel drew up a deposition asking certain questions. Among these questions only the following are of interest here:

"Third interrogatory: Do you know Mr. William F. Morgan of San Antonio, Texas?

Fourth interrogatory: Did you have one or more conferences with Mr. Morgan during the spring of 1934, relative to Captain Harold K. Coulter, 23rd Infantry?

Fifth interrogatory: Did Mr. Morgan request you to stop the court-martial proceedings against Captain Harold K. Coulter, 23rd Infantry?

Sixth interrogatory: Did you direct that the military police picket and watch the grounds of Mrs. William F. Morgan's residence at Alameda Circle, San Antonio, Texas?

Seventh interrogatory: If your answer to foregoing is in the negative, who did?

Eighth interrogatory: Did you offer Captain Harold K. Coulter, 23rd Infantry, the choice of receiving punishment

under the 104th Article of War, or trial by General Court-Martial?

Ninth interrogatory: Did Captain Coulter elect to receive punishment under the 104th Article of War?"

There were no cross-interrogatories by the prosecution. The form of deposition with the interrogatories was transmitted to the Commanding General, Eighth Corps Area (Major General Hagood), by letter signed by the trial judge advocate, Captain Scott, dated July 4, 1934, in which he requested that the testimony of Major General Hagood be taken upon the attached deposition in view of the fact that it was understood that he was about to leave the vicinity temporarily and his presence had been requested on July 5 by the defense. The request was returned by the following indorsement of Headquarters Eighth Corps Area:

"1. The witness desired by the defense is the Appointing Authority, is superior to the Court, does not come within its jurisdiction, and the Court has no authority to compel his attendance. He is also the Reviewing Authority. The proceedings of the Court are not valid until they have received his approval and it would be contrary to good order and military discipline for him to do anything at this time that might subsequently embarrass him in his action upon the proceedings. Moreover, it is believed that the testimony of the witness would be immaterial and unnecessary.

2. The Corps Area Commander therefore declines to direct the witness to appear before the Court and declines to direct anyone to take his deposition."

The trial judge advocate further stated that the court, of course, realized that the answers to the eighth and ninth interrogatories dealing with whether or not Captain Coulter was offered the choice of punishment under the 104th Article of War or a general court-martial, and whether or not he elected to do so, were best shown by the papers themselves. He then tendered the papers to the defense in their entirety, with the stipulation that they were the original papers and came from his possession

(R. 135-138).

It thus appears that the testimony of the appointing authority, who was also the reviewing authority, was desired in the capacity of a witness for the defense and was denied. There is no prohibition that one who has appointed the court and anticipates that he will act as reviewing authority in a certain case may not in that case appear as a witness for the defense. While a member of the court may not continue as such and participate in its findings if he is the accuser or appears as a witness for the prosecution, without nullifying its proceedings (A.W. 8), there is no prohibition that he shall not appear as a witness for the defense and he may be called and used as such a witness without loss of his eligibility as a member of the court. And if a member of the court can appear as a witness for the defense without disqualification in the duties he is called upon to perform as such member, certainly the appointing authority may appear as a witness for the defense without disqualification in the duties he may later perform as reviewing authority. The refusal of the appointing authority to permit himself to be used as a witness for the defense was unwarranted as a matter of law and might have been highly prejudicial to the rights of the accused but for the fact that the testimony sought from him was not material to the issues of the case.

The original documents relating to the action under the 104th Article of War tendered by the prosecution to the defense for introduction in evidence as the best evidence of the matters upon which information was sought by the eighth and ninth interrogatories submitted to the appointing authority, were later offered in evidence by the defense, received, and marked "Defense Exhibit No. 5" (R. 213). They show that a communication from the office of the Corps Area Commander, Eighth Corps Area, to Captain Harold K. Coulter, 23d Infantry, dated May 15, 1934, charged that on or about the 1st day of February, last, at a ranch near Campbellton, Atascosa County, Texas, he was guilty of certain offenses of an immoral character which had been made the subject of an investigation by the Corps Area Inspector. The communication recited that he was familiar with the allegations made against him and had been shown a copy of the charges prepared as a result of that investigation. It further stated that, in order to avoid a public scandal, which would involve innocent parties, the Corps Area Commander had decided to suspend action in the matter of

a general court-martial and to proceed against him under the 104th Article of War; and that, in accordance with the provisions of that Article, he was thereby given an opportunity to demand trial by general court-martial, and should state by indorsement thereon whether such trial were demanded. By indorsement dated May 17, 1934, accused requested that compliance with the communication be suspended until completion of maneuvers or he was able to consult his attorney and the individuals concerned. He was granted a reasonable time in which to reply, and under date of May 22, 1934, did reply substantially as follows: He did not desire a settlement of the matter under the 104th Article of War. He invited attention to the fact that the charge set forth in the basic letter was no part of the charge referred to Lieutenant Colonel Williams (investigating officer) for investigation under paragraph 35, Manual for Courts-Martial, and expressed the belief that if the charge were investigated as contemplated under the paragraph mentioned the investigation would fully exonerate him and obviate the necessity for further action. And he concluded with the statement that, if the suggestion made in the preceding paragraph were not given favorable consideration, he then desired a trial by general court-martial (Defense Exhibit No. 5).

