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Volume VI

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CM 202213 to CM 202976

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

Board of Review
CM 202213

SEP 12 1934

UNITED STATES v. Private MURRAY E. MALLON (6712062), DEML (U.S.M.A.), Field Music Detachment.	)	UNITED STATES MILITARY ACADEMY Trial by G.C.M., convened at West Point, New York, July 10, 1934. Dishonorable discharge and confinement for three (3) months. West Point, New York.

REVIEW 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 Charge and Specification are as follows:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private Murray E. Mallon, Detached Enlisted Men's List, (U.S.M.A.), Field Music Detachment, did, at West Point, New York, on or about June 16, 1934, feloniously take, steal, and carry away one (1) Riding Crop No. 423W, value about three dollars and fifty cents ($3.50), the property of the Post Exchange, West Point, N. Y.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. The reviewing authority approved the sentence but reduced the period of confinement to three months and withheld the order for execution of the sentence pursuant to Article of War 50½.

3. The evidence will not be set out in detail but may be summarized as follows: Master Sergeant Mahan, First Sergeant of the Band and Field Music Detachment, to which accused belonged, after warning accused of his constitutional rights and asking him if he (accused) had any objection to having his locker inspected, went to accused's locker with accused and two other noncommissioned officers, opened it, and found a riding crop therein, which accused said was his. Sergeant Mahan then went to the Post Exchange and got Mr. Kuehn, Post Exchange Steward, again went to accused's locker, and in his presence again opened it and showed the riding crop hanging therein to Mr. Kuehn, who claimed it as the property of the Post Exchange. Accused admitted that he got it at the Post Exchange, and, when Mr. Kuehn asked if he paid for it, answered, "Hell, no, you know I didn't pay for it. I stole it". Mr. Kuehn recognized the riding crop as property of the Post Exchange by an adhesive band around it and the markings on that band. He further testified that if the riding crop had been sold the sale would have been made by either of two salesmen named Roach and Weyant. Messrs. Roach and Weyant were called and testified to having seen accused about the Post Exchange but further stated positively that they had not sold a riding crop to him. To sell one to an enlisted man would be a strange circumstance, especially to an enlisted man in the branch to which accused belonged.

4. Accused's statement above quoted amounts to a confession, and the question is presented whether or not the record contains aliunde the confession sufficient evidence of the corpus delicti.

5. Professor Wigmore, in his monumental work on evidence, discusses the requirement of evidence of the corpus delicti aliunde the confession in sections 2070, et seq. After admitting the existence of the general rule that a confession must be corroborated, the learned author says:

> "The policy of any rule of the sort is questionable. No one doubts that the warning which it conveys is a proper one; but it is a warning which can be given with equal efficacy by counsel or (in a jurisdiction preserving the orthodox function of judges) by the judge in his charge on the facts. Common intelligence and caution, in the jurors' minds, will sufficiently appreciate it, without a laying on of the rod in the shape of a rule of law.

> Moreover, the danger which it is supposed to guard against is greatly exaggerated in common thought. That danger lies wholly in a false confession of guilt. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare (ante, sec. 867). Such a rule might ordinarily, if not really needed, at least be merely superfluous. But this rule, and all such rules, are to-day constantly resorted to by unscrupulous counsel as mere verbal formulas with which to entrap the trial judge into an error of words in his charge to the jury. These capabilities of abuse make it a positive obstruction to the course of justice."

The requirement of such corroboration is of course too well settled to be overthrown by the opinion of Professor Wigmore or any one else that such a requirement is superfluous and unwise, but his opinion as above stated is valuable as a caution that the requirement of such corroboration ought not to be extended further than is made necessary by existing precedents. Professor Wigmore further says (sec. 2071):

> "In a few jurisdictions, the rule is properly not limited to evidence concerning the 'corpus delicti'; i.e. the corroborating facts may be of any sort whatever, provided only that they tend to produce a confidence in the truth of the confession.
>
> * * * *
>
> But in most jurisdictions the stricter form of rule is taken, and the evidence must concern the 'corpus delicti'".

The author next takes up the definition of corpus delicti (sec. 2072):

> "The meaning of the phrase 'corpus delicti' has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, first, the occurrence of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); secondly, somebody's criminality as the source of the loss,--these two

together involving the commission of a crime by somebody; and, thirdly, the accused's identity as the doer of this crime.

(1) Now, the term 'corpus delicti' seems in its orthodox sense to signify merely the first of these elements, namely, the fact of the specific loss or injury sustained:

* * * *

This, too, is 'a priori' the more natural meaning; for the contrast between the first and the other elements is what is emphasized by the rule; i.e. it warns us to be cautious in convicting, since it may subsequently appear that no one has sustained any loss at all; for example, a man has disappeared, but perhaps he may later reappear alive. To find that he is in truth dead, yet not by criminal violence --i.e. to find the second element lacking is not the discovery against which the rule is designed to warn and protect us.

(2) But by most judges the term is made to include the second element also:

* * * *

This broader form makes the rule much more difficult for the jury to apply amid a complex mass of evidence, and tends to reduce the rule to a juggling-formula.

(3) A third view, indeed, too absurd to be argued with, has occasionally been advanced, at least by counsel, namely, that the 'corpus delicti' includes the third element also, i.e. the accused's identity or agency as the criminal."

6. The Board has been unable to find any decision by the Supreme Court of the United States with respect to the corpus delicti which is helpful in the problem now before it. The decisions of the state courts are so numerous and so variant that it is impossible to harmonize them, and it would unduly prolong this review even to discuss them. The cases concerning the corpus delicti in the courts of the United States inferior to the Supreme Court are, however, sufficiently few and harmonious to make a consideration of them helpful. The earliest of such cases is United States v. Williams, 1 Clifford 5, Fed. Case No. 16707, in the United States Circuit Court for Maine, 1858. That was an indictment

for murder on the high seas. The brig "Albion Cooper" sailed for Cuba from Portland, Maine, having seven persons on board. Nothing was heard of her until nearly two months later when another vessel picked up on the Bahama banks a small boat identified as having belonged to the "Albion Cooper", in which were three members of her crew, together with provisions, water, compass, the "Cooper's" register, clothing proved to have belonged to the mates, and a watch proved to have belonged to the master. Two of the survivors, Cox and Williams, the defendants in the present case, stated that the "Cooper" had been struck by a squall, that all the other members of the ship's company had been washed overboard, and that the vessel had been so much damaged that the three survivors had abandoned her. Lahey, the third survivor, being separately examined by the American consul at Havana, to which place the rescuing vessel had carried the survivors, made contrary statements implicating Cox and Williams in the death of the master of the "Cooper". They were reexamined and confessed the murder of the captain and other members of the ship's company. They were indicted for the murder of the captain but Lahey died before the trial. The district judge, presiding at the trial, thus instructed the jury:

> "It is true that in our jurisprudence the accused cannot be convicted on their own confessions, without some corroborating proof of the corpus delicti. There must be some proof that the crime has been committed independent of the confessions, but it is not necessary that it should be plenary proof. There must be evidence tending or conducing to prove the fact; and if it has that tendency, it is proper to be submitted to a jury, * * *."

Both accused were convicted and upon motions in arrest of judgment and for a new trial, it was contended that there was not, independent of the confessions, such proof of the corpus delicti as would warrant a conviction. Justice Clifford of the Supreme Court of the United States, sitting as Circuit Justice, held the charge of the district judge, above quoted, to have been correct, and denied the motions of the defense in an elaborate opinion. He held that where the body cannot be found the fact of death in a homicide case may be proved by other cogent and unequivocal

circumstances. If this were not so, it would be impossible ever to convict of a murder at sea in which the deceased had been thrown overboard. The court held that the circumstances above related with reference to the voyage and the articles found in the boat with the accused were sufficient corroboration of their confession. Justice Clifford further said:

> "Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required, says Nelson, C.J., in People v. Badgley, 16 Wend. 59, by any of the cases; and in many of them slight corroborating facts were held sufficient. * * * All that can be required is, that there should be corroborative evidence tending to prove the facts embraced in the confession; and where such evidence is introduced, it belongs to the jury, under the instructions of the court, to determine upon its sufficiency."

In Flower v. United States, 116 Fed. 241 (Circuit Court of Appeals for the Fifth Circuit, 1902), a bank teller was convicted of embezzlement of funds of the bank, largely on his own confession, supported, however, by corroborating circumstantial evidence. It appeared from his confession that his shortage amounted to exactly $36,000, and that he had covered it by changing the label on a sealed package of new bills from $4,000 to $40,000. His confession was corroborated by the discovery of a package falsely labeled as stated, and by evidence that he, immediately preceding an inspection of the bank by a national bank examiner, had made efforts to obtain a large sum of money for a brief period. The defense asked for an instruction to the jury in the language of Wharton on Criminal Evidence, section 325, that "the facts which are the basis of the corpus delicti form a distinct ingredient in the case of the prosecution, to be established beyond a reasonable doubt". This instruction was refused and the court instead instructed the jury that defendant could not be convicted unless his confession was corroborated in a material and substantial manner so far as concerns the fact that the offense had actually been committed by some one and unless the jury should be further satisfied upon the entire case, including the confession, beyond a reasonable doubt that the defendant committed the offense. The Circuit Court of Appeals sustained the action of the trial court in refusing and giving the above instructions.

Daeche v. United States, 250 Fed. 566 (CCA 2, 1918), was an indictment for conspiracy to attack merchant vessels by fastening bombs to their sterns. Accused confessed and the question was whether the corpus delicti was proved. The court agreed with Professor Wigmore in questioning the wisdom of the well settled doctrine that a confession must have some corroboration, saying:

> "That the rule has in fact any substantial necessity in justice, we are much disposed to doubt, * * *."

The following quotations show both the principle upon which the court proceeded and facts of the case to which the principle was applied.

> "The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. Gray v. Com., 101 Pa. 380, 47 Am. Rep. 733; State v. Laliyer, 4 Minn. 368 (Gil. 277); Lambright v. State, 34 Fla. 564, 16 South. 582; Pitts v. State, 43 Miss. 472. But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof. U.S. v. Williams, supra; Flower v. U.S., supra; People v. Badgley, 16 Wend. (N.Y.) 53; People v. Jaehne, 103 N.Y. 182, 199, 8 N.E. 374; Ryan v. State, 100 Ala. 94, 14 South. 868; People v. Jones, 123 Cal. 65, 55 Pac. 698.
>
> There was ample corroboration in this latter sense of the existence of an agreement to attack ships outside of Daeche's confession. He was in correspondence, personal and by letter, with Fay and Scholz at about the time in

question. He was certainly trying to learn of the place where or the means whereby he could get high explosives, suitable to their plans. Taken alone they would not establish the conspiracy, but they give great probative strength to the confession, and indeed leave not the least doubt of his guilty. * * * As we have already held that the corroboration need not establish the corpus delicti, at most the charge need only have been that the jury could not convict, if they disbelieved the corroboration altogether. The rule can in any event be no more than that a confession wholly uncorroborated will not serve; any quantitative measure of corroboration we mean to repudiate."

Pearlman v. United States, 10 Fed. (2d) 460 (CCA 9, 1926), was an indictment for transporting a stolen automobile from one state to another. Leong, a Chinaman in San Francisco, bought an automobile of accused, paying him part cash and in part another automobile. When Leong undertook to have the automobile which he had purchased of accused registered, it was discovered that the engine numbers were such as could not possibly have been assigned to a car of that make and year, and upon closer inspection it was seen that they had been altered. The automobile which accused had received in trade from Leong was found abandoned on the street in San Francisco and he was arrested in San Jose, California. When arrested, he said, "Well you have me, and that's all there is to it". It was further proved that accused had been in Salt Lake City, Utah, with the car which he sold to Leong, a few days previous to that sale. The court quoted a part of the passage from Daeche v. United States, given above, and other authorities, setting out the rule that the corpus delicti need not be established aliunde the confession beyond a reasonable doubt, but that some corroborating circumstances were sufficient. Applying that principle to the case before it, the court said:

"The evidence that defendant had crossed the continent with this car, and it was in his possession in San Francisco, that he sold it as his property to Leong, and that it carried a false number, tended to prove the corpus delicti, and corroborates the defendant's admission that it was a stolen car, and that the officers 'had him, and that was all there was to it.'"

7. The authorities above quoted are believed sufficient to show both the general rule of law followed by the federal courts and the manner of its application. Other cases illustrative of the rule are United States v. Boese, 46 Fed. 917; Naftzger v. United States, 200 Fed. 494; Bolland v. United States, 238 Fed. 529; Cohen v. United States, 288 Fed. 835; Mangum v. United States, 289 Fed. 213; Litkofsky v. United States, 9 Fed. (2d) 877; Forlini v. United States, 12 Fed. (2d) 631; Wynkoop v. United States, 22 Fed. (2d) 799; Aplin v. United States, 41 Fed. (2d) 495; Wiggins v. United States, 64 Fed. (2d) 950. The general rule, laid down with the greatest clearness in the Daeche case, is that the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of evidence or at all, but that some evidence corroborative of the confession must be produced and such evidence must touch the corpus delicti. There is such corroborative evidence in the present case, namely, the adhesive band on the crop found in accused's locker and the markings thereon showing that it came from the Post Exchange, the circumstance that a crop so marked was found in the locker of a man not belonging to a mounted organization and having no apparent use for such an article, and the testimony of the two salesmen at the Post Exchange that they had seen him there recently but that he had not purchased a crop. This evidence does not prove the corpus delicti beyond a reasonable doubt, since it does not exclude the possibility of a sale of the crop to some third party and a further innocent transfer of it from the purchaser to accused; but, as has been shown, proof beyond a reasonable doubt aliunde the confession is not required. The above proof touches the corpus delicti, since it tends to show, though it does not absolutely prove, that the crop had been a part of the stock of the Post Exchange and had been wrongfully taken thence. This circumstance distinguishes the case from CM 193828, Morande and Mingo, in which a conviction was set aside because the evidence corroborating the confession did not touch the corpus delicti.

8. The record of trial in the present case is legally sufficient to support the findings and the sentence.

N. A. Trumbull, 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 202225

AUG 15 1934

UNITED STATES v. Private AUDY R. LEACH (6253079), and Private HARRY I. STAPLES (6253864), both of Headquarters Company, 1st Infantry.	SECOND DIVISION Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, July 23, 1934. As to each: Dishonorable discharge and confinement for three (3) months. Fort Francis E. Warren, Wyoming.

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

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

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

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

Specification: In that Private Audy R. Leach, Headquarters Company, 1st Infantry, and Private Harry I. Staples, Headquarters Company, 1st Infantry, acting jointly, and in pursuance of a common interest, did, at Fort Francis E. Warren, Wyoming, on or about June 18, 1934, feloniously take, steal and carry away one (1) pair of civilian trousers, value about seven dollars and fifty cents ($7.50) the property of Private Emanuel F. Lamon, 6253833, Headquarters Company, 1st Infantry.

Each pleaded not guilty to, and was found guilty of, the charge and specification. Evidence of one previous conviction of Leach was introduced, but none of Staples. Each was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for three months. The reviewing

authority approved the sentence, designated Fort Francis E. Warren, Wyoming, as the place of confinement and directed that execution of the sentence be withheld pursuant to Article of War 50½.

3. In this case the two accused were charged with and convicted of larceny of a pair of civilian trousers from a fellow soldier. The owner identified the trousers and testified to their disappearance from his locker and to finding them in a pawn shop. The pawn broker was unable to identify accused. The connection of the accused with the disappearance of the trousers was made entirely by statements made by them to an investigating officer. Each accused made a voluntary statement and both statements were received in evidence without any warning to the court that it should consider each statement against its maker only. The statement of Staples is a confession that he took the trousers and pawned them himself, but it includes the charge that he did so at the instigation of Leach, and that Leach was present at the time that Staples took the trousers and also at the time that Staples pawned them. Leach's statement is wholly inconsistent with the foregoing and does not admit that Leach had any part in the taking of the trousers or in pawning them, but admits only that on the way down town Staples told Leach that the trousers belonged to a third soldier and that Leach drank a part of the whisky bought with the money obtained by pawning the trousers. Leach's statement falls short of being a confession of guilt. It is true that he admits that after the trousers had been stolen Staples told him that they belonged to another soldier, but this is not inconsistent with their having been taken with the permission of that soldier. Even if this be not so, and if it be considered that Staples' statement to Leach amounted to information that the trousers had been stolen, that made Leach, not a principal, but merely an accessory after the fact.

4. Since Leach's statement is not a confession of guilt, the only evidence in the record connecting him with the larceny is the confession of Staples. That the confession or statement of one joint accused made after the transaction is completed is inadmissible against the other is well settled. M.C.M., par. 76, p. 61; par. 104 c, foot p. 117; Dig. Ops. JAG, 1912-30, par. 1294. The introduction of the statement or confession of Staples without warning to the court that it must be considered against him alone was, in the opinion of the Board of Review, error injuriously affecting the substantial rights of Leach.

5. What purported to be a certificate of one previous conviction was introduced against Leach. The certificate was faulty and inadmissible in that it failed to show:

a. The nature of the offense of which accused was convicted, which is of importance in order that the court may decide what weight to attribute to the previous conviction;

b. The date of the previous offense, which should be stated in order that it may appear that that offense was committed within one year preceding the date of the present offense; and

c. That the sentence imposed at the previous trial was approved.

Though these may perhaps be inferred from the certificate, it would be preferable that it should also expressly state that the officer signing it is the custodian of the service record of the person convicted and that what is certified is a true copy of entries on that record.

6. For the reasons indicated in paragraphs 3 and 4, the Board of Review holds the record of trial legally insufficient to support the findings and sentence as to accused Leach, legally sufficient to support the findings of guilty as to accused Staples except insofar as they indicate a participation in the alleged offense by the accused Leach, and legally sufficient to support the sentence as to accused Staples.

N. A. Trundell, Judge Advocate.

Archibald King, Judge Advocate.

Theodore Tait, Judge Advocate.

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

Board of Review
CM 202243

AUG 27 1934

UNITED STATES	)	HAWAIIAN SEPARATE COAST ARTILLERY BRIGADE
v.	)	Trial by G.C.M., convened at Fort De Russy, T. H., July 2, 1934. Dishonorable discharge and confinement for one (1) year. Penitentiary.
Private FERNANDO D. YSABEL (R-321997), Headquarters Battery, 64th Coast Artillery (AA).	)	

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 to be legally sufficient to support the findings of guilty.

2. Confinement in a penitentiary in this case is not authorized by the 42d Article of War since the period of confinement adjudged is not more than one year.

3. For the reason hereinbefore 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 one year at a place other than a penitentiary.

H. A. Turnbull, 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 202250.

SEP 15 1934

UNITED STATES	)	PHILIPPINE DEPARTMENT
v.	)	Trial by G.C.M. convened at Fort Mills, P.I., June 7, 1934. Dishonorable discharge and confinement for one (1) year. Fort Mills, P.I.
Private PABLO DE RAMOS (R-324417), Headquarters Battery, 91st Coast Artillery (PS).	)	

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. The accused was tried upon the following Charges and Specifications:

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

Specification. (Assault with intent to commit sodomy upon Rosa Degesa).

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

Specification. In that Private Pablo de Ramos, Headquarters Battery, 91st Coast Artillery (PS), did at Fort Mills, P. I., on or about March 23, 1934, willfully, unlawfully and feloniously commit an act of lasciviousness upon the person of one Rosa Degesa by them and there forcing her upon a mat and placing his penis against her buttocks and remaining in that position for some moments, this being in violation of Article 439 of the Penal Code of the Philippine Islands.

Accused was acquitted of the first charge and specification and convicted of the second. The two specifications were intended to cover the same act.

3. The testimony directly connecting accused with the offense is solely that of three Filipino children, the girl upon whom the offense is alleged to have been committed, who was 11 years of age, and the two boys aged 10 and 7 respectively, who testified that they observed the act by looking through a peep-hole into accused's house, in which it is alleged that the offense was committed. On the other hand, accused offered the testimony of two Filipino adults, one a soldier and the other a civilian, that he was occupied at the post saw mill at the time of the alleged offense. Contrary to this testimony is that of Sergeant Joe West, 59th Coast Artillery, that accused was absent from his work at the saw mill about the time of the alleged offense and the testimony of the mother of the prosecutrix that she saw accused in the street in front of his house shortly before the time of the alleged offense.

4. The first question for consideration is whether the specification of which accused was convicted alleges an offense and the nature of that offense. The obvious intention of the draftsman of the specification was to charge a "crime or offense not capital", and not a "disorder or neglect to the prejudice of good order and military discipline" or "conduct of a nature to bring discredit upon the military service." Article 439, Philippine Penal Code, cited in the specification, was no longer in force on the date mentioned in the specification; but had been superseded January 1, 1932, by Article 336, Revised Penal Code. The differences between them are, however, verbal only and of no importance to this case. Article 336 reads as follows:

> "ART. 336. Acts of lasciviousness. - Any person who shall commit any act of lasciviousness upon other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by <u>prision correcional</u>."

This makes it necessary to quote Article 335, Revised Penal Code, which superseded Article 438, Penal Code, but made no material changes therein:

> "ART. 335. When and how rape is committed. Rape is committed by having carnal knowledge of a woman under any of the following circumstances:
>
> 1. By using force or intimidation;
> 2. When the woman is deprived of reason or otherwise unconscious; and
> 3. When the woman is under twelve years of age, even though neither of the circumstances mentioned in the two next preceding paragraphs shall be present.
>
> The crime of rape shall be punished by <u>reclusion temporal</u>."

The Board of Review considers the erroneous citation not to be a fatal error when it is borne in mind that the article cited had been superseded by another of substantially the same provisions; and that the specification should be read as though Article 336, above quoted, now in force, had been mentioned.

5. A valid specification might have been drawn alleging lascivious conduct with a female child under twelve years of age, in violation of the proper section of the code, but this was not done. The use of the verb "forcing" in the specification and the absence of any allegation that the prosecutrix was under 12 years of age convince the board that the specification must be taken as alleging an offense under the first of the "circumstances" mentioned in Article 335 (quoted above), and not under the third; and that the gist of the offense alleged was therefore the non-consent of the prosecuting witness and the use of force by the accused, as in any rape or assault case. It was therefore incumbent upon the prosecution to prove that the prosecutrix did not consent and that accused used force or intimidation to overcome her resistance. The only evidence to this effect is that of the prosecutrix herself (R. 6). But neither of the small boys who observed the affair through a peep-hole supports her. Buenaventura Plasabas, aged 7, testified that Rosa did not cry, that he did not see her struggle, though she was kicking Ramos (R. 16, 17). The absence of any outcry makes it doubtful if the kicks were kicks of resistance. The elder boy, Dominador Calonsag, called by the nickname of Badong, aged ten, testified that accused was not holding Rosa, that she was neither crying, kicking, nor making any movement, that accused did not have his hand over her mouth, and that "it seemed as if she liked it" (R. 11-14). Furthermore, the scene of the alleged offense was in a village and in a house opposite the prosecutrix's own home (R. 19). The house was presumably of such light construction that an outcry within could easily have been heard without. The two boys who were peeping denied that Rosa cried out, though one of them testified that Rosa saw him at the peep-hole (R. 11). Rosa's mother, who was in her house all the afternoon (R. 19) apparently heard no outcry. Rosa made no complaint to her mother, who, as has just been said, was at home all the afternoon, and never mentioned the matter to her, or, so far as appears, to any one else, until questioned the next day, after Mrs. Degesa had heard of the affair from Badong (R. 19).

6. In spite of all these circumstances tending to show consent by the prosecutrix to the indecent familiarities with her person, the board, not being authorized to weigh the evidence, might feel obliged to hold that the testimony of the prosecutrix herself to the force used against her was sufficient to support the conviction, were it not for another matter not hitherto mentioned. Doctor Hillo, a Filipino civilian physician, examined Rosa the day after the alleged offense and was called to testify as to the result of his examination. His testimony in that respect was negative, as he said that he observed nothing wrong. He further testified in answer to questions by members of the court as

follows (R. 23):

"Q. Do you know anything about the character of this child?
A. Yes sir.
Q. What do you know?
A. The child is a wild child. She is always playing away from home.
Q. How many years have you known her?
A. More than three years.
Rosa Degesa was then brought before the court.
Q. Is this the child you examined, the one we are speaking of?
A. Yes sir.
Rosa Degesa was excused and withdrew.
Q. Do you know the child pretty well?
A. Yes sir.
Q. Do you know of her reputation as to telling the truth?
A. Yes.
Q. Do you think that she is a truthful child or that she would tell an untruth?
A. I have no knowledge of her telling lies."

No attack whatever was made upon the reputation of the prosecutrix for veracity. It has been held many times, both by the courts and by this office, that, in the absence of attack upon the veracity of a witness, testimony supporting the witness' reputation in this respect is inadmissible. Louisville and Nashville R.R. Co. v McClish, 115 Fed. 268; Ford v. United States, 3 Fed. (2d) 104; Harris v. United States, 16 Fed. (2d) 117; Bishop of Durham v. Beaumont, 1 Campbell 206; CM 190269, Sheffield; CM 195687, Stansbury; CM 198865, Sosebee; CM 201710, Reynolds; CM 201997, Mellon. The principle on which these cases proceed is discussed in the review, paragraphs 4 and 5, in the Mellon case last cited, and need not be repeated. That principle is applicable to the present case, unless the guilt of accused was so clearly established that the error in admitting Doctor Rillo's testimony concerning the reputation of the prosecutrix could not have affected the findings of the court.

Even if it be considered that the evidence is compelling that indecent familiarities took place between accused and the prosecutrix, it is not so as to her non-consent and the use of force by accused. As has been pointed out, the evidence for the prosecution on this branch of the case is solely that of the prosecutrix, and the testimony of the two boys and circumstantial evidence are to the contrary. When therefore a physician living in the same community with the prosecutrix, of the same race and knowing her well, testified that he had never known her to tell untruths, his testimony may have been weighty in inducing the court to exclude her from the class of children given to making up tales and can hardly have failed to enhance the value of that testimony to the detriment of accused. It is to be noted in this respect that the inadmissible

evidence with respect to the prosecutrix's reputation for veracity was brought out by questions by members of the court. Such was the fact in three of the cases previously decided by this office in which this error was held fatal. In CM 190259, Sheffield, the Board of Review said:

> "It cannot be contended that members of the court were not unduly influenced by the testimony as to Rathel's trustworthiness and truthfulness when the members themselves drew this testimony from the witnesses on their own initiative."

In CM 198865, Sosebee, the Board of Review also said:

> "The fact that the court propounded questions as to the truthfulness of witness Woodall indicates that at least some of its members were doubtful regarding his testimony."

In CM 195687, Stansbury, the evidence involved was also brought out by the court. In the present case, since one member of the court thought the prosecutrix's reputation for veracity to be of sufficient importance for him to ask questions about it. that member at least must have considered the answers which he elicited to be of some weight. Whether other members so thought it is impossible to tell, but, for all that is known, the vote of the member who asked the questions about Rosa's veracity may have determined the finding of the court against accused. The Board therefore concludes that the testimony of Dr. Rillo as to the prosecutrix's veracity was injurious to the substantial rights of accused.

7. As has been said, in order to convict of the specification under consideration, proof of the non-consent of the prosecutrix and "force or intimidation" by accused is necessary. It is by no means clear that the court so understood. On the contrary, it seems probable that it supposed that, since the prosecutrix was under twelve, the absence of her consent and the use of force need not be shown. Whether this apparent misunderstanding of the requisites of proof by the court would of itself be ground for setting aside the conviction need not be decided in view of the clear and harmful error in the admission of Dr. Rillo's testimony.

8. The Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

W. A. Trumbull J.A.

J.A.

J.A.

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

Board of Review
CM 202253

NOV 10 1934

UNITED STATES	)	SIXTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters Sixth Corps Area,
Major GUY H. DOSHER	)	Chicago, Illinois, July 16, 17,
(0-5454), Field Artillery.	)	and 18, 1934. Dismissal.

OPINION of the BOARD OF REVIEW
HALL, TURNBULL and KING, 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 Major (then Captain) Guy H. Dosher, Field Artillery, having on or about March 18, 1932, become indebted to the Citizens Loan Association, 7 South Dearborn Street, Chicago, Illinois, in the sum of three hundred dollars for value received and having failed without due cause to liquidate said indebtedness and having on or about June 20, 1933, promised in writing to the Commanding Officer, Jefferson Barracks, Missouri, that he would on or about August 1, 1933, pay on such indebtedness the sum of seventy-five dollars, did without due cause at Chicago, Illinois, on or about August 1, 1933, dishonorably fail to keep said promise.

Specification 2: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about March 18, 1932, become indebted to the Citizens Loan Association, 7 South

Dearborn Street, Chicago, Illinois, in the sum of three hundred dollars for value received and having failed without due cause to liquidate said indebtedness and having on or about June 20, 1933, promised in writing to the Commanding Officer, Jefferson Barracks, Missouri, that he would on or about August 1, 1933, settle such indebtedness in full, did, without due cause at Chicago, Illinois, on or about August 11, 1933, dishonorably fail to keep said promise.

Specification 3: In that Major (then Captain) Guy H. Dosher, Field Artillery, being indebted to the Citizens Loan Association, 7 South Dearborn Street, Chicago, Illinois, in the sum of one hundred thirty dollars and sixty-six cents ($130.66) for value received, which amount became due and payable on or about March 10, 1933, did, at Chicago, Illinois, from August 11, 1933, to June 1, 1934, dishonorably fail and neglect to pay said debt.

Specification 4: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about November 19, 1931, become indebted to the Jackson Personal Thrift Service, Inc., 140 W. Cortland Street, Jackson, Michigan, in the sum of three hundred dollars for value received and having failed without due cause to liquidate said indebtedness, and having on or about September 24, 1932, promised in writing to said Jackson Personal Thrift Service, Inc., that he would on or about October 5, 1932, pay on such indebtedness the sum of $32.25 as interest thereon, did, without due cause, at Jackson, Michigan, on or about October 5, 1932, dishonorably fail to keep said promise.

Specification 5: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about November 19, 1931, become indebted to the Jackson Personal Thrift Service, Inc., 140 West Cortland Street, Jackson, Michigan, in the sum of three hundred dollars for value received, and having failed without due cause to liquidate said indebtedness, and having on or about November 7, 1932, promised in writing to the said Jackson Personal Thrift Service, Inc., that he would on or about January 1, 1933, pay the sum of

$24.00 per month until the amount then due on said indebtedness was fully liquidated, did, without due cause, at Jackson, Michigan, on or about February 1, 1933, dishonorably fail to keep said promise.

Specification 6: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about November 19, 1931, become indebted to the Jackson Personal Thrift Service, Inc., 140 West Cortland Street, Jackson, Michigan, in the sum of three hundred dollars for value received, and having failed without due cause to liquidate said indebtedness, and having on or about April 17, 1933, promised in writing to the said Jackson Personal Thrift Service, Inc., that he would make a payment on his account on May 1, 1933, did without due cause at Jackson, Michigan, on or about May 1, 1933, dishonorably fail to keep said promise.

Specification 7: In that Major (then Captain) Guy H. Dosher, Field Artillery, being indebted to the Jackson Personal Thrift Service, Inc., 140 W. Cortland Street, Jackson, Michigan, in the sum of two hundred forty dollars for value received, one-tenth (twenty-four dollars) of which amount, became due and payable on January 1, 1933, and a like sum the first of each month thereafter until paid, did, at Jackson, Michigan, from February 1, 1933, to June 1, 1934, dishonorably fail and neglect to pay said debt.

Specification 8: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about November 19, 1931, become indebted to the Jackson Personal Thrift Service, Inc., 140 West Cortland Street, Jackson, Michigan, in the sum of three hundred dollars for value received, and having failed without due cause to liquidate said indebtedness and having on or about August 4, 1933, promised in writing to the Commanding Officer, Jefferson Barracks, Missouri, that his entire aforesaid indebtedness would be liquidated before the end of the calendar year, 1933, did without due cause, at Jackson, Michigan, on or about January 1, 1934, dishonorably fail to keep said promise.

Specification 9: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about September 17, 1932, become indebted to Petersen-Harned-Von Maur of Davenport, Iowa, in the sum of twenty-seven dollars and eighty-nine cents ($27.89) for merchandise received, and having failed without due cause to liquidate said indebtedness, and having on or about August 29, 1933, promised in writing to the Commanding Officer, Medford District, CCC, Medford, Oregon, that he would on or about October 1, 1933, settle such indebtedness in full, did without due cause, at Davenport, Iowa, on or about October 1, 1933, dishonorably fail to keep said promise.

Specification 10: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about September 17, 1932, become indebted to Petersen-Harned-Von Maur of Davenport, Iowa, in the sum of twenty-seven dollars and eighty-nine cents ($27.89) for merchandise received, and having failed without due cause to liquidate said indebtedness, and having on or about November 16, 1933, promised in writing to Colonel G. C. Marshall, Infantry, the Senior Instructor, Illinois National Guard, that he would on or about December 1, 1933, settle such indebtedness in full, did, without due cause, at Davenport, Iowa, on or about December 1, 1933, dishonorably fail to keep said promise.

Specification 11: In that Major (then Captain) Guy H. Dosher, Field Artillery, being indebted to Petersen-Harned-Von Maur of Davenport, Iowa, in the sum of twenty-seven dollars and eighty-nine cents for merchandise received which amount became due and payable on or about September 17, 1932, did, at Davenport, Iowa, from September 17, 1932, to June 1, 1934, dishonorably fail and neglect to pay said debt.

Specification 12: In that Major (then Captain) Guy H. Dosher, Field Artillery, having on or about July 31, 1933, become indebted to the Post Exchange, Fort Sill, Oklahoma, in the sum of about fifty-seven dollars and eighty-eight cents ($57.88) for merchandise received, and having failed without due cause to liquidate said indebtedness,

and having on or about November 16, 1933, promised in writing to the Senior Instructor, Illinois National Guard, that he would settle such indebtedness in full on or about December 1, 1933, did, without due cause, at Fort Sill, Oklahoma, on or about December 1, 1933, dishonorably fail to keep said promise.

Specification 13: In that Major (then Captain) Guy H. Dosher, Field Artillery, being indebted to the Post Exchange, Fort Sill, Oklahoma, in the sum of fifty-seven dollars and eighty-eight cents ($57.88) for merchandise received which amount became due and payable on or about July 31, 1933, did, at Fort Sill, Oklahoma, from July 31, 1933, to June 1, 1934, dishonorably fail and neglect to pay said debt.

Specification 14: (Dishonorably failing and neglecting from September 30, 1932, to June 1, 1934, to pay a debt for groceries which became due and payable on or about September 30, 1932. - A nolle prosequi was entered by the prosecution to this specification by direction of the appointing authority.)

Specification 15: (Officially signing, with intent to deceive an auditing officer, a false certificate in a company fund book, known by him to be false. - Finding of not guilty.)

CHARGE II: Violation of the 93d Article of War. (Finding of not guilty.)

Specification: (Embezzlement on or about August 3, 1933, of $8.39, property of a company fund of a CCC Company intrusted to him as company commander. - Finding of not guilty.)

He pleaded not guilty to all charges and specifications, except Specification 14, Charge I, to which a nolle prosequi was entered by the prosecution, and was found guilty of Charge I and Specifications 1 to 13,

inclusive, thereunder. He was found not guilty of Specification 15, Charge I, and of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution under the several specifications of which accused was convicted relates to his alleged dishonorable failure and neglect to pay certain debts to the Citizens Loan Association of Chicago, to the Jackson Personal Thrift Service, Inc., of Jackson, Michigan, to the firm of Petersen-Harned-Von Maur of Davenport, Iowa, and to the Post Exchange, Fort Sill, Oklahoma, and to his alleged dishonorable failure to keep certain promises of payment of these obligations in whole or in part. Specifications 1, 2 and 3, of Charge I, refer to transactions with the Citizens Loan Association; Specifications 4, 5, 6, 7 and 8, of Charge I, refer to transactions with the Jackson Personal Thrift Service, Inc.; Specifications 9, 10 and 11, of Charge I, refer to transactions with Petersen-Harned-Von Maur; and Specifications 12 and 13, of Charge I, refer to transactions with the Post Exchange, Fort Sill, Oklahoma. In summarizing the evidence it will be convenient to recite first that which relates in common to the group of specifications describing transactions with one of these creditor organizations, and to follow that common evidence with such further evidence that relates particularly to one or more of these specifications.

Specifications 1, 2 and 3, Charge I.

Harold L. Otterstrom testified that he is the assistant manager of the Citizens Loan Association of 7 South Dearborn Street, Chicago, Illinois, and as such has the custody of its records with reference to loans made to individuals. These records were made by a bookkeeper under his own personal supervision and he has knowledge of everything done with reference to the accounts. The records pertaining to an account with an Army officer by the name of Dosher he had with him personally. They show that on March 18, 1932, the Citizens Loan Association received a note in the amount of $300.00, executed by Major Guy H. Dosher, Field Artillery, United States Army, then Captain Dosher (accused). Witness identified a card as the original ledger account of accused, kept in accordance with the Small Loans Act of the State of Illinois, which card contained a

record of all payments received, the distribution as to principal and interest, and the dates received and the dates to which the interest is paid. The loan (i.e., the note) was payable in twelve monthly instalments of $25.00 each, plus interest, commencing April 10, 1932, and expiring March 10, 1933. The final and last payment made by accused upon the note was $35.00, received on August 11, 1933, and there was due at the time of the trial $130.66 with interest from August 11, 1933 (R. 16-20; Ex. 2).

Upon cross-examination the witness testified substantially as follows: He handled all accounts with Army officers, approximately 1200 in number. The original note is in the hands of the Association's attorney at Monmouth, Illinois. The claim had not been assigned to another organization. This was not permitted by state law (R. 22). On the loan of $300.00 accused has paid $169.34 in principal. The $130.66 still due constitutes principal. The rate of interest charged on the account is 3½% per month on unpaid principal balances. Under the Small Loans Act a note, both principal and interest, becomes due at the time of the default in any payment of principal or interest (R. 24). On June 20, 1933, there was due on this note $139.05, with interest from February 27, 1933 (R. 25). It is illegal to charge interest on interest. Witness' organization brought this account to the attention of the military authorities because accused had defaulted on it, was delinquent in payments, and quite often failed to reply to communications sent him (R. 27). The account was referred to the military authorities before it was referred to the Association's attorney. Witness had no knowledge that a payment of $16.30 was made by accused and never credited upon the card (R. 28). If such were the case it would constitute grounds to call the account a disputed one (R. 29).

Upon further examination by the prosecution, the defense, and the court, the witness testified that all an Army officer has to do to get money from his organization is to sign a note, and his signature is accepted because he is an officer and a gentleman (R. 31). If the military authorities did nothing about the collection of this indebtedness from accused witness' organization would have recourse to the civil courts. The organization "very, very seldom" writes to The Adjutant General when it finds that an officer has been in arrears or has been careless in not paying his accounts (R. 32). Collateral security is required in every

case from a civilian who makes a loan, either salary assignments, chattel or automobile mortgage, or both, or all three, or stock or bonds. The organization writes The Adjutant General about loans only when the case has become very serious and the organization believes it should come to the attention of the military authorities (R. 33). There was a difference between the method of collection through The Adjutant General and the salary assignment of a civilian in that the military authorities would not "hold up" the man's pay (R. 34).

As to Specifications 1 and 2, Charge I, it is also shown that Colonel Walter Krueger, 6th Infantry, commanding Jefferson Barracks, Missouri, received on or about June 20, 1933, by written indorsement from accused the following statement concerning his account with the Citizens Loan Association:

> "4. With reference to time of payment of account referred to, I cannot see my way clear to make promise of any payment until receipt of my July pay. I will make payment of at least $75 immediately after August 1st and the balance of account shortly thereafter." (Exhibits 1 and 3; R. 67,97.)

Specifications 4, 5, 6, 7 and 8, Charge I.

Mark A. Hanna testified that he is the supervisor and the acting manager of the Jackson Personal Thrift Service, Inc., and that as such he has the custody of its records and accounts. His organization has an account with Major Guy H. Dosher, Field Artillery, formerly Captain (accused). Witness identified certain ledger cards as those relating to loans to accused (R. 38), and stated that these records were made under his supervision and that he was the proper custodian of them (R. 39). On November 19, 1931, accused had reduced a previous loan down to a balance of $45.00 and at that time requested and obtained a renewal for an additional $255.00, thus making a new loan and indebtedness at that time of $300.00. On this balance the last payment was made on January 12, 1933. After that payment accused still owed $240.00 on principal and $35.41 in interest (R. 40-41; Exs. 7,8,10 and 11). At the present time (i.e., July 16, 1934) accused owes the Jackson Personal Thrift Service, Inc., $427.00. This includes the principal of $240.00 as of January 12, 1933, interest of $35.41 due as of that date, and interest from that date (R. 43).

Upon cross-examination the witness testified substantially as follows: The legal rate of interest in Michigan on loans similar to this one is 3½% per month on the unpaid balance (R. 46). No penalty is permitted, and if an account becomes delinquent additional interest cannot be charged. In this particular case there was no security other than the note. Postdated checks were taken from accused for the payments made (R. 47).

Upon examination by the court witness testified that his organization operated under a "Uniform Small Loan Act", the same as the one in Illinois, and that the legal rate of interest is 3½% per month. The amount of the loan is limited to $300.00 (R. 50).

As to Specification 4, Charge I, it is also shown that accused sent a letter to Personal Thrift Service, Inc., dated September 24, 1932, which contained, among other matters, the following statement:

> "If you will furnish me with a statement of interest due to include October 5th, I will send check covering that amount at the same time." (Ex. 5; R. 42,67.)

The Personal Thrift Service, Inc., replied to this communication as follows:

> "On October 5th, your interest will amount to $32.25. We will expect this amount, and also sixteen post-dated checks, so that we can renew your account for the balance due in the amount of $240. We are very pleased to learn that you now feel that you have your financial condition in better shape, and that we will have no future trouble in regard to the money which you owe us."

The "agreement" of accused was not carried out (R. 42-43).

As to Specifications 5 and 7, Charge I, it is also shown that accused sent a letter to Personal Thrift Service, Inc., dated November 7, 1932, which contained, among other matters, the following statement:

> "If you will make a new note or otherwise arrange to permit me to defer payments on the amount I owe you, I can

resume payments on it January 1st at a rate of one tenth the amount now owed per month until the entire amount is paid." (Ex. 4; R. 67,104.)

This promise was kept only to the amount of one payment, and as a whole the promise was not kept (R. 45).

As to Specification 6, Charge I, in addition to the evidence recited above there was received in evidence a letter purporting to have been written by accused at Fort Sill, Oklahoma, to Personal Thrift Service, Inc., dated April 17, 1933, which stated:

"I am still affected by the 'bank holiday', however, I will be able to make a payment on my account, May 1st." (Ex. 6.)

This promise was never kept (R. 44).

As to Specification 8, Charge I, it is also shown that Colonel Walter Krueger, 6th Infantry, commanding Jefferson Barracks, Missouri, received on or about August 4, 1933, by written indorsement from accused, the following statement concerning his account with the Jackson Personal Thrift Service, Inc.:

"6. For your information, my entire indebtedness can, and will, be liquidated from salary alone before the end of the calendar year. If business conditions improve during the next two or three months, payment would be accelerated by outside income." (Exs. 18 and 19; R. 66,106.)

This promise was not kept (R. 59).

Specifications 9, 10 and 11, Charge I.

R. H. Harned testified by deposition that he is the Vice President of Petersen-Harned-Von Maur, of Davenport, Iowa, and has known accused for about three years. The records of this company show that on September 17, 1932, accused was indebted to it in the amount of $27.89, the balance of an account for merchandise received, after credit for the payment of $25.00 on that date, and that interest had been charged on the account up to June 27, 1934, without further payment of principal or interest. The records of the company also show the following action taken by it in regard to the collection of the account and the response of the accused:

"Nov. 18, 1933, wrote him and asked for payment." *
"April 1, 1933, wrote and asked for payment."
"April 10, 1933, he wrote would pay in 60 to 90 days."
"Sept. 4, 1933, wrote and asked for payment. He answered would pay Oct. 1, 1933."
"Feb. 2, 1934, received letter from Major Dosher from Monmouth stating would pay bill March 1, 1934."
"April 17, 1934, wrote him we hadn't received his remittance."

"June 26, 1934, wrote Major Dosher in answer to his letter inquiring about the $25.00 payment and his check for $26.90. This was explained to him in a letter June 26, 1934 as follows:

> 'We received your check Sept. 17, 1932 for $25.00, which was returned on account of insufficient funds with a protest charge of $1.90, total $26.90. You was notified and then you sent us a check in place of the $25.00 check one for $26.50. The $25.00 credit entry was let stand on the ledger as the $1.90 protest fee did not enter into his account.'" (Ex. 21.)

* Note: The figures "1933" are probably in error for 1932.

As to Specification 9, Charge I, in addition to the evidence recited above there is the following evidence: Major Clare H. Armstrong, 6th Coast Artillery, Commanding Officer of the Medford District, Civilian Conservation Corps, Medford, Oregon, on or about August 29, 1933, received from the accused by fifth indorsement on August 29, 1933, a promise to pay to Petersen-Harned-Von Maur, of Davenport, Iowa, the sum of $27.89 for merchandise purchased. The promise was in the following language: "1. Remittance will be made October 1st paying this account in full" (Exs. 20, 22; R. 107-108).

As to Specification 10, Charge I, in addition to the evidence recited above there is the following evidence: Colonel G. C. Marshall, Infantry, then Senior Instructor, Illinois National Guard, on or about November 16, 1933, received from accused by third indorsement the following statement with reference to the firm of Petersen-Harned-Von Maur, of Davenport, Iowa:

> "3. I hereby give assurance that my indebtedness to writer of basic communication will be met, probably within ten days, certainly, by December 1st." (Ex. 17; R. 55-56, 66, 109.)

Specifications 12 and 13, Charge I.

The records of the Post Exchange, Fort Sill, Oklahoma, show that on or about July 31, 1933, accused was indebted to this post exchange in the

amount of $57.88 for merchandise received, and that on June 27, 1934, he was still so indebted in the same amount (Ex. 23).

As to Specification 12, Charge I, in addition to the evidence recited above there is the following evidence: Colonel G. C. Marshall, Infantry, then Senior Instructor, Illinois National Guard, on or about November 16, 1933, received from accused by 13th indorsement the following statement with reference to the latter's indebtedness to the Post Exchange, Fort Sill, Oklahoma:

> "5. Remittance in full amount ($57.88) will be made not later than December 1st." (Ex. 16; R. 53-55, 66-67, 112.)

4. At the close of the case for the prosecution the defense made a motion for a directed verdict of not guilty under all charges and specifications on the ground that insufficient evidence had been presented. Such a motion, styled a "motion for findings of not guilty", is authorized under the provisions of paragraph 71 d, Manual for Courts-Martial, and is determined by the court as an interlocutory question. Arguments by the defense and the prosecution were heard upon the motion. Both sides having been heard at length, the court was closed, and, upon being opened, the president announced that the motion of counsel for the defense for a directed verdict of not guilty was not sustained, and that the case would proceed (R. 72-77).

5. The evidence for the defense is found almost wholly in the testimony of the accused who was sworn at his own request and testified at considerable length.

He first announced that, with the permission of the court, he proposed to give testimony showing:

> "(1) That I am not financially irresponsible as the Trial Judge Advocate, or rather, as the depositions introduced might indicate.
>
> (2) That there has been ample cause for any tardiness in meeting my financial obligations.
>
> (3) That any promises made to superior officers or civilians were made in good faith and that failure to fulfill wholly any promises so made was due to circumstances

and conditions over which I had no control.

(4) That there has been nothing dishonorable in my attitude toward my financial obligations." (R. 79.)

Accused then proceeded to present a "general picture" which he followed with testimony in rebuttal and explanation of the offenses alleged in the various specifications.

He was born in southern Illinois in 1891. He attended the rural schools until about thirteen years of age. Because of the inability of his family to keep him in school any longer he then left home. In the eight years that followed he worked on the farm, in shops and factories, and served an enlistment in the Navy, from which he was discharged on his twenty-first birthday (January 22, 1912) upon expiration of his term of service. A week later he entered high school, from which he graduated the following June (1913). In the fall of that year he entered the College of Engineering, University of Illinois, where he remained as a student in good standing until the Mexican border trouble in 1916.

In 1915 he helped organize a battery of National Guard artillery at the University of Illinois, made up of students and instructors (R. 80). He married in June, 1914.

From the time he left home at the age of thirteen he received no financial aid from any source. While in college it was necessary for him to earn funds outside of school hours to maintain himself and his wife and to meet the normal expenses of a student. All his available time outside of the classroom was spent either in the University foundry making patterns and moulds or in charge of the computing room of the locomotive testing laboratory. He spent his summer vacations as a mechanic in the railroad shops or as a locmotive fireman.

He was on the border with the University of Illinois Battery in 1916. In January, 1917, he passed the examination for provisional second lieutenant, Regular Army. He left school owing about $300 in notes and had the "usual $400-$500 outlay for uniforms and equipment" upon his entry into the Army.

Serving with the Third Division in France, with the temporary rank of captain, he participated in the usual defensive sector training, the

Aisne-Marne Defensive, the Aisne-Marne Offensive, and the Meuse-Argonne Offensive, as regimental operations officer of the 76th Field Artillery. After the Armistice he served for eight months with the Army of Occupation, and later for four months as supply officer, Motor Transport Service, Clichy Park, Paris (R. 81).

Until his wife joined him in Paris in August, 1919, she had continued her education at Washington University, while he paid all her expenses. He returned to the United States in December, 1919. During the previous eight years with no resources other than his own "faculties", and without financial aid, he had completed a high school course, had acquired the equivalent of a college education, had supported a wife for six of the years and paid all her expenses for nearly two years of college, and had saved some money. This record he believed to be prima facie evidence of financial integrity and a highly developed sense of financial responsibility, as well as evidence of the possession on his part of considerable aptitude in the management of personal finances, and indication of certain traits of character not likely to be thrown aside after he attained the age of thirty.

For several years after the war he had the "usual financial ups and downs" for a junior officer of that period with no resources other than his Army pay. From time to time he got into debt and paid out again.

During 1931 his marital affairs became more and more of a problem. The situation became acute early in 1932, and he and his wife separated (R. 82). At first he paid her bills for clothing, shelter and food. Later he gave her $125.00 to $150.00 per month for maintenance. His expenses were abnormally high. A depression was on and it was no longer possible to borrow money from commercial banks. To avoid possible embarrassment on account of unpaid bills he borrowed from loan companies, paying an exorbitant rate of interest. However, as late as August 1, 1932, his financial condition was not at all alarming. He never speculated. His personal habits were then, and still are, simple and inexpensive.

In the summer of 1932 he received orders to leave September 1st for the Field Artillery School. In the small community in which he was serving on D.O.L., it became common knowledge that his wife and he were

not living together and that he was leaving for a change of station. Many bills of which he had no previous knowledge were presented to him for payment, and, while he was not responsible for them having been contracted, he felt that to disclaim them would reflect unfavorably on the military service. He accordingly assumed responsibility for their payment, borrowed as much as he could on short notes, paid many of the bills in full, a part on others, and made arrangement for deferred payment on the balance.

After he entered the Field Artillery School his wife was granted an uncontested divorce in September, 1932, in Iowa, on the ground of mental cruelty (R. 83). The court awarded to her $125.00 per month alimony, one-third of any subsequent increase of his pay, during the time she remained unmarried, and all furniture and household goods, and he was to pay court costs and attorney's fees.

Immediately after the divorce was granted he worked out a plan for liquidating his debts which he proposed to several of his creditors with explanation as to the cause of the condition. A few made no response, but to one or two of these and to those who accepted the proposal he started payments under the plan in January, 1933.

During the period from August 1, 1932, to June 1, 1933, inclusive, his average monthly payments for alimony and indebtedness, exclusive of current living expenses, were slightly in excess of $240.00 per month.

Just prior to June 1, 1933, he received orders to National Guard duty at Monmouth, Illinois, and immediately on arrival there was ordered to Civilian Conservation Corps duty in Oregon. He returned to his station at Monmouth on October 28th, and had just arranged for an apartment with a view to getting his furniture out of storage and getting settled when he received telegraphic instructions to report at Gwinn, Michigan, for further Civilian Conservation Corps duty (R. 84). After two weeks on that duty he was ordered to Fort Brady, Michigan, for temporary duty, from which he was later relieved to return to Monmouth on January 8, 1934. He arrived in Chicago on April 27th for two weeks duty in National Guard inspection, returned to Monmouth upon its completion, and was again ordered to Chicago where he arrived on May 25th, and had since remained, having been in arrest at Fort Sheridan since June 16th (R. 85).

Accused had a verbal agreement with his present wife, Florence Barry Dosher, since the date of their marriage in October, 1932, to the effect that any monies or funds that she might receive from any source whatsoever, either as interest or as dividend on investments, or as principal on matured notes, stocks or bonds, were available for the payment of any personal or assumed obligation of her husband. At the time of their marriage she was fully aware of the debts he had assumed. She then held as indorsee the promissory note of R. and J. Dick Co., Inc., for $30,000.00, which was renewed on December 2, 1932, and made payable four years after date, with interest at 4% per annum, payable June 2d and December 2d. She also held 100 shares of the stock of the Muscatine Hotel Company, of Muscatine, Iowa, of the par value of $100.00 each, fully paid and non-assessable (R. 85-89; Def. Exs. 1 and 2).

In November, 1931, accused's monthly income was $490.00, and his total indebtedness was $700.00 (R. 90). On September 16 (1932), immediately after his divorce, his monthly income from pay was $430.00, and his "liabilities had jumped to $3800". On October 29, 1932, he remarried. His pay was then $430.00 and he had outside income of approximately $50.00, making a total of $480.00 per month. His assets then consisted of insurance, about $150.00; a car, $300.00; Mrs. Dosher's car, $350.00; $3000.00 worth of furniture; the R. and J. Dick Co. note, $30,000.00; hotel stock, $10,000.00; total $43,800.00. The furniture was owned by Mrs. Dosher prior to her marriage to him (R. 91). The R. and J. Dick note was bearing semi-annual interest in the amount of $750.00, which was being paid regularly. The hotel stock paid 6% "interest" annually and this was paid to January 1, 1932. His liabilities on October 29, 1932, had been reduced to $3500.00.

On April 1, 1933, his pay was $403.00. His assets remained as on October 29, 1932, plus the accrued interest for the period, and his liabilities had been reduced to $2640.00. About this time the R. and J. Dick Company advised that they would be unable to meet the note on the due date, January 2, 1933. They requested a renewal as of December 2, 1932, with interest reduced to 4%, and this was granted. The next interest payment was June 2, 1933. The Hotel Company failed to pay "interest" in January, 1933 (R. 92).

On June 6, 1933, about the time he went on Civilian Conservation Corps duty, accused's pay was $403.00, and no outside income had been received.

His assets remained the same as in April, plus the accrued interest which brought them to $45,160.00. His liabilities were reduced to $2485.00.

On October 28, 1933, the date he returned from Oregon to his station at Monmouth, Illinois, his pay was still $403.00. There was no change in assets except additional accrued interest. No outside income was received during this period. His liabilities had been reduced to $2175.00. Ordered out to Civilian Conservation Corps duty in Michigan he returned again to his permanent station in Monmouth on January 8, 1934. His pay was then $403.00. There was no change in assets except additional accrued interest, but his liabilities had been reduced to $1950.00.

On July 10, 1934, his pay went up to $431.00. There was no change in assets except accrued interest. No outside income had been received. His liabilities had been reduced to $1300.00 (R. 93).

During accused's movements under orders between September, 1932, and his last move to Chicago on June 2, 1934, he had either been reimbursed the actual expense of travel, received mileage at the rate of eight cents per mile, less land grant deduction (in one instance three and one-half cents per mile from Monmouth, Illinois, to Jefferson Barracks, Missouri), or, as in one other instance, traveled by troop train (R. 94).

The accused then presented testimony in explanation or denial of the several offenses with which he was charged. This testimony is summarized below under the several specifications to which it refers.

Specifications 1, 2 and 3, Charge I.

These specifications pertain to an account with the Citizens Loan Association. This loan, in the amount of $300.00, was obtained March 18, 1932. From that date to include December 31, 1932, $226.43 was paid on this account, of which amount $65.33 was credited to interest, and $144.58 to principal. Through error $16.52 in October, 1932, was not credited (R. 95). Under date of November 5, 1932, accused wrote the Citizens Loan Association explaining the difficulties that had arisen as a result of his divorce and marital difficulties, and proposing a plan for liquidating the indebtedness. They responded with a counter proposal that he send a remittance at that time paying interest to November 10th, make a further remittance on December 10th taking care of the interest to that

date, and then, beginning with January, 1933, make a flat payment of $15.00 or more per month until the obligation was paid in full. He remitted the interest as requested, and in January, 1933, remitted $14.50 on the account. This was credited $7.25 to interest and $7.25 to principal. He remitted $15.00 in February (1933), which was credited $6.38 to interest and $8.62 to principal. The interest charges were quite disturbing to him, especially in view of the fact that his original proposal to creditors had been based on a reasonable interest charge, and he had interpreted the letter from the Citizens Loan Association to the effect that some concession would be made on their high rates of interest. During the next three months, since he was seeking some way to pay this account in full to avoid further payment of the high interest rate, he made no payments on it. He had every reason to believe that interest on the Dick Company note in the amount of $600.00 would be available about June 2 (1933) when due, and he planned to pay the Citizens Loan Association in full upon receipt of this. Meanwhile, he received orders for a change of station to Monmouth, Illinois, and upon arrival there on June 1st he was ordered to Jefferson Barracks for Civilian Conservation Corps duty (R. 96).

On June 20 (1933) the "indorsement quoted by the Trial Judge Advocate" was written (see Specification 1, Charge I). Interest on the Dick Company note had not been received and accused had no word in reference to it. His indorsement of June 20 was made in good faith. It seemed reasonable to expect that by August 1st at least part of the amount due as interest would be received. He "habitually drew up a tentative list of payments covering two or three months in advance". From a study of this tentative schedule it "seemed entirely feasible" to pay $75.00 on this account on August 1 even though he failed to receive the interest due on the Dick Company note. But by August 1 several things had occurred that could not be foreseen: First, no interest payment had been received; second, he was transferred from Jefferson Barracks, to Oregon on Civilian Conservation Corps duty; third, living expenses increased materially; fourth, reimbursement for travel on his change of station from Fort Sill, Oklahoma, to Monmouth, Illinois, had not been received, but was received on August 8th; fifth, his transcript of pay was lost in the mail and he did not receive his June or July pay until August 11th; sixth, failure to receive pay when due and failure to receive reimbursement for travel within a reasonable time prevented him from making payments as scheduled. As a

result some two or three creditors demanded payment of their accounts in full (R. 97). Because of this combination of circumstances he realized that he could not pay the $75.00 as agreed. He had been notified that he would be relieved and returned to his station, to arrive there not later than September 1st, and it was necessary for him to keep available sufficient funds for the return of himself and dependent to his station.

Upon receipt on August 8 (1933) of reimbursement for travel he made a remittance of $35.00 to the Citizens Loan Association with a letter of explanation and a request for a slight extension of time. He received no reply other than a form receipt for the payment showing a credit of $26.61 to interest and $8.39 to principal. He asked for an explanation of the interest charge, but received none. Meanwhile the firm wrote the Commanding General complaining at the nonreceipt of the $75.00 and made statements in reference to the account that were not in accordance with the facts.

The wording of accused's indorsement of June 20 (1933) did not make the promise alleged in Specification 2 (Charge I). According to his figures, supported by receipts and canceled checks, there was a balance of approximately $120.00 owing on the account on June 20 (R. 98). Had conditions not arisen making it impossible for him to pay the full amount of $75.00 on August 1st, "it seemed a reasonable assumption " that he would be able to pay the remaining $45.00, as stated in his indorsement, shortly thereafter.

Beginning as early as November (1933) and continuing for two or three months he wrote to every individual he knew who might be in a position to lend him a few hundred dollars on the securities, evidence of which has been presented (R. 99), but without success.

During his entire period of Civilian Conservation Corps duty he was continually paying on obligations. He was particularly anxious to pay obligations owed to small creditors because he felt that there was at least some justification in delaying the payment on these accounts to loan companies in view of the high rate of interest being charged.

Almost immediately after returning to Monmouth, Illinois, on January 8, 1934, he received a communication from the "Military Tract Collection Agency", of Monmouth, Illinois (R. 100). This agency informed him that

they had in their possession a note given to the Citizens Loan Association. He asked for an itemized statement and received it after considerable delay. Before any adjustment could be attempted he was ordered to Chicago where he had been since awaiting trial. (Accused recited the payments he had made on this account. They are substantially those credited to him on the records of the Association (Ex. 2), except for a payment of $16.52 he claimed to have been made on October 8, 1932, and supported by a canceled check in his possession. The canceled check is not produced.) (R. 101-102; Def. Ex. 4.)

Specifications 4, 5, 6, 7 and 8, Charge I.

These specifications pertain to an account with the Jackson Personal Thrift Service, Inc. For several years accused had been meticulous in maintaining a personal file in which outgoing and incoming communications of any apparent importance were filed promptly and habitually indexed. In his change of station from Fort Sill to Monmouth all his files prior to August 1, 1932, were lost, but he had reason to believe that all his files from that date were complete in every respect. He had no record of correspondence covering the alleged promise to pay interest on October 5, 1932, referred to in Specification 4. He did know that during the latter part of September and during the month of October, 1932, he was working on the plan for liquidation of debts which he has outlined in his previous testimony. Since he was then making no avoidable agreements until he had a chance to work out a plan in detail he did not understand the representation in this particular specification.

No promise was ever made as alleged in Specification 5. A proposal was made but it was never accepted (R. 102-103). Under date of November 7 (1932) accused communicated with the company, explaining the conditions with which he was confronted, and making the following statement:

> "If you will make a new note or otherwise arrange to permit me to defer payments on the amount I owe you, I can resume payments on it January 1st at the rate of one-tenth the amount now owed per month until the entire amount is paid."

They replied to this letter under date of "November 4, 1932" (November 14, 1932, see Ex. 4), but made no comment in reference to the proposal and

demanded immediate payment of "some $45 in interest". He replied on December 9th that he was unable to meet their demands as to interest payment at that time. He also stated that all other creditors to whom he had presented his plan for liquidation had accepted, but that he had heard nothing from them in reference to it. They made no response to this letter and he wrote them again on January 29, 1933, asking for an answer to his proposal. Meanwhile he made a remittance of $24.00 early in January but received no reply other than a form receipt showing the $24.00 credited to interest. With the exception of one or two collect telegrams he had had no communication from the Jackson Personal Thrift Service since their letter of November 14, 1932. A letter from them to the Commanding General, Sixth Corps Area, was forwarded to him for remark while he was on Civilian Conservation Corps duty in Oregon and was returned by indorsement under date of August 4, 1933 (see Exs. 18 and 19)(R. 104).

Accused had no record of the communication referred to by the prosecution under Specification 6 (see Ex. 6), nor had he any recollection of the circumstances. The reference to the bank holiday reminded him that he and Mrs. Dosher had deposited in two Muscatine, Iowa, banks, The First National and the Hersey State Bank, an amount slightly under $200.00. At the end of the bank holiday declared by the President these two banks failed to open their doors. Shortly after June 1, 1932, they did reopen as a consolidated bank and he and his wife were able to get about $50.00. No further payment had been made but he had learned recently that 10% of the balance was available.

In reference to Specification 7, accused invited attention to his testimony in reference to Specification 5 and stated that, as indicated in that testimony, no such promise was made (R. 105).

He testified that the allegation contained in Specification 8 was apparently based on paragraph 6 of his indorsement dated August 4, 1933 (see Exs. 18 and 19). The statement contained therein did not apply specifically to the Jackson Personal Thrift. Moreover, it was based on the assumption that he would be relieved and returned to his station prior to September 1, 1933, as he had repeatedly been informed. At the end of the calendar year he was still on Civilian Conservation Corps duty and, subsequent to August 4, 1933, had made three changes of station, involving more than 3000 miles. A proposal made to the Jackson Personal

Thrift Service in the same indorsement was as follows:

> "I stand ready on thirty days' notice of acceptance to meet the principal of this obligation in full, plus a reasonable interest charge for the deferred payment."

This proposal was also ignored. The original note to the Jackson Personal Thrift Service was transferred about this time to the Personal Holding Corporation, New York. He had made two attempts since returning from Civilian Conservation Corps duty in January, 1933, to resume payments on the account. Once they replied that the executive who was handling the account was out of town and that they would communicate with him (accused) when he returned. Hearing nothing from them after a month or so accused wrote again, informing them that he would like to have a proposal from them in reference to the account since he desired to resume payments on it. This time he was informed that all papers were in the hands of Colonel Mitchell and that they could do nothing about it until the return of the papers (R. 106).

Specifications 9, 10 and 11, Charge I.

These specifications refer to an account with Petersen-Harned-Von Maur, a department store in Davenport, Iowa. The amount involved is $27.89. It is alleged in these specifications that he became indebted to the above firm in the amount indicated, and that he failed dishonorably and without due cause to pay. In two of the specifications it is charged that, having made promises to superior officers giving specific dates on which payment would be made, he did, without due cause, fail to keep said promises.

The indebtedness referred to in these specifications was contracted by his former wife, and the fact that there was an unpaid balance on the account came to his attention the latter part of August, 1932. He talked to the credit manager of the store, explaining the situation, and informed him that he would assume responsibility for the payment of the account on the condition that, if he (accused) made payment of approximately half of it within a few weeks, they would permit him to defer payment on the balance for some time. The amount of the bill was $52.89. They agreed to this arrangement and he accordingly paid $25.00 on the account on September 17, 1932 (R. 107).

It was nearly impossible to convey to one who did not actually experience it the turmoil and uncertainty incident to the service upon which he was engaged at the time and for several months after the indorsement of August 29, 1933, was written, in which he promised that he would settle this indebtedness in full on or about October 1st (see Exs. 20 and 21; Specification 9, Charge I). It was impossible to foresee from one day to the next what would happen. There were materially increased living costs. And there was uncertainty, since he was repeatedly reminded by the District Commander that inasmuch as he was a National Guard instructor he must be prepared for relief and return to his station on a few hours notice. The latter part of August he was notified by the District Commander that he was not to be returned to his station within the immediate future, but would probably stay on indefinitely, and this was the information available at the time of the indorsement of August 29, 1933. Beginning early in September, 1933, information was again given him that he would be leaving in a few days. To one not in debt such uncertainty might not have much significance. But in his case, where he habitually paid out, immediately after receipt of his month's pay, that part of it not absolutely essential for current living expenses, the uncertainty was "highly harassing". He knew that on a few hours notice he might have to leave for his station. His wife had driven to Oregon to join him (R. 108). He had no idea whether he would be returned on a troop train or permitted to return on a mileage basis. He had to keep available enough money for his own and his wife's travel expenses to Monmouth, Illinois, approximately $100.00 in either event. And still no income had been received from investments.

This was the situation on October 1, 1933, when the time came to make payment on the Petersen-Harned account, and he "simply couldn't turn loose of the money" to pay it until he found out what would happen with reference to his return to his proper station. If, as then seemed evident, he returned to his station on a mileage basis he could pay the account when reimbursement was received. He was relieved from Civilian Conservation Corps duty in Oregon in October and reached his station October 28th. But before he could receive reimbursement for the travel performed he had been ordered to Civilian Conservation Corps duty in the upper peninsula of Michigan.

Under Specification 10, in which it is alleged that he promised the Senior Instructor, Illinois National Guard, in writing under date of

November 16, 1933, that the account would be settled in full by December 1 (1933), and without due cause failed to keep his promise, the prosecution quoted only one paragraph of accused's indorsement, as follows:

> "3. I hereby give assurance that my indebtedness to the writer of basic communication will be met, probably within ten days, certainly by December 1st."

Paragraph 2, which precedes the one just quoted, modifies materially the meaning and intent of the latter paragraph, and reads as follows (R. 109):

> "Within a few days after the securities indicated in (c) reach me, I will be in a position to meet the obligation referred to in basic communication, as well as all of my obligations that are due."

The reference was to the securities with which the court is already familiar. Accused had written to have them forwarded to him, anticipating that he would have no difficulty in arranging for a loan of a few hundred dollars with them as collateral. Five days after the indorsement referred to was written (indorsement dated November 16, 1933) he had telegraphic orders relieving him from duty at Gwinn and sending him to Fort Brady, Michigan, for Civilian Conservation Corps duty. Because of this change of station these securities, the promissory note and the hotel stock, did not reach him until after December 1, 1933, and his later efforts to raise money on them were without result (R. 110).

After accused's return to Monmouth on January 8, 1934, he examined his records with reference to the Petersen-Harned-Von Maur account and found an entry of payment the latter part of 1932. He communicated with the firm asking for verification of payments made and they replied that their records showed no payment since September 17, 1932. He had no proof of a subsequent payment and could only assume that their record was correct.

Specifications 12 and 13, Charge I.

These specifications refer to an account with the Post Exchange, Fort Sill, Oklahoma, and the only account in the specifications contracted subsequent to August, 1932.

Prior to accused's departure for change of station from Fort Sill to Monmouth, Illinois, on June 1, 1933, he verified the amount owed the Post

Exchange and found the total to be $72.88, due and payable prior to July 10 (1933). Except for a small partial payment in June his June and July pay did not become available until August 11, 1933. When the balance of his June pay was not received at the regular time, he advised the Post Exchange Officer of the reason for the delay in payment, and upon the receipt of pay in August he remitted $40.00 by money order, expecting to send the balance in a few days (R. 111). Acknowledgment of the receipt of $40.00 included a new statement of the account which showed a balance of $57.88, instead of the $32.88 due according to his records. He wrote for an explanation and some time later was informed that the difference was due to an item of $25.00 indebtedness to the Post Tailor, contracted about June 1st, having been charged against his account at the Post Exchange. This item had been contracted with the understanding that it was not to be charged against his exchange account but would be payable at his convenience prior to December 1, 1933.

Under Specification 12, which alleges that having made a promise to the Senior Instructor, Illinois National Guard, under date of November 16, 1933, that the account would be paid not later than December 1, 1933, he did without due cause fail to keep his promise, the prosecution had quoted only one paragraph of his indorsement. As in the preceding instance, the meaning of the paragraph is "materially modified by the context". A full explanation as to why the account had not been paid was made. Reference was made to securities and to the fact that he had written to have them forwarded to him. He outlined his plan for raising money on them and for paying the account to the Post Exchange as soon as that money was available (R. 112). Within five days he had been ordered to Fort Brady, and when the securities were received he was unable to borrow the money on them as anticipated (R. 113).

General testimony under all specifications.

Each and every promise made to a superior officer or to a civilian was made in good faith, and in no instance was accused without a full and due sense of responsibility with reference to the account. Any specific date set for the payment of an account was based on the information available at the time the promise was made (R. 117). In each case of failure to keep a promise there was invariably between the time the promise was made and the time for fulfillment some actual or imminent change in his duty status. Civilian Conservation Corps duty was bad enough in the

majority of cases but he knew of no other officer in the service who was subjected to as much uncertainty and who served nearly eight months with seven changes of station involving nearly 6500 miles of travel.

To the question that might be asked him as to why he did not ask for release from his promise when it became apparent that he would not be able to meet it, the answer was that in some instances he was in daily expectation of receiving the necessary funds from outside income, and in any case each of the communications involved in these charges had Headquarters, Sixth Corps Area, as the military office of origin. Colonel Krueger, Colonel Marshall, and the Commanding Officer, Medford District, represented simply channels of communication and not offices of record so far as these communications were concerned. He could see no point in communicating with a commander who had no record of the basic communication and who, in all probability, would have but slight recollection of the matter. He looked upon Headquarters Sixth Corps Area as the office having record of the matter, and he felt that that office was fully advised and aware of his ever changing condition of service and with the efforts he was making to liquidate his indebtedness (R. 118). Communications pertaining to the obligations mentioned in these specifications were forwarded to him for remark at various times during the period from August 1, 1933, to January 1, 1934, and, since his indorsement in each instance carried an explanation of the changes in his duty status and of other factors affecting payment on his debts, it seemed to him that no additional communication in explanation of delays was called for.

In closing his testimony accused wished to add that never in his life had he failed to pay a just debt, nor had he attempted to evade any obligation either personally contracted or assumed. He had never had any thought but to pay the debts listed in these charges in full at the earliest possible time.

While he may have been foolish to assume debts that might possibly have been avoided without dishonor, and to continue paying unreasonable alimony, when otherwise he could have paid all his debts by that time, he believed that the documentary evidence presented fully supports the fact that since the alimony and debts were assumed in September, 1932, he had done all that was humanly possible to fulfill his obligations. In spite of the heavy alimony paid, and in spite of months of service under trying conditions and materially increased living expenses, his total

indebtedness had been steadily reduced. In the period from August 1, 1932, to date, he had drawn in pay about $9600.00 (R. 119). He had carried about the minimum of life insurance at a cost of about $800.00 during the period, and for more than a year had contributed fairly regularly to the support of his mother. In other words, he had lived for a period of two years, including eight months of Civilian Conservation Corps duty, on less than forty per cent of his pay. His indebtedness had been reduced to a point where, given a very few months of duty at his station at Monmouth, his financial affairs would be in such condition that there would be very little likelihood of their being in any way embarrassing (R. 120).

Upon cross-examination by the prosecution, and in part by the court, accused testified substantially as follows:

In the latter part of November, 1931, he owed approximately $100.00 in small bills, $300.00 on a note to the Jackson Personal Thrift Service, Inc., and approximately $300.00 to the Service Finance Corporation, a total of $700.00. Subsequent to November, 1931, and prior to September, 1932, his "marital affairs became quite difficult", and finally culminated in divorce. In the middle of 1932 he and his wife were separated. For a time he paid the living expenses which she contracted, and for about three months prior to the divorce in September, 1932, he paid her $125.00 to $150.00 a month for her maintenance while they were living separately. A considerable number of bills "developed" during the summer of 1932 and it was necessary for him to borrow money wherever he could in order to liquidate them. A great number of additional bills were presented beginning August 1, 1932, when it was learned that he was making a change of station (R. 126). These bills amounted to several hundred dollars. He had made up from memory the list of bills which on October 1, 1932, represented his liabilities of $3800.00, and they were as follows: Muscatine State Bank, Muscatine, Iowa, $100.00; C. R. Stafford, attorney, Muscatine, Iowa, $304.00; Service Finance Corporation of San Antonio, $136.00; Hofheimer, Inc., Norfolk, a loan company, $210.00 (R. 127); Citizens Loan of Chicago, $180.00; Federal Services Finance Corporation of Washington, D. C., $475.00; Jackson Personal Thrift, $280.00; Refrigerator Discount Corporation, $100.00 for a refrigerator contracted for by his former wife; Havercamp, of Muscatine, Iowa, $210.00; Eitman Grocery of Muscatine, Iowa, $104.00; F. H. Bomke, $152.00; Meerdink Clothing Company, Muscatine, Iowa, $125.00; Grimm Drug

Company, Muscatine, Iowa, $75.00; Muscatine Lumber & Coal Company, Muscatine, Iowa, $56.00; Petersen-Harned-Von Maur, Davenport, $53.00; Dr. Clapp, of Muscatine, Iowa, $22.00; a dentist in Muscatine, Iowa, $20.00; the Magnus Laundry, Muscatine, Iowa, $36.00; the Batterson Department Store, Muscatine, Iowa, $60.00; and Peale & Company, Muscatine, Iowa, $75.00. There was also $500.00 owed to a relative (R. 128). (Note: These items total $3273.00.) In addition to these there were somewhere between $300.00 and $500.00 in small bills brought to life from his correspondence with various people with whom he thought his former wife may have had things charged. These bills were a gradual development from November 30, 1931, to about October 1, 1932 (R. 129). The only bills contracted by him were those to the loan companies when he borrowed money in order to pay bills. The other items, except for a very small number, were contracted by his former wife, the majority of them without his knowledge and after their separation, although perhaps a third of the amount was a gradual accumulation of not being able to keep up with living expenses during the period preceding February 15, 1932. His wife was living in the same town with him but he made no effort to stop payment of the bills, first, because he was "loath to do it", and second, because he did not realize the magnitude of them until it was too late (R. 130). The loans with loan companies total $1281.00, including balances on $600.00 owed to loan companies, as shown in November, 1931 (R. 131). The proceeds of these loans were applied when received to the payment of bills. Accused bought a new automobile in June, 1932, from one of these loans amounting to $475.00, and had since disposed of it. At the time of trial he had an automobile (R. 132), title to which was in his present wife. The value was "in the neighborhood of $300", he believed. He had made efforts over several months to raise money by selling it (R. 133). He did not take steps to notify the public that he would not be responsible for obligations incurred by his former wife after their separation because he had never known of an Army officer publishing such a notice, and he was "very loath to take any such step as that" because of the reaction in the small community in which he was serving (R. 135). His first marriage was in June, 1914, by which there was one child, then (at the time of trial) in the custody of his former wife. He believed that the alimony of $125.00 a month was disproportionate to the amount of pay that he was receiving (R. 136). Since February 1, 1934, he had not paid the full amount of $125.00 a month (R. 137), but had paid $225.00 covering March, April, May and June (R. 138).

Upon redirect examination accused testified substantially as follows: In August, 1932, he paid on his debts: alimony, $125.00; Citizens Loan

Association, $31.13; Eitman Grocery, $40.00; Batterson's, $30.00; F. H. Bomke, coal, $51.50; Dr. Clapp, $21.85; George Zoller, $5.00; a total of $304.48. In September, 1932, he paid: alimony, $125.00; Citizens Loan, $30.25; Harry Timm, $9.00; Magnus Laundry, $15.00; H. F. Barnard, $9.50; a total of $188.75. In October, 1932, he paid: alimony, $125.00; C. R. Stafford, $100.00; Citizens Loan Association, $16.52; Federal Services Finance Corporation, $63.00; a total of $304.52 (R. 139). In November, 1932, he paid: alimony, $125.00; C. R. Stafford, a loan, $100.00; Security National Bank, $150.00; Refrigerator Discount Corporation, $14.00; Breummer Motor Company, $20.50; Leu & Son, $10.80; Associated Military Stores, $4.38; Peale & Company, $10.00; miscellaneous accounts, $12.00; Grimm Drug Company, $20.00; Muscatine Lumber & Coal Company, $20.00; a total of "$546.68" (note error; actual total, $486.68). The amounts paid on these bills were exclusive of current living expenses during the period (R. 140-141). In December, 1932, he paid: alimony, $125.00; C. R. Stafford, $50.00; Citizens Loan Association, $16.32; Security Bank, $105.00; Refrigerator Discount Corporation, $14.00; miscellaneous accounts, $2.20; Grimm Drug Company, $10.00; a total of "$356.52" (note error again; actual total, $322.52). These payments were from accused's pay for that month and from money borrowed from the Security Bank at Lawton. In January, 1933, he paid: alimony, $125.00; C. R. Stafford, $54.00; Service Finance Corporation, $12.00; W. H. Hofheimer, $21.00; Citizens Loan Association, $15.00; Jackson Personal Thrift Corporation, $24.00; Security Bank, $125.00; a total of $376.00 (R. 142). In February, 1933, he paid: alimony, $125.00; Service Finance Corporation, $12.00; W. H. Hofheimer, $21.00; Federal Services Finance Corporation, $32.00; Security Bank, $75.00; Refrigerator Discount Corporation, $14.00; George Kranz, $4.50; "Meerding" Clothing Company of Muscatine, $13.00; Grimm Drug Company of Muscatine, $10.00; a total of "$296" (note error again; actual total, $306.50). In March, 1933, he paid: alimony, $125.00; Service Finance Corporation, $12.00; W. H. Hofheimer, $21.00; Citizens Loan Association, $15.00; Security Bank, $75.00; Refrigerator Discount, $14.00; Grimm Drug Company, $10.00; Muscatine Lumber & Coal Company, $5.00; a total of $277.00. In April, 1933, he paid: alimony, $125.00; Service Finance Corporation, $12.00; W. H. Hofheimer, $21.00; Federal Services Finance, $32.00; Security Bank, $100.00; a total of $290.00. In May, 1933, he paid: alimony, $125.00; Service Finance, $12.00; W. H. Hofheimer, $21.00; Federal Services Finance Corporation, $32.60; Security Bank, $50.00; Muscatine Lumber & Coal Company, $5.00 (total $245.60). In June, 1933, he paid: alimony, $125.00; Service Finance, $12.00; W. H. Hofheimer, $21.00; Security Bank, $55.00; Refrigerator Discount, $10.00

(total $223.00). The total paid on old obligations and for alimony was "$3408.55". This also included $735.00 borrowed and repaid during this period. (Note actual total, $3325.05, but see Defense Exhibit 5 for tabulation of these payments and additional items not mentioned by accused.) (R. 143, 154.) During the period accused was on duty at Fort Sill, Oklahoma, as a student officer, his average monthly living expenses were around $130.00 or $135.00 (R. 144). At no time during all this period of time did accused ever intend to deceive his commanding officer in any way, nor to deceive his creditors by making these promies, as has been alleged. Never in his life had he owed anybody and not paid them, except for the balances shown as owed on these old debts. He had never intended to defraud these creditors by making false claims against them or through nonpayment (R. 145). The bills have to be paid and, if he lived long enough, there was no question but that they would be paid regardless of what happened.

Upon recross-examination accused testified substantially as follows:

He was divorced from his first wife September 14, 1932, and remarried on October 29, 1932. The first item of Defense Exhibit 5 indicating a payment of "alimony" in the amount of $125.00 in August, 1932, was a "misnomer". This was an amount paid to Mrs. Dosher for separate maintenance (R. 146).

Upon examination by the court accused testified substantially as follows:

When he entered into dealings with these loan companies and borrowed money from them they told him that they would charge him 3½% per month on unpaid principal when it became due, and that undoubtedly appeared in the contract which he signed (R. 149). He attempted to sell the hotel stock or to use it as collateral and he attempted to use the $30,000.00 note as collateral. He had never attempted the discount of the note because his debts were such a small proportion of the face of it that to have discounted it would have entailed at the time entirely too much sacrifice (R. 152). His total indebtedness at the time of the trial was $1300.00 (R. 153). He was asked to comment on the fact that eleven months and sixteen days had elapsed since August 1, 1933, the date he had promised that a payment of $75.00 would be made to the Citizens Loan Association, and replied that as early as November, 1933, it came to his attention that the allegations

contained in these charges were being investigated, and he had been advised that if he made payments on these obligations during this period there might be a "presumption" against him because this would seem to be an effort to get out from under the allegations that had been made (R. 156). During these eleven months since August 1, 1933, he had drawn his pay. He agreed to the rate of interest of the loan companies by signing the contract, and later in his proposal made in November, 1932, he attempted to have reduced what he had agreed to pay at the start. In this proposal he made no objection to the high rate of interest but pointed out the condition he was in and asked for an opportunity to defer payment on the account, with a reduction of interest if possible (R. 157). To the firms of which he had made this request he had since made but one payment, that of $35.00 to the Citizens Loan Association in August, 1933 (R. 158). From a cash sale of the automobile he might have received $200.00. None of the obligations listed in the charges had been paid, for the reasons that he had just stated (R. 159). Accused's attention was directed to the Petersen-Harned-Von Maur account of $27.89, which he had once promised to pay on October 1, 1933, and again on December 1, 1933, and asked what he considered that a promise meant. He replied that throughout his service he had never failed to keep a promise. He had "a deep sense of responsibility in connection with any promise made". The conditions which occurred during this period were such that it seemed impossible to predict from one day to the next what would happen. The promise would be made, and before the time came for fulfillment several different factors would enter in. There had been some question as to the correctness of the Petersen-Harned-Von Maur account and this was a factor in delaying payment. The items had been under investigation since November, 1933, and in most instances the people he had talked with about paying these accounts had advised against it (R. 160). In his letters to the various commanding officers he had questioned the correctness of only two of the accounts, the Post Exchange, and later the Petersen-Harned-Von Maur (R. 161). He made a complaint about the Post Exchange account after August 1, 1933, when a payment of $40.00 was made on it. A month and a half or more later he received an explanation of the additional charge of $25.00. On November 16, 1933, the bill was not in dispute. It has not since been paid (R. 163).

Captain Clarence H. Kells, Infantry, a witness for the defense, testified that during the early part of July he had made a careful inquiry into the value of the holdings in the Muscatine Hotel Company and the note of the R. and J. Dick Company, mentioned in the record, and had been informed by the head of the Securities Department of the First National

Bank of Chicago that these securities were not then marketable (R. 167). In Dun and Bradstreet the Muscatine Hotel Company had a credit rating up to $150,000.00, and the R. and J. Dick Company up to $1,000,000.00. Both were rated as good pay. The securities of either organization are unquoted on any exchange (R. 168). The R. and J. Dick Company is a subsidiary of the R. and J. Dick Company of Scotland which manufactures belting of various kinds. Prior to January, 1932, this company was paying all of its obligations promptly and was rated high in financial reserve. Since then its financial reserve had dropped somewhat, but without affecting its credit rating (R. 169).

The accused was recalled and testified that while he was on duty at the Field Artillery School he had sought a loan of from $600.00 to $1000.00 from the bank at Lawton, Oklahoma, on the $30,000.00 note and the hotel stock as security, but that it had been refused (R. 171).

6. The prosecution offered in rebuttal of the testimony of accused two depositions of Mrs. Hazel B. Dosher, the divorced wife of accused. Objection was made by the defense on the ground that the testimony contained therein was a privileged communication which should not be received without the consent of both parties concerned. The law member ruled that all evidence pertaining to occurrences since the divorce was admissible, and that evidence of occurrences prior to the divorce, not admissible because privileged, would be received if in rebuttal to matters brought into the case by accused (R. 172-179½).

The testimony of Mrs. Dosher is substantially as follows: She had known accused for twenty-one years. She had been divorced from him on September 14, 1932, and awarded alimony of $125.00 per month by the court. Accused had paid this alimony regularly and promptly up to and including February, 1934. His subsequent payments of alimony to June 15, 1934, have been as follows: March 29, 1934, $25.00; April 22, 1934, $50.00; April 26, 1934, $50.00; May 28, 1934, $50.00; and June, 1934, $50.00. She has one child by accused, a son then eleven years of age (Ex. 27). There was brought to the attention of the witness the following statement made by accused to the Commanding Officer, Jefferson Barracks, Missouri, under date of August 4, 1933:

"For several years, my former wife seemed to find outlet for any fit of temper in running up bills without my knowledge.

After a year or more of hard effort, I would succeed in getting out of debt only to be plunged in again. Finally the situation became unbearable and culminated in divorce."

She denied that her extravagance, as outlined in this statement, was the reason for the divorce, but stated that it was granted on the charge of cruelty. She lived with him until the early part of August, 1932. During the last months she lived with him she employed no regular maid, but had a cleaning woman occasionally and a girl who stayed with her son when they were away from home. She made practically all her own dresses. Examples of the prices she normally paid for purchases were as follows: Shoes, approximately $8.50; dresses, $15.00 to $20.00; fur jacket, approximately $32.50. She bought no jewelry. During her married life with accused she was not in the habit of entertaining more often nor more expensively than was normally done by wives of other captains with whom she was acquainted (Ex. 28).

In further rebuttal of the testimony of accused the prosecution introduced the deposition of W. H. Garrison, Vice President, Federal Services Finance Corporation, 744 Jackson Place, Washington, D. C. Mr. Garrison testified substantially as follows: In May, 1932, his company financed accused in the purchase of a Ford Tudor Sedan. The car cost $580.00. There was a down payment of $175.00. Insurance was $30.80, charges $43.20, and the contract was for $479.00 divided over 15 payments, one of $31.00 due August 1, 1932, and 14 of $32.00 each. Accused is supposed to have sold this car in April, 1934, and had given the Corporation a lien on his Buick to take its place. On June 20, 1934, accused owed $214.00 on the contract (Ex. 29).

7. The sufficiency of the evidence to support the findings of guilty may conveniently be discussed, first, under each of the specifications, and then generally upon the question as to whether or not accused's repeated failures to meet his obligations and his promises were without due cause and dishonorable, as alleged.

Specification 1, Charge I.

The evidence shows, and it is admitted by accused, that he became indebted to the Citizens Loan Association in the sum of $300.00 on March 18, 1932, for value received, as alleged. It is also shown, and is admitted by accused, that on June 20, 1933, he addressed a written indorsement to

the Commanding Officer, Jefferson Barracks, in which he stated that immediately after August 1st he would make payment of at least $75.00 on this account. It is further shown that after the date of this indorsement accused paid $35.00 on the account on August 11, 1933, but had made no payment since, as he admits, and at the time of trial there was due $130.66 with interest from August 11, 1933.

Specification 2, Charge I.

In addition to the evidence mentioned above in proof of Specification 1, it is shown that accused's statement of June 20, 1933, to the Commanding Officer, Jefferson Barracks, contained an additional promise that he would make payment of the balance of the Citizens Loan Association account shortly after August 1 (1933). As shown above, he did not do so. In his testimony accused contended that the wording of his indorsement of June 20, 1933, did not make the promise alleged. There is no merit in this contention.

Specification 3, Charge I.

In addition to the evidence mentioned above in proof of Specification 1, it is shown that accused's note of $300.00 to the Citizens Loan Association was payable in twelve monthly instalments of $25.00 each, with interest, commencing April 10, 1932, with the final payment of principal and interest due on March 10, 1933. It is further shown that after the payment of $35.00 by accused on August 11, 1933, there remained due and payable the sum of $130.66 which had not since been paid. Accused testified that he made a payment of $16.52 in October, 1932, with which he was not credited, but he offered no other evidence in support of this and his claim of payment may be ignored.

Specification 4, Charge I.

The evidence shows that accused became indebted to the Jackson Personal Thrift Service, Inc., in the sum of $300.00, for value received, on November 19, 1931, payable in 20 monthly instalments of $15.00 each. But $60.00 of the principal sum of this obligation had ever been paid. In a letter sent by accused to this creditor under date of September 24, 1932, he stated that if the creditor would furnish him with a statement of interest due to include October 5 (1932), he would send a check covering

that amount at the same time. The creditor replied that on October 5 his interest would amount to $32.25. The agreement to pay interest was not complied with and no further payment was made by accused until the last one on January 12, 1933.

Specification 5, Charge I.

In addition to the evidence mentioned above in proof of Specification 4, it is shown that in a letter written by accused to this creditor under date of November 7, 1932, he made the following statement:

> "If you will make a new note or otherwise arrange to permit me to defer payments on the amount I owe you, I can resume payments on it January 1st at a rate of one tenth the amount now owed per month until the amount is paid."

There is no evidence that a new note was made nor that any arrangement was reached to permit accused to defer payments upon the amount he owed, but accused did make a payment of $24.00 on January 12, 1933, a sum which was one-tenth of the amount he then owed. Even if the language of accused be interpreted as a promise to make payments of $24.00 per month, commencing on January 1, 1933, it is evident that this promise was conditioned upon the acceptance of a new note by the creditor or some arrangement to defer payments, neither of which was done. Accused's contention is sound that a proposal was made, but not accepted, and the evidence does not support the allegation of the specification that a promise was made.

Specification 6, Charge I.

In addition to the evidence mentioned above in support of Specification 4, it is shown that in a letter written by accused to this creditor under date of April 17, 1933, he made the following statement:

> "I am still affected by the 'bank holiday', however, I will be able to make a payment on my account, May 1st."

Accused testified that he had no record of this communication nor any recollection of the circumstances. Proof of the authenticity of the signature on this letter is not so satisfactory as the proof of other

signatures to communications of accused received in evidence, but the finding of the court that it was authentic is doubtless based upon its comparison of this signature with other admitted signatures of accused and may be accepted. The language, "I will be able to make a payment on my account, May 1st" is fairly to be construed, not merely as a statement of anticipated ability to pay, but as a promise to make a payment on the date named. As already shown, no payment on this account was made after January 12, 1933.

Specification 7, Charge I.

The evidence under this specification is identical with that mentioned under Specification 5, Charge I. The indebtedness to the Jackson Personal Thrift Service, Inc., as stated under Specification 4, Charge I, was payable in monthly instalments of $15.00 each, and the evidence does not support the allegation of Specification 7 that on and after January 1, 1933, it became due and payable at the rate of $24.00 per month. Accused's contention, that no promise was made to change the rate of payment, is well supported.

Specification 8, Charge I.

In addition to the evidence mentioned above in proof of Specification 4, it is shown that in an indorsement written by accused to the Commanding Officer, Jefferson Barracks, Missouri, under date of August 4, 1933, he stated that his entire indebtedness would be liquidated before the end of the calendar year. This promise was not kept. Accused testified that this statement did not apply specifically to his indebtedness to the Jackson Personal Thrift Service, Inc. This may be admitted, but necessarily it included that indebtedness as a part of his entire indebtedness.

Specification 9, Charge I.

The evidence shows that on September 17, 1932, accused was indebted to the firm of Petersen-Harned-Von Maur, of Davenport, Iowa, in the amount of $27.89, the balance of an account for merchandise received, after credit for a payment of $25.00 on that date. In referring to this account accused stated in an indorsement to the Commanding Officer, Medford District, Civilian Conservation Corps, Medford, Oregon, dated August 29,

1933, that remittance would be made October 1 (1933), paying this account in full. No further payment of principal or interest was made on the account, as admitted by accused at his trial. He testified that this indebtedness was contracted by his former wife and that it did not come to his attention until the latter part of August, 1932, and further stated that the creditor agreed to defer payment on the balance if he paid approximately half of the bill that was then $52.89. He paid $25.00 on September 17, 1932. Repeated demands for payment were subsequently made by the creditor, and at least two promises of payment made to the creditor by accused. Under cross-examination accused testified that some question about the correctness of the account had been a "factor in delaying payment". The evidence shows that accused's check for $25.00 received by the creditor on September 17, 1932, was protested for nonpayment, and that subsequently he sent another check to cover both the amount of the dishonored one and the protest fee. There is no evidence that he questioned the account until he wrote the creditor on June 26, 1934.

Specification 10, Charge I.

In addition to the evidence mentioned above in proof of Specification 9, it is shown that in an indorsement written by accused to Colonel G. C. Marshall, Infantry, Senior Instructor, Illinois National Guard, under date of November 16, 1933, with reference to the account of Petersen-Harned-Von Maur, he stated that this indebtedness would be met by December 1st. Accused testified that the meaning and intent of the paragraph containing this statement was modified materially by the preceding paragraph in which he stated that within a few days after certain securities reached him he would be in a position to meet all of his obligations then due. The statement upon which this specification rests is an independent one and the claim that it is modified by a preceding statement is without merit.

Specification 11, Charge I.

The evidence under this specification is included in that mentioned under Specification 9 above. Notwithstanding the promises of payment mentioned above under Specifications 9 and 10, and other and repeated promises of payment made directly to the creditor, this balance of $27.89 due Petersen-Harned-Von Maur on September 17, 1932, had not been paid at the date of the trial in July, 1934, as admitted by accused.

Specification 12, Charge I.

The evidence shows that on July 31, 1933, accused was indebted to the Post Exchange, Fort Sill, Oklahoma, in the sum of $57.88 for merchandise received; and that in an indorsement written by him to the Senior Instructor, Illinois National Guard, under date of November 16, 1933, with reference to this account, he stated that a "remittance in full of the amount ($57.88)" would be made "not later than December 1st". It is shown that accused was still indebted in the same amount on June 27, 1934, and he admitted at the trial that he had paid nothing on the account. Accused testified that the meaning of his statement was materially modified by the "context" of the indorsement in which he had outlined his plans for raising money on securities. Whatever may have been his plans the statement promising to pay the full amount of the account "not later than December 1st" is an independent one and there is no basis for the claim of accused that it was modified by other matter.

Specification 13, Charge I.

The evidence under this specification is included in that mentioned under Specification 12 above. As stated there, the debt was payable on or about July 31, 1933, and, as admitted by accused, has not since been paid.

8. There remain for consideration the questions whether or not the failures of accused to meet these obligations when they became due, and to fulfill his repeated promises to make payments on them, were both "without due cause" and dishonorable, as alleged.

It is reasonable to expect that accused would be eager to discharge at the earliest possible moment the obligations to these two loan companies, the amount of which, by his own agreement, was increasing at the rate of 3½% interest per month. And there was the further, and what should have been the more compelling reason to pay not only these loans, but also the commercial and post exchange accounts, in the fact that he had made these definite written promises of payment, not only to the creditors themselves, but also to his superior officers upon complaint made by the creditors. These were compelling reasons why the obligations, which amount roughly to about $600, should have had priority in payment. Accused admits that he did not pay them when they were due and when he promised to pay them, and he claims that there was ample cause for his "tardiness" and that his failure to fulfill his promises was due to

circumstances and conditions over which he had no control. But in his testimony he recited in great detail, as if in defense, the payments that he did make upon other debts during the period in which he was defaulting on these, and showed that these payments reached the considerable sum of $4300. The payment of so much money on other debts within this period of less than two years does not support his claim that there was ample cause for his delay in the payment of these, but indicates rather that in the selection of debts that he would pay he had no regard whatever for the formal written promises that he had made. The record is silent as to what other promises of payment he may have made, nor does he show that in the keeping of any such promises he was unable to keep those upon which the charges are based. It is of interest to note that in October, 1932, when a promise to pay interest of $32.25 to the Jackson Personal Thrift Service, Inc., matured and was ignored, he claims to have paid $304.52 on other debts. A promise to make a payment to the same creditor in May, 1933, was ignored although he says that he paid $245.60 on other debts in that month. It is of further interest to note that in the summer of 1932 in order to purchase a new automobile he entered into a contract to pay $479.00 in fifteen monthly payments, the first of $31.00 on August 1, 1932, and the succeeding payments of $32.00 each. In June, 1934, he still owed $214.00 on this contract.

The "circumstances and conditions over which he had no control", given by accused as the reason for his failure to fulfill his promises, appear mainly to be his duty with the Civilian Conservation Corps. This covered the period from early June, 1933, until January, 1934. Some extra expense was doubtless incurred because of his movements in this duty, but he testified that he had either been reimbursed the actual expense of such travel, received mileage at the rate of eight cents per mile, less land grant deduction (in one instance three and one-half cents per mile from Monmouth, Illinois, to Jefferson Barracks, Missouri), or, as in one other instance, traveled by troop train. Notwithstanding these difficulties it appears from his testimony that during this very period he reduced his liabilities by more than $300.00, thus indicating an ability to make substantial payments where he wished to make them.

He may also have included his marital experience in the "circumstances and conditions over which he had no control" that prevented him from meeting his promises. It is shown that in the early part of 1932 he separated from his first wife, whom he had married in 1914, and was

divorced by her on September 14, 1932. Notwithstanding the fact that he remarried a month and a half later he continued from that date to the following July to make substantial monthly payments of from $223.00 to as much as $546.68 on such debts as he chose to pay. It does appear that, while his new wife was aware of his debts and had agreed that her separate income might be applied to the payment of them, there were no funds available from this source to apply on them. Accused's second marriage was a matter quite within his control, and, while its promise of financial aid was not fulfilled, it must necessarily have increased his current living expenses and reduced his ability to make payments on his debts.

An officer of the Army is expected to be "a man of honor; that is to say, a man of high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment". Winthrop's Military Law and Precedents, Reprint 1920, p. 711. Such a man pays his debts when they become due, or, if circumstances unavoidably prevent payment, he frankly discloses the facts to his creditor, and endeavors to reach a satisfactory arrangement with him. And his action would be the same if he made a promise to a creditor, or to another, that he would make a payment at a certain time. A man of honor does not ignore his debts when they become payable, nor does he ignore promises of payment that he makes. Though the failure to fulfill a single promise to pay a debt might not be considered dishonorable when that failure was due to carelessness, forgetfulness or temporary lack of funds, it cannot be so held where, as in this case, there were repeated promises made and not kept.

Considering the evidence in its entirety, and particularly that which has just been discussed, no reasonable doubt can be entertained that the failure of accused to meet these obligations when they became due, and to fulfill his repeated promises to make payments on them, was "without due cause" and dishonorable. The dishonorable neglect to pay debts is a violation of the 95th Article of War. Par. 151, M.C.M.

9. In arriving at its conclusion the Board has not overlooked CM 202290, Lowry, in which The Judge Advocate General held that conduct which ordinarily would be considered a violation of the 95th Article of War did not constitute such a violation under the peculiar circumstances involved. There the conduct was an isolated incident or escapade; but

in the instant case the evidence shows a continued and consistent disregard of obligations and promises covering a period of more than a year and a half.

10. At the time of the trial accused was 43 5/12 years of age. The statement of his service, as it appears in the Official Army Register, is as follows:

"(Federal: Seaman U.S. Navy 26 Aug. 08 to 21 Jan. 12.--Non-Federal: 1 lt. F.A. Ill. N.G. 26 Sept. 16 to 6 July 17.)--1 sgt. 1 F.A. Ill. N.G. 28 June 16; hon. dis. 21 Aug. 16; 2 lt. 1 F.A. Ill. N.G. 22 Aug. 16; 1 lt. 29 Aug. 16 to 25 Sept. 16.--2 lt. of Cav. 3 June 17; accepted 7 July 17; 1 lt. 3 June 17; capt. (temp.) 5 Aug. 17; capt. 21 May 20; trfd. to F.A. 1 July 20; maj. 1 Oct. 33."

11. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 5 and 7, Charge I, but is legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4, 6, 8, 9, 10, 11, 12 and 13, Charge I, and of Charge I, and legally sufficient to support the sentence, and warrants confirmation thereof. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War.

Theodore Hall, Judge Advocate.

H. A. Trumbull, Judge Advocate.

Archibald King, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O. NOV 15 1934 To: The Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Major Guy H. Dosher (0-5454), Field Artillery, together with the foregoing opinion of the Board of Review.

2. I concur in the opinion of the Board of Review, and, for the reasons therein stated, recommend that the findings of guilty of Specifications 5 and 7, Charge I, be disapproved and that the sentence be confirmed.

3. Inclosed herewith is a draft of letter for your signature transmitting the record of trial 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. Attention is invited to the following correspondence in connection with this case:

Letter to you from Representative Chester Thompson, dated July 26, 1934, acknowledged on August 6, 1934.

Letter to The Adjutant General from Representative Chester Thompson, dated August 7, 1934, asking investigation of the continuance of the arrest of Major Dosher and release, if proper. Reply, dated August 17, 1934, stated reasons given by Commanding General, Sixth Corps Area, for continuing the status of arrest.

Letter to you from Representative Claude V. Parsons, dated July 30, 1934, acknowledged August 4, 1934.

Letter to the President from Representative Claude V. Parsons, dated July 30, 1934, transmitting a brief, acknowledged August 10, 1934. Original letter and brief are transmitted herewith.

Letter to you from Senator Louis Murphy, dated August 3, 1934, transmitting another copy of the brief mentioned above, acknowledged August 13, 1934.

Letter to The Adjutant General from Representative Kent E. Keller, dated October 27, 1934, transmitted herewith, inquiring if Major Dosher is being held without pay. Reply, dated November 2, 1934, stating that the September and October pay has been released to Major Dosher conditionally.

Other than the careful consideration you have promised to give to certain of these communications and to the brief, they require no further action. Except as noted above and transmitted herewith the originals and the copies of the replies thereto are on file in the office of The Adjutant General.

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

5 Incls.
Incl. 1 - Record of trial
Incl. 2 - Draft of let. for sig. of Secy. of War
Incl. 3 - Form of executive action
Incl. 4 - Let. from Representative Keller to TAG 10-27-34
Incl. 5 - Let. from Representative Parsons to the President 7-30-34 & Incl.

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

Board of Review
CM 202290

OCT 2 1934

UNITED STATES)	HAWAIIAN DIVISION
)	
v.)	Trial by G.C.M., convened at Schofield Barracks, Hawaii, July 20, 30, 1934. Dismissal.
)	
Second Lieutenant DEXTER M. LOWRY, JR. (0-17628), 21st 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 July 20 and 30, 1934, at Schofield Barracks, Hawaii, upon a charge and specifications which may be abstracted as follows:

CHARGE: Violation of the 95th Article of War.

Specification 1: Drunk and disorderly at the Infantry Club.

Specification 2: Unlawfully breaking and entering in the night time the apartment occupied by Second Lieutenant Harold R. Uhlman, 21st Infantry, and family, at the Infantry Club.

Specification 3: That accused did "conduct himself in a rude, improper and insulting manner toward Mrs. Bessie Stewart, a woman not his wife, by pushing her to the floor, then placing her on a bed and attempting to fondle her against her will, in the meantime saying to her 'I am Lieutenant Dexter Lowry. I always get what I want and I am going to have you,' or words to that effect; this to the disgrace of the military service."

All specifications allege the offenses to have occurred at Schofield Barracks, Hawaii, June 5, 1934. Accused pleaded not guilty to and was convicted of all specifications and the charge. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service. The convening authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in chief may be summarized in narrative form as follows:

On the evening of June 5, 1934, Mrs. Uhlman, wife of Second Lieutenant Uhlman, and Mrs. Bessie Stewart, a widow twenty two years of age employed by Lieutenant Uhlman as a nurse for his baby, who appears to have been treated much as a member of his family, took their seats in the dining room at the Infantry Club, Schofield Barracks. Accused, who had known Lieutenant Uhlman slightly at the Military Academy and had met Mrs. Uhlman only a few days before, seated himself at the same table. A little later Lieutenant Uhlman arrived and also took a seat at the same table. Accused had a bottle of sloe gin with him. He drank some of its contents and offered drinks to the others at the table. He did most of the talking, whistled, and pounded the table. His conversation was noisy, foolish, and boastful. He said that he was "a good second lieutenant," that he was the only officer capable of firing a machine gun with the new ammunition, and he told what a "spiffy" officer he was. He stated, "If I don't like the way the colonel or general dresses I go right up and tell them, and they say, 'I will take that off right away.'" (Lieutenant Uhlman, R.13,14; Mrs. Uhlman, R.25,28,29; Mrs. Stewart, R.36,37).

After dinner the Uhlman family went upstairs to rooms which they occupied in the same building. Accused asked and received permission of Lieutenant Uhlman to come upstairs with them. Lieutenant and Mrs. Uhlman occupied one room as a bedroom; next, with a door between, was a bathroom; and, beyond that, also with a connecting door, another bedroom occupied by Mrs. Stewart and the Uhlman baby. Each of the three rooms also had a door opening on the hall. Mrs. Stewart occupied herself with putting the baby to bed and the others entered Lieutenant and Mrs. Uhlman's bedroom. Mrs. Uhlman lay on one bed and her husband on another, each with a pillow propped against the back. Accused sat in a chair and talked in a manner similar to his conversation in the dining room. Accused took several drinks while upstairs, and Lieutenant Uhlman had one with him.

Lieutenant Uhlman was called to the telephone. Mrs. Uhlman testified (R.26),

> "The minute Lieutenant Uhlman went downstairs, Lieutenant Lowry came over to the bed and said how lovely and sweet I was. He tried to kiss me, and when I pushed him away, he said, 'Not so fast young lady. I am First Lieutenant Dexter Lowry.' He tried to kiss me again and I pushed him away and he said, 'I just wanted to kiss your ear.' I told him if he felt affectionate that he could go in and kiss the baby."