The comment of Captain Scott, trial judge advocate, upon the act of the defense in putting upon the stand William T. Morgan, Jr., a child of nine years of age, the son of Mrs. Alice T. Morgan (R. 172-173), recited in paragraph 4, supra, was wholly uncalled for under the circumstances and was objectionable. Comment as to the weight to be given to the testimony of the child would not have been improper in final argument but it was out of place when made at the time the testimony was received, and the language used by the trial judge advocate in his reference to the action of the defense in calling the child as a witness was intemperate and without justification. However, this error of the prosecution is not considered to have injuriously affected the substantial rights of the accused.

6. The proof of the sexual misconduct of the accused, a married man, with Alice T. Morgan, a woman not his wife, alleged in Specification 1 of Charge I, Original Charges, and the Specification, Charge I, Additional Charges, rests upon the testimony of Mr. and Mrs. Jensen, the two servants of Mrs. Morgan. Under the first of these two specifications, which alleges

misconduct at Mrs. Morgan's home near San Antonio between January 1 and April 1, 1934, their testimony shows the following: Accused had a key to Mrs. Morgan's house in San Antonio, and frequently had his meals there and slept there. His wife was not always present on these occasions. He had been seen going to Mrs. Morgan's bedroom at night. Mrs. Jensen had quite frequently found accused in bed with Mrs. Morgan in the morning and had wakened him so that he could get to his work on time. Mr. Jensen had taken breakfast to accused and Mrs. Morgan in the "pink room" about the 16th of February, 1934. Mrs. Morgan had opened the door when he knocked. She was in a nightgown and accused in pajamas. Mrs. Coulter was not in the house at that time. Mrs. Morgan had several times asked Mrs. Jensen to get accused to come to her bedroom at night. At one time Mrs. Jensen was unable to waken him and asked her husband to do it. This he did and helped accused, who was dressed in his underclothes, to find the way to Mrs. Morgan's room. On or about February 25, 1934, Mrs. Jensen had occasion to speak to Mrs. Morgan one morning and knocked on the door of the "pink room". This room was the only one in the house that had a double bed. The door happened to be insecurely fastened and swung open about six inches when she knocked on it. She saw accused and Mrs. Morgan in the bed together. Accused was wearing the upper part only of his pajamas and Mrs. Morgan a nightgown. Mrs. Jensen could not describe what they were doing because she turned and walked away.

Under the other of these two specifications, which alleges misconduct at the ranch near Campbellton on or about November 5, 1933, the testimony of Mr. and Mrs. Jensen shows the following: Mrs. Morgan and her little boy, accused and his wife and their two children, and the two servants spent the night at the ranch. There had been considerable drinking by Mrs. Morgan, accused and his wife during the evening and they were intoxicated. Mrs. Morgan and Mrs. Coulter were sleeping in the front room and accused was in the double bed in the middle room. About 2 o'clock in the morning after all had gone to bed Mrs. Morgan came out to Mrs. Jensen on the sleeping porch and asked her to get accused. She found him in the double bed in the middle room. He and Mrs. Morgan then went back in the middle room together and Mrs. Morgan asked her to watch between this room and that where Mrs. Coulter was sleeping to see that Mrs. Coulter did not wake up and surprise her. Mrs. Jensen watched Mrs. Coulter for about thirty minutes while accused and Mrs. Morgan were in bed together in the middle room. Mrs. Coulter wakened and called Mrs. Morgan. Mrs. Jensen

then went into the room where accused and Mrs. Morgan were, felt in the bed for Mrs. Morgan, and in doing so felt accused. She took Mrs. Morgan by the arm and brought her out on the sleeping porch. The two had been together about an hour. Mrs. Morgan was in a nightgown and accused in pajamas.

The proof of the sexual misconduct of accused with Mrs. Morgan at the ranch near Campbellton on or about February 1, 1934, alleged in Specification 2 of Charge I, Original Charges, rests upon the testimony of the Mexican boy, Joe Mesa, with some corroboration in that of Grady Peeler, and shows the following: Accused and Mrs. Morgan reached this ranch in a new car late one afternoon about February 20, 1934, and were seen by Mesa and Mr. Peeler upon their arrival and during the evening. About 1 or 2 o'clock in the morning Mesa saw a light still burning in the ranch house and went in to turn it off. He opened the door of the room where accused and Mrs. Morgan were and saw them together in bed. The new car that accused and Mrs. Morgan were driving was seen by both witnesses leaving the place the next morning between 5 and 6 o'clock. The discrepancy in dates between the allegation and the proof is not considered material since the testimony of all witnesses, including those of the defense, indicates that there was no misapprehension as to the particular occasion referred to.