Lieutenant Uhlman returned to the room and informed his wife that the telephone message was an invitation to the movies. The two Uhlmans and accused went downstairs. Mrs. Uhlman obtained from Private Poole, caretaker of the club, keys to the outer doors of the two bedrooms, locked them and directed Mrs. Stewart to fasten the door from the bathroom into the hall on the inside with a hook and eye. Mrs. Stewart did so, undressed, and went to bed; and Lieutenant and Mrs. Uhlman went to the movies. (Lieutenant Uhlman, R.14-17; Mrs. Uhlman, R.26,27,31; Mrs. Stewart, R. 37, 38; Poole, R.50,51).

As soon as they had gone, accused knocked on the door of Mrs. Stewart's room. When she did not answer, he went outside and sang below her window. He came back upstairs and knocked on Mrs. Stewart's door again. She told him that she did not want him in there, that she was undressed and in bed, and for him to go away. Accused went downstairs, broke a bottle against a tree outside the club and again returned to Mrs. Stewart's door and asked to be admitted. Mrs. Stewart repeated that she was ready for bed and did not want to see him. Accused went downstairs, got a table knife from a waiter, telling him that he wanted it to make high-balls, came upstairs again, put the knife through the crack of the bathroom door, with it lifted the hook with which it was fastened, and entered. Mrs. Stewart tried to leave the apartment through the door between her room and the hall, but accused pushed her away from that door, locked it on the inside, and put the key in his pocket. He went to turn out

the lights but desisted when Mrs. Stewart objected. He told Mrs. Stewart to go into Lieutenant and Mrs. Uhlman's bedroom. They both went into that room and sat down; but, before doing so, accused replaced the key in the door of Mrs. Stewart's room. Mrs. Stewart was dressed in pajamas, bath-robe, and slippers. Accused talked further in a foolish and boastful manner. He tried to kiss Mrs. Stewart; and, when she objected, he kissed her feet. Every time that Mrs. Stewart would get up, accused would get up and take hold of her, then they would sit down again. Finally, accused rose and said that he was going to kiss the baby good-night. Mrs. Stewart objected and stood in the doorway between Lieutenant and Mrs. Uhlman's room and the bathroom. Accused shoved Mrs. Stewart in the effort to get by, and she fell. He picked her up, laid her on the bed, and lay on top of her, saying, "I am Lieutenant Dexter Lowry. You are sweet and attractive. You appeal to me and I am going to have you" (R.41). He kissed Mrs. Stewart on the eyes and cheek, rubbed his hand across her face, then slipped it down inside her pajamas and fondled her breast. Mrs. Stewart struggled, and finally pretended to hear some one coming upstairs. Accused then asked Mrs. Stewart to see what time it was. She ran downstairs to the kitchen, where she found Private Poole, caretaker of the club, whom she told that a lieutenant was annoying her and asked to come and stay with her until Lieutenant and Mrs. Uhlman should return, which he did. Accused followed Mrs. Stewart downstairs and apparently left the building. (Mrs. Stewart, R.38-42,44-50; Poole, R.51-54).

Private Poole quoted Mrs. Stewart as saying to him that she was afraid for the baby's sake and promised to let accused in if he would stay only a little while (R.57), but she denied having made such a statement (R.83).

Private First Class Buddington, the waiter who served accused at dinner, testified that accused was intoxicated at that time (R.61). Lieutenant Uhlman (R.14,18), Mrs. Uhlman (R.27,28), and Mrs. Stewart (R.43,46), concur in saying that accused was drunk. Lieutenant Uhlman saw accused take at least five drinks (R.18). Mrs. Uhlman testified to accused "falling all over himself," stumbling (R.32). Private Poole, the caretaker, who saw accused at the time that Mrs. Stewart fled to him for protection, testified that accused was sober, but that "he acted in a sort of daze, standing there sort of shaking" (R.52).

4. The only evidence presented by the defense other than that relating to accused's character, which will be discussed later, was the testimony of Second Lieutenant Bruce Easley, Jr., 35th Infantry, who dined across the dining room from accused, but facing the table where he sat. He noticed nothing unusual about accused, who was not creating a disturbance, and witness did not observe him pounding the table, whistling, or talking loud. Witness was present only long enough to eat, about twenty minutes (R.87-90).

5. In rebuttal, the prosecution called First Lieutenant Bernard A. Byrne, Jr., Infantry, another diner at the Infantry Club the same evening, who testified that accused came over to witness' table and sat down, but did not eat there. Witness gathered that accused had been drinking a good deal. He talked foolish, and he had a bottle and offered witness a drink. Witness further testified (R.100) -

> "Q. In your opinion, was he drunk or sober?
> A. May I define that my way, by an exact statement?
> Q. I would like a direct answer, and then you can qualify it.
> A. I am reluctant to say he was drunk, because of the complete state of collapse that implies, on the other hand, I am rather reluctant to say that he was sober. I might define it in current language 'was pretty tight.' I questioned his judgment but not his ability to do anything routine. There was a hop that night and I wouldn't expect if he had gone he would have misconducted himself. He seemed to be in full possession of his routine faculties.
> Q. Did you consider him capable to perform his military duties?
> A. I think he would get by without having his misconduct conspicuous."

6. The following character testimony was introduced by the defense:

a. Brigadier General James B. Gowen, 21st Brigade (R.86,87); has known accused since witness took command of the 21st Brigade in February, 1954. He has noted efficiency reports on accused passing through his hands. Accused's general character and record during that period have been superior.

b. Second Lieutenant Bruce Easley, Jr., 35th Infantry (R.87,88), has known accused for seven years. He knew him at Fort Benning where they went to school together. Accused was certainly very good and he had a rather enviable reputation.

c. Colonel Duncan K. Major, Jr., G.S.C. (R.90,91), knew accused from July, 1930, to September, 1931, while accused was a lieutenant under his command. He regarded accused as an excellent young officer with a promising future. Accused was always well groomed and dressed, above average in intelligence, force, and leadership, extremely gentlemanly, and with great poise. The witness knows nothing of the facts concerning the pending charges; but would be glad to have accused serve under him, as his intimate knowledge of him leads him to continue having confidence in him and his worth to the service.

d. Colonel George C. Marshall, Infantry (R.91,92), knew accused while a student officer at the Infantry School, when accused conducted himself as an ambitious officer of fine military appearance, courageous, agreeable, and honorable.

e. Colonel H. Clay M. Supplee, 21st Infantry (R.92,93), testified that accused's last report, made by his company commander and concurred in by his battalion commander and the witness, was superior. Accused's character was above average at that time. The witness would especially desire to have accused under his command in peace or war.

f. Captain Elmer F. Wallender, 21st Infantry (R.93,94), has known accused two years and was his company commander for one year. In professional ability accused is a superior officer, and his character is above reproach. He "would love to have" accused in his command in any capacity.

g. First Lieutenant L. Hoyt Rockafellow, 21st Infantry (R.95,96), has known accused two years. Accused served under the witness for four months. Witness would rate accused excellent as a gentleman, and superior as to the character of his service. Witness would especially desire to have accused serve under him. Upon his last efficiency report witness gave accused a general rating of superior.

h. Major Carleton Coulter, Jr., 21st Infantry (R.96,97), has known accused sixteen months, during all of which time he has been accused's battalion commander. Accused commanded a company for three or four months. On his last efficiency report

witness rated accused superior. Witness has never heard "the faintest breath" against him as to his character as a gentleman. Witness would be glad to have accused under him at any time.

7. In the opinion of the Board of Review the evidence convincingly proves all of the specifications.

a. Specification 1: Drunk and disorderly. Most of the witnesses testify that accused was drunk, and, considering his past record, his conduct is inconsistent with any other hypothesis. Beside the acts mentioned in specifications 2 and 3, accused was disorderly in respect of his boisterous conduct at table, his behavior toward Mrs. Uhlman when her husband left the room to answer the telephone, his preventing Mrs. Stewart from leaving her room, his kissing her feet, and his attempt to enter the baby's bedroom to kiss the baby good-night.

b. Specification 2: Breaking and entering Lieutenant Uhlman's apartment. After having been repeatedly told by Mrs. Stewart that she was undressed and in bed and that he must not come in, after repeated unsuccessful efforts by him to get in, knowing that she was alone except for a baby and that she was a member of the household of a brother officer, accused got a table knife from the waiter at the club, telling a falsehood as to the purpose for which he wanted it, with it raised the hook closing one of the doors to Lieutenant Uhlman's apartment, and entered. All the foregoing is fully proved by the uncontradicted testimony of Mrs. Stewart, and in part by Privates Poole and Buddington.

c. Specification 3: Rude, improper, and insulting conduct toward Mrs. Stewart, by pushing her to the floor, then placing her on a bed and attempting to fondle her against her will, saying, "I always get what I want and I am going to have you."

All the foregoing was proved by the uncontradicted testimony of Mrs. Stewart, corroborated by her appeal to Private Poole for protection, as testified to by him.

8. Honorable Duncan U. Fletcher, Senator from Florida, Honorable Carey A. Hardee, former Governor of that State, and the parents of accused appeared before The Judge Advocate General and the Board of Review and Messrs. Fletcher and Hardee made oral arguments in accused's behalf. Senator Fletcher has also addressed to the Board of Review a letter in the nature of a brief. The arguments of Messrs. Fletcher and Hardee may be thus summarized:

a. Their argument first attacked Lieutenant Uhlman, and to some extent his wife. It is alleged that accused was their guest; but that, moved by "jealousy and revenge", by desire on the part of Lieutenant Uhlman to gain a file, and by resentment at a rumor that accused had made disparaging remarks about Lieutenant Uhlman, he and his wife pressed these charges and exaggerated accused's mishavior.

Mrs. Uhlman and Mrs. Stewart were members of the household of Lieutenant Uhlman and under his protection. In the opinion of the Board he would have been blameworthy if he had not taken some action to protect them from such conduct as that of accused. The proper action for him to take was that which it is presumed that he took, namely, a report to higher authority. Whether or not it was his duty under the circumstances to prefer charges, he was certainly within his rights in doing so. But even if Lieutenant Uhlman was actuated by improper motives in making complaint and preferring charges, even if he violated the laws of hospitality, none of which is admitted, what has that to do with the present case? He is not being tried, but Lieutenant Lowry; and the question is not whether Uhlman was guilty of conduct unbecoming an officer and a gentleman, but whether Lowry was.

b. The argument also attacked the reputation of Mrs. Stewart. There have been filed in this office on behalf of accused an unsworn letter from C. G. Woodruff, constable at Mannford, Oklahoma, so poorly spelled and written as to be almost illegible, and an affidavit by Harvey Jackson, police officer at Cheyenne, Wyoming. Both refer to one Bessie Page, and allege that she is of bad character and has a police and jail record. Woodruff's letter contains nothing to identify the subject of it with Mrs. Stewart, but Jackson says that he knows her and that she is the same woman who as Bessie Stewart worked for Lieutenant Uhlman at Fort Francis E. Warren, and who accompanied "some officer" to Honolulu. Senator Fletcher also suggested that Mrs. Stewart's appearing in pajamas, bath-robe, and slippers constituted an invitation to accused to make advances; but, as he broke into her room after she had gone to bed, it is difficult to see how she could have been dressed otherwise.

Mrs. Stewart has had no opportunity to explain or rebut these allegations against her character; but, even if they are true, what of them? The court was not trying Mrs. Stewart, but Lieutenant Lowry; and the only possible bearing of the allegations was (1) to attack Mrs. Stewart's veracity as a witness, and (2) to show that she invited accused's advances. As to (1), Mrs. Stewart's testimony

is wholly uncontradicted, and is corroborated by that of other witnesses, so far as it could be. As to (2), Mrs. Stewart's past history was unknown to accused, and there is nothing in the record to show that her conduct on the occasion under consideration was other than correct and discreet. Mrs. Stewart's person is her own; and, even if it should be the fact, as alleged in the papers submitted, that she had on previous occasions yielded her person to many men, that circumstance gave accused no rights over it and she had just as much right to refuse it to him as though she were a virgin. That she did refuse it to him emphatically and repeatedly is shown by her own uncontradicted evidence, and above all by her action in fleeing to an enlisted man for protection.

c. The third argument of Messrs. Fletcher and Hardee was that the gravity of the affair had been exaggerated, that it was all a mere frolic, and, as to specification 3, that Lieutenant Lowry tried to have a harmless petting party, and desisted when he found that his attentions were unwelcome. The repeated efforts of accused to enter Lieutenant Uhlman's apartment after Mrs. Stewart repeatedly refused to admit him show that such a view is untenable, as does accused's conduct in lying on top of her.

The Board has carefully considered the above arguments advanced by Messrs. Fletcher and Hardee, but is of opinion that they do not justify any modification of the action which would otherwise be proper.

9. Five out of the ten members of the court and the trial judge advocate signed a recommendation that the sentence be commuted to reduction of 750 files on the promotion list, basing their recommendation on accused's superior record and previous good character. As has already been stated in this opinion (ante, par. 6), the defense introduced eight officers who testified that accused's professional qualifications were superior, and that his conduct prior to the occasion under consideration had uniformly been that of a gentleman. These witnesses included accused's brigade commander, two regimental commanders, his battalion commander, and two company commanders. An examination of accused's efficiency reports shows that they had been, with two minor exceptions, favorable, and in many instances highly so. These circumstances, in the opinion of the Board, constitute no ground for setting aside or modifying the findings of the court. They do, however, furnish an argument of some force for commuting the sentence, but the Board believes that that argument is fully met

by the following passage from the review of the Judge Advocate, Hawaiian Division, in which it fully concurs:

> "I am unable to concur in the recommendation of the officers who signed the recommendation for clemency. Specification 1 is an offense which might very properly be under the 96th Article of War, but specifications 2 and 3 are offenses which properly belong under the 95th Article of War — conduct unbecoming an officer and a gentleman. When an officer forcibly enters a room which he knows is occupied by a young woman who is alone therein, except for a small child, and forces her onto a bed and gets on top of her, kisses her and fondles her breasts and says to her, 'I am Lieutenant Dexter Lowry. You are sweet and attractive. You appeal to me and I am going to have you,' and she is struggling to escape, and does escape, and flees to an enlisted man for protection against the improper advances of the drunken officer, I am of the opinion that the officer who is guilty of such misconduct is unworthy of retention in the service."

For the reasons so well stated in the paragraph just quoted, the Board refrains from recommending that the sentence be commuted.

10. At the time of the alleged offenses accused was 28 years of age. The statement of his service in the Army Register is as follows:

> "Cadet M.A. 1 July 25; 2 lt. of Inf. 13 June 29; A.C. 12 Sept. 29 to 28 Dec. 29."

The Register further shows that accused graduated from the Infantry School, Company Officers' Course, in 1932.

11. 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 and the sentence and warrants confirmation thereof. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War.

H. A. Turnbull, Judge Advocate.

Archibald King, Judge Advocate.

Theodore Hall, Judge Advocate.

To The Judge Advocate General.

1st Ind.

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

1. Transmitted herewith for the action of the President is the record of trial in the case of Second Lieutenant Dexter M. Lowry, Jr. (O-17628), 21st Infantry, together with the foregoing opinion of the Board of Review.

2. I concur in the conclusions reached by the Board of Review to the effect that the evidence proves all the offenses alleged in the several specifications and that the record of trial is legally sufficient to support the findings of guilty of the specifications and the sentence. The evidence, however, fails to convince me that the actions of the accused, as alleged in the specifications and proved beyond reasonable doubt, constitute, under the peculiar circumstances of this particular case, violations of the 95th Article of War, although they are clearly offenses under the 96th Article of War.

3. The offense alleged in Specification 1 - being drunk and disorderly in a public place - is or is not a violation of the 95th Article of War depending upon the surrounding circumstances shown by the evidence in each particular case. The offenses alleged respectively in Specifications 2 and 3 - unlawfully breaking and entering the apartment of a brother officer and attempting to fondle and force his attentions upon a woman not his wife against her will - normally, and in most cases, undoubtedly would be considered as constituting violations of the 95th Article of War. The question here is whether the evidence in this case establishes beyond a reasonable doubt that the acts of which the accused was found guilty constitute a violation of that Article. If any such doubt arise from the evidence, it must be resolved in favor of the accused.

4. The 95th Article of War denounces "conduct unbecoming an officer and a gentleman." The conduct so denounced may be in either an official or an unofficial capacity. The behavior involved in this case was clearly in an unofficial capacity. The conduct in an unofficial capacity contemplated by the Article of War has been defined as

> "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Winthrop, page 1106, Reprint, page 713; M.C.M., paragraph 151.)

It is also said:

> " * * * there is a limit of tolerance below which the individual standards in these respects of an officer or cadet cannot fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This Article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness. " (M.C.M., paragraph 151.)

Colonel Winthrop at page 1106 of his work (Reprint, page 712), in his discussion of the old Article 61 (present Article 95), says:

> "The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must necessarily entail the penalty of dismissal. The Article in the fewest words declares that a member of the Army who misconducts himself as described is unworthy to abide in the military service of the United States. The fitness therefore of the accused to hold a commission in the Army, as discovered by the nature of the behavior complained of, or rather his worthiness morally to remain in it after and in view of such behavior, is perhaps the most reliable test of the amenability to trial and punishment under this Article."

General McClellan, in G.O. 111, Army of the Potomac, 1862, with reference to the same subject, uses the following language:

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

In this connection I conclude that the 95th Article of War does not by its terms lay down any hard and fast rule by which its applicability may be determined with regard to an officer's conduct generally, but that in each case where the question of its application is raised,

that question must be determined in the light of the circumstances of the particular case measured by human experience and by military precedents.

5. The full and careful summary of the evidence which has been made by the Board of Review in its opinion removes all necessity of now making a further detailed statement of evidence.

The allegation of Specification 1 that accused on June 5, 1934, was drunk and disorderly in the Infantry Club is sufficiently broad to include the conduct alleged in Specifications 2 and 3. It is believed, however, that it was intended by Specification 1 to refer rather to accused's behavior other than that involved in the specific acts alleged in Specifications 2 and 3. This other behavior consists of accused's conduct prior to the departure of Lieutenant and Mrs. Uhlman to attend moving pictures, and particularly his conduct and demeanor at the dinner table and later in the room of Lieutenant and Mrs. Uhlman while Lieutenant Uhlman was downstairs answering a telephone call.

Among the examples, given in the Manual for Courts-Martial (paragraph 151), of the kind of conduct contemplated by the 95th Article of War is "being grossly drunk and conspicuously disorderly in a public place." The Infantry Club - or at least the dining room thereof - may be considered a public place. The evidence leaves no shadow of doubt that accused was decidedly drunk in the Infantry Club, but it is a question whether his condition of drunkenness may properly be termed gross. He was not so drunk as to be physically incapacitated. He evidently knew where he was, with whom he was talking, and, at least in a general way, what he was doing. At the table he appears to have been somewhat boisterous. He talked loudly and in a boastful manner; he whistled and pounded on the table. Nevertheless it appears that his conduct was not such as to attract the attention of an officer sitting at a nearby table. Also quite significant to me appears the fact that, notwithstanding accused's condition and actions at the time, Lieutenant Uhlman drank with him not only at the table but later in the rooms upstairs, that Mrs. Uhlman accepted a drink from him, but, not liking the taste, passed it to Mrs. Stewart, who finished it, and that when they left the table Lieutenant and Mrs. Uhlman acceded to accused's request for permission to accompany them upstairs and made no objection to his entering their bedroom and sitting talking with them while they lay on their respective beds. All this does not to my mind present a picture of gross drunkenness and conspicuous disorderly conduct.

Considering now the incident that occurred in the Uhlman bedroom during the time that Lieutenant Uhlman was answering the telephone, it appears that, as Mrs. Uhlman lay propped up on the bed, accused

approached her, told her "how lovely and sweet" she was and tried to kiss her; but when she pushed him away he seems to have abandoned his efforts with no great reluctance remarking that he only wanted to kiss her ear. When he made this remark Mrs. Uhlman told him "if he felt affectionate that he could go in and kiss the baby". Shortly after this incident Lieutenant and Mrs. Uhlman permitted the accused to accompany them downstairs and to sit at table with them. The impression that I get from a reading of the evidence is that Mrs. Uhlman was not filled with any great indignation, but rather regarded accused's conduct as a foolish, ill-advised, but not altogether unnatural, attempt at playful gallantry on the part of a young man who, through excessive libations, had lost for the time being his judgment and sense of proportion and good taste. Her own judgment appears to have been good in treating the matter more or less as a joke and not creating a scene, especially in view of her apprehension that, if her husband returned and found the accused attempting to kiss her, he might readily yield to a natural impulse and strike the accused thereby causing a scandal.

In my opinion accused's conduct and demeanor while in the dining room and during the incident with Mrs. Uhlman just discussed do not appear to have been such as to demonstrate that the accused is not fit to remain an officer in the Army, and that consequently they do not constitute a violation of the 95th Article of War.

6. The offenses alleged in Specifications 2 and 3 are so closely related that they may be considered together. It is undoubtedly true that, ordinarily, the unauthorized and unlawful breaking and entering of the apartment of a brother officer in the night time and against the will of the lawful occupant thereof, as alleged in Specification 2, as well as the actions described in Specification 3, would constitute conduct unbecoming an officer and a gentleman within the meaning of the 95th Article of War. However, as hereinabove indicated, the conduct alleged in each of these two specifications must be weighed in the light of all of the circumstances appearing.

Indeed, few human actions are, necessarily, of themselves, and under all circumstances, such as to constitute the kind of conduct denounced by the 95th Article of War. For example, it may be said that burglary and larceny both involve conduct unbecoming an officer and a gentleman; and this is probably true in nine hundred and ninety-nine cases out of a thousand. Yet it is not difficult to conceive of circumstances under which the commission of either or both of these, or of even more serious, crimes would not constitute such conduct.

As said by Attorney General Cushing (6 Ops. Atty. Gen. 415),

> "To commit a crime of any sort is, to say the least of it, in general, unofficerlike and ungentlemanly conduct. Undoubtedly, cases may and do occur, of assault, or even of homicide, by an officer of the Army, which constitute a technical crime at law, the facts of which, when they come to be scrutinized by the eye of a court-martial, would be held the reverse of criminal, and highly honorable to the party accused. These are exceptional cases."

I consider that we are now considering an exceptional case. So in each case the conduct charged as a violation of this Article must be weighed in the light of all the circumstances.

7. In the instant case we have to consider a young officer of previous excellent character and unblemished reputation, who, under the stimulus of strong drink, was guilty of certain reprehensible actions which he undoubtedly would not have committed had he been sober. The fact of his being drunk is, of course, no defense to the specifications alleging these actions; but it is one of the circumstances to be considered in determining whether or not his reprehensible conduct constituted a violation of the 95th Article of War.

That the accused was drunk is proved beyond doubt - not so drunk as not to know where he was and what he was doing, but in a condition which might be described as so befuddled as to deprive him of ordinary judgment and to make him liable to place a construction upon his own actions and those of others different from the construction a sober person would place upon them. He was in a jovial, sociable mood as is evidenced by his joining the family of Lieutenant Uhlman, his invitations to partake of his liquor, and his desire to remain with the family when they went to their rooms. As frequently happens with persons under the influence of liquor, he seems to have become demonstratively affectionate but apparently with no very definite preference as to who should be the object of his affections. Mrs. Uhlman, to end his demonstrations toward her, suggested that he go in and kiss her baby. This suggestion seems to have impressed itself upon, and sunk into, his gin-befogged mind; for later, after he had succeeded in entering the Uhlman apartment, he expressed a desire to kiss the baby goodnight and attempted to go into the baby's room for that purpose. Also there is some evidence, not altogether clear, that, when seeking entrance to the apartment, he said something to the effect that what he wanted was to kiss the baby goodnight.

Lieutenant and Mrs. Uhlman made no objection to his going

into their bedroom and visiting with them. In his confused mental condition it is reasonably possible that he was unable to distinguish between the propriety of his being in the apartment when Lieutenant and Mrs. Uhlman were there and the impropriety of his seeking entrance when Mrs. Stewart was alone with the baby. When the accused sought to induce Mrs. Stewart to admit him, while she refused, explaining that she was ready to retire, she does not appear to have evinced any particular resentment or indignation. When he asked her if she did not like him she intimated that she did not like him in his then drunken condition. I am not satisfied that, with his temporarily impaired mental processes, he did not get the impression that she was pretending to be coy and that there would be no serious objection on her part if he did come in. It seems to me quite possible that he had the gin-engendered notion that it would amount to nothing more than a mischievous lark if he were to raise the latch and slip in. Accordingly he entered through the bathroom door which, it appears probable, could have been prevented by Mrs. Stewart by the simple expedient of holding the bathroom door so that there would have been no crack through which to insert the knife and raise the hook. Finding Mrs. Stewart at the outside door of her bedroom, which she had unlocked, he pushed her away from the door, relocked it, and put the key in his pocket. He then suggested that they go into the other room where they would not be likely to awaken the baby and he started to put out the light; but, when Mrs. Stewart objected, he did not do so. He told Mrs. Stewart to go into the other room and she followed his direction, going ahead of him, while he restored the key to the lock of her bedroom door. Mrs. Stewart at no time cried out for assistance. On the contrary she sat down or lay down - it is not clear which - and chatted with the accused about various subjects, although she was clad only in her night clothing, slippers and a bathrobe. She suggested smoking and they both had cigarettes - how many does not appear. When she got up he also arose, but it does not appear that she made any further attempt to leave the room. When he attempted to kiss her and she objected, he appears to have used no force to overcome her objections; and when, since she was not willing to be kissed in a normal way, he proceeded to kiss her bare feet, there is nothing to indicate that she made any protest. Finally he announced that he was going into the other room to kiss the baby goodnight. Then, instead of slipping out through the door of the room in which they were at the time, Mrs. Stewart placed herself in the doorway between the Uhlman bedroom and the bathroom and, when the accused attempted to pass her, she pushed him. He, as she says, pushed back and she fell down. Thereupon the accused picked her up and laid her on one of the beds. What occurred there need not be further described, but it is to be noted that even then there was no outcry from Mrs. Stewart, but, by pretending that she heard somebody coming up the stairs, she induced him to cease his attentions. Then and then only did she seek any assistance. When he asked

her to find out what time it was she left the bed, went downstairs, apparently without interference by the accused, and called an enlisted attendant to come up to the apartment and remain until the return of Lieutenant and Mrs. Uhlman.

In view of all the circumstances I am not satisfied that the attitude and conduct of Mrs. Stewart, however justified they may have been under all the circumstances, may not have induced the accused, by reason of his mental condition due to drink, to believe, though erroneously as the evidence discloses, that he was being led on by Mrs. Stewart and that she was not averse to a flirtation and a bit of rather hectic love-making. If accused's conduct was brought about by such an impression on his part, then I am not prepared to say that his behavior on this one occasion, under all the circumstances, shows him, notwithstanding his excellent past record and reputation, to be unfit to remain an officer. Therefore, applying the tests and principles quoted in paragraph 4 hereof, I am of the opinion that the record of trial does not satisfactorily establish violations of the 95th Article of War, and that the accused should be given the benefit of the doubt and convicted only of violations of the 96th Article of War.

8. In reaching the above conclusion I have considered no evidence outside the record of trial proper. From other papers accompanying the record, however, appear a number of facts which tend to support my conclusion reached from the record.

Before formal charges were preferred the subject matter of this case was thoroughly investigated by Major Carleton Coulter, Jr., 21st Infantry. In his report of investigation he expressed the following opinion:

> "It is believed that Lieut. Lowry's conduct on this evening was merely foolish and not vicious. The result of intoxication upon a temperament such as this officer possesses could easily result in making him act in this boisterous and ridiculous manner in which he did act on this occasion. Lieut. Lowry even when sober frequently acts and talks in a loud boyish and boastful manner which is either amusing or obnoxious to those in his vicinity. I have personal knowledge of two occasions on which this manner alone has resulted in his getting into difficulties with two of his commanding officers. Any other interpretation placed upon the actions of Lieut. Lowry is so out of keeping with the nature of this officer that it cannot be considered by anyone having a thorough knowledge of him. His background, his upbringing, and his whole attitude toward

himself and others would all tend to prevent his being guilty of any vicious or criminal act, no matter how far under the influence of liquor he might be. The testimony of every witness stresses the boisterous and irresponsible nature of his conduct, while there is that of the two most damaging, Mrs. Uhlman and Mrs. Stewart, that cannot be interpreted in this light, which is believed to be the true one. The inferences against this officer are more the result of circumstances than of testimony."

Major Coulter's recommendation was as follows:

"That Lieut. Lowry be disciplined for his condition and conduct on the night of June 5, 1934, but that he be dealt with as leniently as is consistent with discipline."

The regimental commander, Colonel H. Clay M. Supplee, 21st Infantry, concurred in Major Coulter's findings and recommended, in view of accused's previous excellent character, that he be reprimanded. The brigade commander, Brigadier General James B. Gowen, considered that a mere reprimand would be inadequate and recommended trial under the 96th Article of War. The trial judge advocate and five of the ten members of the court by which accused was tried and found guilty have recommended that the sentence be mitigated by substituting for the dismissal a reduction of 750 files on the promotion list. This recommendation is particularly significant in view of the fact that since the findings and sentence were concurred in by at least two thirds of the members of the court not less than two of these five members must have voted for conviction of a violation of the 95th Article of War and for the sentence of dismissal.

The reviewing authority, General Halstead Dorey, it is true, approved the sentence as adjudged and forwarded the record for action under the 48th Article of War; but it must be remembered that he had no power to commute the sentence. He was obliged either to approve or to disapprove the sentence, the President alone having power to commute.

9. For reasons hereinabove indicated I recommend that, in view of the peculiar circumstances of this case, only so much of the findings be approved as involves findings of guilty of the specifications in violation of the 96th Article of War and that the sentence be confirmed, but, because of the previous excellent record of the accused, of the

extenuating circumstances appearing in the record, and of the clemency recommendation of the trial judge advocate and five members of the court, I recommend that the sentence be commuted to a reduction of 750 files on the promotion list.

10. Inclosed herewith for use in case you approve my views and recommendations are a draft of a letter for your signature transmitting the record to the President for his action and a form of action by him as confirming authority designed to carry my recommendations 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. In addition there is inclosed a memorandum of certain correspondence concerning clemency.

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

6 Inclosures:
Incl. 1- Record of trial.
Incl. 2- Draft of letter for sig. of Sec. of War.
Incl. 3- Alternate last page of same.
Incl. 4- Form of executive action.
Incl. 5- Alternate form of same.
Incl. 6- Memo. of correspondence concerning clemency.

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

Board of Review
CM 202359

NOV 19 1934

UNITED STATES	)	EIGHTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sill, Oklahoma, August
First Lieutenant ROY P.	)	1, 1934. Dismissal and con-
TURNER (0-15403), 1st	)	finement for one (1) year.
Field Artillery.	)	

OPINION of the BOARD OF REVIEW
HALL, TURNBULL and KING, 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 96th Article of War.

Specification: In that First Lieutenant Roy P. Turner, 1st Field Artillery, United States Army, did, on or about July 3, 1934, between Fort Sill, Oklahoma, and Lawton, Oklahoma, on the Fort Sill-Lawton Highway, within the State of Oklahoma, wrongfully and unlawfully operate a motor vehicle over said highway, while under the influence of intoxicating liquor.

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

Specification: In that First Lieutenant Roy P. Turner, 1st Field Artillery, United States Army, did, on or about July 3, 1934, between Fort Sill, Oklahoma, and Lawton, Oklahoma, on the Fort-Sill-Lawton Highway, within the

State of Oklahoma, while operating a motor vehicle on said highway, wrongfully and unlawfully strike Private John H. Rutan, Battery E, 1st Field Artillery, a pedestrian along said highway, with the said motor vehicle, which the said First Lieutenant Roy P. Turner was then and there operating and did wrongfully and unlawfully fail to stop and render aid and assistance to said Private John H. Rutan.

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

Specification: In that First Lieutenant Roy P. Turner, 1st Field Artillery, United States Army, did, between Fort Sill, Oklahoma, and Lawton, Oklahoma, on the Fort Sill-Lawton Highway, within the State of Oklahoma, on or about July 3, 1934, willfully, feloniously and unlawfully kill Private John H. Rutan, Battery E, 1st Field Artillery, by striking him with an automobile.

Accused pleaded not guilty to all charges and specifications and was found guilty of all, except that the court excepted the word "willfully" from the Specification, Charge III. No evidence of previous convictions was introduced. Accused was sentenced to dismissal and confinement at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. A few preliminary matters must be considered before taking up the evidence:

a. The defense challenged Captain Russell C. Snyder, 1st Field Artillery (R. 4), on the ground that he was the commanding officer of Battery E, 1st Field Artillery, to which the deceased belonged, and had handled certain papers in the case. On being sworn with respect to his competency as a member of the court, Captain Snyder testified that he was the commanding officer of Battery E, 1st Field Artillery, to which the deceased, Private John H. Rutan, belonged, and to which Private Starrett, an important witness for the prosecution, also belonged (R. 5). After Rutan's death, witness opened one or two personal letters belonging

to him. He also arranged for and participated in Rutan's funeral. The witness has no knowledge of the facts in the case nor any prejudice or personal interest therein. He has not formed an opinion as to the guilt or innocence of accused nor discussed the case with the trial judge advocate or his assistant (R. 6-8). The court overruled the challenge of Captain Snyder for cause. The Board of Review is of the opinion that it acted correctly in so doing, as no substantial evidence was introduced tending to show bias or other disqualification on the part of the challenged member.

b. Before pleading to the general issue, the defense submitted a plea to the jurisdiction of the court on the ground that the alleged offenses took place off the military reservation and within the exclusive jurisdiction of the State of Oklahoma, and further that the accused was, in substance, being tried for murder within one of the states of the union in time of peace, in violation of the 92d Article of War (R. 11, et seq.). The argument to support this plea was substantially as follows: By section 10324, Oklahoma Statutes, driving an automobile when drunk constitutes a felony. By section 2216 of the same Statutes "homicide is murder in the following cases: * * * Third. When perpetrated without any design to effect death by a person engaged in the commission of any felony". It is therefore murder under the laws of Oklahoma to kill a man, even without any design to effect death, by running into or over him while driving an automobile when drunk. The specifications under Charges I and III, taken together, show that accused was charged with killing a man by striking him with an automobile driven by accused while under the influence of intoxicating liquor.

The court overruled the foregoing plea, and the Board of Review concludes that it acted correctly in so doing. Admitting for the sake of argument that killing a man by driving an automobile over him when the driver is drunk constitutes murder in Oklahoma, the conclusions sought to be drawn by the defense do not follow. There are several answers to the position of the defense, any one of which alone is sufficient:

(1) Accused is an officer of the Regular Army and therefore subject to the Articles of War at all times and places, even if within the territorial jurisdiction of Oklahoma. The word "murder", as used in the 92d Article of War, does not have a different meaning in each

state, according to the definition of murder by the common law or statutes thereof, but a single meaning at all places. Murder is defined in federal law as follows:

> "Murder is the unlawful killing of a human being with malice aforethought. * * *." Sec. 273, Federal Penal Code, USC 18: 452.

It is stated in paragraph 148 a, Manual for Courts-Martial, that -

> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * intent to commit any felony."

Manslaughter is defined in federal law as follows:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
> First. Voluntary--Upon a sudden quarrel or heat of passion.
> Second. Involuntary--In the commission of an unlawful act nor amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection."
> Sec. 274, Federal Penal Code; USC 18: 453.

The Judge Advocate General in interpreting the meaning of the word "felony", as used in section 1118, Revised Statutes, which forbids the enlistment of any person "who has been convicted of a felony", has expressed the opinion that the purpose of this statute is entirely federal and that in such case it is a well established principle that the definition must be found exclusively in federal law, and only upon failure of federal definition may resort be had to the common law. He has further expressed the opinion that there is no authority for looking to the laws of the various states and territories. Cps. JAG, 1918, p. 707. Since the definitions of murder and manslaughter quoted above are those of federal law, it follows that the definition of the word "felony", as

used therein and in the Manual for Courts-Martial, must be sought in federal law. Under the laws of the United States the following crimes are felonies: Those declared expressly or impliedly by statute to be such, those punished under their common law name and which are felonies at common law, and those made a felony by a state law which is adopted by Congress. United States v. Coppersmith, 4 F. 198. Felonies are defined as follows by federal statute:

> "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies." Sec. 335, Federal Penal Code; USC 18: 541.

Operating a motor vehicle while under the influence of intoxicating liquor has not been denounced by Congress as an offense except in the Code of the District of Columbia, where, either as a first or a subsequent offense, it is not punishable by imprisonment for more than one year. Code of the District of Columbia, title 6, sec. 247. And it is, of course, not an offense, much less a felony, at the common law. Nor is there any adoption here of the Oklahoma statute which declares that driving while drunk constitutes a felony. The Act of June 15, 1933, 48 Stat. 152, reenacting section 289 of the Criminal Code, quoted by counsel (R. 13), is wholly inapplicable to the present case. By its terms it applies only to places described in section 272 of the Criminal Code, USC 18: 451, i.e., on the high seas or on a federal reservation. The place of the present offense is not such. Furthermore, the above act applies by its terms only to an act or omission not made penal by any law of Congress. Murder is made penal by the 92d Article of War and section 273 of the Criminal Code, USC 18: 452.

(2) Each specification must be taken by itself. The Specification, Charge III, so taken, does not allege that accused was drunk, nor does it use any other words bringing the offense therein alleged within the definition of murder. The allegation in the Specification, Charge I, that accused was drunk cannot be imported into the Specification, Charge III. The court might have acquitted the accused of the Specification, Charge I, alleging driving when drunk, and nevertheless convicted him of the Specification, Charge III, alleging manslaughter. Furthermore, so far as the pleadings go, the specifications under Charges I and III,

though both referring to the same day, may have related to different times and places on that day.

(3) Even though it be true that accused was drunk at the time that he committed the acts alleged in the Specification, Charge III, and if it be further admitted that he was guilty of murder, those circumstances did not deprive the court-martial of jurisdiction to try him for manslaughter, the offense alleged in the Specification, Charge III. Manslaughter is a less serious offense included within murder, and that accused was not charged with the most serious offense that might have been laid against him is certainly nothing of which he has any right to complain. Certain old opinions of this office digested in the latter half of paragraph LXII A, Dig. Ops. JAG, 1912, p. 143, may seem inconsistent with what has just been said. Of the four opinions there cited, the last, C 17462, January 28, 1905, is lost from the files. In the first two, R 33, 154, July 11, 1872, and R 34, 250, May 3, 1873, the specification alleged all the elements of murder, though the offense was laid under a charge in violation of an Article of War pertaining to manslaughter. The evidence proved murder. This office held that the court was without jurisdiction. In the present case, even if it be admitted that the evidence proves murder, the specification does not allege that offense. The only remaining opinion, R 42, 449, December 8, 1879, involved an application for pardon of a general prisoner serving a sentence for manslaughter. The Judge Advocate General elaborately reviewed the evidence, concluded that reasonable doubt existed of the prisoner's guilt, and recommended his pardon. The opinion added that, though the offense was charged as manslaughter, the evidence appeared to show that the crime committed was murder, which, it had been held by The Judge Advocate General, could not in time of peace be brought within the jurisdiction of a court-martial by entitling it manslaughter. If the opinion just mentioned or any other of those cited is meant to hold that, if an accused is charged with manslaughter and the evidence adduced at the trial shows that he might have been charged with and perhaps convicted of murder, the court is without jurisdiction to proceed with the manslaughter trial, for the reasons already stated the Board of Review is unable to concur.

The Board of Review concludes that the court acted correctly in overruling the plea to its jurisdiction.

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

a. Sergeant W. S. Shotts, Battery E, 1st Field Artillery. About midnight, July 3, 1934, I was called to the post hospital at Fort Sill, Oklahoma, and identified there Private Rutan, then lying on a table in the operating room (R. 24-26).

b. Captain Russell F. Ernst, Medical Corps, on July 6, 1934, made an autopsy on Private John H. Rutan, Battery E, 1st Field Artillery, a report of which was admitted as Exhibit II. The defense admitted that the witness was an expert.

Cross-examination: There were no bruises from the neck down. There were abrasions on the left side of the body, two lacerated wounds anterior and lateral surfaces, left lower leg, surrounded by contused tissue, 5 inches and 2 inches long, respectively; small lacerated wound, lateral surface, right lower leg; complete compound fracture of both bones in both legs. There were skin abrasions on the forehead and bridge of nose; no abrasions on scalp; moderate abrasion of left external ear and on right side of lower jaw. The fracture of both legs might have been caused by an automobile running over the legs while the deceased was lying down. I could not tell whether the deceased was struck from the front, rear, or side. The sutures in the wounds were on the anterior and lateral surfaces of the left leg. I observed no bruises on the body from the neck down and the abdominal organs were all right (R. 26-29).

c. George C. Robison, Route 4, Lawton, Oklahoma. I live on the Fort Sill-Lawton Highway across the road from Highland Cemetery. About 10 o'clock on the evening of July 3, I had just come in and had lain down in bed on the front porch. I heard a racket in front of the house and thought a goods box had fallen from a car. The driver went on down near the cemetery entrance and stopped for a very few seconds. I didn't see anybody get out. The car was going north toward Fort Sill. I saw a white bulk on the road. I noticed a car from the south stop at this bulk, back out, turn around and go south. A bunch of cars gathered there and I got up and went out and found that a man was lying there. I stayed about ten minutes until the ambulance took the man away.

Cross-examination: I saw no other cars going north. I didn't hear any cries. I had a clear view of possibly 75 yards.

Redirect examination: There wasn't any moon shining that night.

Examination by the court: It was possibly 5 or 10 minutes before I went out. It must have been 30 minutes, maybe not that long, before the ambulance arrived (R. 29-34).

d. Staff Sergeant William O. Lowe, Field Artillery School Detachment (white). About 10 o'clock on the night of July 3, I was driving north toward the post on the Fort Sill-Lawton Highway. I found a man lying on the right side of the road in front of the cemetery, just off the edge of the pavement, head toward the road. I stopped, saw the man was hurt, turned my car around, drove to the filling station just south of there, asked them to notify the Lawton officers, and drove back to where the man was lying. I noticed glass along the road. Some soldiers came along and identified the man as Private Rutan, Battery E, 1st Field Artillery.

Cross-examination: The man's face was bloody and one of his legs was broken. He had a shoe on his left foot, but the other was missing. Others present and I looked for that shoe. The body was plainly visible by my headlights. After I drove back to the filling station and asked them to make the call, it was 10:05 by my watch (R. 34-39).

e. Private Joe C. Riddle, Jr., Medical Department. On the night of July 3, I was ambulance driver. I drove to the Highland Cemetery and picked up a man lying on the grass close to the edge of the pavement and took him to the hospital at Fort Sill, Oklahoma.

Cross-examination: I left the hospital at 10:30 p.m. and got back at 10:50. He was unconscious but alive. He had on blue serge pants, a white shirt, and one shoe. He was later identified as Private Rutan (R. 39-42).

f. Private Lonnie K. Starrett, Battery E, 1st Field Artillery. On the night of July 3, 1934, I was on area guard, No. 9 post, first relief. That post extends from post headquarters south to the warehouse back of the Quartermaster corral. About 10:25 o'clock that night a car came from the direction of Post Field with a right headlight out and a left headlight burning. I was preparing to stop this car when he turned

in and stopped of his own accord. He honked the horn several times. There was nobody in the car but the driver. He said he wanted somebody from the Constructing Quartermaster's to drive him home. I told him that there was no one there. He asked where he could telephone for a taxi. I took him to post headquarters. He tried two numbers unsuccessfully. He said he was an officer in the army but didn't say who he was. He came back from post headquarters in the car and repeated that he wanted some one from the Constructing Quartermaster's to drive him home. I suggested telephoning for a military police and he wouldn't consent to that. He got in his car and pulled around and started back to Post Field. I told him there was a car coming and for him to wait awhile. While he stopped for a few seconds, I examined the right headlight, and it was broken and I saw that the right fender was bent. The right headlight was out and was full of glass that had been broken recently. I made a memorandum of the license number. It was 464-661, Oklahoma. He was dressed in grey civilian clothes. I smelled liquor as soon as he drove up, in the car and on him. Part of the time he spoke clear enough and other times his talk was disconnected and blurred. I took it for granted that his car was a Chevrolet, but I won't be sure.

Cross-examination: Upon leaving he turned and drove south with a little difficulty. He drove away in a proper manner. He drove up, stopped, turned around, and drove away, all in a careful and prudent manner. I made a statement at post headquarters to Captain Arnold and at that time I pointed out this lieutenant, and when I made this statement he had the heading under the name of Lieutenant Turner. I made no report of this incident.

Redirect examination: I have been in the service for a year.

Examination by the court: The odor of liquor seemed to be from the man's breath (R. 42-49).

g. Private Rufus Jones, Headquarters Battery and Combat Train, 1st Battalion, 1st Field Artillery. Around 10:30 p.m., July 3, Lieutenant Holsinger instructed me to look up a one-lighted car. I found such a car in the rear of Lieutenant Turner's quarters with the right headlight bent back, pointing straight upward, the lens shattered. There was some glass left in it. The car had a bent right fender and dents in the hood.

The license was 464-661, Oklahoma. I notified Lieutenant Holsinger. The dent in the fender seemed to be caused by a soft object, but I don't know what bent it. I found what I thought were blood stains on the right-hand door on the side of the shield, also three or four strands of sandy blonde hair (R. 50-52).

h. First Lieutenant George L. Holsinger, 1st Field Artillery. I know accused. He is Lieutenant Roy P. Turner. On the night of July 3-4, I was prison officer and assistant provost marshal. About 11 or 12 o'clock that night I gave instructions to the guard to look for an automobile with a broken right headlight. I found such a car, which I know belonged to Lieutenant Roy P. Turner from the registered number, which was Oklahoma 464-661, and from the fact that I have seen Lieutenant Turner drive it. About 12:30 that night I saw this car, a Chevrolet sedan, with a broken front headlight, dented right front fender, dented hood, in the rear of accused's quarters. It was locked up in one of my garages in the rear of the guardhouse and has been there ever since, with a quantity of broken glass in the lens. I noticed a piece of glass wedged under the hood. The next morning, about 10 o'clock, I picked up that same piece of glass and turned it over to Lieutenant Fowler, provost marshal. The lettering was printed in the glass, "EVROLE". I also found in the car a bottle containing about one-fifth of a quart of gin, which I have had locked up in the safe since that time.

Cross-examination: This piece of glass was wedged under the hood on the right side. The only part that I took in the identification of Private Rutan was the checking of the battery numbers taken from his clothing. The clothing belonged to Private George G. Meyers, Battery E, 1st Field Artillery (R. 52-56).

The court at this point took a recess and examined the automobile in question.

i. Joe Bailey, Deputy Sheriff, Lawton, Oklahoma. On the night of July 3-4, I investigated an accident which occurred on the Fort Sill-Lawton Highway, near the Highland Cemetery. I found an army man there lying beside the road. He was sent to the hospital. I also found there headlight glass of an automobile and I gathered up the pieces. On one piece of glass that I found were the letters "CH" molded in the glass.

I turned these pieces of glass over to Sergeant Roach, military police.

Cross-examination: I arrived at the scene of the injury around 10:00 p.m. The man injured was fully dressed with the exception of his right shoe, which was missing. Others present and I looked for it but did not find it that night. I made another search the next morning and looked fifteen steps south and as far north; also to the hedge of the cemetery. Beside the glass mentioned, I found some thicker and older looking glass fifty paces further south. The glass that I picked up was freshly shattered (R. 57-61).

j. Sergeant William J. Roach, Headquarters, Headquarters Battery and Combat Train, 1st Battalion, 1st Field Artillery. On July 3, Mr. Bailey turned over to me some shattered glass of a headlight of an automobile. It had the letters "CH" on one piece. I turned that glass over to Lieutenant Fowler that night. I was on military police duty.

Cross-examination: The day after the accident Mr. Bailey, Lieutenant Holsinger, Private Covey, and I made a search for the shoe. We searched about 100 yards south and 100 yards east (apparently an error for north). I did not go beyond the hedge into the cemetery. I looked over the hedge for the shoe (R. 61-64).

k. Sergeant Rudolph Perez, 2d Ammunition Train. At the direction of Lieutenant Fowler, I took photographs of a dented car parked in the garage at the rear of the guardhouse. I scraped something off the car that looked to me like blood. I took it to the station hospital and turned it over to First Lieutenant Knox Dunlap. It is marked on the photograph where I made the scrapings (Exs. III, IV and V, received in evidence).

Cross-examination: I have had considerable experience in fingerprint work. I made a minute examination of the car, which has been identified by Lieutenant Turner, to determine whether the fingerprints of Rutan appeared thereon. I found numerous other fingerprints but none of Rutan (R. 64-67).

l. First Lieutenant Knox Dunlap, Medical Corps Reserve. I made an analysis of scrapings given me by Sergeant Perez and determined them to

be blood. I could not state that it is human blood, as it is necessary to have rabbits to test that on and I have no rabbits, but I am confident that it is blood. This was in the neighborhood of July 4.

Cross-examination: Grasshoppers do not have true blood, birds do. The scrapings could have been sent to Walter Reed Hospital. There was enough to determine whether it was human blood (R. 68-70).

m. First Lieutenant George L. Holsinger, 1st Field Artillery, recalled, identified the bottle of liquor found in accused's car, which was offered in evidence (R. 71-73).

n. First Lieutenant H. C. Fowler, 1st Field Artillery. On the night of July 3-4, I was provost marshal, Fort Sill, Oklahoma. As such I went to the quarters of Lieutenant Turner about 1 p.m. (apparently an error for a.m.), July 4, to investigate the damage to his car. I found his car, which I knew by the license number 464-661, and I took some shattered glass from the right headlight. I found one piece with the numbers on it "91" and part of "5", which appeared to be 915. (Piece of glass offered in evidence as Exhibit VI.) The left headlight was not broken and has a number on it, 915986. (Left headlight received in evidence to be withdrawn at conclusion of trial.) I also have a piece of glass which Lieutenant Holsinger turned over to me, which contained the lettering printed in the glass "EVROLE". (Offered in evidence as Exhibit VII.) I also have an envelope with a piece of glass in it which was turned over to me by Sergeant Roach, which piece has three numbers on it "986". (Offered in evidence as Exhibit VIII.) I also have a piece of glass bearing the letters "CH", which Sergeant Roach turned over to me. (Offered in evidence as Exhibit IX.) I questioned accused whether he was on the post within a certain period on the night of July 3. Before doing so, I told him that anything he might say might be used against him and that he need not say anything. Accused said he had been driving his car between 9:45 and 11:30 p.m., July 3.

Cross-examination: I went to the scene of the accident at 11 o'clock the next morning, July 4, with Lieutenant Holsinger. I made a thorough investigation to locate the missing shoe. The shoe was found July 30 by Mr. Jackson, caretaker of the cemetery, 10 or 15 yards northeast of where the body was found. When I went to Lieutenant Turner's quarters I awakened him from sleep. In my opinion he was sober. I smelt no

liquor. I was within two feet of him (R. 73-83).

o. First Lieutenant Winfield W. Scott, 1st Field Artillery. On the night of July 30, I lived at quarters 60-E, Post Field, Fort Sill, Oklahoma. Lieutenant Turner lived in quarters 60-CD, next door, with a beaverboard partition between. On the night of July 3 or morning of July 4, I heard a conversation between Lieutenant Turner and Mrs. Turner. I recognized their voices. Mrs. Turner asked several times what Lieutenant Turner had run into. He answered that he didn't know several times, and one time he said nothing. This was after 12:30 a.m. I was awakened by a car driving in at the rear of his house. It might have been around 1 a.m. Mrs. Turner said, "You have wrecked your car again. What did you run into?" His reply was, "I don't know" (R. 83-87).

5. The evidence for the defense may be summarized as follows:

a. H. C. Veteto, plasterer, Lawton, Oklahoma. "I just have met" accused. He is Lieutenant Turner. On July 3, about 9:30 or fifteen minutes to 10:00 p.m., I left Lawton with Private Phelps and Corporal Covington. I was driving the car. We drove out 11th Street toward Fort Sill. Phelps was in the front seat with me and Covington in the back seat. Before we reached the "Y", Covington said that he thought that a motorcycle cop was following us and to be careful in driving. I glanced up and saw one light following. I didn't pay any attention, I don't recall whether it passed me. I think this car pulled around near the caretaker's house at the cemetery. It stopped in front of the cemetery when we were about one hundred yards behind. The place where Private Rutan was picked up was south of that place. A man got out on the east side of his car, on the opposite side from where he was driving, and he came walking towards us trying to flag us down, and I didn't know but it might be a holdup and I stepped on the gas. I did not observe anybody walking north on the highway prior to this. I did not observe a bundle at the right of the road. I believe that that car followed me straight on to Fort Sill. If the car ahead of me struck any object, I couldn't see it. I just saw you (apparently meaning accused) once and saw two other men (perhaps an error for no other men). I had two lights burning on my car.

Cross-examination: It was pretty dark. I didn't hear any crash like a box falling off a car. I noticed this one-eyed car behind me

in the mirror. We were all drinking, but not too much. Covington was drinking quite a bit. When this car stopped by the cemetery, I saw it was the same one-eyed car. I saw only one person and he was out of the car.

Examination by the court: I thought it was a Plymouth two-seated car. It was the left headlight which was burning. The man whom I saw had light clothes and no hat. You can see several "one-eyed cars" in Lawton. I have noticed that they are picked up by the military policemen on the reservation. I had my bright lights on (R. 88-98).

b. Corporal William L. Covington, Company K, 29th Infantry. Mr. Veteto, Private Phelps and I left Lawton about 10:30 p.m. via the Fort Sill Boulevard. Before we reached the junction of the Cache road, I said to the others that it looked like a motorcycle cop was following us. I looked back twice that I remember. I can't say whether that car passed us. About even with the house of the caretaker of the cemetery, a car passed us going north. Our lights were burning but I don't recall looking ahead; I was watching the left side of the car I was in. I didn't see a car stop. I saw a man approaching, walking south. That was the only thing I saw. We passed that car. I didn't notice whether it had one light or not. Later I observed a "one-eyed car" approaching from the rear. We turned on the CMTC road and that car proceeded north.

Cross-examination: I am not sure that the man I saw walking came from the parked car. I didn't see any people in the car. The man that I saw didn't make any gestures with his hand.

Examination by the court: The parked car followed us. I can't say that it was the same car that followed behind us before (R. 98-104).

c. Private Morton G. Phelps, Company K, 29th Infantry. I left Lawton about 9:45 p.m., July 3, with Corporal Covington and Mr. Veteto. I was in the front seat with Veteto. Covington said that he thought that there might be a motorcycle cop behind us. As the car passed us, near the little white house at the cemetery, I saw it was a car with one light. The only person I saw on the highway was at the south end of the car that was parked on the boulevard in front of the cemetery. The car that we saw there is the one that had the one light and passed us near

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the caretaker's home at the cemetery. I did not see a bundle or white object. A man got out of the car at the right-hand side and waved his hand, walking south toward us. I thought the car was a Plymouth. His left headlight was burning. That car followed us.

Cross-examination: Nobody was in the parked car.

Examination by the court: I was sober. We were going 25 miles an hour when the car passed us, and then Veteto stepped up to 45 miles when we passed the car that was parked. I told Veteto it was a highjacker and to step on it. I did not recognize the man who got out of the parked car. I have not seen him since to my knowledge (R. 104-110).

d. Private George Meyers, Jr., Battery E, 1st Field Artillery. Prior to his death, Private Rutan and I were in the same organization. We attended to the stables and bunked together. We were close friends. Rutan's hair was very dark black. He was in the habit of borrowing clothes from me. The night before that on which he lost his life, he came in after I had retired and made the remark, "I will get that son-of-a-bitch or he will get me or I will get myself". He seemed despondent and worried. He said he had trouble with a woman. The date that he lost his life I had been on a picnic. When I returned I went to care for the horses at the stables. Rutan was there. He said, "See all these horses; I fed them all myself, but I will not do it again. * * * They think I care, but I don't give a damn". We had dinner and went to the barracks and he said good-bye. He said, "If you ever see me again, you will not see me like this" (R. 110-113).

6 a. The prosecution recalled as a witness in rebuttal First Lieutenant H. C. Fowler, 1st Field Artillery, but Lieutenant Fowler's evidence related to a conversation between himself and the county attorney as to the trial of accused before a court-martial rather than a state court (R. 113-116). It is not thought necessary to abstract it.

b. The court recalled Private Lonnie K. Starrett, Battery E, 1st Field Artillery, whose testimony may be summarized as follows: In going to and from post headquarters accused staggered. His eyes were slightly red and bloodshot. I couldn't notice it so much when he first got out of the car, but I am positive he had been drinking.

Examination by the prosecution: I smelled liquor on him. He had some difficulty in turning the car around.

Examination by the defense: He drove up in a careful and prudent manner. I considered accused drunk, but not dangerously so. I examined the headlight and saw the dent in the fender. I saw no dent in the hood (R. 116-119).

c. The prosecution called as a witness in rebuttal Major John M. Tamraz, Medical Corps, who testified: I examined Private Rutan on the night of July 3, 1934. He had intercranial injury which caused his death. He could have been struck with some object on the cranium. I was very careful to get any smell of alcoholic liquor, and I couldn't find any evidence of it.

Cross-examination: Rutan also had compound fracture of both legs. Those were his injuries. The head injury could have been caused by hitting Rutan with some object, most any kind of object. The compound fracture of both legs could have been caused by running over the legs with a car or truck.

Examination by the court: He died from the injury to his head and not from something else (R. 119-121).

7. The exhibits in this case are of great importance and particular attention is invited to them. They may be listed and described as follows:

Exhibit I: Map of Fort Sill and vicinity, not, however, including the site of the accident, which was just off the south edge of the map.

Exhibit II: Autopsy Protocol, the important part of which may be summarized as follows:

THE FIELD ARTILLERY SCHOOL
STATION HOSPITAL
Fort Sill, Oklahoma.

July 6, 1934.

AUTOPSY PROTOCOL in the case of Private John H. Rutan, who died 2:47 p.m., July 6, 1934. Admitted to hospital July 3, 1934.

GENERAL EXAMINATION: About 70 inches in height and weighing about 150 pounds. Hair brown. Skin abrasions on forehead and bridge of nose.

None on scalp. Moderate abrasion of left external ear and on right side of lower jaw. Two sutured lacerated wounds, anterior and lateral surfaces, left lower leg, surrounded by contused tissue, and respectively 5 inches and 2 inches long. Similar wound, half inch long, lateral surface, right lower leg. Complete compound fracture, both bones, both legs, junction of distal and medial thirds. Small hemorrhage, left temporal muscle. Small subconjunctival hemorrhage, each eye.

CRANIAL CAVITY: Contusions and small lacerations over vertex of brain at the junction of the occipital and parietal lobes, bilateral. Small subdural hemorrhages in same area. The cortex is injected and edematous throughout. Hemorrhage between the temporal lobe, right, and tentorium. No skull fracture. Except as above, brain normal.

THORACIC CAVITY: No free fluid. Except for moderate congestion, lungs normal. Heart and aorta normal.

ABDOMINAL CAVITY: No free fluid. Abdominal organs and walls normal.

DIAGNOSIS: 1. Cerebral contusion and laceration, moderate, vertex of brain at junction of parietal and occipital lobes, bilateral. 2. Hemorrhage, subdural, moderate, same area. 3. Hemorrhage, moderate, between tentorium and temporal lobe, right. 4. Fracture, compound, comminuted, both bones, both legs at junction of middle and lower thirds.

Exhibit III: Photograph of top of hood of accused's automobile showing dent on right side, just in front of windshield, 3/4 inch deep and 13 inches long, also having place marked where blood was found.

Exhibits IV and V: Photographs of accused's automobile, showing the dent above mentioned, also right headlight bent back, dent on right fender, and hood overlapping radiator on right side by 1 inch. Blood and oil on glass of right front window also shown.

Exhibit VI: Piece of glass showing numbers "91" and part of another number which might be a "5" or a "3", taken from right headlight of accused's car by Lieutenant Fowler (R. 74).

Exhibit VII: Piece of glass showing the letters "EVROLE" and beneath them the word "TOP", found by Lieutenant Holsinger wedged under the hood of accused's car (R. 54,75).

Exhibit VIII: Piece of glass showing the figures "86" and preceding them part of another figure, which might be a "9" or an "8", picked up by Bailey in the road where deceased was found (R. 57,58,61, 62,76).

Exhibit IX: Piece of glass bearing the letter "C" followed by part of "H", picked up by Bailey in the road where deceased was found (R. 57, 58,61,62,76).

A bottle of gin, partly filled, found in accused's car (R. 71,72), and the lens of the left headlight of accused's car, unbroken, and bearing the number 915986 (R. 75), were received in evidence and withdrawn, but were not numbered as exhibits.

8. The most important question for consideration is whether the evidence supports the findings of guilty. This question may be separately considered with respect to each charge and the specification thereunder.

a. The Board of Review first takes up Charge I and the specification thereunder, alleging driving while drunk. The most direct evidence on this point is the testimony of Private Starrett, the sentinel at post headquarters (R. 42-49,116-119; ante, this opinion, pp. 8-9,15-16).

It is true that the witness did not in so many words say that the man with whom he conversed on the night of July 3, and about whom he testified, and the accused present in court were one and the same person; but he fixed the time of the conversation as 10:25 p.m. (R. 43), and made a memorandum of the number of the car of the man with whom he talked as 464-661, Oklahoma (R. 44), which was the number of accused's car (Lieutenant Holsinger, R. 53); and accused admitted that he was driving his car between 9:45 and 11:30 that evening (R. 78). Hence the identification is sufficient even without referring to the somewhat ambiguous further testimony of Starrett, as follows (R. 48):

"Q. When did you know him by the name of Lieut. Turner?

A. I made a statement at Post Headquarters to Captain Arnold and at that time I pointed out this Lieutenant and when I made this statement, it had the heading under the name of Lieut. Turner."

Apparently, by "this Lieutenant" the witness meant the accused then present before him.

What, then, does Starrett say as to the sobriety of the man whom he saw on that occasion? He says that he considered him drunk, though not dangerously so (R. 118). This positive statement would alone be sufficient to sustain the finding, but the witness supported his conclusion by citing definite indications of drunkenness. The witness smelled liquor on the man's breath (R. 44,49), the man's talk was at times "disconnected and blurred" (R. 44), he staggered (R. 117), and his eyes were slightly red and bloodshot (R. 117).

That a partly filled bottle of gin was found in accused's car (R. 54,71) also tends to prove this specification. The Board sees no merit in the objection of the defense counsel in a brief filed by them that this bottle was inadmissible because not shown to counsel before trial (brief, p. 9). It is alone a sufficient answer that, when the bottle was offered in evidence, the defense was expressly asked if there was any objection to its admission and answered, "No objection" (R. 71,72). The objection in the brief therefore comes too late. But, apart from this, though disingenuous conduct or sharp practice on the part of the military police or trial judge advocates is not to be condoned, it is not shown that any such occurred (see R. 81). The Manual for Courts-Martial contains no requirement that all the prosecution's exhibits be shown to the defense before trial, nor is there any settled practice to that effect.

The evidence above summarized and certain other evidence hereinafter discussed (post, this opinion, pp.33-35), clearly prove drunkenness within the definition given in the Manual for Courts-Martial, paragraph 145, namely, "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties". The fact that, when Lieutenant Fowler went to accused's quarters and awakened him about 1 a.m., two and a half hours later, accused was sober and did

not smell of liquor, is not considered sufficient to offset the more nearly contemporaneous evidence already mentioned.

b. The Board next considers Charge II and the specification thereunder alleging that accused, while operating a motor vehicle, wrongfully and unlawfully struck Private Rutan, a pedestrian on the highway, and wrongfully and unlawfully failed to stop and render aid. The word "unlawfully" in the final clause of the specification was ill chosen, as the Board has been unable to discover any statute of Oklahoma or other applicable law requiring the rendition of aid under such circumstances. However, the omission by accused (if proved) may be considered unlawful in the broad sense that it was violative of the 95th and 96th Articles of War. Was the offense proved? Whether accused's car struck and killed Rutan is hereinafter discussed in connection with Charge III and the specification thereunder. If it did, the present specification is proved, since it is admitted that the accused did not render aid. It is contended in the brief filed on behalf of accused that his car did not inflict the fatal head injuries on deceased, though it may have run over him and broken his legs as he lay in the road unconscious as the result of a blow on the head previously received (brief, p. 13). Upon this hypothesis the present specification is also proved, except the unimportant allegation that accused was a pedestrian, as a person driving a car at night should keep a sufficient lookout to avoid running over an unconscious man in the road; and, if he does so, should, as a matter of common decency and honor, if not of positive law, stop and render aid.

That failure by an accused to stop and render aid to a person injured by his automobile, or, in the language of the street, being a "hit and run" driver, is conduct unbecoming an officer and a gentleman, in violation of the 95th Article of War, was held by the Board of Review and The Judge Advocate General in CM 185023, Corrigan.

c. Charge III and the specification thereunder, by far the gravest of all, allege manslaughter of Private Rutan by striking him with an automobile. The court properly struck the word "willfully" from the specification, as the offense, if any, was involuntary manslaughter.

Was the offense proved? The theory of the prosecution was that deceased was walking along the road, presumably near the east edge of the

paved portion, i.e., on the right side with respect to a person or vehicle traveling toward the post, was hit by the bumper of accused's car on the legs between the knees and the ankles, which broke both bones in each leg; that deceased was thrown against the right headlight and radiator and on top of the hood of accused's car, causing the various breakages, dents, stains and displacements on the automobile, described in the testimony and shown in the photographs (Exs. III, IV and V); and that the body then fell off on the east or right side of the road where it was found. Either by striking some part of the car or by striking the ground the head injuries were caused which resulted in death. The contention of the defense, as shown by inference from the questions and cross-questions asked at the trial, and as set out in the brief since filed by it, is that the injuries to deceased's body and accused's car are inconsistent with the theory of the prosecution. It is pointed out that there were no bruises or wounds on deceased between the neck and the knees (Ex. II; R. 28,29), and no fracture of the skull (Ex. II). The brief for the defense says (p. 12):

> "It is difficult to imagine how the automobile belonging to the accused, if it had in fact struck the deceased Rutan, could possibly have been dented, crushed, and bent in the way it was, on the right front fender, on the headlight, on the radiator shell, on the hood, on the tag and bracket, and on the cowl, without inflicting some wound, bruise, or contusion on the body and arms of Rutan."

After adverting to the testimony of Private Meyers that deceased was worried and anticipated a fight with some one (R. 110-113), the brief suggests (p. 13):

> "What may easily have happened, is that Rutan was brutally assaulted about the head with some heavy instrument, and was thrown from an automobile, at or near the place where he was found, and that his legs were broken by being run over by some vehicle, which both medical officers testified (Record, pp. 28 & 121) could have caused their fracture."

The brief also mentions the testimony of Mr. Robison, who was in bed on the porch of his house near where the deceased was found, that he saw nobody walking along the road (R. 32,34) and that (R. 30) "There was a commotion or racket in front of the house; I thought a goods box had

fallen from a car".

It does not seem probable that Robison, in bed and about to go to sleep, would have noticed a man walking past his house on the road. Had Rutan been thrown from an automobile to the road it is unlikely that the impact of his body with the road would have made the noise heard by Robison that caused him to think that a "goods box had fallen from a car". But, on the other hand, the impact of accused's car with Rutan, and particularly that of Rutan's head, or other part of his body, with the body of the car at the place where the hood and cowl were dented, would have been likely to have caused just such a noise as Robison heard.

But the evidence which in the opinion of the Board is conclusive against accused is the broken glass. As has already been stated in the list of exhibits (ante, this opinion, p. 18) there was picked up at the place where deceased was found unconscious a fragment of a headlight lens bearing the letter "C" followed by part of an "H" (Ex. IX). There was found wedged under the hood of accused's car a piece of similar glass bearing the letters "EVROLE" (Ex. VII). The uninjured left headlight of accused's car bore the number 915986 (R. 75). There was picked up at the place where deceased was found a piece of glass bearing the figures "86", preceded by part of another figure which might be a "9" or an "8" (Ex. VIII). Still in accused's right headlight was a piece of glass showing the figures "91" and part of another figure which might be a "5" or a "3".

The defense objects (brief, p. 15):

> "In the two sets of glass exhibits introduced, the broken edges did not match in either case."

The answer is obvious from an inspection of the exhibits. The breaks were not clean fractures. In each case there were apparently very small fragments or splinters of glass which were not picked up.

The brief for the defense also says (pp. 14,15):

> "Glass from more than one headlight lens was found near where Rutan was found (Record, p. 60), and some

> of it later discarded. In other words, a high degree of selectivity was practiced in picking out the glass to be used as evidence in this case."

That there was other glass on the road than that introduced in evidence may be admitted; but, as Bailey, the deputy sheriff, who picked up the glass, testified, the other glass was picked up "fifty paces south", a considerable distance away from the site of the accident in the opposite direction from the presumed direction of travel of the car which struck deceased; and this other glass was "thicker and older". That which was picked up was "freshly shattered", as appears both from Bailey's express statement (R. 60,61) and from inspection of the exhibits. In other words, Bailey picked up fragments of freshly shattered glass at the site of the fatal accident. He naturally and properly did not bother with "thicker" glass, i.e., of another make, which was "older", i.e., had apparently lain in the road for a time, and which was fifty yards off in a direction in which it could not have been carried by the death dealing car.

Defense counsel argue that Chevrolet cars are no rarity, nor is it uncommon to find glass on the road from their lenses (brief, p. 16). Nevertheless, it passes belief that a freshly shattered fragment of glass bearing the letters "CH" could be found on the road within a few miles and a few hours of the place and time at which accused's car was found with a broken lens, a fragment of which bore the letters "EVROLE"; and yet come from another car. Add to this the evidence of the other pair of fragments bearing numbers. It is incredible that another Chevrolet car should have had an accident at precisely that spot and in that accident have had its headlight lens broken between the H and the E of CHEVROLET and in the middle of the number of the lens. The evidence of the glass fragments produces a moral certainty, amounting almost to mathematical demonstration, that accused's car was at the scene of the fatal accident to Rutan shortly before the fragments of glass were picked up, and that something there happened to it sufficient to jar from it the fragments of glass picked up by Mr. Bailey.

If this be so, and if there be considered also the finding of Rutan's unconscious form at the same place as the glass, and the dents and stains on accused's car, the natural and logical inference is that the accident which jarred the glass from accused's car at that point was

a collision of it with Rutan. What other inference is possible? The mere running over deceased's prostrate form by accused's car might have broken his legs; and, though highly improbable, it may for the sake of argument be admitted as possible that such an occurrence might have broken accused's headlight as a consequence of the jar; but such an event could not possibly have bent back the headlight, pushed back the radiator, and caused dents on the body and the fender and the blood stains on the cowl and the window. (See Exs. III and IV.) If, therefore, the theory of the defense be adopted that deceased was slugged and thrown unconscious into the road, and if it be further assumed that the presence of the glass in the road be explained by accused's car running over the deceased's legs, it is necessary to go further and assume the occurrence, the same evening or shortly before, of another accident to accused's car. What sort of an accident could it have been? Running into another automobile or inanimate object could not cause blood stains. The brief for the defense says that the striking and running over of birds, rabbits, and other small animals is of frequent occurrence, and might explain the blood on accused's car (brief, p. 14). Running over a rabbit, skunk, cat, or dog could not possibly cause bloodstains on top of the cowl and on the window, nor could it cause the dents and displacements already mentioned. With few exceptions, birds are diurnal in their habits. Bats, it is true, are nocturnal; but are rarely found. Admitting for the moment that the bloodstains on accused's car might have been caused by running into a bat or nocturnal bird, such an occurrence could not have caused the dents and displacements, as a bat or a bird does not weigh enough. Running into a stray horse or cow might cause the bloodstains, dents, and displacements, but would have done more. It would have wrecked accused's car completely. By a process of exclusion we are brought to the conclusion that the previous accident, if it existed, must have been a collision with a human being in a standing position. Also, a collision such as is indicated by the condition of accused's car must have caused serious injuries to the person struck. But if, prior to running over Rutan, accused had run into and seriously injured another man, it would be possible for him to offer proof of such an occurrence other than his own testimony. Accused would know when and where it occurred and by what witnesses to prove it. Even if from drunkenness or otherwise, he did not remember it, such an event would be notorious and mentioned in the newspapers. If the damage to

accused's car is to be explained by an accident other than that which killed Rutan, it is under the circumstances incumbent upon accused to offer some evidence that such an accident occurred, but he has not done so. When it is shown, as it is by the fragments of glass, that accused's car was at the scene of one serious accident; and, further, that accused's car was badly damaged about that time, it is for accused to show, if such was the fact, that his car was not damaged at that accident, but at another. He has offered no proof of the existence of such another accident, though he might have done so had it existed. The conclusion is justified that accused's car struck deceased while the latter was in a standing position near the place where Rutan's body was found and that that collision caused the injuries both to Rutan and to accused's car.

Another item of evidence tends strongly to disprove the theory of the defense that deceased was slugged and thrown unconscious from a car into the road, where his legs were later broken by being run over by accused's car or some other. Staff Sergeant Lowe, who first found deceased lying by the road, testified that deceased was lying on the east or right side of the road, "just off the edge of the pavement on the grass, head toward the road" (R. 35). That means that the lower part of deceased's legs, where the fractures occurred, was well over on the grass, five feet or thereabouts from the paved and traveled part of the road. The legs could not have been broken by an automobile running over them while the body was in that position unless the automobile had left the paved part of the road and been driven far over on the grass, a highly improbable hypothesis. If the legs were broken by being run over by an automobile, without the trunk, arms, or head being injured, which is the theory of the defense, the natural inference is that the body was at the moment of being run over lying with the legs on the paved part of the road and the trunk and head to one side, presumably the right or east, out of the line of travel. Yet if that was the position of the body at the moment of its being run over, it must have been carried laterally five or six feet to the grass and completely turned round, with the head in the opposite direction. An automobile running over an unconscious man in the road might roll him over, but could hardly transport him laterally out of its path or turn him end to end. On the other hand, if, as the prosecution maintains, deceased was struck while in a standing position and fell backward against the right headlight and right side of the radiator and upon the right side of the hood, he would have fallen clear of the path of the automobile on the right, to such a place

as that where he was found, and assumed some such position as that in which he was found. In other words, the location and position of the body are consistent with the theory of the prosecution and the view that deceased was struck by accused's automobile while in a standing position, and wholly inconsistent with the theory of the defense.

Certain evidence tending to the contrary should be considered.

In the first place there are the breakage of the lens, the dents in the fender and hood, the bending back of the headlight and the displacement of the radiator. It is urged that such damage to a car could not occur consistently with the absence of skull fracture and of wounds or bruises between the neck and the knees. Deceased weighed 150 pounds (Ex. II). Careful examination of the photographs (Exs. IV and V) shows that the bracket of the headlight was not bent, but that the rear shell of the light, which is thin metal, was twisted. This might have occurred, as well as the displacement of the radiator, by the mere impact of 150 pounds weight. The glass would of course break easily either from impact of the body or from the heel of a shoe. The fender and hood of a light car such as the Chevrolet are made of very thin metal. The sudden dropping of so much weight on the hood would crush it, even though no hard object struck it. The fender might have been dented by the heel of a shoe. The bending back of the headlight and the damage to the radiator and hood, if caused by the weight of the body as a whole rather than by a blow from any particular part, would not necessarily cause wounds or bruises.

The fact is that deceased received a blow on the head sufficient to kill him as a result of intercranial injury, but without any fracture of the skull (Major Tamraz, R. 120,121; Ex. II). This may be unusual, but the unusual character of the situation is the same whether the blow was from contact with some part of the automobile, with the ground, or, as the defense maintains, by being slugged. Hence this fact constitutes no argument against the theory that deceased was killed by being struck by accused's automobile.

The defense also relies upon the testimony of Private Jones, that he found three or four strands of sandy blonde hair on the right door of accused's car (R. 52), and that of Private Meyers that deceased's hair

was very dark black (R. 111). However, the autopsy protocol gives the color of deceased's hair as brown (Ex. II). The expression "three or four strands" would seem to indicate long hair, and not the short hair of a soldier. The photographs show that the glass in the window in question is pivoted and projects when open (Exs. IV and V). It may be that the hair in question was that of a woman which caught on the glass as she entered the car, and not that of any person run into. The only other possible theory, which the defense apparently supports, is that the hair was that of some person run into by accused's car prior to the fatal accident to Rutan. But who can that person have been? A serious automobile accident to a human being is almost certainly known, and can be proved; yet the defense has not shown that anything of the sort occurred.

The Board of Review does not minimize the objections to the view which it takes of the case, but upon a careful review of the evidence it considers those objections of far less weight than those which might be raised against any other possible view, and particularly against the view that accused had had two accidents, in one of which he ran into some person other than Rutan, or some object, and injured his car, and in the second of which he ran over Rutan's prostrate body.

As has been said, the Board concludes that accused's car ran into deceased while the latter was in a standing position on the road near where he was found unconscious, and that that collision caused the damage to accused's car and the injuries to and death of deceased. Even if this be so, was accused guilty of involuntary manslaughter, of which he has been found guilty? That offense is thus defined in the Manual for Courts-Martial, paragraph 148 a:

> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law."

Homicide caused, whether intentionally or not, in the commission of a felony is murder. Paragraph 148 a, M.C.M. By section 10324, Oklahoma Statutes, 1931, driving a motor vehicle while under the influence of intoxicating liquor is a felony, and having liquor in the vehicle is

prima facie evidence of violation of the section. It would therefore seem that accused might have been tried for and convicted of murder in the state courts. But, as has already been said (ante, this opinion, par. 3 b (3)), manslaughter is a lesser offense included within murder, and accused has no right to complain because he was not charged with the most serious offense of which he may have been guilty.

But whether or not accused was guilty of murder, he was guilty of manslaughter in that he committed a homicide "by culpable negligence", as the Manual expresses it in the passage just quoted, or recklessly, with disregard of human life, as other authorities put it. Robison says that the view of the road from his porch was unobstructed for 75 yards (R. 33), so it is a fair presumption that it was unobstructed to a driver for that distance or further. To run down a man in a standing position on an unobstructed road is negligence per se. Though the doctrine res ipsa loquitur has not, so far as the Board of Review has been able to find, been applied under that name to involuntary manslaughter, yet it is believed that the principle behind that doctrine is applicable to such a case as the present. The typical case for the application of the doctrine is that of a passer-by on the sidewalk injured by a brick or scantling falling from the scaffold of a building under construction. The injured man was not upon the scaffold and cannot possibly know just what occurred there. But he does know, and the court and jury know, that such an accident does not ordinarily occur unless there has been negligence on the part of the building contractor or his employees. The law does not place upon the party injured the impossible burden of proving some specific act of negligence on the part of some particular employee, which caused the brick to fall. To do so would be in effect to deny recovery. The prosecution is not required to negative the possible but highly improbable hypothesis that the brick fell as a result of something impossible to foresee and avoid. If such was the case, the defendant must at least go forward with some evidence to that effect.

Similar principles are applicable to the present case. The only differences between negligence in civil and in criminal cases are two: In the latter (1) the negligence must be of a higher degree, the conduct of accused must be culpable, reckless, or wanton, showing disregard of human safety; and (2) the negligence must be proved beyond a reasonable doubt. The Board considers both these requirements satisfied. As has been shown, the prosecution has proved by the testimony of Starrett

(R. 42-49) that accused was driving an automobile while drunk; by evidence already analyzed, that accused's automobile ran down deceased while he was in a standing position on the road and killed him, that deceased wore a white shirt; and, by the evidence of Robison (R. 33), and the silence of the other witnesses on the point, that there were no obstructions to the view. Given those circumstances, one may say that except for the existence of some highly improbable circumstance the accident could not have happened without the culpable negligence or reckless conduct of accused. The only highly improbable circumstance exculpating accused of which there is the least evidence whatever, or which can even be imagined, is that deceased ran into the path of the car. Notwithstanding some slight evidence that deceased was despondent (R. 111-113), the Board considers that theory too fanciful for serious consideration. To go further and require the prosecution to show just what happened, the precise nature of accused's negligence, and to exclude every hypothesis other than that of accused's guilt, even though highly improbable and unreasonable, is to place upon the prosecution a burden impossible to sustain and render convictions for homicide impossible except where a surviving eye-witness is present.

In 3 Blashfield's Cyclopedia of Automobile Law, section 44, it is said:

> "The general rule is, irrespective of statute, that if a motorist, by gross carelessness or culpable negligence, implying an indifference to consequences in driving his machine, causes the death of another, he is guilty of manslaughter.
>
> * * * *
>
> Thus an automobile driver who kills a person on the highway as a result of gross negligence in failing to keep a proper lookout is guilty of involuntary manslaughter, though at the time of the killing the driver was operating his machine lawfully and at the rate of speed permitted by law."

The offense of manslaughter, if committed at all, was complete, so far as the accused was concerned, when the deceased's body struck the ground after falling from the hood of accused's automobile. Except that

deceased did not die until later, accused was at the moment when Rutan's body struck the ground either guilty or not guilty of manslaughter. What accused later did or omitted could not change his guilt, but is nevertheless material as throwing a flood of light on the mental state of accused. Accused's failure to stop and render aid, though it occurred later, tends powerfully to show that accused was, not only after but at the moment of the accident, guilty of that wantonness, recklessness, and disregard of the safety of others which is the mental element in manslaughter.

The Board realizes that with respect to the weight and sufficiency of the evidence, no two cases are alike and every one must be judged upon its own facts. Nevertheless cases where a court and jury have had before them similar situations may be helpful. In People v. Smaszcz, 311 Ill. 494, 176 N.E. 768, defendant was convicted of involuntary manslaughter of Mrs. Moriarty, but contended that the evidence did not support the verdict. The facts were as follows: Three women on their way to church at 7:45 Sunday evening were run down and one of them killed at Stony Island Avenue and 86th Street, Chicago. The attendant at a filling station on that corner was inside the building reading a paper. He heard a crash like that of two cars striking, looked up and saw a tan Studebaker car leaving the scene. He ran to the street and asked another motorist who came along to follow the Studebaker and obtain its number which that motorist did. The women were found in the street, Mrs. Moriarty dead and the others unconscious. Defendant, owner of the car bearing the number thus obtained, was arrested at 2 a.m. as he was putting his car into his garage. The car had the right headlight smashed and the bar between the two headlights broken, the reflector gone and fender bent. A reflector was picked up at the scene of the accident which fitted defendant's headlight. A woman's hat was found between the spokes of the spare wheel on the side of defendant's car, which was identified by the husband of deceased as her hat. The defendant testified that he was at a friend's house from 6 to 9 with his car parked outside, and that between those hours he neither drove the car nor authorized anyone else to do so and that on coming out he found the car where he had left it. The court said (176 N.E. 771):

> "The questions of fact arising out of the evidence are the identity of the plaintiff in error as the driver

of the automobile and the sufficiency of the evidence to show that the negligent driving of the car was the proximate cause of Mrs. Moriarty's death."

It will be noted how close are the questions thus stated to those presented by the present case. In the Smaszcz case the jury resolved those questions unfavorably to the defendant and the Supreme Court held that it was justified in doing so. The court further said (same page):

> "The question whether a defendant charged with manslaughter by the negligent driving of an automobile is guilty of criminal negligence which was the proximate cause of the death is a question of fact for the jury to pass on under correct instruction by the court. People v. Falkovitch, 280 Ill. 321, 117 N.E. 398, Ann. Cas. 1918B, 1077; People v. Adams, 289 Ill. 339, 124 N.E. 575. The jury might justifiably find from the evidence, beyond a reasonable doubt, that Mrs. Moriarty was killed by being struck by an automobile driven by the plaintiff in error on a well-lighted street intersection in the city of Chicago at a rate of speed much greater than was reasonable and proper, having regard to the traffic and use of the way, and so as to endanger the life or limb of persons using the street, in willful disregard of the danger to human life. The force of the collision and the speed of the car are indicated by the testimony of Nelson that, when he heard the crash, it sounded like two automobiles coming together. The collision was not of two automobiles coming together, but was of an automobile with human flesh--the bodies of the three women. The automobile itself bore evidence of the force of the collision, and consequently of the speed of the automobile. The right headlight was dented, its glass broken, the reflector dropped out, the metal rod between the headlights was broken, and the left fender was badly damaged. The broken bar and dented metal showed the force was extreme, particularly when it is considered that the

collision was not of metal with metal but of metal with human flesh, and that the bodies of the three women were thrown or dragged 45 feet from where they were struck. * * * The flight of the plaintiff in error from the scene of the collision without any effort to ascertain the extent of the injuries caused by his act or to help the injured persons may also be taken into consideration as evidence of guilt."

People v. Black, (Cal. App.) 295 Pac. 87, was an indictment for involuntary manslaughter. The only eye-witness saw a Graham-Paige automobile approach a blind crossing at 35 miles an hour; saw the brakes suddenly put on, the car skid, strike a woman pedestrian crossing the street, and throw her into the air. The car stopped at right angles to its former course and immediately started off on the cross street in the direction toward which it was headed when stopped. As the car left its license number was seen to be 2455. The defendant had been seen shortly before driving a Graham-Paige with that number, and a Graham-Paige bearing that number was soon afterwards found abandoned in the next town with the glass of the headlight and its metal rim missing. A metal rim and broken glass were found at the scene of the accident. Defendant afterwards admitted that he had had an accident. Defendant was convicted and his conviction was sustained. The court said, 295 Pac. 88:

"While it is possible, as suggested by appellant, that the deceased may have purposely thrown herself in front of the car for the purpose of being killed, such an act would have been willful, and not merely negligent, and such a possibility is not sufficient to create a reasonable doubt. In a prosecution for manslaughter involving a bullet fired from a gun, we apprehend the prosecution would not be required to establish affirmatively that the deceased did not move a few inches into the pathway of the bullet, in order to commit suicide. While it was incumbent upon the prosecution in this case to show that the proximate cause of the accident was the manner in which the car was driven, we think this burden was met, and that it was no more the people's duty to

negative this unreasonable possibility than it was to make such additional proof as to the actions of the deceased in the case of People v. Halbert, just cited."

Other cases in which the facts bore some similarity to those involved in the present case and in which verdicts of guilty were sustained are State v. Elliott, 94 N.J. Law 36, 110 Atl. 135; State v. McGrath, (N.J.) 140 Atl. 452; State v. Goldberger, (Conn.) 173 Atl. 216; People v. Cunningham, 64 Cal. App. 12, 220 Pac. 312; People v. Kelly, 70 Cal. App. 519, 234 Pac. 110.

In view of all the foregoing, as well as of certain additional evidence hereinafter mentioned (this opinion, pp. 33-35), the Board concludes that the record supports the findings of guilty of Charge III and the specification thereunder, alleging manslaughter.

d. There are two other items of evidence which have a bearing on more than one of the specifications.

(1) First among these is the evidence of Private Starrett as to what accused did about 10:25 p.m., July 3 (R. 42-49,116-119). It is inconceivable that a sober man driving a car, who had had no serious accident, would accost a lone sentry at half past ten in the evening and insist on "somebody from the Constructing Quartermaster's" driving him home. A sober man who had had nothing happen to him to disturb his mental equilibrium would have realized that there would be no one in the quartermaster's office at that hour and would have felt no need of any one to drive him home. The fact that his car had a broken headlight would have been good reason for going to a garage, but was no reason for substituting another driver if the first was sober and in possession of his faculties. What then was the explanation of the extraordinary conduct of accused? Either or both of two causes, drunkenness and mental perturbation as a result of the accident. As to the latter, the following passage in Underhill on Criminal Evidence, in the chapter on Homicide, is in point (sec. 502):

"Conduct of the accused subsequent to the crime.--
The perpetration of a homicide is well calculated to create a perturbation in the mind of any one implicated in it, that will manifest itself by the agitation subsequently noticeable in his conduct. If the charge that the accused did the

> killing is disputed, or if it is supported by circumstantial evidence only, such evidence is peculiarly appropriate. It is proper to show the conduct of the accused on the night of the killing if it is unusual in any way. It is proper, therefore, to show that the accused acted unnaturally, and confusedly, or was drinking, or was excited and nervous in manner, spoke hurriedly and in a low tone, looked pale and appeared greatly distressed shortly after the crime or when he was accused of it."

Of course, at the time of meeting Private Starrett accused did not know that the injuries which he had inflicted upon Rutan would be fatal; but the same principle, that excitement, nervous behavior, or peculiar conduct is relevant as indicating consciousness of guilt, is applicable to offenses other than homicide. Underhill, same work, secs. 200, 202.

If accused's unusual behavior was due to drunkenness, the evidence tends to prove Charge I and the specification thereunder, alleging driving while drunk; if such behavior was due to perturbation at having recently struck a man with his automobile, the evidence tends to support Charges II and III, and the specifications thereunder, alleging failure to render aid and manslaughter, respectively. The most reasonable inference, which the Board considers itself justified in drawing, is that accused's peculiar conduct in asking for somebody from the constructing quartermaster's to drive him home and otherwise, was due to a combination of the two causes, drunkenness and a mental perturbation due to a consciousness of guilt of having struck a man and fear of the consequences. In that view, the evidence tends to support all charges and specifications.

(2) There is also to be considered the midnight conversation between accused and his wife, overheard through the partition between their apartments by Lieutenant Scott (R. 83-87; ante, this opinion, p. 13). The defense objected to this as introduction of a privileged communication between husband and wife, but the court admitted it. Though neither spouse can be required to testify to such a communication unless the other consents, the claim of privilege will not exclude testimony of a third party who overheard such a conversation. Par. 123 b, M.C.M. In the opinion of the Board, the answers of accused were admissible as admissions against interest or under the principle stated in the passages just quoted and cited from Underhill.

After 12:30 a.m., July 4, the witness heard Mrs. Turner several times ask her husband what he had run into. He answered several times that he did not know, and once he said nothing (R. 85,86). Is such an answer, or failure to answer, by a man to his own wife, the conduct of one who is and has been sober and to whom nothing unusual has happened? The Board thinks that it is not; and that accused's peculiar behavior on this occasion is to be explained in the same way as his behavior in asking for somebody from the constructing quartermaster's office to drive him home. His ignorance, real or feigned, and silence, when questioned by his wife, tend to prove either that he was or had been drunk and therefore could not remember what had happened, or that he was conscious of guilt in that he knew that he had struck and probably injured some one and had not stopped to give aid. More probably, the two causes concurred, in that his drunkenness rendered his memory hazy, but yet he knew that he had struck some one. In this aspect the evidence tends to support all charges and specifications.

9. Accused is 34 years of age. He graduated from the Field Artillery School in the Battery Officers' Course in 1928 and the Advanced Motors Course in 1929. The Army Register shows his service as follows:

> "2 lt. of Inf. U.S.A. 16 Sept. 18; accepted 17 Sept. 18; hon. dis. 1 Jan. 19.--2 lt. of F.A. 3 July 23; accepted 17 Oct. 23; 1 lt. 2 Oct. 28."

10. 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, and the designation of the Disciplinary Barracks or a military post as the place of confinement. A sentence of dismissal is mandatory for violation of the 95th Article of War and is authorized for the violations of the 93d and 96th Articles of War involved in the present case.

Theodore Hall, Judge Advocate.

N. A. Turnbull, Judge Advocate.

Archibald King, Judge Advocate.

To The Judge Advocate General.

Special Assignments 1st Ind.

War Department, J.A.G.O., DEC 19 1934 To the Secretary of War.

1. Transmitted herewith for the action of the President is the record of trial in the case of First Lieutenant Roy P. Turner (O-15403), First Field Artillery, together with the foregoing opinion of the Board of Review.

2. I concur in the Board's opinion to the effect that the evidence sustains the findings of guilty of Charge I and its specification and that the record is legally sufficient to support the sentence; but, for reasons hereinafter indicated, I am unable to concur in the view that the evidence is legally sufficient to support the findings of guilty of Charges II and III and the specifications respectively thereunder.

3. By Charge II and its specification it is alleged that Lieutenant Turner, in violation of the 95th Article of War, at the time and place stated, while operating a motor vehicle, wrongfully and unlawfully struck Private John H. Rutan therewith and wrongfully and unlawfully failed to stop and render aid and assistance to said Private Rutan. By Charge III and its specification Lieutenant Turner is charged with the manslaughter, at the time and place stated, of Private Rutan by striking him with an automobile, in violation of the 93rd Article of War. Obviously the findings of guilty of these two charges and their specifications cannot be sustained unless the evidence proves beyond reasonable doubt that Private Rutan was the person struck by the automobile. The opinion of the Board of Review contains a careful and very full abstract of the evidence, to which attention is here invited.

4. The evidence is believed sufficient to warrant the conclusion that the accused was operating the automobile when it struck and seriously injured some man who was wearing a white shirt, at the place specified in the two specifications; that the accused was under the influence of intoxicating liquor at the time of the accident and that the injured man was taken to the Station Hospital at Fort Sill and carried into the emergency room, arriving there at 10:50 o'clock, p.m. The evidence also shows that Private Rutan on the night of the accident was in that hospital suffering from severe injuries as a result of which he died three days later; but I am unable to find any competent evidence in the record to show that Private Rutan and the man in the white shirt who was struck by the automobile and taken to the hospital were one and the same person.

The evidence shows, it is true, that the man struck by the automobile sustained a fracture of one leg and that his face was bloody.

It also appears that Private Rutan had compound fractures of both bones of each leg, abrasions of the face, lower jaw and one ear and a severe head injury. It is scarcely to be argued, however, that the mere fact that the man struck by the automobile sustained injuries vaguely similar to those suffered by Private Rutan proves the two to be one and the same person.

It is noted also that Sergeant Lowe, who was present at the scene of the accident soon after it occurred and before the injured man had been removed, testified that some soldiers came along while he was there and identified the injured person as Private Rutan. The soldiers were not produced. Sergeant Lowe's testimony on this point being pure hearsay cannot be considered.

The Charge of Quarters on the night of the accident, Sergeant Shotts, testified that about midnight that night, which would be about two hours after the accident, he was called to the Station Hospital "to identify Private Rutan, who was in the hospital in the operating room laying on a table at that time" and that he did identify him. There is nothing in the record, however, to show that the person identified by Sergeant Shotts was the man who had been struck by the automobile. Moreover the witness does not swear that the man identified by him was Private Rutan but merely that he so identified him at the hospital. This identification may have been false or the witness might have later learned that he was mistaken.

For aught that is shown by competent evidence the man injured by the automobile may have recovered and be alive and well today. In this state of the evidence the findings that accused struck Private Rutan with his automobile and failed to stop and render him aid and assistance and that by striking him he caused his death, cannot legally be sustained.

5. Even if the evidence clearly established that the man struck by accused's automobile was Private Rutan still, in my opinion, it would for another reason fall short of proving the charge of manslaughter.

I agree with what apparently is the view of the Board of Review that to sustain the conviction of manslaughter in this case the evidence must establish beyond reasonable doubt that the injuries, which resulted in death, were caused by culpable negligence on the part of the accused, or, as it is sometimes expressed, by his reckless, wanton conduct showing disregard of human life.

6. The evidence, while unsatisfactory in many respects, may, for the purposes of this discussion, be regarded as sufficient to establish the following facts relative to the accident in question:

The accused at the time and place stated, while somewhat under the influence of intoxicating liquor, was operating his motor car when it collided with a pedestrian, probably on his feet at the time, and seriously injured him. The circumstances appear to have been such that the accused must have known that his car had struck a human being and that the resultant injury was probably serious. Nevertheless, after stopping momentarily he left the scene of the accident without any effort to ascertain the seriousness of its consequences and without rendering any aid or assistance. The vital question then arises whether or not culpable negligence on the part of the accused was the proximate cause of the collision. Unless all reasonable hypotheses consistent with the conclusion that the accident was not caused by culpable negligence on the part of the accused are excluded by the evidence, the charge of manslaughter cannot be sustained.

Driving an automobile while under the influence of intoxicating liquor may be negligence; but the fact of the driver being in this condition is not necessarily the cause of a collision with a pedestrian.

In this case there appears to have been no eye witness to the accident. Consequently, if negligence causing the accident is shown, it must be by circumstantial evidence only. The accident occurred on the Fort Sill - Lawton Highway, in front of the house in which the witness George C. Robison resided. The Highway runs north and south and lies immediately to the west of the Highland Cemetery. Mr. Robison's house was on the west side of the road directly opposite the Cemetery. At about 10 o'clock on the evening of July 3, 1934, Robison was lying on a bed on his front porch when he heard a noise which sounded to him as if a goods box had fallen from an automobile. Looking towards the road he saw an automobile going north towards Fort Sill. This automobile stopped near the entrance to the Cemetery for a moment and then proceeded north. Robison noticed some white object lying on the opposite side of the road from his house. Shortly thereafter another car came from the south, stopped beside the white object, and then turned around and drove away to the south. After this a number of cars stopped and Robison went out to the road. This was about ten minutes after his attention had been attracted by the sound which he supposed was the falling of a box. He then discovered that the white object he had seen was a man wearing a white shirt who was lying just off the pavement on the east side of the road. Robison says nothing about the speed of the automobile or the manner in which it was being driven. He states that it was about 75 yards from his front porch to the hedge of the Cemetery and he also states that he had a clear view for possibly 75 yards; but whether he meant that this view was towards the Cemetery hedge or down the road does not appear.

The condition of accused's car as shown by the evidence indicates that the victim of the accident when the front of the car collided with him was thrown onto the top and side of the hood and struck the cowl. This would indicate that the car was moving with some considerable speed but not necessarily that the speed was excessive.

The position of the injured man when found together with the fact, as shown by the marks on the car, that he was struck by the right front headlight, makes it appear probable that the car was being driven on the east side of the pavement which would be the right side of the road.

Since shattered pieces of glass from the headlight were found at the place where the injured man lay, it is probable that he was not dragged or thrown any considerable distance. It appears from the testimony of Private Joe C. Riddle, Jr., that it was about ten feet from the place where the injured man lay to the entrance of the Cemetery. If this be so and if the car, after the accident, stopped at this entrance, as testified by the witness Robison, the car cannot have been moving at any very high speed.

7. The fact is that it is impossible to know from the evidence what actually caused the accident. One can only surmise and no one may legally be convicted of crime upon mere surmise. The accident may or may not have been due to negligence on the part of the accused and, if due to negligence, the negligence may have been only slight and far from that culpable negligence necessary to sustain the charge of manslaughter in this case. It is just as reasonable to surmise that the pedestrian was struck solely as the result of his own negligence. He may well have been walking along the side of the road and have stumbled or inadvertently stepped directly in front of the automobile. Such hypothesis is far from unreasonable or even improbable, for accidents of that nature, without any negligence upon the part of the motorist, are of almost daily occurrence. The Director of Traffic here informally estimated that about half of the accidents in which pedestrians are struck by automobiles are due solely to carelessness upon the part of pedestrians.

8. Because of the utter lack of proof that negligence on the part of the accused caused the injury as well as because, as hereinabove indicated, it is not proved that Private Rutan was the man struck by the automobile, I am of the opinion that the record is not legally sufficient to support the conviction of manslaughter. Since, however, no eye witness to the accident is available and it is most improbable that any further evidence can be obtained on the question of negligence, it would

appear useless to have a rehearing on the manslaughter charge.

9. Although, as hereinabove indicated, the evidence is not legally sufficient to support the findings of guilty of Charge II and its specification for the reason that it was not shown that Private Rutan was the person struck by the automobile, nevertheless the evidence is sufficient to show that accused did strike and injure some person, and, knowing this, left the ecene without rendering any assistance or making any effort to ascertain the seriousness of the injuries. It is proper to consider this reprehensible conduct on the part of the accused, which would constitute a violation of the 95th Article of War, as an aggravating circumstance, in determining what punishment should be meted out for the offense of driving a motor car while under the influence of intixicating liquor. Although dismissal ordinarily would be considered an unduly severe punishment for this offense if unattended by any aggravating circumstance, nevertheless the sentence adjudged in this case, dismissal and confinement for one year, is authorized for violation of the 96th Article of War, and in view of the seriously aggravating circumstance mentioned above it is considered that dismissal would not be an excessive punishment.

It has been informally learned from the office of the Adjutant General that the accused has been in confinement since August 1, 1934. For this reason and also because it is possible, as pointed out above, while disapproving the findings of guilty of Charge II and its specification, to take into consideration the aggravating circumstance to which reference has been made above in determining what punishment should be enforced for the offense alleged in the specification of Charge I, a rehearing on Charge II and its specification is not recommended.

10. For the reasons hereinabove set forth, I recommend that the findings of guilty of Charges II and III and the specifications respectively thereunder be disapproved; that the findings of guilty of Charge I and its specification and the sentence be confirmed; that, in view of the recommended disapproval of the charge of manslaughter and of the length of time accused has already been in confinement, the unexecuted portion of the confinement adjudged be remitted; and that as thus modified the sentence be carried into execution.

11. Inclosed herewith is a memorandum concerning Lieutenant Turner's service and certain representations made in his behalf, together with a draft of a letter for your signature transmitting the record to the President for his action for use in case you approve my views and recommendations and a form of action by him as confirming authority

designed to carry my recommendations 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.

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

4 Inclosures:
1. Record of Trial.
2. Draft of letter for sig. of Sec. of War (with alternate last page).
3. Form of executive action (Bd. of Rev. and J.A.G.).
4. Memo. of Turner's service.

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

Board of Review
CM 202366

OCT 8 1934

UNITED STATES	)	SIXTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sheridan, Illinois,
Captain THEODORE P. FOX	)	August 23 and 24, 1934. Dis-
(0-243422), Engineer	)	missal and confinement for
Reserve.	)	two (2) years.

OPINION of the BOARD OF REVIEW
HALL, TURNBULL and KING, 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 four specifications, each alleging that he caused a false claim against the United States to be presented by R. G. Fuller, in violation of the 94th Article of War (Charge I); four specifications involving the same transactions as the preceding four, each alleging wrongful payment by accused of a false claim of R. G. Fuller, in violation of the 96th Article of War (Charge II); and six specifications, each alleging embezzlement, in violation of the 93d Article of War (Charge III). After submitting a plea to the jurisdiction of the court (see par. 3 b of this opinion), which was overruled by the court, accused pleaded not guilty and was convicted of all charges and specifications. He was sentenced to dismissal, forfeiture of all pay and allowances and confinement for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

The specifications will be set out hereafter severally, with the evidence conerning each and the Board's views.

3 a. Preliminary. Accused was, before and during the time covered by these specifications, and still is, a captain of Engineers in the Reserve Corps, residing at Pontiac, Illinois, on active duty with the

Civilian Conservation Corps. Until relieved upon discovery of his alleged offenses, accused commanded Company 627 of that Corps at Camp Mississippi Palisades, near Savanna, Illinois, and was the custodian of its funds and property.

b. Plea to the jurisdiction. Accused pleaded to the jurisdiction of the court on the following grounds (R. 11):

> "1. That the alleged offenses did not take place on a military reservation.
>
> 2. That the funds and material which comprise the basis of the alleged offenses were not military property nor intended for the use of the military service.
>
> 3. That the accused during the period in which the alleged offenses took place was not, in effect, on active duty of the military service of the United States, but was acting in the capacity of a federal overseer on duty with the Civilian Conservation Corps."

Reasons 1 and 2 obviously have no legal merit. Reason 3, however, should be considered. This plea in effect asserts that the accused during the time the alleged offenses were committed was not subject to military law.

Accused was placed on active duty by the following order (R. 11):

"HEADQUARTERS SIXTH CORPS AREA
Chicago, Illinois.

SPECIAL ORDERS) October 10, 1933.
No. 204)

EXTRACT

1. By direction of the President and to carry out the provisions of the Act of March 31, 1933 (Public No. 5, 73rd Congress, each of the following-named Reserve Officers is, with his consent, ordered to active duty for a period of six months beginning October 11, 1933. On that date each Officer will proceed without delay from that place indicated after

his name to Jefferson Barracks, Missouri, reporting in person upon arrival to the Commanding Officer thereof, for duty in connection with the Civilian Conservation Corps. Each officer will rank from the date set after his name:

* * * *

Captain Theodore Paul Fox, 0-243422, Engr-Res. (IRD), P.O. Box 303, Pontiac, Illinois. (August 16, 1933).

* * * *

Unless sooner relieved for the convenience of the Government, each officer will be relieved from duty in time to enable him to arrive at his home on April 10, 1934, on which date he will revert to an inactive status. The travel directed is necessary in the military service. Chargeable to procurement authorization FD 506 P 2-0121 P 2-0620 A 8815 N and FD 513 P 2-0620 P 2-0700 A 8815 N.

By command of Major General Parker:

J. M. GRAHAM,
Colonel, General Staff,
Chief of Staff.

OFFICIAL:

ELMER C. DESOBRY,
Lieutenant Colonel, Adjutant General's Department,
Actg. Adjutant General."

By later orders, accused's station was changed and his tour of duty was extended for six months (par. 2, S.O. 224, Headquarters Sixth Corps Area, November 1, 1933; par. 11, S.O. 66, same headquarters, March 19, 1934; stipulation, R. 13).

The Act of March 31, 1933, 48 Stat. 22, cited in the order placing accused on duty, provides:

"Be it enacted, etc., That for the purpose of relieving the acute condition of widespread distress and unemployment now existing in the United States, and in order to provide for the restoration of the country's depleted natural resources and the advancement of an orderly program of useful

public works, the President is authorized under such rules and regulations as he may prescribe and by utilizing such existing departments or agencies as he may designate, to provide for employing citizens of the United States who are unemployed, * * *." (Underscoring supplied.)

Under the authority conferred in the underscored words, the President called upon the Army in general and the Officers' Reserve Corps in particular for certain duties in connection with the Civilian Conservation Corps. In pursuance of that policy and under the authority of the same underscored words, the President called accused, with his consent, to active duty in connection with the Civilian Conservation Corps. This office has expressly held that under the statutory authority just quoted members of the Enlisted Reserve Corps may with their own consent be called to active duty with the Civilian Conservation Corps (JAG 326.22, April 11, 1933); and, if that be so, reserve officers may be called to such duty also. Are such officers subject to military law when so called? The 2d Article of War includes among those persons subject to military law the following:

"* * * all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same."

"The said service" refers to "the military service of the United States" mentioned in the preceding clause.

This office has held that a reserve officer called to active duty other than with the Civilian Conservation Corps is (JAG 241.12, June 13, 1925),

"* * * during the period of such active duty, under military jurisdiction, subject to all of its disciplinary laws and consequently clothed with all the obligations of his rank in a manner exactly like that of an officer of the regular establishment. * * *."

To the same effect see JAG 400.321, January 28, 1922. During the World War many reserve officers on active duty were tried by court-martial. In

JAG 210.41, May 6, 1925, this office said:

> "* * * In any event, while a sharp distinction may be drawn between an active duty status and an inactive duty status, with reference to reserve officers, there is not, from a military viewpoint, any distinction of status between a reserve officer on active duty for training purposes only and such an officer on active duty for other purposes."

Reserve officers called to duty in connection with the Civilian Conservation Corps are not called as civilian foremen, but as officers of the United States Army. They are in general called, and this officer in particular was called, by the order of the Secretary of War, because of their knowledge, experience, and training as army officers. They wear the uniform of the army and are under the orders of other officers of the army. Second Lieutenant James W. Anderson, Infantry Reserve, on duty with the Civilian Conservation Corps, was tried by general court-martial, convicted, and sentenced to dismissal and one year's confinement. The sentence was confirmed by the President and published in General Court-Martial Orders No. 8, War Department, April 18, 1934 (CM 201678). The court was without jurisdiction of accused and the entire proceedings were illegal, if the objection now raised is valid.