Unsuccessful effort was made by the defense to weaken the testimony of the two Jensens and the Mexican, Joe Mesa, by cross-examination in an attempt to show that they had received money from Mr. Morgan. Some of the testimony of Mrs. Jensen appears upon first impression to be lacking in plausibility and difficult to believe, particularly that wherein she states that Mrs. Morgan called upon her in the night, not once but several times, to get accused to come to her bedroom. It seems strange that Mrs. Morgan would call upon a servant to do this when it might naturally be expected that she would wish to conceal any such visits by accused, but, since the testimony of both of these servants indicates that she must have known that her intimacies with him were well known to them, it is obvious that she considered any attempt at concealment quite unnecessary. She seems to have made use of the servant to perform this service for her as freely as she would for the performance of any other and usual service. Neither the Jensens nor Joe Mesa testify to having seen accused and Mrs. Morgan in the act of sexual intercourse, but they have testified

that the two did occupy the same bedroom or bed together on various occasions as alleged. In offenses of this nature it is a generally accepted principle of law that "the circumstances must be such as will lead the guarded discretion of a reasonable man to the conclusion that the offense has been committed, and should be so cogent as to exclude any reasonable hypothesis except that of guilt", and further that, "if the facts shown can be reconciled with innocence, they are insufficient to sustain a conviction". 2 Corpus Juris 23; 1 Ruling Case Law 648. If the testimony of these witnesses for the prosecution be accepted as true and the principle just recited applied to the circumstances they have described, there can be no question but that the offenses were committed by the accused as alleged. Consistent with his pleas of not guilty the accused has flatly denied the commission of the wrongful acts alleged. That Mrs. Morgan should make a flat and unequivocal denial, as she did upon the witness stand, was quite to be expected. Upon the face of the record of trial no substantial reason is apparent to support any serious question as to the truth of the stories told upon the stand by the two Jensens and the Mexican boy, Joe Mesa. The court had the opportunity of seeing these witnesses face to face and observing their demeanor upon the stand, not only upon their direct examination, but under a sharp cross-examination in which a futile effort was made to show that in their testimony they were moved by prejudice or self-interest. And the court relied upon the truth of their testimony. The Board of Review sees no reason to do otherwise.

It is provided by Article 499 of the Texas Revised Criminal Statutes that:

> "'Adultery' is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman when either is lawfully married to some other person."

The evidence in this case does not show that accused and Mrs. Morgan lived together, but it does go far to show, under Specification 1 of Charge I, Original Charges, that, while they did not live together, they did indulge in habitual carnal intercourse. It is not necessary, however, to determine whether or not the offense alleged in this specification is adultery under

the local law, since the sexual misconduct of which the accused is convicted is unquestionably such as to dishonor and disgrace him personally as a gentleman, seriously to compromise his position as an officer, and to exhibit him as "morally unworthy to remain a member of the honorable profession of arms". His acts must at the very least be considered those of "indecorum" which indicate a lack of the "moral attribute common to the ideal officer and the perfect gentleman", and as such are punishable as violations of the 95th Article of War. M.C.M., par. 151.

Under Specification 1 of Charge II, Original Charges, the evidence shows that on August 31, 1933, accused was indebted to Dr. Moody's Sanitarium, a corporation, for house rent in arrears to the amount of $480, and that he executed a note in that amount to the corporation, which note became due on November 28, 1933. He defaulted in payment upon the maturity of the note, and, although he was notified of this default and complaint of it made to the military authorities on two separate occasions, he made no payment on the note until on March 10, 1934, he made a payment of $50, which was $20 more than the current rent then due on the premises. The allegation of the specification that he received from the Government during the period of his occupancy of this house a rental allowance of $68 per month is not an element of the offense charged which required proof, but is mere surplusage. The court could not well take judicial notice that the accused was actually "receiving" such an allowance during the period, as it was asked by the prosecution to do, but its inability to do so is immaterial. The neglect of the accused to comply with the promise of payment made in his promissory note unquestionably reflected discredit upon the service and is a matter for which he is properly punishable as a violation of the 96th Article of War.

Under Specification 2 of Charge II, Original Charges, the substance of the offense of which the accused was convicted is not that he caused and directed the two enlisted men to act as armed guards for private property, but that he did cause and direct them to procure Government arms from the supply sergeant, remove them from the reservation, and devote them to a private and wholly unauthorized use. This offense is properly punishable as a disorder to the prejudice of good order and military discipline in violation of the 96th Article of War.

7. At the time of the trial accused was 38 8/12 years of age. The statement of his service as it appears in the Official Army Register is as follows:

"Pvt. and corp. Co. E 3 Inf. Ohio N.G. 19 June 16 to 23 July 17.--2 lt. of Inf. 14 June 17; accepted 24 July 17; 1 lt. 14 June 17; capt. (temp.) 1 Dec. 17 to 21 Oct. 19; capt. 1 July 20; A.C. 1 July 29 to 21 Aug. 29."

8. The court was legally constituted. No errors 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 and the sentence, and warrants confirmation thereof. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War, and is authorized upon conviction of violation of the 96th Article of War.

H. A. Turnbull, Judge Advocate.
[illegible], Judge Advocate.
[illegible], Judge Advocate.

To The Judge Advocate General.

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TITLE

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