For the reasons given, the Board considers that the third ground stated for the accused's motion was without foundation and that that motion was properly overruled.

4. In summarizing the evidence and in commenting thereon the Board in several instances has copied the excellent review of this case by Captain George B. Campbell, Judge Advocate General's Department, Assistant Judge Advocate, Sixth Corps Area. As it would embarrass the reader unnecessarily to do so, the Board does not put all such passages in quotation marks, but makes this acknowledgment. The Board has, of course, made an independent study and evaluation of the testimony, and is alone responsible for its conclusions.

The Board now turns to a detailed consideration of the specifications with the evidence concerning each. The four specifications under Charge I

and the four specifications under Charge II relate to four transactions, each covered by a specification under Charge I and a specification bearing a corresponding number under Charge II. Each pair of specifications relating to the same transaction will be considered together.

5. Charge I: Violation of the 94th Article of War.

Specification 1: In that Captain Theodore P. Fox, Engineer, Reserve, while on active duty, did at Savanna, Illinois, on or about December 26, 1933, cause to be presented by R. G. Fuller, Savanna, Illinois, for payment, a claim against the United States, by causing to be presented to him, the said Captain Fox, an officer of the United States duly authorized to pay such claims, in the amount of about $57.96 for foodstuff alleged to have been furnished to the United States for the use of the 627th Company, Civilian Conservation Corps, Camp Mississippi-Palisades, Savanna, Illinois, which claim was false in that no foodstuff had been furnished the said 627th Company, Civilian Conservation Corps, by the said R. G. Fuller, and was then known by the said Captain Fox to be false.

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

Specification 1: In that Captain Theodore P. Fox, Engineer, Reserve, while on active duty and being at the time custodian of the Company Fund 627th Company, Civilian Conservation Corps, did at Camp Mississippi-Palisades, Savanna, Illinois, on or about December 27, 1933, wrongfully pay from the Ration Savings account of said fund, to R. G. Fuller, Savanna, Illinois, the amount of about $57.96 on a false claim for foodstuff purported to have been furnished by the said R. G. Fuller to the 627th Company, Civilian Conservation Corps, he, the said Captain Fox, well knowing at the

time that the said payment was false in that no foodstuff had been furnished the said 627th Company, Civilian Conservation Corps, by the said R. G. Fuller.

In Savanna, Illinois, there were in business two brothers by the name of Fuller. One of them, Robert G. Fuller, operated a furniture store (R. 16); the other, Bert E. Fuller, was the proprietor of a grocery store and traded under the name of G. E. Fuller & Son (Ex. 16). On or about December 26, 1933, the accused, who had been transacting company business with the Fuller furniture establishment, went into that store and explained to R. G. Fuller that CCC Company 627 had "more money in one appropriation than he needed, and that if they had some of that in other forms, why, they could buy furniture. He stated that if he was in some other town, Peoria, I think, that that could be arranged; that it was regular to change funds from one appropriation to the other, customary in the army, that if he was where that could be done he could have the furniture" (R. 17). After some conversation with the accused, Mr. Fuller, placing great confidence in the uniform of the United States Army and in the integrity of accused, stated that he had a brother in the grocery business in Savanna and that an arrangement could probably be made whereby furniture could be purchased but billed as groceries on the brother's stationery and check made out to the brother though actually received by Robert G. Fuller in payment of the furniture. "In that way he bought some furniture and made the check to me as groceries" (R. 17, 18). Pursuant to the conversation between Mr. Fuller and accused, a statement of account purporting to show the purchase of groceries, dated December 26, 1933, in the sum of $57.96, for furniture purchased, was prepared on a billhead of G. E. Fuller & Son, by Miss Haas, bookkeeper for R. G. Fuller, as directed by accused (R. 45, 53). Though he at first objected to doing so, the bill was receipted by Bert Fuller for G. E. Fuller & Son (R. 54; Ex. 1, Ex. 16, QQ 8-12). The account was paid from the company fund by check signed by accused as company commander, made payable to G. E. Fuller & Son, and indorsed by "G. E. Fuller & Son", by Bert Fuller (Ex. 3, Ex. 17, QQ 7, 12). The amount of the check was charged in the company council book against the ration savings (Ex. 14).

The above facts are established by the testimony of R. G. Fuller (R. 16-21, 36, 37, 48); Miss Haas (R. 51-54, 56, 61, 66, 67, 71, 72); deposition of Bert E. Fuller (Ex. 16); Prosecution's Exhibit 1, bill of

G. E. Fuller & Son; Exhibit 2, ledger of R. G. Fuller; Exhibit 3, check; Exhibit 4, entry in company council book; Exhibit 15, bank statement. The facts are not denied by the defense, whose only contention is that the company received and benefited by the furniture purchased (Lieutenant Erb, R. 152-155; Def. Ex. A, inventory of property in camp), which may be admitted.

It may be suggested with respect to Specification 1, Charge I, above quoted, as well as with respect to Specifications 2, 3 and 4 to the same charge, that there is a variance between the allegations and the proof in two respects. In the first place, it may be argued that it is alleged that a claim was presented against the United States, whereas the evidence shows that a claim was in fact presented against the company fund. As is well known, the company fund, whether of a company in the army or one in the Civilian Conservation Corps, is in two parts, one "ration savings" and the other "other funds". The claim here in question was presented against and paid from ration savings. Ration savings are derived solely from appropriations; and, although they are no longer "public funds" in the accurate sense of the term and are not subject to audit by the Comptroller General, they nevertheless retain the character of funds of the United States. Thus, at the close of the World War, ration savings of disbanded organizations were covered into the Treasury of the United States. See Circulars 107 and 145, War Department, December 3 and 12, 1918, and Circular 129, War Department, March 17, 1919, which directed that such deposits be made to the credit of general appropriations, Quartermaster Corps. It is directed by paragraph 38 i, War Department Regulations for the Civilian Conservation Corps, March 6, 1934, that ration savings of disbanded Civilian Conservation Corps units be deposited in the Treasury.

In JAG 123.5, April 28, 1919, it was held in the case of a Quartermaster officer, who was also a company commander, that the surety on his official bond was liable for misappropriation of ration savings by him, since they retained their public character, though the surety was not liable for "other funds". In JAG 123, February 26, 1923, a warrant officer claimed a refund of $41 collected from him, because, when serving as a captain and company commander during the World War, he had purchased from ration savings of his company certain articles not food, though properly purchasable from "other funds" of the company. The Inspector

General held that if there had been any "other funds" of the company, the matter might have been adjusted by a transfer of the necessary amount of such funds to the ration savings account; but, as there were no "other funds", the collection had been properly made. The Judge Advocate General concurred. In JAG 123, December 12, 1930, it was held that ration savings, being derived from funds appropriated for subsistence of the army, might not be expended for any other purpose, even though the organization in question no longer operated a mess. In JAG 123, July 9, 1932, it was held that as a matter of law ration savings might be spent only for food or allied purposes. In JAG 680.48, October 8, 1931, paragraph 3, it was held that the equitable and beneficial title to ration savings was in the enlisted men of the company, though the question whether the legal title was in the United States was not decided. It may be well argued that it is, since the company is neither a corporation nor a partnership; nor can the legal title be in all the men of the company in common or jointly, since, if that were so, a member would continue to own a share after transfer or discharge, and the men of the company would have the right to control the disposition of their own property. Nor, in such a case, would the Government have any right to cover into the Treasury ration savings of disbanded organizations. If, as the above circumstances indicate, the legal title to ration savings is in the United States, the claim of R. G. Fuller was presented "against the United States", and no variance exists.

It is unnecessary, however, to reach a definite decision on the legal title to ration savings, as, even if there was a technical variance in the respect mentioned, the elaborately drawn specification apprised accused with sufficient accuracy and correctness of the offense with which he was charged, and there is not the least reason to suppose that he was misled. The variance, if in fact there was any, was a harmless error which may be passed under the 37th Article of War.

It may be suggested that there was another variance, namely, that Specification 1, Charge I, and the other specifications under that charge allege presentation of a false claim by R. G. Fuller, whereas the false claim really was presented by Bert E. Fuller, trading as G. E. Fuller & Son. If Bert Fuller had taken an active part in the presentation of the false claim, if he had received all or a part of the money collected thereon, that contention might be sound; but in fact all that he did was

over his protest to permit the use of his trade name by his brother. Accused and R. G. Fuller used the name G. E. Fuller & Son as a blind or curtain to conceal the true character of the claim which R. G. Fuller presented and collected. In the opinion of the Board, no variance existed in this respect.

The Board considers that the evidence supports the findings of guilty of Specification 1, Charge I, and Specification 1, Charge II, and that those findings should stand.

6. Charge I: Violation of the 94th Article of War.

Specification 2: Causing a false claim for $93.58 to be presented by R. G. Fuller, January 23, 1934.

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

Specification 2: Wrongful payment of a false claim of $93.58 to R. G. Fuller, January 24, 1934.

These and subsequent specifications under Charges I and II are in the same form as the first specifications under those charges, set out in full and discussed in the preceding paragraph.

On January 23, 1934, accused again approached R. G. Fuller, requesting that the same procedure be followed with respect to other merchandise furnished Company 627 by R. G. Fuller amounting to $93.58, and including linoleum, labor for putting it in place, scales, a rug, a motto, and other articles. Miss Haas, bookkeeper for R. G. Fuller, made out a bill on a blank billhead, in which "G. E. Fuller & Son" was inserted by a rubber stamp as the creditor, for $93.58 worth of tomatoes, sugar, and catsup, as requested by accused. Accused delivered to Miss Haas a check, which she "put through our register" and entered on the cash book and ledger. She receipted the bill in the name of G. E. Fuller & Son, adding her own initial. The transaction appears in the company council book as an expenditure of $93.58 to G. E. Fuller Co., charged against ration savings.

The foregoing is shown by the testimony of R. G. Fuller (R. 22-25, 37, 38, 48, 49); Miss Haas (R. 54-56, 73); Exhibit 16, deposition of Bert

Fuller; Exhibit 2, ledger of R. G. Fuller; Exhibit 5, bill above mentioned; Exhibit 6, entry in council book. The check for this transaction is missing.

The defense to this and the following specifications under Charges I and II is the same as with respect to the first specifications under Charges I and II. The evidence is legally sufficient to support the findings, which should stand.

7. Charge I: Violation of the 94th Article of War.

Specification 3: Causing a false claim for $108.95 to be presented by R. G. Fuller, March 1, 1934.

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

Specification 3: Wrongful payment of a false claim of $108.95 to R. G. Fuller, March 15, 1934.

On March 1, 1934, another similar transaction was made at the request of accused. A Tabriz rug worth $100 and a few other articles, of a total value of $108.92, were furnished by R. G. Fuller to the company; a bill for beets, canned milk, sugar, tomatoes, and peaches, amounting to $108.95, was made out by Miss Haas on a blank billhead on which "G. E. Fuller & Son" was inserted as the creditor. Accused paid the bill with a check on the company fund; the bill was receipted by Miss Haas in the name of G. E. Fuller & Son, and the transaction appeared in the company council book as a payment of the same amount to "G. E. Fuller Grocery", charged against ration savings.

The foregoing is proved by the testimony of R. G. Fuller (R. 28, 29, 49); Miss Haas (R. 56, 61); Exhibit 16, deposition of Bert E. Fuller; Exhibit 10, bill; Exhibit 11, check; Exhibit 12, council book.

The record supports the findings on these specifications, which should stand.

8. Charge I: Violation of the 94th Article of War.

Specification 4: Causing a false claim for $104.65 to be presented by R. G. Fuller, July 12, 1934.

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

Specification 4: Wrongful payment of a false claim of $104.65 to R. G. Fuller, July 12, 1934.

In May, 1934, accused bought a number of articles from R. G. Fuller, ostensibly for Company 627, though two bookcases, a cedar chest, and a desk, of the value of $93, bought May 1, were sent to accused's home at Pontiac, Illinois, as will be shown under Specification 2, Charge III. The account at the end of May amounted to $104.65. On July 12, accused went into the store and requested that the matter be handled as before. Accordingly, Miss Haas prepared a bill on a blank billhead on which was stamped "G. E. Fuller & Son", showing a single item, "June 1, account, $104.65". Accused gave her a check on the company fund, payable to "Fuller Co.", for the same amount. Unlike the others, this check was indorsed "R. G. Fuller", and the bill was receipted by Miss Haas, "R. G. Fuller per M.P.H.". The transaction appeared in the company council book as a payment of $104.65 to "Fuller Co.", charged against ration savings and supported by the above bill as a voucher.

The foregoing is proved by the testimony of R. G. Fuller (R. 25, 27, 49); Miss Haas (R. 57, 58, 62); Exhibit 16, deposition of Bert E. Fuller; Exhibit 2, ledger of R. G. Fuller; Exhibit 7, bill; Exhibit 8, check; Exhibit 9, entry in council book.

As to the subsequent payment of this account a second time by Mrs. Fox, see paragraph 11 of this opinion. That payment is not considered to affect the guilt of accused with respect to the specifications now under consideration. With respect to these specifications, the record supports the findings, which should stand.

9. In justice to accused it should be said that he did not profit a cent by the commission of the offenses mentioned in the specifications under Charges I and II, with perhaps the exception of Specifications 4, as to which see paragraph 11 of this opinion. Apparently his motive was a good one, to obtain needed furniture, linoleum, etc., for his company,

which it could not otherwise get. To do this, he contrived the scheme described in the preceding paragraphs, caused false vouchers to be made, false claims presented, and the money of his company to be spent for purposes for which it was not legally expendable. If these specifications were all that there was to this case, his conduct would be little if any worse than that of the warrant officer concerned in JAG 123, February 26, 1923, mentioned in paragraph 5 of this opinion, who was made to refund to the ration savings account the money which he had illegally spent from it, but who was not even tried. If the foregoing charges and specifications were all that there was to this case, dismissal might be too harsh a sentence, especially considering accused's lack of military experience and his unfamiliarity with government and army finance and accounting. But, as is shown in the subsequent paragraphs of this opinion, accused's other offenses were much more serious.

10. Charge III: Violation of the 93d Article of War.

Specification 1: In that Captain Theodore P. Fox, Engineer Reserve, while on active duty and being at the time custodian of the Company Fund 627th Company, Civilian Conservation Corps, and as such, custodian of the moneys of said Company Fund, did, at Camp Mississippi-Palisades, Savanna, Illinois, on or about April 13, 1934, feloniously embezzle by fraudulently converting to his own use moneys in the sum of about $397.50, property of the said Company Fund, which moneys came into his possession by virtue of his office as custodian of said fund.

The specification is inartificially drawn, since it places the title to the money embezzled in the "company fund". However, whether or not this term be technically accurate, there is no reason to suppose that accused was misled or left in ignorance of the offense with which he was charged, and the inaccuracy mentioned may be passed under the 37th Article of War as harmless.

The evidence in chief for the prosecution with respect to this specification is as follows:

On April 13, 1934, accused went into the furniture store of R. G. Fuller and paid in cash the bill of that house against his company for March, amounting to $5.15, leaving still due only $2.10 for a purchase earlier in April. Accused then engaged in conversation with Miss Mina P. Haas, the bookkeeper and manager of the store, at which time he handed her a check drawn by him on the company fund and payable to R. G. Fuller in the amount of $397.50 and requested her to indorse it and to make out a bill covering the March account, showing due $397.50 from Company 627. Miss Haas remonstrated with accused; but finally acceded to his request when he explained that such procedure was the regular routine, that the bills represented by this check of $397.50 had already been paid and this transaction was "just for his files" (R. 59). No money was received by R. G. Fuller, as the check, after having been indorsed by Miss Haas, was immediately returned to Captain Fox. The bill and the check did not represent any purchases whatever from G. E. Fuller & Son or R. G. Fuller. The bill was prepared on a blank billhead, having stamped on it, "G. E. Fuller & Son", as the creditor, contained no items, but merely the words "To Mdse, March Acct. $397.50", and was receipted by Miss Haas in the name of G. E. Fuller & Son, followed by her own initial. On the same date the company council book shows a disbursement of $397.50 to "Fuller Co.", charged against ration savings, and supported by the bill to which reference has just been made as a voucher. The ledger sheet of the Company Fund, Company 627, Civilian Conservation Corps, in the National Bank of Savanna, shows payment of a check for $397.50 on or about April 13.

The foregoing is shown by the testimony of R. G. Fuller (R. 30, 31); Miss Haas (R. 59, 60, 69, 70, 73, 74, 75); Exhibit 16, deposition of Bert E. Fuller; Exhibit 13, bill; Exhibit 14, entry in company council book; and Exhibit 15, bank statement. The check is missing.

With respect to this specification, the defense called C. S. Hahn, assistant manager of the National Bank of Savanna, where the account of the company was kept, who testified that on April 13, 1934, there was deposited by Captain Fox in the account of Company 627, Civilian Conservation Corps, $400, including $2.50 currency and a check for $397.50 (R. 176, 177). The deposit slip was identified by the witness and is attached to the record marked Exhibit K. The bank statement, Exhibit 15, shows a deposit of $400 on April 13, 1934.

After the defense had rested the prosecution introduced by way of rebuttal Exhibit 36, two sheets from the council book of Company 627, showing receipts and disbursements for April, 1934. The exhibit was not identified, and the defense neither made nor expressly waived objection to its admission. Several other unidentified documents were introduced during the trial, but in every other such case the defense said, "No objection". However, in view of the statement in the Manual for Courts-Martial, paragraph 116 a, that objection to a copy of a public record because of lack of authentication must be deemed waived if not asserted, the Board would not be warranted in holding that error was committed in receiving this exhibit.

The evidence submitted with respect to Specification 1 of Charge III is clear and undisputed as regards the preparation and use of the false voucher (Ex. 13) and indorsement of the check for $397.50 by Miss Haas at the request of accused and the return of the indorsed check to accused on April 13, 1934. The evidence introduced by the defense showing a deposit of $400 on April 13, including a check for $397.50, evidently was for the purpose of raising some doubt whether the alleged embezzlement was actually committed or whether the accused after preparing his false voucher repented of his act and deposited the check to the credit of the company, thereby cancelling the entire transaction. The fact that the item of $397.50 was entered in the council book as a charge against ration savings for April and the false statement used as the supporting voucher, considered in connection with the fact that the council book balanced for April with the bank statement and cash on hand, refutes the theory of innocence indicated by the deposit of the $397.50 check on April 13. Obviously, if accused had repented of his act of securing a false voucher with a view to the embezzlement of funds from the company fund and had deposited the check instead of cashing it and keeping the cash, the council book account for April would not have balanced, as the deduction of $397.50 from the council book would have caused the bank balance to be $397.50 over. An examination of the council book for April (Ex. 36) shows receipt of a ration savings check on April 11 of $2035.89. On the same date, April 11, the bank statement of the company (Ex. 15) shows a deposit of $1635.89. The testimony of Mr. Hahn, the assistant mananger of the bank (R. 178, 179), shows that on deposit of a check where cash is paid to the depositor in part the bank statement would show only the net balance received by the bank as the deposit. In the instant case, therefore, the

amount of the deposit less the amount of the ration savings check shows a difference of $400 unaccounted for. Two days later, April 13, the evidence shows that accused secured a false voucher for $397.50 from Miss Haas and deposited a check on the same date for $397.50, plus $2.50 in currency, making a total deposit of $400. It is apparent that the deposit of April 13 in the amount of $400 was for the sole purpose of causing the bank statement to show a deposit equivalent to the amount withheld on April 11 when the ration savings check of $2035.89, less $400, was deposited to the credit of the company fund. The $400 has never been accounted for, except the $2.50 cash deposit made April 13, at the same time that the $397.50 check was deposited. Accused's persuading Miss Haas, the bookkeeper of R. G. Fuller, to prepare and receipt a false voucher in favor of G. E. Fuller & Son, the grocer, in the amount of $397.50, and to indorse a check in that amount payable to R. G. Fuller, and the subsequent charge against the ration savings fund of $397.50 show beyond reasonable doubt a purpose on the part of the accused to falsify the company accounts in order that his withholding of the $397.50 might not be discovered. His action indicates a deliberate plan to deceive the auditors inspecting the company council book and to protect himself in his fraudulent conversion of funds entrusted to him as company commander. The conduct of accused furnishes abundant evidence in support of the intent involved in an embezzlement charge. The documentary evidence not only removes the doubt that first may have been raised by the deposit of the $397.50 check on April 13, but discloses that that particular act was but a part of a dishonest scheme to defraud his company.

The Board of Review considers that the present specification is the most serious offense charged against accused and that it is fully proved. The record supports the finding.

11. Charge III: Violation of the 93d Article of War.

Specification 2: In that Captain Theodore P. Fox, Engineer Reserve, while on active duty and being at the time custodian of the Company Property 627th Company, Civilian Conservation Corps, and as such, custodian of the property of said Company, did, at Camp Mississippi-Palisades, Savanna, Illinois, on or about May 1, 1934, feloniously embezzle

> by fraudulently converting to his own use the following articles of furniture, viz: one mahogany bookcase, value about $29.00; one bookcase, value about $20.00; one cedar chest, value about $14.50, and one desk, value about $29.50, total value about $93.00, property of the said company, which property came into his possession by virtue of his office as custodian of said property.

It may be questioned whether the allegation that title to the property was in the company is technically correct, but money of the company fund and property bought therewith is commonly said to belong to the company; and, whether that expression is accurate as a matter of law, the words used are, as a practical matter, the best that could have been chosen to inform accused of the offense with which he was charged. Specifications laying title to money or property in a company have been passed by the Board of Review and The Judge Advocate General without question for many years.

As has been stated in paragraph 8 of this opinion, in discussing Specifications 4, Charges I and II, the evidence for the prosecution shows that on May 1, 1934, at Savanna, Illinois, accused bought of R. G. Fuller two bookcases, a cedar chest, and a desk, of the value of $93, which were sent to accused's home at Pontiac, Illinois, 168 miles distant. Shipment was made by a CCC truck, manned by two members of that corps, and the goods were received by Mrs. Fox, who had been informed by her husband that they were coming. As has also been stated in the paragraph mentioned, payment was made by accused on July 12 for these goods and other furniture purchased for the company during May, amounting in all to $104.65, by a check on the company fund for that amount signed by accused and payable to "Fuller Co.". The transaction appeared in the council book as a payment of $104.65 to "Fuller Co.", chargeable against ration savings, and supported by a bill of G. E. Fuller & Son made out by Miss Haas at accused's request.

The foregoing is shown by the evidence cited at the end of paragraph 8 of this opinion and in addition by the following: R. G. Fuller (R. 31, 33, 38-41, 43, 49-51); Miss Haas (R. 66, 68, 69, 71-72); Pertle, driver of the truck (R. 77-79); Exhibit 17, deposition of Tepovich, helper on the truck; Mrs. Fox (R. 167).

With respect to this specification, Mrs. Fox testified for the defense that she expected to pay for the furniture and did in fact pay for it by her personal check for $98.75, drawn to the order of R. G. Fuller Co., which she produced. For many years she has paid all household bills. Though the check bears the date June 26, 1934, Mrs. Fox states that that was a mistake, that it and two other checks for groceries involved in Specifications 5 and 6, Charge III, were actually drawn Friday evening, July 20, that she gave them to one of her daughters to mail, that at that time she had not heard of any investigation of her husband's conduct (Mrs. Fox, R. 167, 170, 180, 181; Ex. E, check). R. G. Fuller indorsed this check to the Company Fund, Company 627, and it bears the subsequent indorsement of the company fund, by Captain Bellis, accused's successor in command (R. G. Fuller, R. 39, 40; Miss Haas, R. 65-68; Ex. E, check).

The furniture was originally purchased on the credit of the company and accused subsequently paid for it by a check on the company fund. A few days later, about the time that the investigation of accused's conduct started, Mrs. Fox sent another check to R. G. Fuller in payment of it. If, contrary to what she maintains, she did so at the request of her husband, her action is obviously no defense to him. In this connection it is to be noted that the prosecution asked Mrs. Fox if she received a telephone message from her husband about that date, but the defense objected, and the law member sustained the objection, erroneously, as the Board thinks (R. 187-188). Mrs. Fox appears to have been an excellent citizen and mistress of her household, but many a woman of previously honorable conduct will lie to save her husband and consider herself justified in so doing. However, even if Mrs. Fox was telling the truth, her conduct in paying for the furniture on her own initiative, though creditable to herself, cannot undo the offense of accused in converting to his own use, by shipping to his home, furniture bought on the credit of his company.

It may be argued that there is with respect to this specification a variance between the allegation and proof, in that it is alleged that accused embezzled furniture, whereas, as shown by the evidence, he embezzled money. Specifications 5 and 6, Charge III, which involve somewhat similar transactions, allege embezzlement of money. It is true that in all three cases accused ordered goods on the credit of the company,

intending them for the use of his family, and paid for them with company funds, but there is a difference. The groceries involved in Specifications 5 and 6 were shipped direct from the vendors in Chicago to accused's home in Pontiac and were never in the possession of CCC personnel. The furniture, on the other hand, ordered on the credit of the company, was delivered by accused's order into a CCC truck, manned by members of that corps, and sent by accused to get it. It may therefore be said that the furniture came into his official possession as company commander and was embezzled by his action in diverting the truck to his home.

In the opinion of the Board of Review the record supports the finding of guilty of this specification, which finding should stand.

12. Charge III: Violation of the 93d Article of War.

Specification 3: Embezzlement of $15, property of the company fund, Company 627, CCC, June 1, 1934.

This specification and Specifications 4, 5 and 6, Charge III, are in the same form as Specification 1, Charge III, already discussed, ante, paragraph 10 of this opinion, differing only as to dates and amounts.

Prior to June 1, 1934, C. R. Dennison of Thomas, Illinois, a farmer, sold to the company an iron safe for $15, for which he was paid by accused (R. 81). Some two weeks thereafter, accused came to the home of Mr. Dennison and requested his daughter, Miss Philomena Dennison, to have her father sign three blank receipts which were to be used as receipts for the safe transaction. Accused explained that he "had to have three bills, there were three different records". The bills were signed by Mr. Dennison in blank as requested and returned to accused (R. 81, 82, 87, 89, 90). The blank bills were later filled in as covering the purchase of eggs, $15; potatoes, $35; and an iron safe, $10 (Exs. 18, 19 and 21). Mr. Dennison never sold accused or CCC Company 627 any eggs or potatoes and never had any transaction with the accused other than the sale of the safe (R. 83, 90).

The receipted bill for $35 for potatoes, above mentioned, is involved in Specification 4, Charge III, and need not be further considered here. The receipted bill for $10 for the safe was used as a voucher to support an entry in the company council book of a disbursement of $10, charged to

ration savings (Ex. 22). The receipted bill for $15 for eggs, which were not in fact bought, was used as a voucher to support the entry in the company council book of a disbursement of $15, charged to ration savings (Ex. 20).

We have here proof of disbursements from the company fund of $10 and $15, a total of $25, ostensibly for a safe and eggs, respectively, and further proof that the only actual purchase was of a safe for $15. This leaves $10 unaccounted for, and the inference is justified that accused converted that amount to his own use. The discrepancy between $15 alleged to have been embezzled and $10 proved may be disregarded. Subject to what has just been said, the Board considers that the record supports the finding with respect to this specification, and that that finding should stand.

13. Charge III: Violation of the 93d Article of War.

Specification 4: Embezzlement of $281.90, property of the company fund, Company 627, CCC, June 26, 1934.

Miss Philomena Dennison, mentioned in the preceding paragraph, did stenographic work and typing for accused, some of it personal and some official. On or about June 26, 1934, accused had Miss Dennison fill out eleven bills in accordance with data that he read from a sheet of paper in his hand. He directed Miss Dennison to insert "John R. Colin" as the creditor, various quantities of butter, eggs, and cheese, as having been purchased, and to write "paid in full" on each of the eleven bills and sign the initials "J.R.C.", explaining that they represented the name of John R. Colin, a farmer who was unable to write and who had sold the company the articles shown on each of the said bills and had been paid in cash therefor. Miss Dennison did so.

John R. Colin, a farmer in Guilford Township, Illinois, as to each of the alleged sales by him, denied specifically that he had made it, and further said that he had never had any dealings with accused except for wood and honey. Colin signed his name to his deposition. Hines, mess steward of the company, testified that the articles billed had not been received from the payees to his knowledge.

The eleven bills, purporting to represent purchases from Colin, and the bill for $35 for potatoes, signed in blank by Dennison as stated in the preceding paragraph, amount in all to $281.90. These twelve vouchers, none of which represented any actual transaction, were used to support an entry in the company council book, "Cash payments, $281.90", charged to ration savings.

The foregoing is shown by the testimony of Dennison, R.82,83; Miss Dennison, R.90-96,99; Ex.25, deposition of Colin; Hines, R.123-135; Exs.19, 23, receipted bills; Ex.24, entry in company council book.

The defense offered no explanation of these transactions. The inference is justifiable that accused embezzled the $281.90 and covered his crime by pretended disbursements in support of which he caused false vouchers to be made. The record fully supports the finding of guilty of this specification, which is both one of the most serious and one of the most convincingly proved of all.

14. Charge III: Violation of the 93rd Article of War.

Specification 5: Embezzlement of $38.15, property of the company fund, Company 627, CCC, July 12, 1934.

On or before July 6, 1934, William A. Marth, a salesman for Reid, Murdoch & Company, grocers, of Chicago, called at the camp of Company 627 and obtained from accused an order for pickles, costing $16.75, to be delivered at the camp, and for "delicacies", including mushrooms, anchovies, and caviar, costing $38.15, to be delivered at accused's home. The delicacies were received by Mrs. Fox.

The following question and answer are quoted (R.102),

"Q How was the bill to be made out?
A I do not recall that there was anything said. I billed it C.C.C. Camp Company 627, in care of Captain T.P. Fox, Savanna, Illinois."

There were received in evidence as Exhibits 26 and 27, respectively, the order sheet of Reid, Murdoch & Company and the receipted bill, the former stating "Charge to C.C.C. No. 627, c/o Capt. T.P. Fox, Savanna, Illinois," and the latter being rendered to, "Company 627 C.C.C. Camp, Miss. Palisades, Savanna, Ill." Marth stated that he had never seen the order sheet before the trial (R.102), so that it is a fair inference that it was written at the main office of the house in Chicago from data

transmitted by him. Marth was asked no questions about the bill, but from its nature it must have been written in Chicago also. The bill was not itemized. The defense expressly said that it had no objection to the admission of these papers.

The total bill of $54.90, including both the pickles and the delicacies, was paid by check drawn July 12 by accused on the company fund. The transaction appears in the company council book as an expenditure of $54.90 to "Reid-Murdoch Co.," chargeable to ration savings.

All the foregoing is shown by the testimony of Marth, R.100-112; Ex.26, order sheet; Ex.27, receipted bill; Ex.28, check; Ex.29, company council book; Mrs. Fox, R.165.

With respect to this specification, the defense offered the testimony of Mrs. Fox, which was similar to what she testified concerning specification 2, Charge III (see ante, par. 11 of this opinion), namely, that her husband informed her in advance that he had ordered the delicacies, that she paid for them by her check for $38.15, drawn Friday, July 20, and given to one of her daughters to be mailed July 21, that the check has been cleared and she produced it, and that at the time she did not know of any investigation of her husband's conduct. (Mrs. Fox, R.165,166,170,180,181,186,187; Ex.D, check). It was also shown that Reid, Murdoch & Company paid $38.15 to the company fund July 25, 1934 (Ex.B).

It may be argued that Marth, the salesman, did not recall that anything was said at the time that the order was placed as to how the bill was to be made out; that accused openly and clearly directed shipment of the delicacies to his home; that the lumping of the pickles and delicacies in a single order and the charging of both to the company fund, so far as the evidence shows, may have been the unauthorized act either of Marth or of some clerk in the office of Reid, Murdoch & Company; that the bill sent to Company 627 was not itemized; and that accused may have paid it all from the company fund through carelessness and without any intention to pay his personal debts with company money. That argument might be convincing if the present were the only specification upon which accused was being tried, and if there were no testimony in the record concerning other transactions. It is, however, well settled that evidence of other similar transactions is admissible to show intent or design, especially in cases where fraud is charged. Wood v. United States, 16 Peters 342; Bryan v. United States, 133 Fed. 495; Wigmore on Evidence, Sec. 302, and cases collected there and in 62 LRA 193, note; M.C.M. par. 112 b; CM 201997, Mellon. It is therefore permissible to consider the evidence in the case concerning other transactions to help determine whether the intent of

accused in paying the bill from company funds was innocent or guilty. Viewing the present transaction in the light of accused's conduct in other matters as shown by the testimony, the inference is justifiable, if not irresistible, that he was, in this instance as in others, using his official position to put across a fraudulent scheme for his own pecuniary benefit.

The Board considers that the record supports the conviction of the present specification and that that conviction should stand.

15. Charge III: Violation of the 93rd Article of War.

Specification 6: Embezzlement of $41.47, property of the company fund, Company 627, CCC, July 17, 1934.

The transaction involved in the present specification is substantially like that involved in the preceding one. On or about July 17, 1934, accused placed an order with Durand-McNeil-Horner Company, grocers, of Chicago, through L.A. Spengler, their salesman, for canned goods amounting to $41.47 to be shipped to his home at Pontiac, Illinois. The order was forwarded to the company in Chicago and the provisions delivered to Mrs. Fox at Pontiac, Illinois, as requested. The bill was paid on July 17 by check drawn by accused, which he delivered personally to Spengler. Spengler testified that when the check was delivered to him there were written in pencil under the signature of the accused the words "Charge to personal account." The check as produced in court bore no such notation, but had under accused's signature as drawer, like all his other checks in evidence, the impression of a rubber stamp, "Co. Fund, 627th Co., C.C.C." Spengler did not remember whether that notation was there when he received the check. The order sheet and "salesmen's collection report" are both made out against accused by name, without mention of the company. The transaction appears in the company council book as a disbursement of $41.47 to "Durand-McNeil-Horner Co. $41.47", charged against ration savings and supported by the "salesmen's collection report", receipted by Spengler, as a voucher. On July 20, 1934, the same date that the check is punched as paid, a debit of $41.47 appears on the ledger sheet of the company fund account in the National Bank of Savanna. Beside the company fund account, accused also had at this time a personal account in the same bank.

The foregoing is shown by the testimony of Spengler, R.112-123; Ex.30, order sheet; Ex.31, salesmen's collection report; Ex.32, check; Ex.33, council book; Ex.15, bank ledger sheets; Ex.35, deposition of Miles, bank cashier; Mrs. Fox, R.164.

Mrs. Fox testified with respect to this specification substantially as she did with respect to the preceding, but she did not produce the check with which she says she paid the bill. She said the Durand-McNeil-Horner Company "kept the check", and that a few days before testifying she received a letter from them informing her that the bill had been paid twice and that she had a credit with the company (Mrs. Fox, R. 164, 165, 170, 180, 181).

The court evidently considered that Spengler was either mistaken or lying when testifying that the check when he received it bore a pencil notation to charge to personal account. His story is highly improbable, for two reasons. In the first place, no one would have had any interest to erase the notation after the check was received by Spengler and before it reached the drawee bank; and if it had been on the check when received at the drawee bank, the check would have been debited against accused's personal account. But the check itself is punched as having been paid by the bank July 20 and the ledger sheet of the company fund account (Ex. 15) shows a debit of $41.47 on that day, showing that it was in fact debited against the company fund account. Secondly, the check is printed on safety paper, as may be seen even in the photostat (Ex. 32); and an erasure, even of pencil writing, shows plainly on such paper, and would certainly have been visible on the original check and possibly even on the photostat. In this, as in the preceding specification, the court presumably did, and the Board may, consider the testimony respecting other transactions as tending to show, with respect to this, that accused's intent and design were not innocent but fraudulent.

Other objections which might be made with respect to this specification have already been considered in connection with the preceding similar specification. The Board concludes that the record supports the finding of guilty of the specification now under consideration, and that that finding should stand.

16. The record contains certain character testimony. Mrs. Fox testified that accused was a good husband and father, that she had never known him to do a dishonest act, that he was meticulous about the prompt and full payment of his bills. She further testified that she and accused had been married sixteen years; that they had three children, aged fourteen, thirteen, and eleven, respectively; that accused was a member of the Presbyterian Church and of "all the Masonic lodges" (R. 168,169,182,184-186).

The defense submitted four character depositions by citizens of Pontiac, one a lawyer previously on the bench, another a Presbyterian minister, the third a physician and lieutenant commander in the Naval Reserve, and the fourth a physician and lieutenant colonel in the Medical Corps Reserve of the Army (Exs. F, G, H, I). All four deponents speak highly of the reputation of accused for veracity and integrity.

17. On the other hand, certain other evidence indicates extravagance and possible need of money by accused. The court and the Board may take judicial notice of the fact that an officer of accused's rank and service would receive a salary of $200 a month, plus rental and subsistence allowances of $116, and minus the percentage reduction required by the Economy Acts. Mrs. Fox testified that accused's civil employment was as engineer in charge of the power house of the Pontiac Branch of the Illinois Penitentiary, at a salary of $150 per month; that her household expenses were from $75 to $85 per month; that, before her husband got into difficulty, they had $700 saved; but he bought a Packard automobile, trading in an old car and obligating himself to sixteen monthly payments of $127 each, of which three have been made (R.167,168,183). A Packard costing over $2000 is certainly beyond the means of a man with a family whose regular salary is only $150 and whose temporary income is about $300 a month.

18. There is attached to the record of trial a request for clemency signed by the defense counsel, asking remission of all confinement because of the extreme hardship and destitution thereby caused to accused's wife and three children. Immediately following that letter is a communication signed by five out of the seven members of the court recommending clemency as and for the reasons stated in counsel's letter. Of the two who did not sign, one was absent on leave. The other added a note, "not signed", and his initials, indicating his dissent from the recommendation. The Board has also received a call from Maurice E. Moore of 1453 Hyde Park Boulevard, Chicago, Illinois, a social worker and law student acquainted with accused and his family, who stated that the family are now living on public relief, requested clemency, and particularly asked that accused be not confined in a penitentiary.

The Board fully appreciates the hardship that will be caused to accused's family by confirmation of the sentence to confinement, and sympathizes with Mrs. Fox and the children; but the situation is not substantially different from that existing in nearly every case where a man with a family is sentenced to confinement by either a civil or a military court. Numbers of cases have passed through the hands of the Board of Review and The Judge Advocate General involving embezzlement or similar

crimes wherein a heavier sentence has been imposed for no greater offenses. The Board feels that to remit or even to reduce the confinement at this time would be a discrimination unjust to other like offenders and would also deprive the case of that deterrent effect which is the chief purpose of punishment by law. It therefore recommends against modification of the sentence at the present time.

19. Confinement in a penitentiary is authorized by section 35, Criminal Code; USC, 18:80, for causing to be presented a false claim against the United States. Such confinement is also authorized for embezzlement by section 47, Criminal Code; USC, 18:100, and by D.C. Code, 1929, Title 6, sec. 98. However, accused is not a habitual criminal, and it is believed that his prior exemplary life and the situation of his family may properly be taken into account so far as to turn the scale in favor of confinement in the disciplinary barracks. Confinement in either a penitentiary or the United States Disciplinary Barracks is lawful, but the Board recommends the latter.

20. Accused is 42 years of age. He served as private and corporal, Chemical Warfare Service, from December 15, 1917, to December 16, 1918, from which service he was honorably discharged with character excellent. He accepted an appointment as captain of Engineers in the Officers' Reserve Corps, June 25, 1927, and with one brief interval has since held that position. He has been on active duty as follows:

July 15 to 28, 1928;
July 6 to 19, 1930;
July 19 to August 1, 1931;
October 11, 1933, to the present time.

21. The court was legally constituted. 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. Dismissal is authorized for a violation of the Articles of War involved in the present case.

Prudon Hall, Judge Advocate.
W. A. Trimble, Judge Advocate.
Archibald King, 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 Captain Theodore P. Fox (0-243422), Engineer Reserve, together with the foregoing opinion of the Board of Review.

2. I concur in the conclusion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation of the sentence. In view, however, of all the circumstances of the case including, first, the fact that, in using ration savings to purchase furniture for his company, the accused obtained no personal benefit; second, the fact that he is a reserve officer with less than a year and a half of active duty; third, the fact that his previous record in civil life appears to be unblemished; fourth, the fact, appearing from statements of an apparently reputable social worker, that accused's family, consisting of a wife and three children, are in desperate financial circumstances and dependent upon public relief measures; and, fifth, the fact that five of the seven members of the court who tried and convicted the accused have recommended that clemency be granted him, it is recommended that the sentence be confirmed but that one year of the period of confinement adjudged be remitted, that the Atlantic Branch, United States Disciplinary Barracks, be designated as the place of confinement, and that the sentence, as thus modified, be carried into execution.

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.

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

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

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

Board of Review
CM 202479

Nov. 3, 1934

UNITED STATES	)	THIRD CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters, Third Corps
Captain THOMAS A. BABBINGTON	)	Area, Baltimore, Maryland,
(0-172125), Infantry Reserve.	)	October 4, 1934. Dismissal.

OPINION of the BOARD OF REVIEW
HALL, TURNBULL and KING, 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 charges and specifications summarized below. He pleaded not guilty to all charges and specifications. The finding of the court with respect to each is set out opposite thereto.

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

Specification 1: Official statement, known by accused to be false, made, with intent to deceive, to Major Logan, I.G.D., at CCC Camp S. 52, Grantsville, Maryland, September 8, 1934, that he (accused) did not send an ambulance to Oakland, Maryland, on the night of August 31, 1934, to bring Miss Helen Hinebaugh to Camp S. 52. Guilty.

Specification 2: Official statement, known by accused to be false, made, with intent to deceive, to Major Logan, I.G.D., at Camp S. 52, Grantsville, Maryland, September 8, 1934, that he (accused) did not give Frank J. O'Brien, Assistant Leader, CCC, $6.00, at Camp S. 52, on the night of August 31, 1934, and tell him to give this money to Miss Helen Hinebaugh. Guilty.

Specification 3: Official statement, known by accused to be false, made, with intent to deceive, to Major Logan, I.G.D., at Camp S. 52, Grantsville, Maryland, September 8, 1934, that he (accused) did not have any conversation with Frank J. O'Brien, Assistant Leader, CCC, at Camp S. 52, Grantsville, Maryland, on the night of August 31, 1934, with reference to Miss Helen Hinebaugh. Guilty.

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

Specification 1: Perjury at Camp S. 52, Grantsville, Maryland, September 8, 1934, in testifying that he (accused) had given no instructions on the night of August 31, 1934, at Camp S. 52, to Frank J. O'Brien, Assistant Leader, CCC. Not Guilty.

Specification 2: Perjury at Camp S. 52, Grantsville, Maryland, September 8, 1934, in testifying that he had not sent an ambulance to Oakland, Maryland, on the night of August 31, 1934, to bring Miss Helen Hinebaugh to Camp S. 52. Not Guilty.

Specification 3: Subornation of perjury at Camp S. 52, at Grantsville, Maryland, September 8, 1934, by inducing First Lieutenant Smiley, Medical Corps Reserve, by threats and intimidation, to testify that he did not overhear a conversation between the accused and Frank J. O'Brien, Assistant Leader, CCC, at Camp S. 52, August 31, 1934, in which accused directed O'Brien to proceed to Oakland, Maryland, with an ambulance, there call for Miss Helen Hinebaugh, deliver to her $6.00, and transport her to Camp S. 52. Not Guilty.

Specification 4: Subornation of perjury, similar to the preceding, except that the witness alleged to have been suborned is First Lieutenant Kroeger, Air Corps Reserve. Not Guilty.

No evidence of previous convictions was introduced. Accused 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. There is no dispute as to any of the important facts with respect to the specifications of which accused was convicted. He voluntarily took the stand and in substance admitted the allegations contained in those specifications (R. 84-99). The evidence may be summarized as follows:

Accused, a reserve officer on active duty with the Civilian Conservation Corps, was in command of Camp S. 52, near Grantsville, Garrett County, Maryland. The other officers on duty at that camp were First Lieutenant Russell D. Smiley, Medical Corps Reserve, First Lieutenant John H. Kroeger, Air Corps Reserve, and Second Lieutenant Allen E. Sowder, Infantry Reserve. These officers, as well as certain civilians employed in a supervisory capacity, occupied at the camp a building referred to as the cabin (Smiley, R. 19).

Some time during the day, August 31, 1934, Lieutenant Smiley told Frank J. O'Brien, a member of the Civilian Conservation Corps detailed as ambulance driver, that he (O'Brien) was to proceed with the ambulance that evening to Swallow Falls Camp, which the Board has been unable to locate on the map but which apparently was in the same county; there pick up two patients; bring them to Camp S. 52, where the patients and O'Brien were to spend the night; and, the next morning, September 1, proceed with them in the ambulance to Walter Reed General Hospital, Washington, D. C. (O'Brien, R. 13; Smiley, R. 19). About 6 p.m. O'Brien entered the sitting room of the cabin and asked Lieutenant Smiley whether he should not leave for Swallow Falls Camp on the mission previously assigned him. Accused was at the moment at the telephone talking to Miss Helen Hinebaugh, who was at Oakland, Maryland, the county seat, some twenty-five miles distant. Lieutenant Kroeger was also present. Accused, after asking Miss Hinebaugh to hold the phone, turned to Lieutenant Smiley and asked if the ambulance was going to Oakland. Smiley answered in the negative, and said that O'Brien was going to Swallow Falls. Accused testified that Smiley volunteered the statement that O'Brien could bring the young lady back, and further suggested that accused tell Miss Hinebaugh "to get a couple more girls" (R. 85). Smiley does not so testify, but it is of little importance whether the idea originated with him or with accused. Accused then said over the telephone to Miss Hinebaugh, "The ambulance is coming over to Swallow Falls and on the way back the driver will stop and get you. Can you get a couple more girls?"

Miss Hinebaugh answered that she would try, and accused said, "I may send something over to you and you know what to get for it". Accused then obtained $2.00 from Lieutenant Smiley and a dollar from Lieutenant Kroeger. Lieutenant Kroeger maintained that he gave the money under compulsion of accused's rank and position, but accused testifies that the money was voluntarily contributed to form a pool with which to buy liquor. Accused then turned to O'Brien, the ambulance driver; and, according to his own testimony, as well as that of the others present, directed O'Brien, after picking up the two patients at Swallow Falls, to go to Oakland, call at the Bon Ton Confectionery for Miss Helen Hinebaugh, give her $6.00, which accused then handed O'Brien, tell her that she knew what to do with it, and to spend it all, and to bring her back to camp in the ambulance (O'Brien, R. 13,14,16,17; Smiley, R. 19-22; Kroeger, R. 23-27,69,70; accused, R. 84-86).

O'Brien complied with these instructions. Apparently Miss Hinebaugh was unable to "get a couple more girls", but did purchase liquor with the money sent her. On the way from Oakland to Camp S. 52, an accident occurred in which the ambulance was wrecked, one of the Civilian Conservation Corps patients was killed, the other had both legs and one arm broken, the driver, O'Brien, was seriously injured, and Miss Hinebaugh was slightly hurt. A number of bottles of liquor, some whole and some broken, were found at the scene of the accident (O'Brien, R. 15,16; Logan, R. 35,44,45; accused, R. 86,87). When informed of the accident about 11 p.m., accused and Lieutenant Smiley proceeded to the scene of it, and thence to Oakland, where they found Miss Hinebaugh in a doctor's office, semi-conscious. There were also present the state's attorney, sheriff, and police. The state's attorney told accused that he was going to charge O'Brien, the driver, with manslaughter, driving while drunk, and reckless driving. O'Brien had previously been sent to a hospital at Cumberland, Maryland (accused, R. 86-89).

Captain Dougherty, accused's immediate superior, conducted an investigation; but, feeling that he had not gotten at the bottom of the matter, he requested an inspector general (Dougherty, R. 46). The Commanding General, Third Corps Area, thereupon sent Major Leon M. Logan, I.G.D., Assistant Corps Area Inspector, who, on September 8, at the camp and elsewhere in the vicinity, conducted a further investigation, at

which accused and Lieutenants Smiley and Kroeger all denied under oath that accused had instructed O'Brien, the ambulance driver, to bring Miss Hinebaugh to camp or that he had given O'Brien $6.00 to give to Miss Hinebaugh. Major Logan read to accused the testimony of O'Brien, previously taken, setting forth the facts substantially as already stated in this opinion, and asked accused if it was true. Accused stated that it was absolutely false and that he had had no conversation with O'Brien that night relative to Miss Hinebaugh (Logan, R. 28-37, 39, 40; Dougherty, R. 48,49,50; Smiley, R. 53; Kroeger, R. 63-65; accused, R. 93). A few days later, upon the inspector further interrogating Lieutenant Smiley and informing him that O'Brien was facing a manslaughter charge, Smiley broke down, admitted the falsity of his previous statements and gave a true account of what had happened (Logan, R. 37-39; Dougherty, R. 49-51; Smiley, R. 54). Still later Lieutenant Kroeger also retracted his former testimony and testified truthfully (Logan, R. 39-44; Dougherty, R. 49-51; Kroeger, R. 65). O'Brien was tried for manslaughter by the Maryland authorities and acquitted (Logan, R. 44).

4. Accused maintained that he concealed the truth from Major Logan in order to preserve the reputation of Miss Hinebaugh and the civil and military prospects of Lieutenants Smiley and Kroeger. Lieutenant Smiley was only 26 years of age and had not yet engaged in civil practice. Lieutenant Kroeger was ambitious to enter the Regular Army (accused, R. 88,91,93). Lieutenants Smiley and Kroeger testified that they were led to testify falsely by accused and that they did so in deference to his superior rank and position as commanding officer (Smiley, R. 54-60; Kroeger, R. 66-69). Accused denied this and testified that it was voluntarily arranged among the three of them that they should testify as they did at first (R. 93). The court apparently believed accused with reference to this matter, and therefore acquitted him of Specifications 3 and 4, Charge II, alleging subornation of perjury. Why the court acquitted accused of Specifications 1 and 2, Charge II, alleging perjury, is not clear. It may be questioned if a conviction of those specifications as drawn could be sustained in view of CM 198262, Miller, but no reason is seen why the court might not at least have convicted accused of the lesser included offense of false swearing.

5. The offenses of which accused has been convicted are convincingly proved and admitted by him. Accused is 33 years of age. He enlisted at

Silver Spring, Maryland, July 8, 1917, in Company K, 1st Infantry, Maryland National Guard, the designation of which was later changed to Company K, 115th Infantry. He reported for federal service July 25, 1917, sailed overseas June 14, 1918, served in the Meuse-Argonne offensive and in a defensive sector, returned to the United States May 24, 1919, and was honorably discharged June 6, 1919, at Camp Meade, Maryland, with character excellent. He was appointed second lieutenant, Infantry, Officers' Reserve Corps, December 30, 1922; first lieutenant, November 4, 1927; captain, January 21, 1932. He has had periods of active duty as follows:

June 19 to July 25, 1923;
August 1 to 15, 1924;
June 23 to August 12, 1926;
August 14 to 27, 1927;
July 1 to August 13, 1928;
July 23 to August 5, 1929;
August 17 to 30, 1930;
September 6, 1933, to date.

6. Attached to the record is a request for clemency signed by accused himself. Other than allegations that accused did not coerce his subordinates (of which he has been acquitted), the only matters in the letter worthy of mention are an allegation that accused's whole previous record, both civil and military, has been extremely good, and the following statement as to his service with the Civilian Conservation Corps. During the first six months of that service accused's company was selected as the outstanding company in the state of Maryland, he was officially commended by letter from the Commanding General, Third Corps Area, and was personally commended with respect to appearance of personnel, discipline and general camp setup as a result of a personal inspection by the General. During the second six months in command accused's company was again selected as the outstanding company in its subdistrict. No member of his command was arrested by the civil authorities. As a result of this record accused was selected to command another company, which was in bad condition generally and in particular as to morale, discipline and records. Accused was in command of this company slightly more than a month, in which time he brought the morale and discipline to a satisfactory condition.

John F. Richter, attorney-at-law, 729 Fifteenth Street, N. W., Washington, D. C., has appeared in person before the Board of Review and has filed a short memorandum on behalf of accused. Mr. Richter stated no facts and advanced no arguments not already mentioned. He requested on behalf of accused either that the charges be dismissed; meaning presumably that the conviction be disapproved, or that accused be permitted to complete his present tour of active duty.

The Board has given careful consideration to all the above, but in its opinion neither the creditable service of accused nor any other fact or argument advanced in his behalf justifies the retention in the service of an officer who has made false official statements under oath.

7. The court was legally constituted. Accused, a reserve officer on active duty, is subject to military law. CM 201678, Anderson; CM 202366, Fox. No errors injuriously affecting the substantial rights of accused were committed at the trial. The offenses alleged in the specifications of which accused has been found guilty constitute, in the opinion of the Board of Review, conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. 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.

_____, Judge Advocate.

K. A. Turnbull, Judge Advocate.

Archibald King, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 202482

NOV 5 1934

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
v.	)	Trial by G.C.M., convened at West Point, New York, September 17, 1934. Suspension without pay and allowances until August 28, 1935.
Cadet GEORGE E. WHITE, JR., First Class, United States Corps of Cadets.	)	

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

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

2. The accused was tried upon charges and specifications summarized below. He pleaded not guilty to Charge I and the specifications thereunder and guilty to Charge II and the specification thereunder. The finding of the court with respect to each charge and specification is set out following it.

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

Specification 1: Official statement, known by accused to be untrue and made with intent to deceive, to a United States Army officer, that his name was "Bickerstaff". Not Guilty.

Specification 2: Official statement, known by accused to be untrue and made with intent to deceive, to a United States Army officer, that he was a member of the Second Provisional Company of cadets. Not Guilty.

Specification 3: Official statement, known by accused to be untrue and made with intent to deceive, to a United States Army officer, that he had not asked the cadet officer of the day if he (accused) had been reported absent. Not Guilty.

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

Specification: Drinking intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy. Guilty.

In each specification it is alleged that the offense occurred at Fort Monroe, Virginia, August 12, 1934. No evidence of previous convictions was introduced. Accused was sentenced to suspension without pay and allowances until August 28, 1935, at which time he will join the then First Class. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The three specifications under Charge I, as originally drawn by the officer who preferred them, allege that the false statements were made to First Lieutenant Carl F. Tischbein, Coast Artillery Corps. The staff judge advocate struck out the name of Lieutenant Tischbein and substituted "a United States Army officer". The Board fails to understand why this was done, as the specifications as amended were in its opinion open to objection as being too indefinite. However, as accused did not object thereto, as the record shows that notwithstanding the indefiniteness of the specifications accused understood who was the officer referred to therein, and as accused was acquitted of the specifications in question, his substantial rights were not injured and such error as existed was harmless.

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

a. First Lieutenant Carl F. Tischbein, Coast Artillery Corps: I know accused as Cadet G. E. White, First Class. On August 12, 1934, I was officer in charge of cadets at Fort Monroe, Virginia. The first time that accused came to my attention was at 11:10 p.m., when he was in front of the mess hall talking to the cadet officer of the day. About 11:30

I was sitting on the mess hall steps right after taps when I noticed a figure in white clothes appear from around the headquarters building, some fifty feet from the building where I was sitting, and proceed south along the railroad track. I turned a flashlight on this figure and I called out, "You man", twice. The figure kept moving. I got into my car and went some 400 yards up the road where I met this figure in white, accompanied by a young lady. I recognized the cadet uniform. I said, "You man, come here. Get in this car". He got in and I said, "What is your name?" He said, "Mr. Bickerstaff, sir". I was wearing O.D. shirt and regulation campaign hat. As we started for camp I said, "What company are you in?" He said, "The second company, sir". The question and answer were repeated. I directed this man to come with me into the office and I opened the screen door. As he arrived inside the door, upon asking and receiving permission to make a statement, he said, "I am in the third company". On this and the previous occasion I asked what lettered company he was in but got only the answer giving a numbered company. I smelled liquor on this man as he passed me. I went upstairs in the headquarters building and summoned Lieutenants Bartlett, McClure and Brusher. As the four of us came downstairs, the man said to me, "Sir, my name is Cadet White and not Bickerstaff". I asked, "Why didn't you tell me so in the first place?" He answered that he thought it was the best thing to do at the time, and further: "I didn't like the way you spoke. You embarrassed the young lady". I also asked, "Weren't you in front of barracks after taps talking to the O.D., and saying you were in the sink and may have been reported absent at taps?" Mr. White denied this. He denied knowing who the O.D. was. I told Mr. White to wait and summoned Mr. Moore who identified accused. He did not challenge the accuracy of the statements of Mr. Moore. Accused asked leave to make a further statement, but I said, "No, go back to barracks and get into bed". Accused made all these statements in a military manner. The other officers returned upstairs and accused came back again. I said, "What do you want?" Mr. White, upon again asking and receiving permission to make a statement, said that he was worried regarding the safe return home of the young lady whom he had left. From my further conversation with accused, I deemed him sober. I would have put him on guard duty. About 9:30 next morning I saw accused, and, upon his asking and receiving permission to ask a question of me, he said, "Just what happened last night?" I said, "Don't you know?" He said, "No, sir". I then said, "I am not going to

tell you what happened last night, but I will show you my memorandum to the Commandant of Cadets", which I did. I identify the accused as the figure in white who gave the name of Bickerstaff. The next morning I ran over the roster and found that accused belonged to the Third Provisional Company (R. 6-18).

b. First Lieutenant William H. Bartlett, Field Artillery, and First Lieutenant Howard A. Brusher, Coast Artillery Corps, testified, and a stipulation was made as to what testimony would be received from First Lieutenant Mark McClure, Field Artillery, if he were present. These were the three officers whom Lieutenant Tischbein summoned to observe accused, as previously stated.

(1) Lieutenant Bartlett testified that an odor of liquor emanated from accused's breath, but that he was sober, that the witness so believed from the way accused enunciated his words and stood erect. Accused stood at attention, was courteous, and used the word, "Sir" (R. 19-20).

(2) Lieutenant Brusher did not distinguish any odor emanating from accused though he stood two or three feet from him. Accused had been drinking, but was at the time sober; he was not staggering and could speak distinctly. His military demeanor was poor in that he was impertinent and did not stand erect and was evasive in answering questions. The witness would not have put him on guard. Physically accused was capable of performing that duty, but not from a mental standpoint. The witness would not have trusted him at that time (R. 20-22).

(3) It was stipulated that Lieutenant McClure would have testified that he did not smell liquor on accused's breath, but was not close enough to him to do so; that in his opinion accused was not drunk; that the only thing out of the ordinary which he noticed was that accused was flustered and picked his way carefully when he went down the steps (R. 22-23).

c. Cadet Joseph C. Moore, First Class: On August 12, 1934, I was officer of the day at Fort Monroe, Virginia. About 11:10 p.m., accused came to me and said, "I was probably reported absent at taps. I was in the sink at the time taps were sounded". About 11:20 Lieutenant Tischbein

called me out of bed and to the headquarters building where accused was. I smelled liquor on accused's breath both the times that I saw him that evening. He was a bit unsteady on his feet, not staggering, but weaving. He was very hesitant to answer questions. He was drunk. He called me by name. When he made the statement to me, he was coming from the direction of the sink. I had reported accused late (R. 23-27).

5. The defense called Cadets William P. O'Neal (R. 29-31), Elmer J. Koehler (R. 32-42), Charles W. Rich (R. 42-45), James Y. Adams (R. 45-51), Eugene H. Walter (R. 51-55), Jack W. Hickman (R. 55-60), Major John M. Devine, Field Artillery (R. 60-61), First Lieutenant Clinton F. Robinson, Corps of Engineers (R. 61-62), and First Lieutenant George E. Bruner, Infantry (R. 62-64), and presented a stipulation as to testimony that would be given by First Lieutenant Frank R. Stevens, Infantry, if he were present (R. 64). The accused also voluntarily testified (R. 64-67). It is unnecessary to abstract the testimony of the cadet witnesses in detail. They and the accused testified in substance that accused was at the hotel at Fort Monroe from 4 p.m., August 12, until late that evening, during which time he drank cocktails, beer and whiskey in considerable quantities; that during the same period he had nothing to eat except some pretzels; and that he became drunk. Accused testified that from 6:30 on, "it begins to get vague". He cannot give a connected story of what happened the rest of the evening, though he remembers flashes. He remembers meeting a girl, walking with her toward the barracks, and some one pulling up alongside of him in a car and telling him to get in. The next thing he remembers is that he was under a light and there were a lot of officers around him. The next morning he had a vague impression of having been questioned, but did not know what his answers had been. It was all very hazy but he did not have any intention of deceiving an officer.

The testimony of Major Devine and Lieutenants Robinson and Bruner and the stipulation with respect to that of Lieutenant Stevens all related to accused's character and record and were highly favorable to him both as to character and ability. Two of the witnesses would have rated accused as "excellent" and two as "superior", using those words as they are used in officers' efficiency reports. In his fourth class year accused stood No. 5 in his class; in his third class year, No. 17; and in his second class year, No. 39. If he had not gotten into trouble he would have been made a cadet captain in August.

6. The prosecution called in rebuttal Major Earle D. Quinnell, Medical Corps, as an expert witness with reference to the effect of liquor upon the mind and body, but in view of the findings of the court it is believed unnecessary to abstract his testimony (R. 67-71).

7. The contention of the defense was that at the time he made the untrue answers to the questions put him by Lieutenant Tischbein accused was so drunk as to be incapable of forming an intent to deceive, and did not know what he was doing. The court apparently accepted this view, since its findings of not guilty with respect to Charge I and the three specifications thereunder are explicable upon no other theory. Though it saved accused from conviction of the specifications alleging false statements under the first charge, this defense greatly increased the seriousness of accused's offense under the specification to Charge II, alleging the drinking of liquor, to which he pleaded guilty, and which the evidence fully sustains irrespective of the plea. This theory of the defense and the evidence adduced in support of it show that accused might well have been convicted of a specification alleging drunkenness in a public place, namely the Chamberlain Hotel, in uniform.

8. The Board of Review has received a personal call from Honorable Andrew Edmiston, Representative in Congress, from West Virginia, who has also addressed the Chief of Staff with reference to this case. Mr. Edmiston stated to the Board that accused's family were people of excellent standing in his district and he requested clemency for accused. However, in view of the aggravating circumstances mentioned in the preceding paragraph, the Board is of opinion that the sentence should stand.

9. Accused was admitted to the Military Academy July 1, 1931, with no prior service, and is 21 years of age.

10. 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.

Theodore Hall, Judge Advocate.

N. A. Turnbull, Judge Advocate.

Archibald W. King, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 202601

APR 10 1935

UNITED STATES)	FIFTH CORPS AREA
)	
v.)	Trial by G.C.M. convened at Fort Benjamin Harrison, Indiana, October 11,12, 13, 15 and 16, 1934. Dismissal and Confinement for five (5) years.
First Lieutenant JULIUS S. SPERTI (O-123046), Field Artillery Reserve)	

OPINION of the BOARD OF REVIEW
HALL, KING, and SMITH, L.M., Judge Advocates.

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

2. Accused was brought to trial upon ten (10) specifications, each alleging embezzlement in violation of the 93d Article of War (Charge I), upon twelve (12) specifications, each alleging conduct unbecoming an officer and a gentleman in violation of the 95th Article of War (Charge II), and upon nine (9) specifications, each alleging conduct of a nature to bring discredit upon the military service, or disorders and neglects to the prejudice of good order and military discipline, in violation of the 96th Article of War (Charge III). Before pleading to the general issue accused moved to strike out Specifications 4, 5, 6 and 7 of Charge II, and Specifications 5 and 6 of Charge III. The motion was denied as to the specifications under Charge II, but sustained as to those under Charge III, and Specifications 5 and 6 of Charge III were stricken out by the court because they were considered duplications in part of Specifications 2 and 5, respectively, of Charge I (R.30-35). Accused then pleaded not guilty to all the remaining charges and specifications. He was found guilty of Charge I and of Specifications 1 to 10, inclusive, thereunder, guilty of Charge II, and of Specifications 4, 5, 7, 8, 9, 11 and 12, thereunder, and

guilty of Charge III, and of Specifications 1, 2, 3, 4, 7, 8, and 9 thereunder. He was found guilty of Specification 3 of Charge II, except the words "and further that the amounts indicated in the said certificate as being on deposit and as being in cash are materially less in fact in both respects than they should be", and guilty of Specification 10 of Charge II, except the words "and by means thereof did fraudulently obtain from the said First Lieutenant John A. Klaiber the sum of Fifty Dollars, $50.00". He was found not guilty of Specifications 1, 2 and 6 of Charge II. 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 for five (5) years. The reviewing authority approved only so much of the finding of guilty of Specification 1, Charge I, as involved a finding of guilty of embezzlement of $945.47, disapproved the findings of guilty of Specification 6, Charge I, and of Specification 4, Charge III, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. During the course of the trial counsel for accused raised a question as to the jurisdiction of the court upon the ground that accused had been kept upon active duty without his consent (R. 335-336). The record shows that accused was ordered to active duty by S. O. 115, par. 19, Headquarters Fifth Corps Area, May 18, 1933, for six months; this active duty was extended four months and twenty-four days by S. O. 237, par. 12, Headquarters Fifth Corps Area, October 11, 1933, and by S. O. 51, par. 3, Headquarters Fifth Corps Area, March 2, 1934, it was extended from April 16, 1934, to October 15, 1934, with his consent. The trial of accused was begun on October 11, 1934, and was not finished by the court until October 16, 1934. It is believed that the contention of accused is without merit. The Board of Review has held repeatedly that a reserve officer on active duty is subject to military law. CM 201678, Anderson; CM 202366, Fox; and CM 202479, Babbington.

In the case of Barrett v. Hopkins, 7 Fed. 312, the court said:

> "Where a soldier in the army was arrested for a crime, and his term of enlistment expired before his trial and conviction by court-martial, it was held that the jurisdiction of the court having once attached by the arrest, it retains jurisdiction for all of the purposes of the trial, judgment and execution."

In Winthrop's Military Law and Precedents, 2d ed., p. 90, the rule as to the continuation of jurisdiction after it has once attached is stated as follows:

> "It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly attached to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This principle has mostly been applied to cases where the offense was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him, -- as by an arrest or the service of charges,--the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused."

4. The specifications, other than those of which accused was acquitted, or in which findings of guilty were disapproved, are set out separately below with the findings of the court, the action of the reviewing authority, a summary of the evidence in support of each of them, and the views of the Board of Review.

Evidence of general application to all the specifications may first be summarized as follows:

Accused, a First Lieutenant, Field Artillery, Reserve, was, with his consent, ordered to active duty for a period of six months, beginning May 22, 1933, and directed to proceed to Fort Knox, Kentucky, and report in person to the Commanding General for training with the Civilian Conservation Corps (R. 37; Ex. 1). This order was later amended to extend the period of service until October 15, 1934 (R. 38-39-40; Ex. 2; Ex. 3). His period of active duty was again extended for a period of two months, beginning October 16, 1934, and the extension order recites that it was "with his consent." (R. 331-333; Ex. 47). During the period from August, 1933, until July 24, 1934, accused was in command of Company 1532, Civilian Conservation Corps, and this company was located at Camp

PE-60 at Huntington, Indiana, and at Camp PE-71 at Milan, Indiana. The council book of the company fund of Company 1532, C.C.C. was identified by First Lieutenant John A. Klaiber, Field Artillery, Reserve, executive officer of this company, who testified that it was authenticated by accused as custodian during the months from October 1933, to June, 1934, inclusive. Witness was familiar with the signature of accused as custodian and has seen him write his name. From September, 1933, until June, 1934, witness was the recorder of the company council book and during this period had seen the book when accused had turned it over to him for preliminary examination prior to audit and had signed the statement in it as recorder. The council book was received in evidence as Exhibit 4. Accused on August 20, 1933, signed a receipt for the company fund of the 1532d Company, Civilian Conservation Corps. and continued as custodian thereafter into the month of July, 1934. (R. 40-46,48,51; Ex. 4).

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

Specification 1: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532. C.C.C. Camp PE-60, and Camp PE-71, and as such official custodian of the Company Fund thereof, did, at or near Huntington, Indiana, and Milan, Indiana, between August 16, 1933 and July 23, 1934, or thereabouts, feloniously embezzle by fraudulently converting to his own use the sum of about TWELVE HUNDRED TWENTY EIGHT DOLLARS AND SIXTY CENTS $1,228.60, property of the company fund, Company 1532, C.C.C., which said money came into his possession and under the care of the said First Lieutenant Julius S. Sperti, by virtue of his said office for the purpose of applying the same for the use and benefit of the said company.

Finding: Guilty.

The reviewing authority approved only so much of this finding of guilty as involved a finding of guilty of embezzlement of $945.47.

Evidence.

First Lieutenant Elvin H. Burger, 11th Infantry, Fort Benjamin Harrison, Indiana, testified that the accused is First Lieutenant Julius S. Sperti, Field Artillery, Reserve, on duty with C.C.C. Company 1532 as a reserve officer called to active duty (R. 47). Witness was a member and recorder of a board of officers to investigate conditions of the company fund of Company 1532. The investigation covered a period beginning in August, 1933 and extending to and including July 23, 1934.

To the question of the prosecution that witness state the result found by the board respecting the financial status of the company, the defense objected on the ground that the witness was not competent to answer, and stated that the prosecution was calling upon a witness to testify as to findings of a board of officers "as to a series of calculations and a whole series of matters involving financial affairs", and had not shown the witness to be an expert in matters of military accounting, which was necessary before the prosecution could pursue this line of testimony. The question was withdrawn. The witness then testified that he had had experience in the keeping of company council books, having kept such books for various organizations since 1923. He had had experience in auditing company funds as shown in council books. This was a part of his duty at Chilkoot Barracks in Alaska. He had made audits for the 24th Infantry, and he had been auditing in the eastern district from January to the end of June, 1934 (R. 48-49).

The prosecution then asked the witness "what the result respecting the financial status of the company was of the board of officers" of which he was recorder. The defense stated that it still objected and asked an opportunity to cross-examine the witness in order to further ascertain his competency on this subject. The president and law member overruled the objection of the defense and stated that the question, asking the result of the board of which the witness is recorder, was "perfectly proper", and that the witness, should he have papers, might use them to refresh his memory in giving the answers to questions of this nature.

Thereupon the witness testified that the board of officers, appointed to investigate the company fund of C.C.C. Company 1532, found a shortage of $2,573.36. This was the entire shortage of

both the company fund and the camp exchange fund. $1,952.63 was the actual shortage of the company fund of C.C.C. Company 1532 (R. 50). During the period covered by this investigation accused was the company commander of Company 1532, C.C.C., and the custodian of the company fund of that company (R. 51).

Upon cross-examination the witness testified that the board discovered the shortage about July 23 (1934) and found that it occurred between January 1, and July 23 (1934). Witness had audited the fund for the months of January and February during this period but had not discovered the shortage at that time (R. 52).

Upon re-direct examination by the prosecution witness testified that the board of which he was a member made a study of the entries of the council book listed under the month of June. At the question as to whether the board came to any conclusion regarding the items listed thereon as expenditures (R. 54) the defense objected to the reading "of any amount of that book" until such time as they had the supporting vouchers, and contended that the member (the witness) should show the corresponding voucher by which the board checked the entry that it studied. The president and law member stated that it is true that the fund book is made up from vouchers but that its accuracy is attested by the custodian and by the council, and it is also subject to audit by superior authorities, and he ruled that the fund book as such, and the figures as they appear therein, were admissible, and overruled the objection (R. 55).

Thereupon the witness testified that the board made a study of the entries under the month of June and accepted as valid the following entries:

Voucher 1, "the collection sheet of May, 1934, as receipt, $174.90, an expenditure of $40.00";

Voucher 2, "under date of June 10th, ration savings for May, 1934, the receipt of $1,299.44, expenditure of $452.44";

Voucher 3, "June 12th, for Wickenhiser Geedy Company, company supplies, expenditure of $12.52 under other funds";

Voucher 13, "June 15th, H.W. Sullivan, Radio Parts, cash of $2.55."

All other entries in the council book for the month of June were not accepted by the board as proper and valid entries (R. 56). The board found that an attempt had been made to pay the following vouchers for expenditures by checks on two banks, the First State Bank of Huntington and the Exchange Bank of Warren, Indiana, but that the checks had not been honored at these banks and none of these bills had been paid at the time the board turned in its findings:

Voucher 4, June 12, Milan Bakery for bread, $79.96;
Voucher 5, June 12, Chris H. Voss Dairy, milk, $62.00;
Voucher 6, June 12, Armour and Company, meat, $43.95;
Voucher 7, June 12, New Fisheries, Inc., fish, $75.15;
Voucher 8, June 15, A. Dattilo Fruit Co., $203.25;
Voucher 10, June 15, Swift and Co., meats, $23.76;
Voucher 11, June 15, Great A. & P. Tea Co., $20.49;
Voucher 12, June 15, Pearl Packing Co., $335.93.

These vouchers had each been "paid" by check which had not been honored by the bank and all bore the "paid stamp or payment mark".

As to the following bills the board was unable to find that they had either been paid in cash, by check, or in any other way, and the vouchers the board found had no markings on them to show that they had ever been presented for payment or paid:

Voucher 14, June 15, Hilker and Bletch, "deserts," $18.00;
Voucher 15, June 15, Ad Seidel & Son, "deserts", $24.00;
Voucher 16, June 15, Loose Wiles, cake, $3.40;
Voucher 17, June 15, Daniel Brothers, meats, $71.56;
Voucher 18, June 15, Crites Bakery, bread, $31.58;
Voucher 19, June 15, Puritan Dairy, milk, $36.36;
Voucher 20, June 15, O.C. Smith, eggs, $25.50;
Voucher 21, June 15, Cloverleaf Creameries, $32.21;
Voucher 22, June 15, E. O. Perry, produce, $14.24 (R. 56-57).

Upon cross-examination the witness testified that in determining the validity of the voucher entries in this book the board considered three things: (1) they interviewed everyone that they could in Milan, Huntington, or any other place where the board visited; (2) they had checks from the banks which were marked "not sufficient funds"; and (3) they had letters from the various firms asking why they did not receive their money to pay these bills. To determine the correct entry in the "book" (i.e. council book) the only thing the board had "to go on" was the voucher.

Thereupon the defense demanded that the prosecution produce the vouchers which the board had studied in determining the validity of the entries in the council book, and contended that they should be in the hands of the witness so that he could refresh his memory from them (R. 58). The president and law member then ruled that the witness could testify to such facts as he knew, refreshing his memory from whatever sources might be necessary, and that if his remembrance of the investigation of these entries in the council book was so clear that he could swear to the truth of what happened, then the vouchers were not necessary (R. 59). The objection to the witness' testimony without the vouchers was overruled.

The witness then continued his testimony substantially as follows under cross-examination. The board accepted the balance as carried forward from the last month under "ration savings, receipts" $865.33; "other funds, receipts" $13.48. Voucher 1, collection sheet for May, 1934, under "other funds, receipts", $174.90 expenditures $40.00 - $174.90 was not correct but should have been $176.90. Vouchers 2, 3, and 13, as mentioned above, were accepted by the board and also Voucher 9, June 15th, boarders, May,1934 $160.52 (R. 60).

Upon re-direct examination the witness testified that the board on July 23 (1934) found no cash but found $22.00 deposited at the Exchange Bank of Warren, Indiana, and $5.30 on deposit in the First State Bank at Huntington. In addition, there was on deposit in the First State Bank the sum of $638.49, representing restricted funds of this company dating back to September, 1933 (R. 61). Paid bills to the amount of $15.07 were also found (R. 241).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington (R. 159) testified that Company 1532, C.C.C., had a restricted account in that bank impounded on September 23, 1933. He had never informed the accused that that fund was released and had become active, nor had he given any official in the bank authority to so inform the accused. The balance of the active company fund account of this company on June 25, 1934, was $5.30. (R. 161-163).

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana, testified that Company 1532, C.C.C. had a balance of $22.00 on deposit in that bank on July 3, 1934 (R. 244-246; Pros. Ex. 45).

Accused admitted that he was short the amount of cash shown on hand as of June 30, 1934 (R. 85-86, 273-275). In further proof of the falsity of certain purported expenditure entries in the council book in June, 1934, authenticated by the accused as correct, which entries, as has been shown, were not accepted by the board as proper and valid, the evidence subsequently set out under Specification 7 of Charge III may also be considered. This evidence shows that checks were received by the creditors whose accounts are set forth under vouchers 4, 5, 6, 7, 8, 11 and 12 in the June, 1934, records of the council book, and that when presented for payment at the banks upon which they were drawn such checks were dishonored because of insufficient funds.

Discussion.

The prosecution attempted to prove this specification by showing, through the testimony of a member of the board, the result reached by a board of officers which investigated the condition of the company fund of Company 1532, C.C.C. The objection of the defense to such testimony, until the competency of the witness as an expert in matters of military accounting was established, was overruled by the court, and the witness was permitted to testify as to the amount of the shortage found. The objection of the defense to testimony as to the conclusions of the board in respect to items listed in the council book as expenditures, and to the reading of any such items, until the vouchers purporting to support these expenditures were produced, was also overruled by the court, and the witness was permitted to state that certain entries of June expenditures in the council book were not accepted by the board as "proper and valid entries." Upon cross-examination of this witness it was shown that in determining the validity of these voucher entries the board considered three things: (1) They interviewed everyone that they could in Milan, Huntington, or any other place where the board visited; (2) they had checks from the banks which were marked "not sufficient funds"; and (3) they had letters from the various firms asking why they did not receive their money to pay these bills. It further appeared that all the board had upon which to determine the correctness of an expenditure entry in the council book was the voucher. The demand of the defense that these vouchers be produced was again overruled by the court which held that the vouchers were not necessary.

It is provided in paragraph 116, Manual for Courts-Martial, that:

> "When the original consists of numerous writings which can not conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, the calculation may be made by some competent person and the result of the calculation testified to by him, as, for instance, if the fact to be proved is the balance shown by account books. In such cases it must be shown to the court that the writings are so numerous or bulky that they can not conveniently be examined by the court; that the fact to be proved is the general result of the whole collection; that the result is capable of being ascertained by calculation; that the witness is a person skilled in such matters, and capable of making the calculation; that he has examined the whole collection and has made such a calculation; and that the opposite party has had access to the books and papers from which the calculation is made. Opportunity will be afforded the opposite party to cross-examine the witness upon the books and papers in question, and to have them, or such of them as the cross-examiner may desire and the court may permit on proper showing (or properly authenticated or proved copies), produced in court for the purposes of the cross-examination."

It was perhaps in the mind of the prosecution to lay a foundation for the testimony of the board member, as might have been done under the provision just quoted, but this was not done. The defense was even denied the right to inspect the vouchers which had been examined by the board of officers in determining the validity of the expenditure entries upon the council book. And in determining these questions the board relied upon what it learned from conversations with individuals, from the inspection of checks marked "not sufficient funds", and from letters written by creditor firms in regard to their bills. The testimony of this member of the board of officers as to the conclusions reached by the board did not come within any exception to the best evidence rule and was therefore incompetent. CM 157375, sec. 1561 (2), Dig. Ops. JAG, 1912-30.

It was shown by the prosecution by competent evidence, but not as a part of the proof under this specification, that checks had been drawn by the accused upon the company fund and sent to certain of the creditors, whose bills are shown in the council book under expenditure items as having been paid, and that these checks were dishonored because of insufficient funds on presentation at the banks upon which they were drawn. There is no competent evidence, however, that the bills represented by these expenditure items in the council book were not otherwise paid, and these entries must therefore be accepted as valid in the absence of competent proof to the contrary.

Notwithstanding the incompetency and the inadequacy of this evidence presented by the prosecution under Specification 1 of Charge I, there is evidence in the record showing the following facts relevant to this specification. Accused was the commanding officer of Company 1532, C.C.C., and the custodian of its company fund from the time he receipted for it on August 20, 1933, until July 24, 1934. The council book of this company fund was accused's book of account, certified by him as correct for each of the months during this period; and the entries therein appear to have been made in his own handwriting, although this is immaterial since they may be assumed to have been made by his authority and direction. This council book shows that at the end of June, 1934, of the amount for which accused was responsible $638.49 was on deposit in the First State Bank of Huntington, and $280.47 was in his personal possession in cash, and he so certified. This sum of $638.49 had been impounded in this bank since September, 1933, and was so impounded at the time of thetrial. Cash to the amount of $280.47 was exhibited to Major Chapman Grant at the end of June, 1934, when he made the June audit, but at a later date in July no cash was found in the possession of accused and his council book shows no expenditures to account for this amount of cash. The ledger sheet of the First State Bank of Huntington shows an active account of the company fund, with a balance of $5.30 on June 21, 1934, which remained undisturbed until withdrawn on August 1, 1934. The ledger sheet of the Exchange Bank of Warren shows a balance of $22.00 to the credit of this company fund on July 2, 1934, which was not withdrawn until July 30, 1934. Accused admitted that he was short the "amount of cash shown on hand as of June 30th". While he had $5.30 on deposit in the First State Bank to the credit of the company fund from June 21, 1934, until his company fund was investigated late in July, he does not refer to this amount in summing up the funds for which he was

responsible in his certificate in the council book for the month of June, 1934, and, although he may have been short the whole amount of $280.47 in cash, as he admits, the evidence does show this amount of $5.30 on hand in June. The amount of $22.00 is also shown to have been on deposit in the Exchange Bank from July 2, 1934, until his affairs were investigated.

It is held that an officer may be convicted of embezzlement upon the uncorroborated evidence of the books kept by him in the course of his duties. CM 130989; sec. 1563 (4), Dig. Ops. JAG, 1912-30. And it is also held that one who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, can not complain if the natural presumption that he spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. CM 123488; sec. 1563 (2), Dig. Ops. JAG, 1912-30. And in this case, as noted above, accused offered no explanation of the shortage other than to admit it.

For the reasons stated the Board of Review is of the opinion that the evidence supports a finding of guilty of embezzlement of $238.10 only, the difference between $280.47 and $27.30 of deposits and $15.07 of paid bills, in the manner and at the times and places alleged.

6. CHARGE I:

Specification 2: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company fund thereof, did, at or near Huntington, Indiana, on or about June 11, 1934, feloniously embezzle by fradulently converting to his own use moneys in the sum of about TWO HUNDRED TWENTY DOLLARS, $220.00, property of the said company fund, which said money came into the possession and under the care of the said First Lieutenant Julius S. Sperti, by virtue of his said office for the purpose of applying the same for the use and benefit of the said company.

Finding: Guilty.

Evidence.

First Lieutenant Elvin H. Burger, 11th Infantry, identified prosecution's Exhibit No. 4 as the council book of the Company fund of Company 1532 C.C.C., and testified that in the entries in this council book for the month of June 1934, there were none accounting for an expenditure in the sum of $220.00 (R. 51; Ex. 4).

Ruth Emily Earhart testified that she is the assistant cashier of the First State Bank of Huntington, Indiana. She identified a document as a counter receipt from the First State Bank, at Huntington, made against the account of the company fund, "Company 1532 C.C.C Julius S. Sperti" for $220.00, which was received in evidence as Exhibit No. 31, and testified that it was handed to her on June 11, 1934 by the accused, who said he needed some cash, and she cashed it. The counter receipt was charged to the company fund account, Company 1532 (R. 170-172).

Discussion.

The evidence presented by the prosecution under this specification is merely that accused on June 16, 1934, drew $220.00 in cash from the account of the company fund, Company 1532, C.C.C., with the First State Bank, and did not show this amount as an expenditure in his council book for the month of June, 1934. Certainly there is no proof of embezzlement in these facts. He had a right to withdraw this money and hold it in cash. The money so withdrawn may have been part of the $280.47 which accused had in his possession at the close of the month of June and then exhibited to Major Grant. There is no evidence that he fraudulently converted it to his own use prior to June 30; and, if he embezzled it after that time, the offense is covered by specification 1, Charge I. The evidence does not support the finding of guilty under this specification.

7. CHARGE I:

Specification 3: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company fund thereof, did, at or near Camp PE-60, Huntington, Indiana, on or about July 14, 1934,

feloniously embezzle by fraudulently converting to his own use moneys in the sum of about ONE HUNDRED TWENTY EIGHT DOLLARS AND FIFTY CENTS, $128.50, the proceeds of a United States Treasury Check, number 102,101, property of the said company fund, which said money came into the possession and under the care of the said First Lieutenant Julius S. Sperti, by virtue of his said office for the purpose of applying the same for the use and benefit of the said company.

Finding: Guilty.

Evidence.

It was stipulated and agreed between the prosecution and defense and accused that if C. C. Collins, Clerk, U.S. Post Office, Huntington, Indiana, were present in court and sworn as a witness he would testify that on or about July 14, 1934, accused presented to him government check #102,101, drawn on the Treasurer of the United States for $128.50, signed by Charles Lewis, Finance Officer, U.S. Army, and payable to "Co. Fund, Co. 1532, C.C.C."; that witness gave accused cash for the check to the amount of $128.50, after the latter had indorsed it; and that he would recognize and identify the document marked "Prosecution's Exhibit No. 7", as a photostatic copy of the check he so cashed for accused. The photostatic copy of this check was then received in evidence as Prosecution's Exhibit No. 7 (R. 70-71).

Captain Charles Lewis, Finance Department, testified that he is Finance Officer, Fort Benjamin Harrison, Indiana. He identified Prosecution's Exhibit No. 7 as a photostatic copy of a check on the Treasurer of the United States issued by him (witness) to company fund, Company 1532, C.C.C., in payment of indebtedness of $128.50 due this company. The signature upon the copy of the check is his own. The check was drawn for the purpose of paying to this company $128.50"for remark as entered on the payroll of this company as due company fund". His office records show when checks drawn by him are paid and show that this check was paid in July, 1934 (R. 71-72). In July, 1934, he was on his present duty as mentioned above. It is a part of his duty to act as disbursing officer, including that as disbursing officer for C.C.C. Camps of the State of Indiana. Such disbursements are usually made by check payments (R. 73).

First Lieutenant Elvin H. Burger was handed Prosecution's Exhibit No. 4, council book of the company fund, Company 1532, C.C.C., and reminded that he had testified that he was a member of

a board of officers detailed to investigate the conditions of the company fund Company 1532, C.C.C., and that such investigation was made. He was then asked whether or not during the course of this investigation he could find any entry or entries under the month of July, 1934, pertaining to a sum of $128.50, either in receipts or expenditures (R. 81). To this inquiry he testified that "we found no such sum at all. The account for the month of July is a perfectly blank page." They found no records anywhere pertaining to such an amount (R. 82). The discovery that there were no entries for the month of July was made on July 23 (1934). There is a fund book covering transactions of Company 1532, C.C.C. for the month of July which was opened by the board on July 26 (1934). In the board's investigation they found no records of receipts or expenditures to properly apply on the month of July. No vouchers for July business were found (R. 87).

The council book kept by accused (Ex. 4) contains no entry of the receipt of this money. Accused admitted that he was short this amount (R. 85-86, 273-275).

Discussion.

Under this specification, alleging the embezzlement of $128.50, the proceeds of a United States Treasury check and the property of the company fund, there is evidence that the Finance Officer at Fort Benjamin Harrison gave accused a United States Treasury check for $128.50, dated July 11, 1934, payable to "Co. Fund, Co. 1532, C.C.C." for the purpose of paying that amount due the company fund. There is further evidence that accused indorsed this check and received cash for it to the amount of $128.50 at the Post Office, Huntington, Indiana, on or about July 14, 1934, but that he did not enter this amount as a credit upon the council book nor did he produce it as a part of the assets of the company fund when his affairs were investigated. As a matter of fact he admitted that he was short in this particular amount. The evidence is regarded as legally sufficient to support the finding of guilty under this specification.

8. CHARGE I:

Specification 4: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company fund

thereof and authorized to make certain collections of moneys due the said company fund, did, at or near Camp PE-60, Huntington, Indiana, on or about June 15, 1934, feloniously embezzle by fraudulently converting to his own use ONE HUNDRED SIXTY DOLLARS AND FIFTY TWO CENTS, $160.52, property of the said company fund, which said money is a part of the sum charged certain boarders for meals furnished by the company mess for the month of May 1934, collected and received by the said First Lieutenant Julius S. Sperti, and which said money came into the possession and under the care of the said First Lieutenant Julius S. Sperti by virtue of his said office for the purpose of applying same for the use and benefit of said company.

Finding: Guilty.

Evidence.

First Lieutenant Elvin H. Burger, 11th Infantry, testified that in the council book of Company 1532 C.C.C. (Ex. 4), there was an entry "voucher 9, June 15, boarders May 1934", showing the receipt of $160.52. On July 23,(1934) and subsequent dates, the board found no cash in the company fund, but did find $22.00 on deposit at the Exchange Bank of Warren, Indiana, and $5.30 on deposit in the First State Bank at Huntington. In addition there was on deposit in the First State Bank the sum of $638.49 representing restricted funds of this company dating back to September, 1933 (R. 60-61). This was carried forward as such in the company audits and could not be checked against (R. 63). The board could find no cash or bank deposits which would represent the amount collected for boarders as entered in the council book under the month of June, nor could they find any entries in the month of June which would account for the actual expenditure of this amount of $160.52 (R. 63,99-100).

First Lieutenant John A. Klaiber testified that during May, 1934, one of his duties with Company 1532, C.C.C. Huntington, Indiana, was that of mess officer in which he supervised the mess and handled the accounts pertaining thereto. At the end of the month he made up a statement of the financial standing of the mess, including bills payable and bills receivable, and presented it to the company commander (R. 93). Bills receivable consisted

in part of boarders' accounts (R. 94). There was money due the mess from boarders for the month of May of which witness collected $103.37 and turned over to accused. Other money for the mess of that month was collected by accused. Witness knew that accused received a money order in one instance and a check in another but could not testify as to the amount of either, although he saw both money order and check (R. 95-97). In the entries for the month of June in the council book (Ex. 4) there is an entry of voucher No. 9, dated June 15th, for boarders, May, 1934, for $160.52, listed under receipts. The total amount due from boarders for that month was $203.65 of which there was one amount of $8.13 that he knew was uncollected (R. 98).

Discussion.

This specification alleges the embezzlement by accused on or about July 14, 1934, of $160.52, property of the company fund and a part of the sum received by him from boarders for meals furnished them by the company mess for the month of May. There is evidence that $103.37 of this amount was collected by Lieutenant Klaiber and turned over to accused, and also that other money for the mess of that month was collected by accused. The amount of $160.52 is entered in accused's council book as a receipt on June 15, 1934, and is included in the moneys for which he certified that he was responsible at the end of June, 1934. This amount is, therefore, included in the amount of which accused was properly convicted of having embezzled, as alleged under Specification 1 of Charge I, and the finding of guilty under Specification 4, Charge I, must necessarily be disapproved.

9. CHARGE I:

Specification 5: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company fund thereof, did, at or near Camp PE-60, Huntington, Indiana, on or about June 16, 1934, feloniously embezzle by fraudulently converting to his own use moneys in the sum of about TWENTY DOLLARS, $20.00, property of the said company fund, which said money came into the possession and under the care of the said First Lieutenant Julius S. Sperti, by virtue of his said office for the purpose of applying the same for the use and benefit of the said company.

Finding: Guilty.

Evidence.

It was stipulated and agreed between the prosecution and the defense and the accused that if D. R. Wygant, Teller in the First State Bank, Huntington, Indiana, were present in court and sworn as a witness, he would testify in substance that on or about June 16, 1934 (R. 156), accused presented a counter receipt to him at the First State Bank and that he gave accused $20.00 in cash for the counter receipt; and that he would recognize the document marked "Prosecution's Exhibit 28" as the counter receipt on the First State Bank, dated June 16, 1934, signed "Co. Fund Co. 1532 C.C.C. Julius S. Sperti", which he accepted from accused and for which he gave accused $20.00 in cash. The counter receipt was thereupon received in evidence and marked "Prosecution's Exhibit No. 28" (R. 157).

First Lieutenant Elvin H. Burger testified that there were no entries on June 16 (1934), or later, in the council book of Company 1532 (Ex. 4) to account for the expenditure of $20.00. The last entry in the book is dated June 15 (R. 284-285).

Discussion.

The evidence under this specification is merely that on or about June 16, 1934, accused withdrew $20.00 in cash from the account of the company fund, Company 1532, C.C.C., with the First State Bank, and did not show this amount as an expenditure in his council book for the month of June or later. As in the similar evidence presented under Specification 2 of Charge I, there is no proof of embezzlement in these facts. Accused had a right to withdraw this money and hold it in cash and there is no evidence that he fraudulently converted it to his own use. The evidence does not support the finding of guilty under this specification.

10. CHARGE I:

Specification 6: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such, official custodian of the company fund thereof, did, at or near Huntington, Indiana, on or about June 25, 1934, feloniously embezzle by fraudulently converting to his own

use the sum of about ONE HUNDRED DOLLARS $100.00, property of the said company fund, which said property came into the possession and under the care of the said First Lieutenant Julius S. Sperti by virtue of his said office.

Finding: Guilty.

Finding of guilty disapproved by reviewing authority.

Since the finding of guilty of this specification was disapproved by the reviewing authority no summary of the evidence thereunder is made.

11. CHARGE I:

Specification 7: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company fund thereof and authorized to make certain collections of moneys due the said company fund, did, at or near Camp PE-60, Huntington, Indiana, on or about June 30, 1934, feloniously embezzle by fraudulently converting to his own use THREE HUNDRED SEVENTEEN DOLLARS AND FIFTY FIVE CENTS, $317.55, property of the said company fund, which said money had been collected and received by the said First Lieutenant Julius S. Sperti from certain enrollees of his said company and which said money came into the possession and under the care of the said First Lieutenant Julius S. Sperti by virtue of his said office for the purpose of applying the same for the use and benefit of the said company.

Finding: Guilty.

Evidence.

Clarence L. Rainey testified that during the latter part of June and the early part of July, 1934, he was company clerk in Company 1532 at Huntington, Indiana. As such company clerk he made out the collection sheet on pay day and would tell either accused or Lieutenant Klaiber "how much the enrollee owed". Witness identified a document as the collection sheet for Company 1532 for the month of June, 1934, which he had made out. It was

offered in evidence but objection by the defense to its admission was sustained by the law member on the ground that it was not a complete document. But the witness was permitted to use it to refresh his memory. Witness thereupon testified that he was present when Company 1532, C.C.C., was paid for the month of June. The "biggest part" of the collections on the company collection sheet were made at that time by accused (R. 123-125). The collection sheet showed that $317.55 was collected at that time and a part of this money was seen by witness.

Upon cross-examination witness testified that this money was collected in cash and was paid by Lieutenant Klaiber. Witness said that he had seen a part of the $317.00 collected because some of this money was paid by check by the finance officer for men that were discharged. He had never seen any checks from the finance officer, but whenever a check would come in accused told him that, "so and so" had paid their bill for the collection sheet and he would enter it on this sheet (R. 126). "The amount paid to be carried to next month was carried on the July collection sheet and that was the money he (accused) received for the men discharged on June 30th". This amount, as shown on the collection sheet, was $196.95 (R. 127).

First Lieutenant John A. Klaiber testified that he was present when C.C.C. Company 1532 was paid for the month of June, 1934, and that he paid the company as agent officer. Accused made the collections on the collection sheet at that time. Witness saw the men pay accused but could not say how much they paid (R. 129).

Upon cross-examination witness testified that the money he saw collected was in cash. There were funds which appeared on the collection sheet in the form of checks. These were checks that were drawn for men who were discharged prior to June 30 and for "men who were paid on final roll". There were at least two checks from the finance officer, one for men discharged and another for men paid on supplementary roll (R. 130). The $317.00 total, as shown on the collection sheet, included a United States Treasury check in the amount of $128.50. Upon examination by the court the witness testified that this amount of $317.55 was carried on the collection sheet as the amount collected, not as the amount due, and that the check for $128.50 was received some time after June 30 (the date of the June collection). After several contradictory statements the

witness finally testified that the check for $128.50 received sometime in July was not included in the total amount collected in cash on June 30 and shown to be $317.55. But he could not testify that $317.00 was collected in cash (R. 131-137).

Lieutenant Elvin H. Burger testified that in the council book of the company fund, Company 1532, CCC (Ex. 4) there were no entries under the receipt column which show company collections for the month of June, and there were in the month of July no entries in the receipt column which show collections for the month of June (R. 137). Accused admitted he was short the "June 30th collection sheet" (R. 85-86; 273-275).

Discussion.

This specification alleges the embezzlement of the company collections of June 30, 1934. The evidence shows that accused took these collections in person from the enrollees on this pay day to the amount of $317.55, or about that sum, and that they were not entered in the council book as money received, nor otherwise accounted for by him. And he admitted that he was short the funds which he collected on the "June 30th collection sheet". The Board of Review is of the opinion that the evidence under this specification supports a finding of guilty of embezzlement of $317.55, in the manner and at the time and place alleged.

12. CHARGE I:

Specification 8: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, CCC., Camp PE-60, and Acting Camp Exchange Officer during the temporary absence of First Lieutenant John A. Klaiber, Field Artillery, Reserve, Camp Exchange Officer of the said company, and as such authorized to make sales of merchandise of the said Camp Exchange to enrollees of the said company, did, at or near Camp PE-60, Huntington, Indiana, between July 7, 1934 and July 10, 1934, or thereabouts, feloniously embezzle by fradulently converting to his own use TWENTY FOUR DOLLARS AND FOUR CENTS, $24.04, property of the Camp

Exchange of the said company, said money having been collected and received by the said First Lieutenant Julius S. Sperti from enrollees of the said company through the sale of Camp Exchange merchandise, which said money came into the possession and under the care of the said First Lieutenant Julius S. Sperti by virtue of his said office for the purpose of applying the same for the use and benefit of the said camp exchange.

Finding: Guilty.

Evidence.

First Lieutenant John A. Klaiber testified that as executive officer of Company 1532, CCC, during April, May, June and July, 1934, his duties included that of exchange officer which office he occupied by the authority of accused who was then company commander (R. 212). Witness identified a document as the daily report sheet for the camp exchange of Company 1532, CCC, for July 7, 1934, and testified that his signature appeared upon the back of it and that the figures and erasures on it were his except the days sales figures on the front part of the report at the top. The document was received in evidence and marked "Prosecution's Exhibit No. 41" (R. 214). Reading from this document witness testified that the amount under the column "Cash", "Total for Month", is $44.05. On July 7, 1934, witness was detailed to Angola, Indiana, and left the camp. He returned from Angola to Company 1532, C.C.C., on or about July 10. Accused took the daily sales from the exchange steward during witness' absence (R. 215), and witness resumed the duties of post exchange officer upon his return. Witness identified a document as another daily report sheet from the camp exchange, CCC Company 1532, but for July 10, 1934, and testified that the figures on it were all his own. The document was then received in evidence as "Prosecution's Exhibit No. 42". Upon examining the document witness testified that the figure under "Cash", "Total for Month" is $68.09, and that this represented the total as of the close of business on July 10 (R. 216). On the daily report for July 7 (Ex. 41) the total for the month under "Cash" is $44.05, and the difference of $24.04 between the two amounts represents the daily sales for the period July 7 to 10, inclusive, during which witness was at Angola. Accused had this $24.04 during his absence and it was not turned over to witness as camp exchange officer upon his return (R. 217).

First Lieutenant Elvin H. Burger testified that after accused had been duly warned of his constitutional rights by the investigating board of which witness was recorder, and had indicated that he understood them, he admitted that during the absence of Lieutenant Klaiber at Angola he (accused) took in the cash collections from the exchange (R. 236-238). Accused further admitted that he was short "$280.73 cash sales receipts, Post Exchange, as of July 10th" (R. 85-86, 273-275).

Discussion.

Other than the admissions of the accused there is no competent evidence that he took in the sum of $24.04 at the Post Exchange in cash receipts during the absence of Lieutenant Klaiber from July 7 to 10, 1934. Lieutenant Klaiber's testimony that accused received $24.04 during his absence is either hearsay or is based on accused's admissions. The two daily reports of the Post Exchange, the first of July 7, 1934 (Ex. 41), and the second of July 10, 1934 (Ex. 42), are not helpful as evidence that accused received the sum of $24.04 during Lieutenant Klaiber's absence. The report of July 7, 1934 is admissible and valid because up to that time Lieutenant Klaiber had been present and acting as exchange officer and presumably had personal knowledge of the facts that he recorded on this report. The report of July 10, 1934, however, is based on matter of which he could have had no personal knowledge. The exchange steward appears to have initialed this report and it is likely that he had personal knowledge of the amount of cash received since the 7th of the month, but he did not testify.

It is not overlooked that accused admitted that he had taken in the exchange cash collections during Lieutenant Klaiber's absence, and confessed that he was short the entire amount of $280.73 cash sales receipts of the exchange as of July 10, 1934. But the fact remains that there is no competent evidence other than this that the sum of $24.04 was actually received in cash by accused in the three-day interval and was not accounted for by him.

While all that is required by way of proof of the corpus delicti is some evidence corroborative of the confession touching the commission of the offense (CM 202213, Mallon), no such evidence is found in the present record. It is accordingly the opinion of the Board of Review that the conviction under this specification should be disapproved because it rests exclusively

upon the admission and confession of accused without other proof of the corpus delicti.

13. CHARGE I:

Specification 9: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, did, at or near Camp PE-60, Huntington, Indiana, on or about July 7, 1934, feloniously embezzle by fraudulently converting to his own use the sum of about TWO HUNDRED FIFTY SIX DOLLARS AND SIXTY NINE CENTS, $256.69, property of the camp exchange, Company 1532, C.C.C., Camp PE-60, entrusted to him by First Lieutenant John A. Klaiber, Field Artillery, Reserve, Camp Exchange Officer.

Finding: Guilty.

First Lieutenant John A. Klaiber upon examining the daily report sheet of the camp exchange, CCC Company 1532 (Ex. 41) testified that under the column "Cash on hand tonight" it shows $256.69, which represented the cash receipts for a period from about May 20 to July 7 (R. 217). This was the amount that witness actually had in his possession before he departed for Angola. (R. 218). The ordinary procedure in keeping this money was to deposit it in the bank over every ten day period, according to regulations, but this was not done during the latter part of May and June. In the latter part of May the company moved from Milan, Indiana, to Huntington, Indiana. Their previous experience with banks in Huntington had been disastrous and they still had funds tied up in the First State Bank of Huntington. Because of this accused advised him to refrain from banking the money until they found a suitable bank (R. 213). When witness left Huntington for Angola he turned over to accused the keys to the chest in which this money was kept. Upon his return from Angola witness did not receive that money back and he had not since received it. He had suggested to accused that the creditors of the camp exchange would probably want to be paid and that it might be a good idea to establish an account so that the creditors could be paid, but an account was not established. Witness never made any further attempt to get this money (R. 218). Witness identified a document handed him as a company fund check, 1532nd Company, CCC, on the Exchange Bank of Warren, Indiana, payable to the Camp Exchange, Company 1532, CCC, in the amount of $685.73, and signed "Company Fund - 1532nd Co. C.C.C. Julius

S. Sperti", and the check was received in evidence as prosecution's exhibit No. 43. Witness testified that this check was given to him by accused on July 23 to start an account in the Bippus Bank for the Camp Exchange. The amount of the check represents $405.00, the amount of enrollee notes for the period May and June, $24.04, the cash sales for the period July 7 to July 10, inclusive, and the balance $256.69, the cash receipts up to July 7. Witness took this check to the Warren Exchange Bank and presented it for payment, but the cashier refused payment on it and marked it "Insufficient Funds" (R. 219-220).

Goerge G. Jones, cashier of the Exchange Bank of Warren, Indiana, testified that the above check was presented for payment by an officer and payment refused because of insufficient funds. From Mr. Jones' testimony and from the ledger sheet which he produced, it appears that on the date of the check the balance in that bank to the credit of the company fund was $22.00, and that that was the maximum balance on any date (R. 249, Ex. 45).

First Lieutenant Elvin H. Burger testified that after accused had been duly warned of his constitutional rights by the investigating board of which witness was recorder, and had indicated that he understood them, he was asked: "According to Lieutenant Klaiber's statement you took cash collections (the reference is to collections of the camp exchange) to and including July 10, 1934?" Accused replied: "I cannot say as to the date, but I imagine that is correct." Accused was then asked: "The daily report sheet for the same period of time shows that this amount was $280.73. Did you turn this amount back to Lieutenant Klaiber?" Accused replied: "No." In the same line of questioning accused said that he had told Lieutenant Klaiber that he had banked the money, that Lieutenant Klaiber had asked him for it at various times, and that on the morning of July 23d he had given him (Lt. Klaiber) a check for $685.73 which was "to cover $280.00 and some cents post exchange money from the collection sheet" (R. 236-238). Accused admitted that he was short $280.73, cash sales receipts, Post Exchange, as of July 10th (R. 86, 273-275). (See also evidence under Specification 8, Charge III).

Discussion.

Under Specification 9 it is shown that when Lieutenant Klaiber left the camp on July 7 he turned over to accused the keys to the chest which contained post exchange funds to the amount of $256.69. Upon his return this money was not turned over to him by accused.

On July 23, 1934, accused gave Lieutenant Klaiber a company fund check for $685.73 on the Exchange Bank. payable to the camp exchange. This sum represented $405.00, the amount of enrollee notes for May and June, 1934, $24.04, the cash sales of the exchange for July 7 to 10, 1934, and the balance $256.69, the cash receipts up to July 7, 1934. The check was not paid upon presentation, there then being but $22.00 in the Exchange Bank to the credit of this account. Accused admitted that he had not turned back to Lieutenant Klaiber the cash collections of the exchange up to and including those of July 10, 1934, and amounting to $280.73, and further admitted that he had told Lieutenant Klaiber that he had banked this money, and that on the morning of July 23, 1934, he had given Lieutenant Kliaber a check for $685.73 to cover this amount. Accused also admitted that he was "short""$280.73 cash sales receipts, Post Exchange as of July 10th."

The evidence is considered legally sufficient to support the finding of guilty under Specification 9, Charge I.

14. CHARGE I:

Specification 10: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company fund thereof and authorized to make certain collections of moneys due the said company fund, did, at or near Camp PE-60, Huntington, Indiana, on or about July 15, 1934, feloniously embezzle by fraudulently converting to his own use ONE HUNDRED SEVENTEEN DOLLARS AND FORTY SIX CENTS, $117.46, property of the said company fund, which said money is a part of the sum charged certain boarders for meals furnished by the company mess for the month of June 1934, collected and received by the said First Lieutenant Julius S. Sperti, and which said money came into the possession and under the care of the said First Lieutenant Julius S. Sperti by virtue of his said office for the purpose of applying the same for the use and benefit of the said company.

Finding: Guilty.

Evidence.

First Lieutenant John A. Klaiber testified that during the month of June and the first part of July, 1934, among other duties he was mess officer of Company 1532, CCC, and kept the accounts pertaining to the mess which were those of the boarders and those of merchants to whom the company owed money (R. 281). The total amount owed the mess by boarders for the month of June, 1934, was $117.46. Witness could not state that this full amount was ever collected but he personally collected $83.16 of it and turned that amount over to the accused (R. 283).

The council book (Ex. 4) contains no entry of the receipt of this sum by accused. He admitted that he was short "the collections from boarders for the month of June" (R. 85-86, 273-275).

Discussion.

Under this specification it is shown that of the amount of $117.46 owed the company mess by boarders for the month of June, 1934, Lieutenant Klaiber collected the sum of $83.16 and turned this amount over to accused. Accused made no entry of the receipt of this money in his council book and did not otherwise account for it. He admitted that he was "short""the collections from boarders for the month of June".

The Board of Review is of the opinion that the evidence under this specification is legally sufficient to support a finding of guilty of the embezzlement of $83.16 only, in the manner and at the time and place alleged.

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

Specification 1: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-71, and as such official custodian of the said company fund thereof, did, at or near Milan, Indiana, on or about January 31, 1934, with intent to deceive First Lieutenant Elvin H. Burger, 11th Infantry, District Inspector, Eastern District, C.C.C., W.C. of Indiana, who had been detailed to audit the company fund of the said company, officially make and sign the following certificate

in the company council book of the said company after the account of the said company fund for the month of January 1934:

"I certify that the foregoing account for the month of January 1934, is correct, and that of the amount for which I am responsible Six hundred and thirty eight and 49/100 (638.49) is deposited with the First State Bank, Huntington, Indiana, to the credit of the Co. Fund, CO. 1532, CCC, and One hundred ninety four and 09/100 ($194.09) is deposited with the Moores Hill State Bank to the credit of the Co. Fund, Co. 1532, CCC.

Julius S. Sperti
1st Lt. FA Res.
January 31, 1934 Commanding "

which certificate was false and known by the said First Lieutenant Julius S. Sperti to be false in that the said amount of ONE HUNDRED NINETY FOUR DOLLARS AND NINE CENTS, $194.09, was not deposited in the Moores Hill State Bank.

Finding: Not guilty.

Specification 2: In that First Lieutenant Julius S. Sperti, Field Artillery Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such, official custodian of the company fund thereof, did, at or near Camp PE-60, Huntington, Indiana, or or about June 30th, 1934, with intent to deceive Major Chapman Grant, 11th Infantry, District Commander, Northern District, C.C.C., W.C. of Indiana, a superiof officer who was required to audit the said company fund, present to the said Major Chapman Grant a duplicate deposit slip of the First State Bank of Huntington, Indiana, as evidence of the deposit of TWO HUNDRED FORTY DOLLARS AND THIRTY TWO CENTS, $240.32, to the credit of the said company fund, which said presentment was false and known by the said First Lieutenant Julius S. Sperti to be false,

in that the said sum of TWO HUNDRED FORTY DOLLARS AND THIRTY TWO CENTS, $240.32, as so evidenced, had not been deposited in the said First State Bank.

Finding: Not guilty.

16. CHARGE II:

Specification 3: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the said company fund thereof, did, at or near Camp PE-60, Huntington, Indiana, on or about June 30, 1934, with intent to deceive Major Chapman Grant, 11th Infantry, District Commander, Northern District, C.C.C., W.C. of Indiana, a superior officer, authorized to audit the said funds of the said company, officially make and sign the following certificate in the company council book of the said company after the account of the said fund for the month of June 1934:

"I certify that the foregoing account for the month of June 1934, is correct, and that of the amount for which I am responsible Six hundred thirty eight and 49/100 ($638.49) is deposited with the First State Bank, Huntington, Indiana, to the credit of the Company Fund, Co. 1532, CCC, and Two hundred eighty and 47/100 ($280.47) in cash, is in my personal possession.

Julius S. Sperti
1st Lt FA Res
June 30, 1934 Commanding"

which certificate was false and known by the said First Lieutenant Julius S. Sperti to be false in the following indicated particulars, to wit; Vouchers number 4, 5, 6, 7, 8, 10, 11 and 12 of said account showing expenditures respectively in the following indicated amounts $79.96, $62.00, $43.95, $75.15, $203.25, $23.76, $20.49 and $335.93 were not expenditures in fact in that checks drawn on the company funds in payments thereof were not paid because of insufficiency

of funds on deposit to the credit of said company fund for the payment of said checks, and that vouchers number 14 to 22, both inclusive, indicating expenditures respectively in the following indicated amounts $18.00, $24.00, $3.40, $71.56, $31.58, $36.36, $25.50, $32.31 and $14.24 were not in fact so paid, and further that the amounts indicated in the said certificate as being on deposit and as being in cash are materially less in fact in both respects than they should be.

Finding: Guilty except the words "and further that the amounts indicated in the said certificate as being on deposit and as being in cash are materially less in fact in both respects than they should be".

Evidence.

Major Chapman Grant, Infantry, testified that during the months of May and June, 1934, he was commanding officer of the Northern district of the CCC in Indiana. Accused was the company commander of the company at Huntington, Indiana. Witness signed the certificate of audit of the funds for the month of June, 1934, in the council book company fund, Company 1532 CCC, received in evidence as Exhibit 4 (R. 101-103). At the time of this audit he counted the cash and found it all there (R. 104). The amount was $280.47. He accepted accused's certificate as true and correct (R. 108). The evidence heretofore recited under the headings "All specifications" and "Specification 1, Charge I" is also applicable and should be considered under this specification.

Discussion.

This specification alleges in substance that the accused, with intent to deceive the auditor of the funds of his company, signed a false certificate in his council book for the month of June, 1934, in which he certified that the account was correct and that he had certain funds on deposit and in cash, well knowing that the certificate was false as to certain expenditure entries in the account, and that the amounts stated in the certificate as being on deposit and in cash were materially less than they should have been.

As has been stated in the discussion under Specification 1, Charge I, supra, while there is evidence that checks drawn to pay the bills represented by certain expenditure items in this June account were dishonored upon presentation, there is no competent evidence that the bills represented by these expenditure entries were not otherwise paid, and these entries must accordingly be accepted as valid in the absence of competent proof to the contrary. There is evidence that the amount of funds on hand at the time of the audit was then in the bank and on hand in cash as certified by accused.

The Board of Review is of opinion that the evidence is not legally sufficient to support the finding of guilty under this specification.

17. CHARGE II:

Specification 4: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-71, and as such official custodian of the company fund thereof, did, at Milan, Indiana, on or about April 4, 1934, with intent to defraud, wrongfully and unlawfully procure the officials of the State Bank of Milan, Milan, Indiana, innocently or otherwise, to submit a bank statement for the month of March 1934, covering the account of the said company fund for the month of March 1934, and did record and present as a true and correct statement of said account, which statement of account was false and known by the said First Lieutenant Julius S. Sperti to be false in that the said statement, as so prepared, recorded and presented, was not in accord with the correct account of the said company fund as shown on the official ledger of the said State Bank of Milan, Milan, Indiana.

Finding: Guilty.

Evidence.

Major Howard Donnelly, 11th Infantry, testified that he was the commanding officer, eastern district, CCC, Indiana (R. 108) during April and May, 1934. During that time accused commanded

Company 1532, Milan, Indiana, one of the companies of the eastern district under witness' command. Witness audited the funds for the month of March, 1934, in the council book company fund, Company 1532, CCC (Ex. 4). The balance of $638.49 on deposit with the First State Bank of Huntington, Indiana, was not verified by witness (R. 109) since this bank was in the northern part of the state and closed. The amount of $61.67 was checked by him against the bank statement in the file of vouchers. The certificate in the council book for the month of March, 1934, showing the balance in the bank, is signed by accused as of March 31, 1934. In this he certified that the foregoing account for the month of March is correct and that of the amount for which he is responsible $638.49 is deposited with the First State Bank, Huntington, Indiana, to the credit of the company fund, Company 1532, CCC, and $61.67 is deposited with the State Bank of Milan, Indiana (Ex. 4) (R. 110). Accused was present at the time witness made this audit. Witness accepted the bank statement for $61.67 as evidence of deposit in the State Bank of Milan, Indiana. He identified a document presented to him as the statement from the bank he had on hand at the time of the audit and it was received in evidence as prosecution's exhibit No. 8 (R. 111). The statement shows a balance of $353.12 in the bank. Five outstanding checks to the total of $291.45 are listed on the statement, leaving an actual balance of $61.67, which corresponds with the balance shown in the fund book. (R. 112). Witness did not go to the bank and verify the account there. He had no reason to believe, either from the voucher or past experience with accused, that there were any irregularities in his conduct (R. 113).

Mr. William H. Call, assistant cashier of the State Bank of Milan (R. 190) testified that he had the ledger sheets of his bank in his charge. He produced and identified the original ledger sheet of "company fund Company 1532, CCC, Julius S. Sperti" which was received in evidence as prosecution's exhibit No. 38, and a true copy later substituted (R. 192-193). Witness testified that he had seen prosecution's Exhibit No. 8 before, and that "it appears to be the statement issued to company fund, Company 1532, CCC, as of April 1, 1934" but does not "compare identically with the ledger card." The balance shown on hand as of April 1, 1934, does not correspond with the balance shown on hand on the official ledger sheet (see Ex. 38). The statement sheet (Ex. 8) as of April 1, 1934, shows a balance of $353.12, and the ledger sheet (Ex. 38) as of April 1, 1934, shows an overdraft of $32.54. Witness admitted that it was not customary for a

bank statement to show a different balance than that of the official ledger sheet (R. 195). Upon being asked to state how it happened that the bank statement differed from the original ledger sheet he testified that accused stated to him that he had impounded funds in the Huntington Bank and was applying his personal funds to the company's account until such a time as funds at Huntington might be released, or until such a time as he might be reimbursed from the United States Treasury, and that the transactions made from time to time were not in order but he wanted a statement made up as it should be made so that he might retain "them" for his file for future reference (R. 196). Witness made up this false and incorrect bank statement received in evidence as "Exhibit 8" (R. 202).

Discussion.

It is convenient at this point to consider the following motion made by the defense before pleading to the general issue (R. 30):

> "Defense: The accused desires to make a motion to strike out Specifications 4, 5, 6, and 7 of Charge II, because these specifications are general in their wording and do not specify the documents alleged to have been presented. They are defective in their wording and do not correctly apprise the accused of the offenses of which he is being charged, per paragraph 71-c, page 56 of the Manual for Courts-Martial. Also because specifications 4 and 6 describe the same transaction arising from the same act, and in fact are duplicate specifications, per paragraph 27, page 17 of the Manual for Courts-Martial.
>
> Similarly Specifications 5 and 7 are the same transaction."

Certain of the objections raised by the motion are, on their face, without merit. Among these are the complaints that the documents alleged to have been presented are not definitely enough specified, and that certain of the specifications are duplicates of others. Each one of the four specifications covered by the motion mentions a different document from the others. However, for reasons which will be pointed out later, the objection that the specifications are indefinite and "do not clearly apprise the accused of the offenses of which he is being charged" has merit.

These specifications appear also to be objectionable on another ground not mentioned by defense counsel, namely, that they are multifarious. Specification 4 is quoted above. When analyzed grammatically, it will be seen that the sentence which constitutes this specification contains three verbs in the principal clause: (a) "procure", (b) "record", and (c) "present", all connected by the conjunction "and". In other words, accused is charged in a single specification with doing three things, as follows:

a. That accused, being at the time custodian of the company fund for Company 1532, CCC, did, with intent to defraud, wrongfully and unlawfully procure the officials of the State Bank of Milan, Indiana, to submit a bank statement for March, 1934, of the account of said company fund, which statement was false and was known by accused to be false.

b. That accused, being custodian of the company fund as aforesaid, did, with intent to defraud, record as a true and correct statement of the account of the company fund in said bank a statement which was false and which he knew to be false.

c. That accused, being custodian of the company fund as aforesaid, did, with intent to defraud, present as a true and correct statement of the account of the company fund in said bank, a statement which was false and which he knew to be false.

Deferring for the moment consideration of the objection of multifariousness, the Board takes up in turn the three parts of the specification just mentioned. Let a first be considered. Perhaps it might not constitute an offense under the Articles of War for an officer who is a depositor in a bank to procure from the officials of the bank a false statement of his private account. It is very doubtful, however, if this is so with respect to an account which an officer has in a bank in an official capacity. As to such an account it is clearly his duty to see that all records state the truth. However, any doubts whether such action might be an offense are resolved against the present accused when there are taken into account the further allegations in the specification that he procured the officials of the bank to take this action "wrongfully" and "unlawfully", and "with intent to defraud". We may suppose a case where an officer for the purpose of concealing an embezzlement procured from the officials of the bank where his company fund account was carried a false statement thereof, but was discovered and relieved from duty

before he had had an opportunity to make any use of it. The Board would consider his action in thus obtaining the false statement a military offense. The Board is therefore of opinion that that part of Specification 4 which it has called a states an offense.

The next question presented is whether the offense so stated is a violation of the 95th Article of War. Procuring a false paper with intent to defraud is clearly un-officer-like and ungentlemanly behavior, and the Board therefore answers the question in the affirmative.

The Board is further of opinion that the evidence supports the finding of guilty of so much of Specification 4 as it has called a. Accused procured from Mr. Call, assistant cashier of the State Bank of Milan, a bank statement which Mr. Call testified did not correspond with the ledger sheet, and which showed a substantial balance instead of an overdraft. Taken in connection with all the other evidence in the record showing financial irregularities and shortages, there can be no doubt that the statement was obtained with intent to defraud.

In that part of the specification which the Board has called b, it is alleged that accused recorded a false statement. The verb "record" ordinarily means to make a copy in some book of an official character, as is done by a recorder of deeds, register of wills, or clerk of a court. Vidor v. Rawlins, 93 Texas 259, 54 S.W. 1026; State v. Cole, 106 W. Va. 611, 146 S.E. 719; Cody v. Purser, 131 Cal. 552, 63 Pac. 844,846; Dougery v. Bettencourt, 214 Cal. 455, 6 Pac.2d 499, 502. It is, however, incumbent upon the pleader, in the judgment of the Board, to state where and under what circumstances the record was made. The specification is silent in this respect. Even if the omission might be passed if no objection had been made, it cannot be when the defense counsel made proper and timely objection on the ground of indefiniteness. Whether the mere placing of a paper, such as this bank statement, in the files of the company can be considered a recording of it is doubtful; but if that is what the pleader had in mind he should have said so. Furthermore, there is in the record no evidence that accused did in fact record the false statement, so that the conviction of this part of the specification is bad in two respects. In the first place, the specification is fatally defective in failing to state an offense with sufficient definiteness, and in the second place the evidence is legally insufficient to support the allegations.

In that part of the specification which the Board has called c, it is alleged that accused presented a false bank statement. The verb "present", as used in a statute with respect to an application for suspension of sentence, has been judicially defined as meaning "to lay before a judge, magistrate, or governing body for action or consideration; submit, as a petition, remonstrance, etc., for a decision or settlement to the proper authorities." Moses v. State, 94 Tex. Cr. 433, 251 S.W. 219,220; Haynes v. State, 108 Tex. Cr. 62, 299 S.W. 234, 235; Noble v. State, 112 Tex. Cr. 541, 17 S.W. 2d 1063, 1064. In other cases, the same verb has been defined, with reference to a bill of exceptions, as meaning to exhibit formally. Cameron v. North Birmingham Trust & Savings Bank, 17 Ala. App. 210, 84 So. 569; Harbaugh v. Lassen Irrigation Co., 24 Cal. App. 773, 142 Pac. 847, 849. In the Cameron case the court said:

> "It will be observed that the language of the statute is: 'Bills of exceptions may be presented', etc. All of the definitions given of the word 'presentation' indicate something more than a mere delivery, or the placing in the legal possession of the presentee of the thing presented. Standard Dict. There must not only be a delivery, but in addition thereto a formal exhibition of the thing presented, so that, with full knowledge, it may be accepted or rejected. This is held to be so in the presentation of accounts against estates, Ellison v. Lindsley 33 N.J. Eq. 260; also in the service of process, May v. Rice, 108 Mass. 150, 11 Am. Rep. 328; Reg. v. Leominster, 2 B. & S. 391."

It may be that the pleader intended to charge that accused laid the false statement before or formally exhibited it to the officer auditing his accounts, much as a defendant might lay an application for suspended sentence or a bill or exceptions before or formally exhibit it to a judge. But the pleader does not say so. He fails to state to whom the false statement was presented or formally exhibited. In the somewhat similar case of uttering a forged document, it is always required that it be alleged to whom the paper was uttered, and either an indictment or specification which failed to do so would be fatally defective. Even if the omission might be passed over if no objection had been made, it cannot be when the defense objects to the specification on the ground of indefiniteness.

Furthermore, the Board can find in the evidence no proof that accused did present this false statement to anyone. Major Donnelly refers to the statement in question as "the statement from the bank that I had on hand at the time of the audit" (R. 111). This falls far short of evidence that accused presented the statement to Major Donnelly, nor does any such evidence appear elsewhere in the record. It is therefore the opinion of the Board that the conviction of part c of this specification must fail for two reasons; first, because the specification is fatally defective for indefiniteness; and second, because the evidence is legally insufficient to support the allegations.

The Board next passes to the question whether the multifarious character of the specification under consideration is a fatal objection to its validity. The Board does not regard the circumstance that defense counsel failed to base his motion to dismiss on the ground of multifariousness a sufficient reason to throw that objection out of consideration, but the fact that a specification is multifarious is not of itself a sufficient reason for setting aside a finding of guilty. The 37th Article of War clearly applies to such a situation as the present. The questions which must be answered, are: Did the multifarious character of this specification injure the substantial rights of accused? Did it prevent him from, or hinder him in, presenting his side of the case?

If the foregoing questions be answered in the affirmative, the conviction of the specification must fail entirely, notwithstanding that, as has been shown, part of the specification states an offense and is supported by the evidence. The Board is of opinion that that part of the specification which it has called a, alleging the wrongful procuring of a false statement from the bank officers with intent to defraud, was sufficiently definite and clear in its language to inform accused with what he was charged, and that the indefinite language of b and c did not prevent him from finding out from the specification the nature of the offense charged under a. It does not see that any prejudice or harm was caused accused in the preparation of his defense by the fact that in addition to the sufficiently definite language with respect to a the specification also contained other allegations very indefinitely stated. It therefore is of opinion that the objection of multifariousness, though valid, is not fatal, since the substantial rights of accused were not injuriously affected.

The Board concludes that the record is legally sufficient to support only so much of the finding of guilty of Specification 4,

Charge II, as involves a finding that accused did, at the time and place and under the circumstances alleged, with intent to defraud, wrongfully procure the officials of the State Bank of Milan, Indiana, to submit a bank statement covering the account of the company fund of Company 1532, CCC, for March, 1934, which statement of account was false and known by accused to be false, in that the said statement, as so prepared, was not in accord with the correct account of the said company fund as shown on the official ledger of said bank.

18. CHARGE II;

Specification 5: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-71, and as such official custodian of the company fund thereof, did, at Milan, Indiana, on or about May 9, 1934, with intent to defraud, wrongfully and unlawfully procure the officials of the State Bank of Milan, Milan, Indiana, innocently or otherwise, to submit a bank statement for the month of April 1934 covering the account of the said company fund for the month of April 1934, and did record and present as a true and correct statement of said account, which statement of account was false and known by the said First Lieutenant Julius S. Sperti to be false in that the said statement, as so prepared, recorded and presented, was not in accord with the correct account of said company fund as shown on the official ledger of the said State Bank of Milan, Milan, Indiana.

Finding: Guilty.

Evidence.

Major Howard Donnelly, 11th Infantry, testified that he audited the funds of Company 1532, CCC, for the month of April, 1934. The certificate in the council book of this company is signed by accused as of April 30, 1934, and certifies that the foregoing account for the month of April is correct, and that of the amount for which he is responsible $638.49 is deposited with the First State Bank, Huntington, Indiana, to the credit of the company fund, Company

1532 CCC, and $7.76, in cash, is in his personal possession, and $201.29 is deposited with the State Bank of Milan, Indiana. The amount shown on deposit in the State Bank of Milan, Indiana, was verified by comparing it with the bank statement for that month (R. 114). Accused was present at the audit of this fund. Witness identified a document as the bank statement that was with the vouchers at the time of the audit and it was received in evidence as prosecution's Exhibit No. 9. Witness further testified that this statement shows a balance of $291.79. Outstanding checks totaling $90.50 are listed, leaving an actual balance of $201.29, which agrees with the certificate in the fund book. He accepted that statement as being true and correct (R. 115-116).

Mr. William H. Call, assistant cashier of the State Bank of Milan (R. 190) testified that he had seen Exhibit No. 9 before and that it appears to be the statement issued to this company (Company 1532 CCC) as of May 1, 1934. The balance shown is $291.79, as of May 1, 1934. Witness was then asked to refer to his ledger sheet, Exhibit No. 38, and to state the balance there shown on hand on May 1, 1934. He replied that it was $155.01. (Note; The ledger sheet, Ex. 38, actually shows $165.01). Upon being asked to state to the court how it happened that the ledger sheet differed as to balance from the bank statement furnished to Company 1532, CCC, he replied that it was stated to him by accused that the latter's funds were still impounded in the Huntington Bank and as yet had not been released, that these transactions were not in order due to this irregular item, and that accused asked that the transactions on the statement be shown as in order "for his file and reference" (R. 196-197). Witness made up the false and incorrect bank statement received in evidence as "Exhibit 9" (R. 202).

Discussion.

For the reasons stated in discussing the preceding specification, the Board of Review is of opinion that Specification 5, Charge II, is, as a matter of pleading, good in part only, i.e., in alleging the wrongful procurement, with intent to defraud, of a false bank statement.

The evidence shows clearly that at the request of accused the assistant cashier of the State Bank of Milan prepared and delivered to him a fictitious statement of the account of the

company fund for April, 1934, showing a balance on hand of $291.79, whereas the true balance was $165.01. The inference is justified that this was done with intent to defraud.

The Board concludes that the record is legally sufficient to support only so much of the finding of guilty of Specification 5, Charge II, as involves a finding that accused did, at the time and place and under the circumstances alleged, with intent to defraud, wrongfully procure the officials of the State Bank of Milan, Indiana, to submit a bank statement covering the account of the company fund of Company 1532, CCC, for April, 1934, which statement of account was false and known by accused to be false, in that the said statement, as so prepared, was not in accord with the correct account of the said company fund as shown on the official ledger of said bank.

19. CHARGE II:

Specification 6: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-71, and as such offical custodian of the company fund thereof, did, at Milan, Indiana, between March 2, 1934 and March 10, 1934, or thereabouts, with intent to defraud, wrongfully and unlawfully procure the officials of the State Bank of Milan, Milan, Indiana, innocently or otherwise, to prepare a deposit book covering the account of the said company fund for the month of March 1934, and did present the same as a true and correct deposit book of said account, which deposit book was false and known by the said First Lieutenant Julius S. Sperti to be false in that the said deposit book, as so prepared and presented, was not in accord with the correct account of the said company fund as shown on the official ledger of the said State Bank of Milan, Milan, Indiana.

Finding: Not guilty.

20. CHARGE II:

Specification 7: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-71, and as such official custodian of the company fund thereof, did, at Milan, Indiana, between March 4, 1934 and May 12, 1934, or thereabouts, with intent to defraud, wrongfully and unlawfully procure the officials of the State Bank of Milan, Milan, Indiana, innocently or otherwise, to prepare a deposit book covering the account of the said company fund for the months of March, April and May 1934, and did present the same as a true and correct deposit book of said account, which deposit book was false and known by the said First Lieutenent Julius S. Sperti to be false in that the said deposit book, as so prepared and presented, was not in accord with the correct account of said company fund as shown on the official ledger of the said State Bank of Milan, Milan, Indiana.

Finding: Guilty.

Evidence.

Major Howard Donnelly, 11th Infantry, testified, as noted above, that he audited the funds of Company 1532, C.C.C. for the months of March and April, 1934(R. 109,114). He was handed two documents and testified that he had seen both of them before, and that they were deposit books of Company 1532 with the State Bank of Milan, Indiana. The book with the "X" in pencil in the inside cover was the deposit book he had used at the audit, while the deposit book with the "XX" in pencil on the inside cover was not present at any audit nor seen by him in connection with an audit. The book marked "X" was received in evidence as prosecution's Exhibit No. 10. Witness testified that the first time he saw this deposit book was at the audit as of March 31 (1934) at some time in the first part of April, 1934 (R. 118). He did not "recollect" but he should have seen it and looked at it at the audit as of April 30 (1934) at some time in the first part of May. He accepted it as a true and correct deposit book of Company 1532 (R. 119).

Mr. William H. Call, assistant cashier of the State Bank of Milan (R. 190) upon being handed prosecution's Exhibit No. 10 testified that he recognized it as the pass book issued by the State Bank of Milan to company fund, Company 1532, CCC (R. 198). He made out this pass book and the entries in it were made in accordance with the instructions of accused. They are deposits as shown on the statement from time to time up to May 12, 1934. With the exception of two or three entries they do not correspond with those deposits as shown on the official ledger sheet of the bank. They do not correspond with the deposits on the ledger sheet because these deposits were put on this book as they were in order to correspond with the deposits put on the statements issued to company fund, Company 1532, CCC, and they are not a true and correct statement of the deposits made by Company 1532, CCC (R.199). Witness was handed a document which he identified as appearing to be a pass book given to company fund, Company 1532, CCC when the original deposit was made March 2, 1934, of $638.79. The writing in this book was that of witness but he had no recollection of giving that pass book (R. 197). This book was received in evidence as prosecution's Exhibit No. 39. (This book is marked with a penciled "XX" on the inside cover and appears to be the one mentioned in Major Donnelly's testimony summarized above). Witness testified that the deposit of March 2, 1934, in Exhibit 39 corresponds with the one in the ledger card, with the exception of an erasure, and that the deposit on March 7, for $1,278.37 in Exhibit 39 corresponds with the ledger card, but that the balance of the deposits shown on the pass book (Ex. 39) do not. He did not enter all the deposits shown there, and the initials were not to his knowledge those of anyone connected with the State Bank of Milan (R. 198). It is not customary for one account to have two deposit books. Witness made out the second deposit book (Ex. 10) because accused told him that the original pass book had been misplaced or lost and asked him to furnish one in its stead to correspond with the credit entries made on the statement sheet for the months of March and April (see Exhibits 8 and 9) (R. 200).

Discussion.

For the reasons stated in discussing Specification 4, Charge II, no offense is either stated or proved with respect to the latter part of the present specification, alleging presentation

of a false deposit book. The first part of the specification, alleging the wrongful procurement of a false deposit book with intent to defraud, does state an offense. The Board further thinks that the evidence supports that part of the specification, as it is proved that the assistant cashier of the State Bank of Milan, at the request of accused, prepared and delivered to him a pass book showing fictitious deposits agreeing with the false statements mentioned in Specifications 4 and 5, Charge II. The inference of an intent to defraud is clearly justified.

The Board concludes that the record is legally sufficient to support only so much of the finding of guilty of Specification 7, Charge II, as involves a finding that accused did, at the time and place and under the circumstances alleged, with intent to defraud, wrongfully procure the officials of the State Bank of Milan, Indiana, to prepare a deposit book covering the account of the company fund of Company 1532, CCC, for March, April, and May, 1934, which deposit book was false and known by accused to be false, in that the said deposit book, as so prepared, was not in accord with the correct account of the said company fund as shown on the official ledger of said bank.

21. CHARGE II:

Specification 8: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, did, at Milan, Indiana, on or about February 28, 1934, with intent to defraud, wrongfully and unlawfully make, draw, utter and deliver to the State Bank of Milan, Milan, Indiana, a certain check in words and figures substantially as follows, to wit:

Fort Wayne, Ind. Feb. 28 1934 No--

LINCOLN NATIONAL BANK AND TRUST COMPANY 71 - 27

Pay to the order of Cash $80.00

Eighty no/100 Dollars

(Signed) Julius S. Sperti

and by means thereof did fraudulently obtain from the said State Bank of Milan the sum of about EIGHTY DOLLARS, $80.00, he the said

First Lieutenant Julius S. Sperti well knowing that he did not have and not intending that he should have sufficient funds in the said Lincoln National Bank and Trust Co., Fort Wayne, Indiana, for the payment of said check.

Finding: Guilty.

Evidence.

Mr. Clifton Wefel, chief clerk, Lincoln National Bank and Trust Company (R. 180), Fort Wayne, Indiana, testified that he is the custodian of the ledger sheets of this bank and had charge of the ledger sheet for the account of accused which he had with him. The sheet is headed "Julius S. Sperti, Huntington, Indiana." The document was received in evidence as prosecution's Exhibit No. 33 and a true copy thereof later substituted therefor (R. 181). Witness identified a document handed to him as a check drawn on his bank signed "Julius S. Sperti" for $80.00, payable to cash, and dated February 28, 1934. The check was received in evidence as prosecution's Exhibit No. 35. This check was presented to the bank for payment but was not paid (R. 183). It was "returned for insufficient funds" (R. 184). Accused's personal balance on February 28, 1934 was 56 cents and was never more at any time thereafter until the account was closed April 20, 1934 (R. 187, Ex. 33).

Mr. William H. Call, assistant cashier, State Bank of Milan, testified that he had seen before the check of February 28, 1934 for $80.00, signed by accused, Exhibit No. 35 (R. 190), when it was presented by accused to the State Bank of Milan to be cashed. It was cleared in the usual manner until it went to the paying bank, where it was refused and protested on account of insufficient funds. It was returned unpaid to the State Bank of Milan and charged to the account of the company fund, Company 1532, CCC (R. 191).

Discussion.

The accused is properly chargeable with knowledge as to the status of his bank account. The evidence supports the finding of guilty.

22. CHARGE II:

Specification 9: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, did, at Osgood, Indiana, on or about June 3, 1934, with intent to defraud, wrongfully and unlawfully make, draw, utter and deliver to A.M. Cline, a certain check in words and figures substantially as follows, to wit:

Fort Wayne, Ind. June 3, 1934 No--

LINCOLN NATIONAL BANK AND TRUST COMPANY

Pay to the order of A.M. Cline $42.83

Forty two and 83/100 Dollars

(Signed) Julius S. Sperti

and by means thereof did fraudulently obtain from the said A.M. Cline the sum of about FORTY-TWO DOLLARS AND EIGHTY THREE CENTS, $42.83, he the said First Lieutenant Julius S. Sperti well knowing that he did not have and not intending that he should have sufficient funds in the Lincoln National Bank and Trust Company, Fort Wayne, Indiana, for the payment of said check.

Finding: Guilty.

Evidence.

It was stipulated and agreed between the prosecution and defense and the accused that if A. M. Cline, of Osgood, Indiana, were present in court and sworn as a witness he would testify in substance that on or about June 3, 1934, he cashed a check for accused; that this check was for $42.83, dated June 3, 1934, drawn on the Lincoln National Bank and Trust Company, Fort Wayne, Indiana, payable to A. M. Cline, and signed "Julius S. Sperti"; that he (Cline) cashed the check in the regular course of business but that it was returned unpaid; and that he would recognize and identify the paper marked "Prosecution's Exhibit 29" as this check. The check was thereupon received in evidence as prosecution's Exhibit No. 29 (R. 157-159).

Mr. Clifton Wefel, chief clerk, Lincoln National Bank and Trust Company, testified that Exhibit No. 29 was presented for payment but was not paid by his bank because the account was closed (R. 184). This account was closed on April 20, 1934 (Ex. 33).

Discussion.

The facts are so clear that no discussion of them is necessary. The evidence supports the finding of guilty.

23. CHARGE II:

Specification 10: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, did, at Huntington, Indiana, on or about July 11, 1934, with intent to defraud, wrongfully and unlawfully make, draw, utter and deliver to First Lieutenant John A. Klaiber, Field Artillery, Reserve, a certain check in words and figures substantially as follows, to wit:

Warren, Indiana. July 11, 1934.

THE EXCHANGE BANK

Pay to the order of Minnie Klaiber $50.00

--- Fifty and no/100 --- Dollars

For------ (Signed) Julius S. Sperti.

and by means thereof did fraudulently obtain from the said First Lieutenant John A. Klaiber the sum of FIFTY DOLLARS, $50.00, he the said First Lieutenant Julius S. Sperti well knowing that he did not have and not intending that he should have any funds in the Exchange Bank, Warren, Indiana, for the payment of said check.

Finding: Guilty except the words "and by means thereof did fraudulently obtain from the said First Lieutenant John A. Klaiber the sum of Fifty Dollars, $50.00".

Evidence.

First Lieutenant John A. Klaiber testified that a document handed to him was a check drawn on the Exchange Bank of Warren, Indiana (R. 220) to the order of Minnie Klaiber for $50.00, dated July 11, 1934, and signed "Julius S. Sperti". The check was thereupon received in evidence and marked "Prosecution's Exhibit No. 44". Witness ordinarily sent his mother a check at the beginning of each month to take care of household expenses, and, since he did not have a checking account, asked accused to give him a check for this amount, which accused did. Witness gave accused nothing in return for this check at that particular time, but it was in partial payment of an account that they had carried between them (R. 221). Witness sent the check to his mother by mail. He saw it again when it was returned to the bank at Warren (R. 222).

It was stipulated and agreed between the prosecution and defense and the accused that if Minnie Klaiber, of Indianapolis, Indiana, were present in court and sworn as a witness she would testify in substance that on or about July 12, 1934, she received through the mail from her son, Lieutenant John Klaiber, a check dated July 11, 1934, drawn on the Exchange Bank, Warren, Indiana, for $50.00, payable to Minnie Klaiber, and signed "Julius S. Sperti"; that she cashed this check but it was returned to her unpaid; and that she would recognize and identify prosecution's exhibit 44 as the check she so received (R. 230).

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana (R. 244) testified that he had seen Exhibit 44 before and that it was presented for payment through the mail and payment refused because there was no such account. They had never had an account known as "Julius S. Sperti" in the Exchange Bank of Warren, Indiana. (R. 248).

Discussion.

It is probable that the court made the modified finding stated above because Lieutenant Klaiber testified that he gave nothing in return at that particular time for the check given him by accused, that it was just a partial payment on an account that they carried between them (R. 221).

The questions are presented whether the specification as modified by the court states an offense, whether it was proved, and whether the offense stated and proved is a violation of the 95th Article of War. CM 122525, Newell, Dig. Ops. JAG, 1912-30, sec. 1475 (3), may be cited as tending to show that no offense is here stated, since it is not alleged that the check was given for value. In that case the specification, charged as a violation of the 95th Article of War, was as follows:

> "In that 2nd Lt. Raymond Newell, did, at Camp Jackson, S.C., on the 15th day of October, 1918, make, and issue a check on the Malden Trust Company of Malden, Massachusetts, in the sum of seventy-five dollars ($75.00) well knowing at the time that he had no checking account in that Trust Company."

The Board said in its review concerning the above specification:

> "This specification does not allege that the check given by accused was given for value, nor that accused in giving the check, had any intent to deceive or defraud, nor does it contain any other allegation essential to the statement of an offense under the 95th Article of War."

The above quotation mentions the omission of an allegation that the check was given for value, and also mentions two other omissions, namely, of an allegation of intent to deceive or defraud and of any other allegation essential to the 95th Article of War. Apparently the writers of the above review would have considered the presence of any one of the three allegations which they mention as sufficient to make the specification a valid statement of an offense. In the present case it is true that we have neither allegation nor proof that the check was given for value, but we have an allegation that the check was given "with intent to defraud", and the further allegation that it was given "wrongfully and unlawfully". When we turn from pleading to evidence, the review in the Newell case says that there was proof that accused, though he had no checking account in the Malden Trust Company at the time that he drew the check, had other funds available and had telegraphed his wife to make arrangements to meet the check.

The review says that "the evidence shows that no offense was committed". The above case is quite different from the present, since the present accused had no other funds available and made no effort to meet this check. The Board is therefore of opinion that the Newell case is distinguishable from the present.

In M.C.M., Appendix 4, Form 114, the approved specification for drawing a bad check, the following words are printed in brackets: "and by means thereof, did fraudulently obtain from _____ $_____", thereby indicating that in the opinion of the authors of the Manual the above words are not indispensable to the validity of the specification.

Apart from precedent and the Manual, the Board is of opinion that the view that no offense is committed in passing a bad check unless value be received for it is too strict and would cause unfortunate consequences. A check given in payment of a pre-existing debt or a gambling debt, a check given as a charitable contribution or as a gift, are all given without valuable consideration in the eye of the law; yet the giving of a bad check by an officer under any of the above circumstances would clearly be discreditable to the military service and would in many cases be conduct unbecoming an officer and a gentleman. The Board and The Judge Advocate General have in many cases passed convictions of giving bad checks in payment of pre-existing debts. Among such are CM 195513, Crose, and CM 199918, Safford. It is further to be noted that the checks mentioned in Specifications 2, 3, 4, and 7, Charge III, of the present case, were all in payment of preexisting debts.

The Board therefore concludes that the specification as modified states an offense.

That the evidence proves the offense charged is so clear as not to require discussion.

The next question is whether the offense alleged and proved constituted conduct unbecoming an officer and a gentleman in violation of the 95th Article of War. The Manual for Courts-Martial, paragraph 151, page 186, in a discussion of this Article of War gives among other instances of violations, "giving a check on a bank where he knows or reasonably should know there are no funds to meet it." If this example be literally construed,

it is not necessary to prove that any one has suffered financial loss by reason of a bad check in order to make the specification good under the 95th Article of War.

In the instant case the circumstances under which the bad check was given were particularly aggravated. The accused knew that the check was intended for Lieutenant Klaiber's mother, and he must have known that to have it returned without payment would cause both Lieutenant Klaiber and his mother great inconvenience and embarrassment. Lieutenant Klaiber and accused were officers of the same company, who should have been brothers in arms. Between officers so closely associated it is necessary, for the proper performance of their duties and the proper functioning of the company, that there should be the utmost frankness and good faith. Between two officers so situated double dealing and deceit are especially to be reprobated, even though no pecuniary loss be involved. The Board therefore concludes that the offense alleged and proved constituted an offense in violation of the 95th Article of War.

The Board is of opinion that the record supports the finding of guilty of Specification 10, Charge II, as modified by the court.

24. CHARGE II:

Specification 11: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company fund thereof, did, at or near Huntington, Indiana, on or about June 25, 1934, with intent to defraud, wrongfully and unlawfully make, draw, utter and deliver to Mr. Cleo G. Geyer, part owner of the Purity Dairies, Huntington, Indiana, a check in words and figures substantially as follows, to wit:

HUNTINGTON, IND., June 25, 1934 No.--

FIRST STATE BANK

Pay to the order of Cash $100.00

- - - One Hundred and No/100 Dollars

For Co. Fund Co. 1532 C.C.C.
(Sgd) Julius S. Sperti

> and by means thereof did fraudulently obtain from the said Mr. Cleo G. Geyer the sum of about ONE HUNDRED DOLLARS, $100.00, he the said First Lieutenant Julius S. Sperti then well knowing that he did not have and not intending that he should have sufficient funds on deposit in the said First State Bank of Huntington, Indiana, to the credit of the said company fund for the payment of said check.

Finding: Guilty.

Evidence.

It was stipulated and agreed between the prosecution and defense and accused that if C. G. Geyer of the Purity Dairies, Huntington, Indiana, were present in court and sworn as a witness he would testify in substance as follows: That on or about June 25, 1934, accused came into the office of the Purity Dairies and asked him (C.G. Geyer) to cash a check for him (accused), that he needed the money for company bills; that witness gave accused $100.00 in cash in return for a check for $100.00; that he recognizes and identifies the document before him as a check dated June 25, 1934, drawn on the First State Bank of Huntington, Indiana, payable to cash, and signed "Co. Fund,Co. 1532 C.C.C., Julius S. Sperti" as the same check that he received from accused on June 25, 1934, for which he gave accused $100.00 in cash; and that he has attempted to cash this check at the First State Bank of Huntington, Indiana, on several occasions since June 25, 1934, but that payment was refused on it. The check was thereupon received in evidence and marked "Prosecution's Exhibit No. 11" (R. 140-141).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington, Indiana (R. 159), testified that as cashier of this bank he is the official custodian of the records therein. He identified Exhibit 11 as a check for $100.00 drawn on an account of the bank and signed by "Company fund No. 1532 CCC Julius S. Sperti", but could not say that he had ever seen it before (R. 160). During the month of June, 1934, accused was authorized to sign checks for Company 1532 CCC. Witness had with him the official ledger sheet of this account which showed a balance of $5.30 on hand on June 25, 1934 (R. 161).

The ledger sheet was received in evidence as prosecution's Exhibit No. 30, and a true copy substituted therefor (R. 162). Witness further testified that if the check, Exhibit No. 11, had been presented for payment on the day it was drawn it would not have been honored because there were not sufficient funds. Company 1532, CCC, besides this account, had a restricted account with the First State Bank which was impounded on September 23, 1933. Since that date witness had never informed accused that this fund was released nor had he given any official of the bank authority to so inform him (R. 161-163). Accused admitted that he was short "the $100.00 to Purity Dairies" (R. 86,274), referring presumably to the transaction now under consideration.

Discussion.

Under this specification it is shown that accused on or about June 25, 1934 gave C. G. Geyer a check for $100.00 drawn on the account of the company fund, Company 1532, CCC, in the First State Bank of Huntington, Indiana, and received in return $100.00 in cash. Since receiving the check Mr. Geyer on several occasions had presented the check at the bank upon which it was drawn but payment had been refused on it. The official bank ledger sheet of this company fund account in this bank shows a balance on hand on June 25, 1934 of but $5.30, which remained unchanged until withdrawn on August 1, 1934. There is no showing that accused had any arrangement with the bank for the payment of this check when presented. The restricted fund was not available for the payment of it.

The evidence is considered legally sufficient to support the finding of guilty.

25. CHARGE II:

Specification 12: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, having on or about May 21, 1934, become indebted to the State Bank of Milan, Milan, Indiana, in the sum of about TWO HUNDRED AND FIFTY DOLLARS, $250.00, for a loan, and having failed without due cause to liquidate said indebtedness, and having on or about June 5, 1934, promised in writing to said State Bank of Milan that he would on or about June 15, 1934, settle such indebtedness in full,did, without due cause, at Milan, Indiana, on or about June 15, 1934, dishonorably fail to keep said promise.

Finding: Guilty.

Evidence.

Mr. Elmer Laws, cashier of the State Bank of Milan, Indiana, (R. 205) testified that accused came in on the morning of May 21, 1934, and asked witness if he could borrow $250.00. Accused said that the camp was leaving town and that he had some bills he wanted to meet and would need funds for about ten days, and that he would be able to reimburse witness when he got his check from the Government after the camp moved to Huntington. Accused turned over his "adjusted compensation certificate" as collateral. The loan was to run for ten days but was never paid. Witness went to Huntington on or about June 5, and saw accused who paid the interest on the note and said he would have the money within a very few days. At the suggestion of witness accused then renewed the note for ten days (R. 206). Witness produced the note signed by accused for $250.00, dated June 5, 1934, payable to the State Bank of Milan. It was received in evidence as prosecution's Exhibit No. 40, and a true copy later substituted for it. This note had never been paid(R. 207). Witness saw accused when he was in the hospital and asked him if he could not pay the note or make a proper assignment of his compensation certificate. Accused said he could not pay it then but would gladly "sign his compensation certificate over" to witness, which he did. This collateral is insufficient, since it is only worth 50% of its face value of $346.00. The loan was a matter of ordinary banking routine. The security is inadequate but witness "figured" that accused was a gentleman since he always acted as such around Milan and his family lived there. Accused asked him for a favor and he granted it. It was a part of witness' duty to make loans (R. 208). In his judgment this was a proper loan and he had every reason to believe it would be paid. There was, however, something unusual about the loan in that it was a ten day note running four months after the date of payment. That does not usually happen (R. 209). If the next Congress votes to pay the cash bonus, and if accused makes a new assignment in proper form, the bank will get whatever Congress votes and will not then be very much the loser (R. 211).

Discussion.

This specification alleges that accused dishonorably failed to keep a promise in writing to settle an indebtedness in full at a certain time.

The evidence shows that accused borrowed $250.00 from the State Bank of Milan, Indiana, on May 21, 1934, and turned over his adjusted compensation certificate as collateral. The loan was to run for ten days but was not paid. The cashier of the bank went to Huntington, Indiana, on or about June 5, 1934, where he saw accused who paid the interest on the note and renewed it for ten days. There is evidence that the cashier saw accused again when he was in the hospital and asked him if he could not pay the note or make a proper assignment of his compensation certificate. Accused said he could not pay the note then but would assign his compensation certificate, which he did. There is no evidence that any further effort was made by the bank to obtain payment of this note.

Dishonorable neglect to pay debts is a violation of the 95th Article of War. But mere neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. It is only where such nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit or specific promises of payment, that it may properly be deemed to constitute an offense. CM 121209; sec. 413 (3), Dig. Ops. JAG, 1912-30. The circumstances of the failure of the accused to pay this debt cannot be considered dishonorable. When last approached by the creditor he was in the hospital (presumably suffering from a self-inflicted gunshot wound) and was not in a position to take action other than that which he did take and which was evidently entirely satisfactory to the creditor. It was further held in the case cited above that where the proof does not show such conduct with reference to the debts as would constitute an offense, although some of the debts had been due for more than seven months, a finding of guilty cannot be sustained.

The Board of Review is of opinion that the evidence under this specification is not legally sufficient to support the finding of guilty.

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

Specification 1: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company funds thereof, did, at or near Huntington, Indiana, on or about October 10, 1933, wrongfully and unlawfully make, draw, utter and deliver to John Kenower & Sons, a retail Lumber Yard Firm, Huntington, Indiana, a certain check in words and figures substantially as follows, to wit:

Huntington, Ind., 19 No.---

FIRST STATE BANK

Pay to the order of John Kenower & Sons $_____

Dollars

Co. Fund Co. 1532 CCC

For_____ (Sgd) Julius S. Sperti

which said check was drawn against funds of the said Company Fund then on deposit in the said First State Bank which at the time were restricted as to withdrawals and known by the said First Lieutenant Julius S. Sperti to be so restricted, and which said check was delivered to the said John Kenower & Sons in conditional payment of a personal loan in the amount of TWO HUNDRED DOLLARS, $200.00, negotiated by the said First Lieutenant Julius S. Sperti on a promissory note, dated October 10, 1933, made payable to the order of the said John Kenower & Sons.

Finding: Guilty.

Evidence.

Mr. V. L. Bridge testified that he is the manager of the retail lumber yard of John Kenower and Sons, of Huntington, Indiana (R. 175). He has known accused since about May, 1933.

The local bank closed. Accused needed some money to pay his bills,and in October, 1933, witness loaned him $200.00. As evidence of this loan accused gave him a check in blank, and when the bank opened he was to take his $200.00 and mail accused the balance. (R. 176). As further evidence of the loan witness had a personal note. He had never received payment for either the check or the note. Upon being asked where the check and note then were, witness replied: "Well, unfortunately I have legal advice and I left it with our attorney and he could not find it this morning. He is still looking." The check was blank as to number, amount and date (R. 177). At the time he received the check accused told him that it was out of a restricted fund. Witness understood that when the bank opened he was to fill out the check for whatever was "on the book", he thought it $654.00 and some cents, and send accused the difference between that amount and his note (R. 178). (See also Exhibit No. 33).

Discussion.

Under this specification the evidence shows that accused in October, 1933, gave Mr. V. L. Bridge, manager of John Kenower & Sons, a check in blank on the local bank at Huntington with instructions that when the bank opened he was to fill out the check for the entire amount of the account, cash the check, take out the sum of $200.00 he had loaned accused, and send accused the remainder. Accused told Mr. Bridge when he gave him the check that it was on a restricted fund. There is some evidence indicating that the check was on the First State Bank, but the check was not produced in evidence and it does not appear whether it was drawn upon funds of Company 1532, CCC, or upon personal funds of accused.

It may be questioned that the specification states an offense under the 96th Article of War, but the specification is not supported by the evidence, and in the opinion of the Board of Review the evidence does not support a finding of guilty.

27. CHARGE III:

Specification 2: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, CCC, Camp PE-71, and as such custodian of the company fund thereof, did, at or near

Batesville, Indiana, on or about January 27, 1934, make, draw, utter and deliver to the First National Bank, Batesville, Indiana, a check in words and figures substantially as follows, to wit:

LINCOLN NATIONAL BANK AND TRUST COMPANY 71-27

Fort Wayne, Ind., Jan. 27, 1934 No.____

Pay to the order of Co. Fund Co. 1532 CCC.....$100.00

---One hundred and no/100 ----------Dollars

(Signed) Julius S. Sperti

which said check was made, drawn, uttered and delivered to the said First National Bank in payment of an overdraft of about SIXTY FIVE DOLLARS AND TWENTY ONE CENTS, $65.21, then and there existing in the said company fund account, he, the said First Lieutenant Julius S. Sperti, then well knowing that he did not have sufficient funds on deposit in the said Lincoln National Bank and Trust Company for the payment of said check, in consequence whereof said check when presented was dishonored to the discredit of the military service.

Finding: Guilty.

Evidence.

It was stipulated and agreed between the prosecution and defense and the accused that if W. F. Hieneke, cashier of the First National Bank, Batesville, Indiana, were present in court and sworn as a witness he would testify in substance as follows: That on or about January 27, 1934, accused gave him a check for $100.00, dated January 27, 1934, drawn on the Lincoln National Bank and Trust Company, Fort Wayne, Indiana, payable to Co. Fund Co. 1532, CCC, and signed by accused, and that the check "was to cover an overdraft of $65.21 in the account of Co. Fund Co. 1532". A check, as described above, was thereupon received in evidence and marked "Prosecution's Exhibit No. 12" (R. 141-142).

Mr. Clifton Wefel, chief clerk, Lincoln National Bank and Trust Company (R. 180-181) upon being handed Exhibit No. 12, testified that it was signed by accused and dated January 27, 1934. This checkwas presented for payment but was not honored at the first presentation. On January 30, 1934, accused's account was overdrawn to the amount of $3.36. The check arrived at the bank for payment on January 31, 1934. A deposit of $130.00 was made on February 1, 1934, and this check was paid on that date (R. 188-189).

Discussion.

The Board of Review is of opinion that this specification is fatally defective in that it fails to allege that accused did not intend to have sufficient funds on deposit for the payment of this check when presented. Such an allegation is an essential requisite in charging this offense. Par. 151, M.C.M.; CM 158679, Dig. Ops. JAG, 1912-30, sec. 1497 (5); form 114, appendix 4, M.C.M.

28. CHARGE III:

Specification 3: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-71, and as such official custodian of the company fund thereof, did, at Milan, Indiana, on or about April 3, 1934, wrongfully and unlawfully make, draw, utter and deliver to the State Bank of Milan, Milan, Indiana, a check in words and figures substantially as follows, to wit:

FORT WAYNE, IND., April 3, 1934 No.____

LINCOLN NATIONAL BANK AND TRUST COMPANY 71-27

Pay to the
Order of Co. Fund Co. 1532 CCC $638.49

------Six hundred thirty eight 49/100 Dollars

(Signed) Julius S. Sperti

for deposit to the credit of the said company fund, he, the said First Lieutenant Julius S.

Sperti, then well knowing that he did not not have on deposit at the said Lincoln National Bank and Trust Company sufficient funds for the payment of said check, in consequence whereof, said check when presented was dishonored to the discredit of the military service.

Finding: Guilty.

Evidence.

Mr. Clifton Wefel, chief clerk, Lincoln National Bank and Trust Company (R. 180-181) upon being handed a document, testified that it was a check drawn on his bank for the amount of $638.49. Thereupon the check was received in evidence and marked "Prosecution's Exhibit No. 34". Witness further testified that this check was presented for payment to his bank and that it was not honored because there were insufficient funds to pay it. (R. 182-183). (See also Exhibit No. 33).

Mr. William H. Call, assistant cashier of the State Bank of Milan (R. 190) testified that he had seen Exhibit No. 34 before. It was credited to the account of the company fund, Company 1532, CCC, in his bank and was sent through for clearance in the usual manner. It was returned unpaid on account of insufficient funds and was then charged against the account of company fund 1532 CCC (R. 191).

Discussion.

The Board of Review is of opinion that this specification, like Specification 2, Charge III, is fatally defective in that it fails to allege that accused did not intend to have sufficient funds on deposit for the payment of this check when presented.

29. CHARGE III:

Specification 4: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on activy duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-71, and as such official custodian of the company fund

thereof, did at Milan, Indiana, on or about April 4, 1934, wrongfully and unlawfully make, draw, utter and deliver to the State Bank of Milan, Milan, Indiana, a check in words and figures substantially as follows, to wit:

FORT WAYNE, IND., April 4 1934 No.____

LINCOLN NATIONAL BANK AND TRUST COMPANY 71-27

Pay to the
Order of CO. Fund Co. 1532 CCC $107.82

------One Hundred Seven - 82/100-----Dollars
Co. Fund, Co. 1532, CCC

(Signed) Julius S. Sperti

for deposit to the credit of the said company fund, he, the said First Lieutenant Julius S. Sperti, then well knowing that he did not have on deposit at the said Lincoln National Bank and Trust Company sufficient funds for the payment of said check, in consequence whereof, said check when presented was hishonored to the discredit of the military service.

Finding: Guilty.

Finding of guilty disapproved by reviewing authority.

Since the finding of guilty of this specification was disapproved by the reviewing authority no summary of the evidence thereunder is made.

30. CHARGE III:

Specifications 5 and 6: Both of these specifications on motion of the defense were stricken from the charges by the court at the beginning of the trial.

31. CHARGE III:

Specification 7: In that First Lieutenant Julius S. Sperti, Field Artillery Reserve, while on active duty, being at the time commanding officer of Company 1532, C.C.C., Camp PE-71 and Camp PE-60, and as such official custodian of the company fund thereof, did, at Milan, Indiana, and Huntington, Indiana, and elsewhere, wrongfully and unlawfully make, draw, utter and deliver to persons and firms, on or about the dates, upon the banks and for the amounts hereinafter respectively specified, worthless checks as follows:

Date	On Bank	Amount	Uttered To
May 19, 1934	The State Bank of Milan, Milan, Indiana	$54.20	Kellogg Sales Co.
May 19, 1934	The State Bank of Milan, Milan, Indiana	$197.71	Armour & Co.
June 20, 1934	The First State Bank of Huntington, Indiana	$20.49	The Great A & P Tea Co.
June 20, 1934	The First State Bank of Huntington, Indiana	$43.95	Armour & Co.
June 20, 1934	The First State Bank of Huntington, Indiana	$75.15	New Fisheries Co.
June 20, 1934	The First State Bank of Huntington, Indiana	$79.96	Milan Bakery
June 20, 1934	The First State Bank of Huntington, Indiana	$203.25	A. Datillo Fruit Co.
June 20, 1934	The First State Bank of Huntington, Indiana	$335.93	Pearl Packing Co.
June 20, 1934	The First State Bank of Huntington, Indiana	$62.00	Chris H. Voss
July 3, 1934	Exchange Bank of Warren, Indiana	$203.25	A. Datillo Fruit Co.
July 3, 1934	Exchange Bank of Warren, Indiana	$335.93	Pearl Packing Co.
July 3, 1934	Exchange Bank of Warren, Indiana	$79.96	Milan Bakery
July 3, 1934	Exchange Bank of Warren, Indiana	$62.00	Chris H. Voss
July 3, 1934	Exchange Bank of Warren, Indiana	$75.15	New Fisheries Co.
July 3, 1934	Exchange Bank of Warren	$43.95	Armour and Co.

which said checks were made, drawn, uttered and delivered to the said persons and firms in payment of obligations incurred by the said First Lieutenant Julius S. Sperti for and in behalf of the said company and chargeable to the said company fund, the said First Lieutenant Julius S. Sperti then well knowing that he did not have and not intending that he should have sufficient funds on deposit in the said banks to the credit of the said company fund for the payment of said checks, in consequence whereof the said checks when presented were dishonored to the discredit of the military service.

Finding: Guilty.

This specification relates to fifteen (15) separate checks. The evidence as to each of them is summarized below.

Evidence.

a. It was stipulated and agreed between the prosecution and defense and accused that if the Treasurer of the Kellogg Sales Company were present in court and sworn as a witness he would testify that on or about May 19, 1934, he received a check for $54.20, drawn on the State Bank of Milan, Indiana, and signed "Company Fund Co. 1532, CCC Julius S. Sperti"; that he would recognize and identify the paper marked "Prosecution's Exhibit No. 24" as the check he so received, that this check was in payment for supplies furnished to Co. 1532, CCC, and that he cashed it in the usual manner but it was returned to him unpaid. The check was received in evidence and is marked "Prosecution's Exhibit No. 24" (R. 153-154).

Mr. William H. Call, assistant cashier of the State Bank of Milan, Indiana (R. 190) upon being handed Exhibit No. 24 testified that accused's signature is on this check as it is signed "Company fund Company 1532 CCC Julius S. Sperti". The check was presented in the usual manner from their corresponding bank but was returned because of insufficient funds. The balance of this account as shown on the ledger sheet of the bank (Ex. 38) was $46.99 on May 19, 1934, the date of this check (R. 192-193).

b. It was stipulated and agreed between the prosecution and defense and accused that if F. L. Gullion, Credit Manager, Armour and Company, were present in court and sworn as a witness he would testify in substance that on or about May 19, 1934, he received a check for $197.71 dated May 19, 1934, drawn on the State Bank of Milan, Indiana, and signed "Co. Fund Co. 1532, CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC; that he would recognize and identify the paper marked "Prosecution's Exhibit 25" as the check he so received, and that he cashed it in the usual manner but it was returned to him unpaid (R. 154). The check was received in evidence and is marked "Prosecution's Exhibit No. 25" (R. 155).

Mr. William H. Call, assistant cashier of the State Bank of Milan, Indiana, (R. 190) upon being handed Exhibit No. 25 testified that he had seen this check before. It was presented at the State Bank of Milan in the usual manner by their corresponding bank but was refused because of insufficient funds. The balance of this account of May 19, 1934 as shown on the ledger sheet (Ex. 38) was $46.99(R. 194).

c. It was stipulated and agreed between the prosecution, defense, and accused that if William Kucker of the Milan Bakery, Milan, Indiana, were present in court and sworn as a witness he would testify that on or about June 20, 1934, he received a check for $79.96, dated June 20, 1934, drawn on the First State Bank of Huntington, Indiana, payable to the Milan Bakery and signed "Co. Fund 1532 CCC Julius S. Sperti", and would recognize and identify the paper marked "Prosecution Exhibit 22" as the check he so received, and would testify that the check was in payment for supplies furnished Co. 1532, CCC, and that he cashed the check in the usual manner but that it was returned to him unpaid. And it was also stipulated that William Kucker would testify that on or about July 3, 1934, he received a check for $79.96, dated July 3, 1934, drawn on the Exchange Bank of Warren, Indiana, payable to the Milan Bakery and signed "Co. Fund Co. 1532, CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC, and would recognize the paper marked "Prosecution Exhibit 23" as the check he so received, and would testify that he cashed this check in the usual manner but that the check was returned to him unpaid. The two checks were received in evidence as Exhibits 22 and 23, respectively (R. 151-153).

Mr. Everett V. Fitch testified that he is the cashier of the First State Bank of Huntington, Indiana. He identified the document labeled "Prosecution's Exhibit No. 22" as a check drawn

against the company funds signed by accused for $79.96, dated June 20, 1934, and testified that it was presented for payment but was not honored because there were not sufficient funds (R.159,166).

Mr. George G. Jones testified that he is the cashier of the Exchange Bank of Warren, Indiana. He had seen prosecution's Exhibit No. 23 before, This check was presented through the mail for payment at the bank and was returned unpaid because of insufficient funds. On July 3, 1934, the company fund, 1532d Co. C.C.C., had a balance of $22.00 (R. 244,246).

d. It was stipulated and agreed between the prosecution and defense and accused that if Chris H. Voss, residing near Milan, Indiana, were present in court and sworn as a witness he would testify that on or about June 20, 1934, he received a check for $62.00 dated June 20, 1934, drawn on the First State Bank, Huntington, Indiana, payable to Chris H. Voss, and signed "Co. Fund Co. 1532 CCC Julius S. Sperti", that this check was in payment for supplies furnished to Co. 1532 CCC: that he cashed the check in the regular course of business but that the check was returned unpaid; and that he would recognize and identify the paper marked "Prosecution Exhibit 13" as the check he so received (R. 142). And it was also stipulated that on or about July 3, 1934, Chris H. Voss received a check, dated July 3, 1934, for $62.00 drawn on the Exchange Bank, Warren, Indiana, payable to Chris H. Voss and signed "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532 CCC; that he cashed the check in the regular course of business but that the check was returned unpaid; and that he would recognize and identify the paper marked "Prosecution Exhibit 14" as the check he so received. The two checks were received in evidence as Exhibits 13 and 14, respectively (R. 143-144).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington, Indiana, identified the document labeled "Prosecution's Exhibit No. 13" as a check for $62.00 drawn on the First State Bank of Huntington, Indiana, against the company fund, and testified that it was presented for payment but was not honored because there were not sufficient funds (R. 163-164).

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana, testified that he had seen "Prosecution's Exhibit No. 14" before and that it was presented for payment and payment refused because of insufficient funds (R. 246-247).

e. It was stipulated and agreed between the prosecution and defense and accused that if F. L. Gullion, Credit Manager, Armour and Company, were present in court and sworn as a witness

he would testify that he received a check on or about June 20, 1934, for $43.95, drawn on the First State Bank of Huntington, Indiana, dated June 20, 1934, and signed "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532 CCC; that he cashed this check in the usual manner but that the check was returned unpaid; and that he would recognize and identify the paper marked "Prosecution's Exhibit 26" as the check he so received (R. 154-155). It was further stipulated that he received a check on or about July 3, 1934, for $43.95 drawn on the Exchange Bank of Warren, Indiana, payable to Armour and Company, and signed by "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC; that he cashed this check in the usual manner but that the check was returned to him unpaid; and that he would recognize and identify the paper marked "Prosecution's Exhibit 27" as the check he so received. The two checks were received in evidence as Exhibits 26 and 27, respectively (R. 154-156).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington, Indiana, testified that the document labeled "Prosecution's Exhibit No. 26" was a check drawn against the company funds, signed by Julius S. Sperti, for $43.95, dated June 20, 1934, and that it was presented for payment and not honored because there were not sufficient funds (R. 166).

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana, testified that he had seen "Prosecution's Exhibit No. 27" before, and that it was presented for payment but payment was refused for the reason that there were insufficient funds (R. 246).

f. It was stipulated and agreed between the prosecution and defense and accused that if the Treasurer of the New Fisheries Company, of Cincinnati, Ohio, were present in court and sworn as a witness he would testify that on or about June 20, 1934, he received a check, dated June 20, 1934, for $75.15 drawn on the First State Bank, Huntington, Indiana, payable to the New Fisheries Co., and signed by "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC; that he cashed the check in the usual course of business but that the check was returned unpaid; and that he would recognize and identify the paper

marked "Prosecution Exhibit 19" as the check he received (R. 148,149). It was further stipulated that he received a check on or about July 3, 1934, for $75.15 drawn on the Exchange Bank of Warren, Indiana, dated July 3, 1934, payable to the New Fisheries Company and signed "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC; that he cashed this check in the usual course of business but that the check was returned unpaid; and that he would recognize and identify the paper marked "Prosecution Exhibit 20" as the check he so received. The two checks were received in evidence as Exhibits 19 and 20, respectively (R. 149-150).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington, Indiana, testified that prosecution's Exhibit 19 was a check drawn against the company fund by Julius S. Sperti for $75.15, dated June 20, 1934, and that it was presented for payment but was not honored because there were not sufficient funds (R. 165).

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana, testified that he had seen prosecution's Exhibit No. 20 before, and that it was presented for payment through the mail and payment refused because of insufficient funds. (R. 247).

g. It was stipulated and agreed between the prosecution and defense and the accused that if A. Datillo of the A. Datillo Fruit Company, Madison, Indiana, were present in court and sworn as a witness he would testify that on or about June 20, 1934, he received a check for $203.25, dated June 20, 1934, drawn on the First State Bank, Huntington, Indiana, payable to A. Datillo Fruit Company and signed by "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC; that he cashed this check in the usual course of business but that it was returned to him unpaid; and that he would recognize and identify the paper marked "prosecution Exhibit 17" as the check he so received (R. 147). It was further stipulated that on or about July 3, 1934, he received a check for $203.25, dated July 3, 1934, drawn on the Exchange Bank of Warren, Indiana, payable

to A. Datillo Fruit Company and signed by "Co. Fund Co. 1532, CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532 CCC; that he cashed this check in the usual course of business but that it was returned to him unpaid; and that he would recognize and identify the papers marked "Prosecution Exhibit 18" as the check he so received. The two checks were received in evidence as Exhibits 17 and 18, respectively (R. 147-148).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington, Indiana, testified that the document labeled "Prosecution's Exhibit No. 17" was a check drawn against the company fund, signed Julius S. Sperti, for $203.25, dated June 20, 1934, and that the check was presented for payment but was not honored because there were not sufficient funds (R. 165-166).

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana, testified that he had seen "Prosecution's Exhibit No. 18" before, and that it was presented for payment and payment refused because of insufficient funds (R. 247).

h. It was stipulated and agreed between the prosecution and defense and the accused that if the manager of the Great A.& P. Tea Company were present in court and sworn as a witness, he would testify that he received a check on or about June 20, 1934, for $20.49, dated June 20, 1934, drawn on the First State Bank of Huntington, Indiana, and signed "Co. Fund Co. 1532, CCC, Julius S. Sperti"; that this check was in payment of supplies furnished Co. 1532,CCC; that he cashed this check in the usual manner but the check was returned unpaid; and that he would recognize and identify the paper marked "Prosecution Exhibit 21" as the check he so received. The check was received in evidence as Exhibit 21 (R. 150-151).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington, Indiana, testified that prosecution Exhibit No. 21 is a check drawn against the company fund signed by Julius S. Sperti for $20.49, dated June 20, 1934, and that this check was presented for payment but was not honored because there were not sufficient funds (R. 164-165).

i. It was stipulated and agreed between the prosecution and defense and accused that if the Treasurer of the Pearl Packing Company, Madison, Indiana, were present in court and sworn as a witness he would testify that on or about June 20, 1934, he received a check dated June 20, 1934, for $335.93, drawn on the First State Bank of Huntington, Indiana, payable to the Pearl Packing Company and signed "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC; that he cashed this check in the regular course of business but that the check was returned to him unpaid; and that he would recognize and identify the paper marked "Prosecution Exhibit 15" as the check he so received (R. 144). It was further stipulated that on or about July 3, 1934, he received a check for $335.93, dated July 3, 1934, drawn on the Exchange Bank, Warren, Indiana, payable to Pearl Packing Company and signed "Co. Fund Co. 1532 CCC Julius S. Sperti"; that this check was in payment for supplies furnished Co. 1532, CCC; that he cashed this check in the regular course of business but that the check was returned to him unpaid; and that he would recognize and identify the paper marked "Prosecution Exhibit 16" as the check he so received. The two checks were received in evidence as Exhibits 15 and 16, respectively (R. 144-145).

Mr. Everett V. Fitch, cashier of the First State Bank of Huntington, testified that prosecution Exhibit 15 is a check drawn on the company fund signed by Julius S.Sperti for $335.93, dated June 20, 1934, and that this check was presented for payment but was not honored because there were not sufficient funds (R. 164).

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana, testified that he had seen "Prosecution's Exhibit 16", and that it was presented for payment and payment refused because of insufficient funds (R. 247).

Discussion.

Specification 7, of Charge III, while otherwise acceptable in that the necessary elements of the offenses are sufficiently alleged therein, was open to objection in that instead of alleging but one offense as it should have (par. 29, M.C.M.), it alleged fifteen separate offenses in reciting the giving of as many checks with insufficient funds. Since the defense did not object to the specification, and since the several checks were

described so minutely in it that it cannot be said that the accused was in any manner misled as to the offenses with which he was charged, it is thought that the error of pleading did not injuriously affect his substantial rights.

Certain other points require consideration. Nowhere in the record is there any direct evidence of the utterance of these checks by accused. The stipulations with reference to them all state that if a certain witness were present in court he would testify in substance that on or about a certain date "he received a check" which is then described. The stipulation does not say that the check was received from accused or that accused delivered or mailed it. The only other evidence directly bearing on the checks mentioned in this specification is the testimony of the bank officers with reference to the state of the company fund account in their banks. The checks themselves are also in evidence. They are all signed, "Co. Fund Co. 1532 CCC Julius S. Sperti." There is no direct evidence or stipulation that the signature on any of these checks is in fact that of accused.

The Board would feel obliged to hold the finding of guilty unsupported because of this lack except for certain further circumstances, as follows: The court was entitled to compare signatures. It had before it Exhibits 12 and 40, being the check involved in Specification 12, Charge II, and the promissory note involved in Specification 2, Charge III. There is evidence in the record, though not as definite and positive as might be desired, identifying these two exhibits as having been signed by accused in the presence of the witnesses who identified them in court. See R. 141,207. Exhibit 40 was subsequently withdrawn and a typed copy substituted, but the original note was before the court. It was the court's privilege to use Exhibits 12 and 40 as standards and to compare with the accused's signature on those exhibits what purported to be his signature on the checks involved in the specification now under consideration. When such a comparison is made the similarity of handwriting is apparent. Furthermore, reliance may be placed upon a statement in the Manual for Courts-Martial (page 120) as follows: "A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection." The Board therefore concludes that the execution of the checks is sufficiently proved.

Another point must be considered. The present specification involves seven checks drawn on the First State Bank of Huntington, Indiana, on June 20, 1934. Mr. Fitch, cashier of that bank testified that the balance to the credit of the company fund in that bank on the date of these checks was $131.01(R. 163), and the ledger (Ex. 30) shows the same. Of the seven checks drawn that day against that account five were drawn for amounts less than the balance to the credit of the company fund, that is, if any one of those checks had been presented on the day it was drawn it would have been paid. As Mr. Fitch testified, these checks were not in fact paid because by the time they were presented the account had been reduced by other checks to an insufficient balance (R. 165). The specification and the evidence show that the total of the seven checks drawn on June 20, 1934 was much in excess of the balance available on that date.

The Board is of opinion that the conviction may be supported on the ground that drawing so many checks on one day for a total in excess of the available balance constituted an offense, even though taking each of the five checks singly no offense was committed.

The Board of Review concludes that the record of trial is legally sufficient to support the finding of guilty of Specification 7, Charge III.

32. CHARGE III:

Specification 8: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, being at the time Commanding Officer, Company 1532, C.C.C., Camp PE-60, and as such official custodian of the company funds thereof, did, at or near Camp PE-60, Huntington, Indiana, on or about July 23, 1934, wrongfully make, draw, utter and deliver to First Lieutenant John A. Klaiber, Field Artillery, Reserve, Camp Exchange Officer of said company, a certain check in words and figures substantially as follows, to wit:

THE EXCHANGE BANK

July 23, 1934

Warren, Ind.

Pay to the order of Camp Exchange Co.
1532 CCC $685.73/100

Six hundred eighty five and 73/100 Dollars

For_____ Company Fund-1532nd Co. C.C.C.

(Signed) Julius S. Sperti

well knowing that, at the time the said check was made and delivered to the said First Lieutenant John A. Klaiber, he, the said First Lieutenant Julius S. Sperti, did not have sufficient funds on deposit with the said Exchange Bank, Warren, Indiana, to pay said check, in consequence whereof said check, when presented for payment, was dishonored, to the discredit of the military service.

Finding: Guilty.

Evidence.

First Lieutenant John A. Klaiber, upon being handed a document, testified that it was a company fund check, 1532d Company, CCC, on the Exchange Bank of Warren, Indiana, for $685.73, payable to the Camp Exchange, Company 1532, CCC, and signed "Company Fund - 1532nd Co. C.C.C. Julius S. Sperti". Thereupon the check was received in evidence as "Prosecution's Exhibit No. 43". Witness further testified that the check was given to him on July 23 by accused to start an account in the Bippus Bank for the Camp Exchange. On that date he presented it at the Warren Exchange Bank for payment but the cashier of the bank refused to pay it and marked it "Insufficient Funds" (R. 218-220).

First Lieutenant Elvin H. Burger testified that, while being examined by the board of which the witness was a member

charged with fixing responsibility for loss of post exchange funds, accused after due warning, admitted that on July 23 he gave Lieutenant Klaiber a check for $685.73.

Mr. George G. Jones, cashier of the Exchange Bank of Warren, Indiana, (R. 244) upon being handed prosecution's Exhibit No. 43 testified that he had seen this check before, and that it had been presented for payment in person by an officer and payment refused because of insufficient funds. The amount of this check is $685.73 and the maximum balance of this account at any time had been only $22.00. But one deposit had been made on the account and that on July 2, 1934, and withdrawn on July 30, in the amount of $22.00. (R. 249).

Discussion.

The Board of Review is of opinion that this specification, like Specifications 2 and 3, Charge III, is fatally defective in that it fails to allege that accused did not intend to have sufficient funds on deposit for the payment of this check when presented.

33. CHARGE III:

Specification 9: In that First Lieutenant Julius S. Sperti, Field Artillery, Reserve, while on active duty, did, at or near Camp PE-60, Huntington, Indiana, on or about July 24, 1934, willfully maim himself in the stomach by shooting himself with a forty-five calibre, government automatic pistol, thereby unfitting himself for the full performance of military service.

Finding: Guilty.

Evidence.

Captain Milton O. Boone, Quartermaster Corps, the senior member of the board of officers appointed at Fort Benjamin Harrison to investigate the status of the company and exchange funds of Company 1532 C.C.C. (R. 268) called upon the police department of Huntington, Indiana, about 12:30 a.m. on July 24, 1934, to take accused into custody, and requested that the

police get the assistance of State Patrolman Albert Teusch. Thereupon City Patrolman Cecil Ramsey and State Patrolman Albert Teusch started out on their rounds and to see if they could locate accused. About 5:00 a.m. they had stopped near a bridge south on State Road No. 5 when a car driven by accused passed them. Accused nodded to Ramsey as he passed. The two officers started after him. About a quarter of a mile beyond he made a right turn down a gravel road, went a short distance, and stopped his car. It was then daylight and the sun was shining. The officers stopped their car immediately behind accused's and got out. About that time accused placed a .45 automatic pistol near his left side and shot. Ramsey ran up from a distance of about forty feet and "grabbed" accused. Teusch ran up at about the same time and picked up the gun which accused had thrown to the ground. Ramsey asked accused, "Why did you do that?" Accused turned and said, "Ramsey, there is an envelope on the front seat that I would like for you to turn over to Lieutenant Klaiber." Ramsey then got an envelope off the front seat of accused's car and later turned it over to Lieutenant Klaiber. Accused was placed in the rear seat of the police car and rushed to the hospital (R. 250-256). He was there seen by Major Ralph L. Cudlipp, Medical Corps, who did not then examine the wounds or open the dressings because accused had just been admitted after a trip in an ambulance, but upon examination on the following day he found a wound which he described as follows: "A perforating gun shot inflicted with a .45 caliber automatic service pistol. Wound of entrance between eighth and ninth ribs about two and a half inches left of mid-sternum line. Wound of exit between tenth and eleventh ribs mid auxillary line. Second wound of entrance flexor surface left forearm one inch below elbow joint. Wound of exit internal surface one and one-half inches below elbow joint. No serious damage to tissues through which bullet passed. In other words shot in the lower chest and in this direction downward and upward direction, the bullet passing through the lower part of the chest, making its exit in the mid axillary line through his forearm and out the back". (R. 74-75).

First Lieutenant John A. Klaiber, upon being handed a document, testified that he had seen it before and that it was a note given to him on or about July 24 (1934) by Patrolman Ramsey of the Huntington police force. The note was received in evidence and marked "Prosecution's Exhibit 46". Witness read

the note to the court as follows:

> "John. I am choosing the only way I know out of this mess. It may seem cowardly, but it is the only way after all. I have been driving around all night and things are all muddled up even in my mind. One more cigarette and then to see what's beyond. Don't let them blame anyone else for the mess. It was all of my making. Happy landings, Joe."

Witness testified that he recognized the handwriting of the note and that it was that of accused. The name "Joe" was a nick-name they applied to accused (R. 257-258).

Major Porter J. Coultas, Medical Reserve Corps, testified that on or about July 30, 1934, he was medical supervisor of the Civilian Conservation Corps work camps and was stationed at Fort Benjamin Harrison, Indiana (R. 304). On or about July 25 he had helped Dr. Galbreath dress accused's wounds. There was a wound of entrance between the ninth and tenth ribs in the mid nipple line, and a wound of exit between the tenth and eleventh ribs in the mid auxillary line. Between the wound of entrance and that of exit they measured a space of six or eight inches. There were powder marks upon the skin. The wounds were sufficient to incapacitate him for the time being from the full performance of military duty (R. 307-308).

Major David L. Stewart, Medical Corps, testified that accused remained a bed patient in the station hospital at Fort Benjamin Harrison for about two weeks because of his injury (R. 262,265). Major Cudlipp on August 13 (1934) marked on the hospital record that accused was cured from his bullet wounds (R. 321).

First Lieutenant Edwards N. Quigley, Third Field Artillery, testified that on or about July 30, 1934 he participated as a member at a meeting of a board of officers appointed to determine the line of duty status of accused as a result of his injuries. Accused was present and after being warned by witness that anything he might say would be used against him he desired to be sworn as a witness.(R. 298). In the course of his testimony he was asked if the shooting was willful on his part, to which he replied: "Sure, there is no use beating around the bush" (R. 302).

Major Porter J. Coultas also participated as a member of the line of duty board in its meeting of July 30, 1934, and corroborated the testimony of Lieutenant Quigley recited above (R. 306-307). Major Coultas further testified that no force or duress was used by the board on accused before he made the statement, nor was any promise of possible future award or leniency made (R. 306). Witness did not consider that accused appeared to be at all nervous or excited at the time, and did consider accused's condition such that he could reason properly. When he told accused that they were going north and might see his wife, accused told him to tell her "not to be uneasy, that he had regained his sense of humor" (R. 308).

Discussion.

Under this specification it is alleged that the accused while on active duty willfully maimed "himself in the stomach" by shooting himself with a forty-five calibre government automatic pistol, thereby unfitting himself for the full performance of military service. The evidence shows that the accused voluntarily shot himself in the body with the weapon described in the specification, as he admits, and that as a result of the wound he was a bed patient in the hospital for at least two weeks. It does not appear, however, that the bullet from the pistol penetrated accused's "stomach". It is thought, however, that the use of the word "stomach" in the specification was intended to describe, not that particular organ of the body, but generally the middle portion of the body where the bullet actually took effect. There is no indication that the misdescription of the part of the body wounded, if there was any such, misled accused or hampered him in the least degree in the preparation of his defense.

The evidence is considered legally sufficient to support the finding of guilty.

34. There is also in the record evidence of certain statements made by the accused with respect to the offenses of embezzlement alleged under Charge I. These statements have been mentioned above under the specifications to which they pertained and are set out in full below.

The board appointed by CCC Headquarters, Fort Benjamin Harrison, Indiana, to investigate the status of company and exchange funds of Company 1532 CCC, consisting of Captain Milton O. Boone,

Q.M.C., First Lieutenant Richard Sears, 3d Field Artillery, and First Lieutenant Elvin H. Burger (R. 268), met at the Post Hospital, Fort Benjamin Harrison, on July 29, 1934 (R. 82, 269). Accused was the only witness heard on that day and was sworn and testified under oath. Before any questions were asked or answered he was told by Captain Boone that he had the right not to answer any questions which would incriminate him in any proceedings or action which the United States Government might take as a result of the investigation (R. 84,269-270,272), and he was warned that he did not have to make any statement or say anything, and that anything that he might say might be used against him (R. 83). The board then questioned accused with reference to any information he could give them which "would help clarify the indebtedness of Company 1532" so that bills due for supplies could be paid without delay (R. 273). He was asked this question by Captain Boone:

> "Lieutenant Sperti, there are many questions that could be propounded to you by the members of the board covering many of the problems that enter into the investigation now being made, and I have given you an idea of the line of questioning. I would like to ask you if you would care to make any statement that will help the board to clarify the records of the company in order that we may be in a position to determine the amount of indebtedness of the Camp Exchange Fund, Company 1532 and the Company Fund, Company 1532, and any moneys which might be due either of those funds by you, and before making any statement I will again advise you of your constitutional rights not to make any statement unless you care to which will incriminate you in any criminal action taken by the United States Government".

Accused then asked to see the company fund book and that the board come to his bedside. Holding the company fund book in his hand and pointing to it at the time he replied:

> "The only information that I can furnish that will help you in determining the amount of funds which I am short is the following: On the voucher as shown as payments for June and subtract $12.52 and $2.55; the amount of cash sown on hand as of June 30th; the June 30th collection sheet; the

collections from boarders for the month of June; the $100.00 to Purity Dairies; $200.00 to John Kenower and Sons; $30.00 Merchants National Bank, Muncie; $10.00 Catholic Community Center, Fort Wayne; $280.73 cash sales receipts, Post Exchange as of July 10th; Supplemental Collection Sheet, men discharged June 30th; and final payroll,$128.50". (R. 85-86; 273-275).

36. The evidence for the defense is confined to character testimony and may be summarized substantially as follows:

Captain K. M. Still testified that in April and May of 1934 he was adjutant of the CCC, State of Indiana, identified a document as a memorandum bearing his signature, and read from it a statement of Mr. Wilcox, State Forester of Indiana, Department of Conservation, commending accused and others for their cooperation and the planting of trees. He also read a communication sent to accused in which the Commanding General commended him for the cooperation he had given the technical service in the planting season. Witness testified that the officers at headquarters always considered that accused was a very excellent officer and had an excellent camp (R. 313-314).

First Lieutenant Edwards N. Quigley testified that he is supervisor of maintenance supplies, CCC work camps of Indiana (R. 316) and had known accused since January (1934). Prior to this episode he considered accused the best reserve officer of his grade in the state. He "had a great deal of leadership". The morale of his company was very high, and anything that accused was given to do was done without asking questions or help from anybody else, and done in a very thorough manner (R. 317).

Major Chapman Grant testified that he submitted an efficiency report on accused about June 30, 1934, and believed that he gave him a rating of superior under paragraph C of the report which is "manner and performance" (R. 317). Under paragraph P he believed that he said that accused had indicated his administrative fitness for the next higher grade by the superior manner in which he performed his present activities. And he had stated that he would especially desire to have accused serve under him (R. 318).

Captain Robal A. Johnson, 11th Infantry, testified that he had been on duty with the CCC in the State of Indiana and while on such duty had seen accused where he was commanding a camp at Milan, Indiana. He had observed accused's work and had rendered an efficiency report on him in which he had rated him excellent as a CCC camp commander. Witness was impressed at that time, March, 1934, by accused's high regard for his duties. Witness never had occasion to audit the funds of Company 1532, CCC (R. 321-323).

First Lieutenant Elvin H. Burger testified that he found accused's camp in very good condition. His camp near Milan was considered an excellent one. He seemed to get along with the civilians there and performed his military duties in an excellent manner (R. 323-324).

Captain Royal A. Machie, Fifth Tank Corps, testified that he is on duty as assistant to the district quartermaster, CCC, Fort Benjamin Harrison, and had been on such duty since September, 1933. In his dealings with Company 1532, CCC he found their duties with reference to his branch performed in an average manner, and generally just as good as any of the companies (R. 324-325).

Lieutenant Colonel Clifford Bluemel, 11th Infantry, testified that he is executive officer of the CCC work camps in the State of Indiana (R. 329). Accused had command at Huntington and at Milan, Indiana, and then returned to the same camp at Huntington. At his first camp at Huntington they considered that he did his work as a camp commander "very well", at his second camp in Milan, "fairly well", and at his last location, on his return to the first camp in Huntington "he was on the ragged edge of getting by" (R. 330).

Accused remained silent.

36. Accused is 39½ years of age. He was born in Pisa, Italy. He served as a private in the 28th Company, 7th Battalion, 159th Depot Brigade, Camp Zachary Taylor, Kentucky, from May 28, 1918, until August 15, 1918. On the latter date he entered the Field Artillery Company Officers' Training School at Camp Zachary Taylor. He was appointed a Second Lieutenant, Field Artillery, Officers' Reserve Corps, on December 11, 1918, was reappointed in the same grade in 1923 and 1928, and was promoted

to First Lieutenant on February 8, 1932. He has been on active duty as follows:

August 16 to 30, 1925;
August 22 to September 5, 1926;
July 26 to August 8, 1931;
July 17 to 30, 1932;
May 22, 1933 to December 15, 1934.

37. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The conclusions of the Board of Review as to the legal sufficiency of the record to support the findings of guilty of the several specifications either in whole or in part have already been set forth in the discussion of the evidence under these specifications. The Board is also of opinion that the record is legally sufficient to support the findings of guilty of Charges I, II, and III, 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 93d and 96th Articles of War. Confinement in a penitentiary is authorized for embezzlement by the 42d Article of War and sections 98 and 401, Title 6, Code of the District of Columbia, 1929. The punishment of confinement at hard labor for five years imposed by the court is believed to be unnecessarily severe. Accused is not an habitual criminal and this appears to be his first offense. While confinement in a penitentiary is authorized in this case, it does not appear that the purposes of punishment demand penitentiary confinement or that the confinement of accused in association with misdemeanants and military offenders would be to their detriment. Par. 90 a, M.C.M. The Board of Review is accordingly of opinion that the interest of discipline would be adequately served if two years of the confinement imposed were remitted and the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, designated as the place of confinement, and so recommends.

Theodore Hall, Judge Advocate.

Archibald King, ~~Judge Advocate~~.

L. W. Smith, Judge Advocate.

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

Board of Review
CM 202720

JAN 14 1935

UNITED STATES	)	THIRD DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Lewis, Washington,
Private JACK CLEM	)	November 23 and 27, 1934.
(6550078), Battery B,	)	Dishonorable discharge and
9th Field Artillery.	)	confinement for six (6) months.
	)	Fort Lewis, Washington.

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

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

2. Accused was tried upon one charge and one specification, which may be thus abstracted:

CHARGE: Violation of the 94th Article of War.

Specification: Larceny at Fort Lewis, Washington, about October 12, 1934, of one pair of elastique breeches, value $3.60, property of the United States, furnished and intended for the military service.

Accused pleaded not guilty to and was found guilty of the charge and specification. Evidence was introduced of two previous convictions, both of absence without leave, one from January 3 to 22, 1934, and the other from March 31 to April 2, 1934. The court sentenced accused to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence, designated Fort Lewis, Washington, as the place of confinement, but withheld the order of execution pursuant to Article of War 50½.

3. For the prosecution it was shown that a pair of elastique breeches, value $3.60, had been issued to Private Cook of accused's battery, for use in the military service (Cook, R. 6, and elsewhere; Tremper, R. 10,11). Cook missed them from his locker on a Saturday morning which he first stated was in the first part of October, and later said that it was "nearer the middle of the month than the first of the month. * * * possibly ten days after pay day" (R. 7,9). The Saturdays in October, 1934, fell on the 6th, 13th, 20th and 27th, so it seems reasonably certain that the breeches were missed October 13. Cook had not authorized accused or anybody else to borrow or use his breeches on this occasion, although he admitted having lent the breeches to accused once when the latter was a recruit and that it was the practice for men in the battery to borrow from each other once in awhile (R. 8,9).

The only testimony tending to connect accused with the breeches was that of Private 1st Class Peter Kelly, special investigator of the Military Police Company (R. 13-16). He first testified that on November 3, 1934, in company with a civilian policeman, he "went to the apartment of Private Clem" in Tacoma (R. 13). His testimony continued (R. 14):

> "Q. How do you know that the apartment was that of Private Clem?
> A. We rang the bell and asked the landlady if Mrs. Clem lived there.
> Q. How do you know that Mrs. Clem answered the door?
> A. Mrs. Clem did not answer the door. A boy came to the door and we asked him for the landlady. We asked her if Mrs. Clem lived there. She said 'Yes' and showed us her apartment. Mrs. Clem came to the door of the apartment and, when we asked her if she was Mrs. Clem, she said she was."

He also testified (R. 13):

> "I * * * asked Mrs. Clem if there were any uniforms there, in the apartment. She told us that Private Clem and a sergeant had been there and had taken all the uniforms but this pair of breeches, which she did not know why they left behind. I asked her to surrender them to me, which she did."

The breeches so obtained were brought into court and identified as those issued to Cook both by his own testimony and by a tailor's mark in them (Cook, R. 19, and elsewhere; Miss Perkins, 16-18).

The defense offered no evidence.

4. The finding of guilty and the approval thereof by the reviewing authority were apparently based upon the presumption of guilt arising from the unexplained possession of goods recently stolen. See staff judge advocate's review, par. 2. The Board of Review does not question the principle, but considers that the evidence fails to bring the present case within it.

In the first place, what evidence is there that the apartment from which the breeches were taken was occupied by accused? None whatever, save the hearsay statements of the landlady and Mrs. Clem, or the women who identified themselves as such. Such evidence was wholly inadmissible; and, if it be rejected, the record contains nothing to connect accused with the apartment or the breeches found therein.

But even if this objection be passed over, - though the Board sees no reason why it should be, - the record is insufficient to raise a presumption of the guilt of the accused. The landlady is quoted as answering "Yes" to the question whether Mrs. Clem lived there, and is said to have shown the witness "her" apartment, i.e., that of Mrs. Clem (R. 14). A woman came to the door of that apartment and, "when we asked her if she was Mrs. Clem, she said she was" (R. 14). "She told us that Private Clem and a sergeant had been there and had taken all the uniforms but this pair of breeches" (R. 13). All this hearsay testimony contains no statement by either woman that accused lived in the apartment. On the contrary it indicates that it was Mrs. Clem's apartment. The expression that "Private Clem had been there and had taken all the uniforms" indicates an occasional visit rather than living there. The foregoing evidence, taken at its face value and waiving all questions of admissibility, tends to show the not uncommon picture of a married private living in barracks whose wife stays in a near-by town in an apartment at which he visits her from time to time.

But the case is not even as strong as that. Kelly testified that he "understood" that accused was in confinement at the time the breeches

were found at the apartment, November 3, and that accused was absent without leave previous to that time (R. 16). Hence for an indefinite time prior to the finding of the breeches accused had been in confinement and had had no opportunity to place the breeches in the apartment supposed to be his, and for a further indefinite time before that he had been absent without leave and presumably absent from the apartment. It will be noted that the breeches were missed October 13, only three weeks before they were found.

Whatever may be the case with respect to stolen articles found in a house or apartment actually occupied by an accused, the Board is of opinion that no presumption of guilt arises when such slight connection is shown between him and the apartment as in the present case.

It is laid down by all the authorities that, in order that a presumption of guilt of larceny may arise, the unexplained possession of recently stolen articles by the defendant must be personal, conscious, and exclusive. 36 Corpus Juris 869, et seq., 17 Ruling Case Law 73, People v. Mulvaney, 286 Ill. 114, 121 N.E. 229; State v. Kinsey (Utah), 295 Pac. 247; People v. Hurley, 60 Calif. 74, 44 Am. Rep. 55, and the authorities hereinafter cited. Here, the possession of accused, so far as proved at all, was none of these. What is meant by these adjectives is shown by some of the cases.

In Ex parte La Page, 216 Fed. 256, it was sought to extradite a Canadian farmer from the United States on the charge of larceny of poultry and a calf from a neighbor in Canada. The principal evidence connecting him with the theft was the finding of a turkey, presumably dead, though not so stated, at the bottom of a well on La Page's farm, which fowl was identified as the property of the neighbor, Arnold. But it was further proved that neither the turkey nor any of the other stolen property had been found on a thorough search of defendant's farm by the sheriff and others the day before, and that in the meantime Arnold and a number of his friends had been about the premises. The court said (p. 259):

> "The possession of recently stolen personal property is some evidence that the possessor was the thief, and its probative force depends on the attending circumstances. But such possession must be a conscious possession, or possession under such circumstances as to show that the

possessor knew it was on his premises, and when the proof shows that it was just as probable, or, as here, more probable, that the stolen property was placed on the premises of the suspected party by another or others, the mere presence of the property on the premises has no significance."

The court held that the evidence did not show even probable cause strong enough to justify extradition.

In an English case, Regina v. Pratt, 4 F. & F. 315, Chief Baron Pollock, a most distinguished and learned judge, went so far as to say (p. 316):

"The mere fact of the goods being on the prisoner's premises, which might be without his knowledge or assent, does not prove possession, much less receiving by him, * * *."

With respect to the requirement that the defendant's possession be exclusive, the following language from Gablick v. People, 40 Mich. 292, is in point (p. 293):

"Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt (see Walker v. People, 38 Mich.); but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where it is discovered."

In CM 163072, Dig. Ops. JAG, 1912-30, par. 1575 (6), this office applied this principle to a case in which stolen property was found in an automobile belonging jointly to two persons. It was held that, in the absence of other evidence, one of them could not be convicted of larceny.

State v. Schimmel, 105 Wash. 151, 177 Pac. 685, was a case somewhat like the present on the facts. Defendant, convicted of larceny, was caretaker of a mine not then in operation and of the buildings in connection with it, in one of which the stolen property was found in January,

1918. The property had been stolen November 4, 1917. Defendant did not enter the building in question often, and had been absent in another state from the middle of November until after the discovery of the property, during which time his wife had remained on the premises and in possession of the keys to the buildings. It was further proved that the lock on the building in question could be picked with a skeleton key or even a bent wire. The court held that, as the building in which the stolen property was found was not exclusively accessible to defendant, the conviction should be reversed.

The specific question whether the presumption of guilt arises against the husband when recently stolen goods are found on premises occupied jointly by a man and wife was answered affirmatively in State v. Johnson, 60 N.C. 235, 86 Am. Dec. 434, and negatively in Perkins v. State, 32 Texas 109, and State v. Drew, 179 Mo. 315, 78 S.W. 594, 101, Am.St. Rep. 474. In the Perkins case, the court said (p. 110):

> "The stolen property was, a month or more after, found in a trunk, in a house occupied by the defendant and his wife. The possession of the house, with his wife, was, in contemplation of law, and for all civil purposes, the possession of the husband. But in criminal acceptation, and for criminal accountability, it was the actual possession of each, and of both. So of the trunk, in which the stolen goods were deposited or concealed. Either the husband or the wife, then, may have acquired this stolen property, and thus deposited or thus concealed them, and may have been the guilty taker, or the guilty receiver; and the other may have been totally ignorant of the legal ownership, or the methods of its acquisition."

However this question may be answered in other cases, the Board feels that in this case the breeches were not shown to have been in accused's possession in any such conscious and exclusive sense as to raise a presumption of guilt against him.

5. 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.

_____, Judge Advocate.

W. A. Trumbull, Judge Advocate.

Archibald K., Judge Advocate.

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

Board of Review
CM 202770

MAY 13 1935

UNITED STATES	)	SIXTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sheridan, Illinois,
First Lieutenant JOHN C.	)	November 20, 21, 23, and 24,
COOLEY (0-262337), Engineer	)	1934. Dismissal and total
Reserve.	)	forfeitures.

OPINION of the BOARD OF REVIEW
HALL, KING and SMITH, L.M., 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 eight specifications, each alleging that he either presented or caused a false claim against the United States to be presented, in violation of the 94th Article of War (Charge I), and four specifications, each alleging embezzlement in violation of the 93d Article of War (Charge II). After submitting a plea to the jurisdiction of the court in regard to all specifications under the 93d Article of War (Charge II), which was properly overruled, accused pleaded not guilty to all specifications and charges. He was found guilty of Specifications 1, 2, 3, 4, and 8, Charge I, and of Charge I; not guilty of Specifications 5, 6, and 7, Charge I, and not guilty of all specifications, Charge II, and of Charge II; and was sentenced to dismissal, total forfeitures, and confinement at hard labor for one year. The reviewing authority approved the sentence but remitted the confinement adjudged, and forwarded the record of trial for action under the 48th Article of War.

3. Accused was arraigned before a general court-martial convened at Fort Sheridan, Illinois, pursuant to orders of the Commanding General, Sixth Corps Area, on November 20, 1934 (R. 4-6). He first entered a special plea to the jurisdiction of the court in regard to all specifications under the 93d Article of War (Charge II), based upon the fact

that his active duty terminated on November 17, 1934, several days prior to his arraignment (R. 13). He admitted the jurisdiction of the court as to the specifications in violation of the 94th Article of War (Charge I), because by the 94th Article of War jurisdiction is retained in case of fraud against the Government (R. 17,20).

The plea to the jurisdiction was overruled (R. 25) and evidence was introduced by the prosecution in support of all charges and specifications. Since accused was acquitted of all specifications under the 93d Article of War (Charge II), at which the plea to the jurisdiction was aimed, no discussion of the ruling of the court on this point is necessary. However, since it appears that accused would have pleaded to the jurisdiction with respect to Charge I and its specifications had these offenses been alleged under any Article of War other than the 94th, discussion of the question of jurisdiction is advisable.

Accused was placed on active duty with his consent for a period of six months beginning November 18, 1933, by paragraph 19, Special Orders No. 232, Headquarters Sixth Corps Area, dated November 10, 1933 (R. 14-15). This tour was extended for a further period of six months to terminate November 17, 1934, by paragraph 7, Special Orders No. 96, of the same headquarters, dated April 23, 1934. In the instant case accused was confined on November 1, 1934, and was served with a copy of the charges on November 6, 1934, both of those events occurring before the expiration of his tour of active duty. This office has repeatedly held that Reserve officers on active duty with the Civilian Conservation Corps are under military jurisdiction and subject to the Articles of War. CM 201678, Anderson; CM 202366, Fox; CM 202479, Babbington; CM 202601, Sperti; and CM 203034, Joyner.

In Barrett v. Hopkins, 7 Fed. 312, the court said:

> "When a soldier in the army was arrested for a crime, and his term of enlistment expired before his trial and conviction by court-martial, it was held that the jurisdiction of the court having once attached by the arrest, it retained jurisdiction for all of the purposes of the trial, judgment and execution."

In Winthrop's Military Law and Precedents, 2d ed., page 90, the rule as to the continuation of jurisdiction after it has once attached is stated as follows:

> "It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly attached to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This principle has mostly been applied to cases where the offense was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him,--as by an arrest or the service of charges,--the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused."

The rule, as set forth above, was followed by the Board of Review, with the approval of The Judge Advocate General, in CM 202601, Sperti.

From the foregoing it is clear that, jurisdiction over the accused for trial upon these charges having once attached, upon his confinement and the service of the charges upon him while he was on active duty, jurisdiction continues for all the purposes of trial, judgment, and execution.

4. Preliminary statement. Accused, a second lieutenant, Engineer Reserve, residing in Chicago, Illinois, was placed on active duty with the Civilian Conservation Corps, as stated in paragraph 3, supra. He reported at Fort Sheridan, November 18, 1933, where he remained until about December 5, 1933, when he was assigned to the 601st Company, CCC, at Camp McCoy, Sparta, Wisconsin, which company on December 27, 1933, moved to Camp Douglas, Wisconsin (R. 501-504). On April 17, 1934, he was relieved from duty with the 601st Company, CCC, at Camp Douglas,

Wisconsin, and assigned to the 1605th Company, CCC, Camp Fairchild, Wisconsin, at which camp he reported on about April 20, 1934 (R. 328, 476,526; Pros. Ex. 15). While serving with the 601st Company at Camp Douglas, he performed the duties of mess officer and camp exchange officer, under Major Alfred M. Goldman, 3d Field Artillery, and First Lieutenant Maurice L. Moore, Infantry Reserve (R. 82,163,308-309,315, 459-460). Upon reporting to the 1605th Company, CCC, at Camp Fairchild, accused performed the duties of mess officer of the company, which at that time was commanded by First Lieutenant Werner H. Zugschweidt, Chemical Warfare Reserve (R. 476). On or about July 15, 1934, accused assumed command of the 1605th Company, CCC, and was commanding officer of that company during its temporary encampment at Camp Gilmanton, near Mondovi, Wisconsin, until his relief from command during October, 1934, because of the discovery of the acts which form the basis of the present charges (R. 256,479,645).

5. The specifications, other than those of which accused was acquitted, are set out separately below with the pleas of accused, the findings of the court, a summary of the evidence in support of each of them, and the views of the Board of Review.

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

Specification 1: In that First Lieutenant, then Second Lieutenant, John C. Cooley, Engineer Reserve, while on active duty, did, at LaCrosse, Wisconsin, on or about February 6, 1934, cause to be presented by The Sisson Company, LaCrosse, Wisconsin, for payment a claim against the United States, by causing to be presented to First Lieutenant Maurice L. Moore, Infantry Reserve, the company commander of the 601st Company, Civilian Conservation Corps, Camp Douglas, Wisconsin, an officer of the United States duly authorized to pay such claim, in the amount of about $67.65 for provisions alleged to have been furnished to the United States for the use of the 601st Company, Civilian Conservation Corps, Camp Douglas, Wisconsin, which claim was false and fraudulent in that provisions in the amount of about $25.75 included in said claim of about $67.65 had not been furnished said 601st Company, Civilian Conservation Corps, by the

said Sisson Company, and was then known by the said Lieutenant Cooley to be false and fraudulent.

Plea: Not Guilty.

Finding: Guilty.

On or about February 1, 1934, accused, as mess officer of the 601st Company, purchased groceries for the company in the amount of $67.65 at the Sisson Company, wholesale grocers of LaCrosse, Wisconsin, through Miss Gertrude Peterson, secretary to Mr. Sisson (R. 29-31,33; Pros. Ex. 4). Included in the total of $67.65 were "family sized" groceries, i.e., in small cans, consisting of 28 varieties of canned fruits, vegetables, sea foods, and other delicacies, itemized on pages 2 and 3 of Prosecution Exhibit 4, of the value of $25.75; which accused asked Miss Peterson to bill as company sized groceries, i.e., in large cans, as follows:

"8 Cs 6-10 Cal. Tomatoes	$20.00
2 Bx C. H. Peaches	5.75",

Accused caused all the groceries to be loaded into a truck, took them to Camp Douglas, and had the family size items delivered to his quarters (R. 33-34,50-51,508-510; Pros. Ex. 4). On or about February 6, 1934, the Sisson Company submitted to the 601st Company a bill for $67.65, in which was included $25.75 for company size tomatoes and peaches. On or about February 8 and 16, 1934, the Sisson Company submitted to the 601st Company two additional bills in the amounts of $8.80 and $61.07, respectively (Pros. Ex. 2). The total of these three bills, less a small discount, was $135.38; and was paid by First Lieutenant Maurice L. Moore, custodian of the company fund of the 601st Company, by check dated March 12, 1934, drawn on funds of the 601st Company on deposit with the First National Bank of Lake Forest, Illinois (R. 329; Pros. Ex. 3). The amount of this check, $135.38, appears on the council book of the 601st Company for the month of March, 1934, as an expenditure from ration savings (to the Sisson Company), and the three bills submitted by the Sisson Company (Pros. Ex. 2) are the supporting vouchers (R. 27; Pros. Exs. 1 and 2).

Lieutenant Moore testified that as far as he knew this payment to the Sisson Company was for merchandise received by the company, although it was possible that the merchandise had been sent to the quarters of the

accused (R. 324-326). Witness further testified that he had not authorized accused to substitute family size groceries for company size and did not know it was being done, and that none of the family size articles were used either by himself or his family, as he messed with the company mess and his wife and children did not arrive at Camp Douglas until about March 10, 1934 (R. 346,371-372).

In defense to this specification it was shown that both accused and Lieutenant Maurice L. Moore, commanding officer of the 601st Company, were married (R. 318,373-374,505). The family of accused consisted of a wife and one child, while that of Lieutenant Moore consisted of a wife and two children (R. 319,485,505). The families of the two officers occupied quarters at Camp Douglas known as General Dunnell's house, and the two officers occasionally took meals there and stayed overnight (R. 374, 452,469-472,486). Mrs. Cooley arrived at Camp Douglas about January 17, 1934, while Mrs. Moore did not take up a permanent residence there until about March 10, 1934, although she spent several week-ends at Camp Douglas prior to that date (R. 371,374,422,450-451,485-486).

The expense of operating the mess at the house was divided equally between accused and Lieutenant Moore (R. 320,323,427,506). Lieutenant Moore did not bother with the purchase of food, but left that to accused, although he did authorize accused to secure part of the supplies for the house mess from the company. The mess steward of the company mess was required to keep a record of the supplies going out and turn it over to Lieutenant Moore (R. 322-324).

In regard to the particular purchases covered by this specification, accused testified that these items were bought with the knowledge and consent of Lieutenant Moore, just before one of the week-end visits of Mrs. Moore, and that Lieutenant Moore had instructed him to charge the family size items as company size. Witness also testified that he entered the cost of the family size items, about $25.00, in the officers' mess account (R. 508-510).

Lieutenant Moore paid the company the value of one ration, $12.00 to $15.00, for the month of February, as Mrs. Moore did not reside at the camp until after March 1, 1934, and he considered that when she visited

over the week-ends she was the guest of the Cooleys (R. 326-327,330,371, 374,451). It was stipulated that accused paid the company fund the value of one ration each month, and a canceled check was introduced showing that he had paid the company $10.00 for rations for the month of February, 1934 (R. 542,438; Def. Ex. 15). The council book of the 601st Company for the month of March shows the receipt of $20.00 in the ration savings account as "Mess Bills - Officers" (Pros. Ex. 1). While there is nothing to show that this amount was in payment for February bills, it is only reasonable to presume such was the case as the entry was made on March 16, 1934. Since Lieutenant Moore used only a small part, if any, of the family size groceries and only paid the company $10.00, which covered his mess at the company, it follows that accused must have benefited by this transaction, at least to the extent of $15.75, because he and his family consumed the $25.75 worth of family size groceries and he only reimbursed the company $10.00.

The Board of Review is of opinion that the evidence under this specification is legally sufficient to support the finding of guilty.

7. Specification 8: In that First Lieutenant, then Second Lieutenant, John C. Cooley, Engineer Reserve, while on active duty, did, at LaCrosse, Wisconsin, on or about March 3, 1934, cause to be presented by The Sisson Company, LaCrosse, Wisconsin, for payment a claim against the United States by causing to be presented to First Lieutenant Maurice L. Moore, Infantry Reserve, the company commander of the 601st Company, Civilian Conservation Corps, Camp Douglas, Wisconsin, an officer of the United States duly authorized to pay such claim, in the amount of about $78.89 for provisions alleged to have been furnished to the United States for the use of the 601st Company, Civilian Conservation Corps, Camp Douglas, Wisconsin, which claim was false and fraudulent in that provisions in the amount of about $25.75 included in the said sum of about $78.89 had not been furnished said 601st Company, Civilian Conservation Corps, by the said Sisson Company, and was then known by the said Lieutenant Cooley to be false and fraudulent.

Plea: Not Guilty.

Finding: Guilty.

On or about March 2, 1934, accused, as mess officer of the 601st Company, again placed an order for merchandise for the 601st Company with the Sisson Company through Miss Gertrude Peterson. Included in the merchandise ordered were a number of family size items, value $25.75, consisting of some 27 varieties of canned foods and other articles which are described in detail on pages 2, 3, and 4 of Prosecution Exhibit 8. At the time these supplies were ordered accused requested Miss Peterson to bill the family size items as follows:

"4 Cs	6-10	Cal. Spinach	$12.00
5 Cs	6-10	Cal. Tomatoes	13.75".

Accused personally signed for the merchandise and caused it to be picked up in a truck and the family size items to be delivered to his quarters at Camp Douglas (R. 36,39,42,45-50,55,61,78-79,511-512). Subsequently a bill in the amount of $78.89 (Pros. Ex. 6, p. 4), including spinach and tomatoes of the value of $25.75, was submitted to the company and paid, along with several other bills from the Sisson Company, by Lieutenant Maurice L. Moore by check dated April 12, 1934, in the amount of $182.99, drawn on funds of the 601st Company (R. 341-342; Pros. Exs. 6 and 7). The council book of the 601st Company for April, 1934, shows an expenditure of ration savings funds in the amount of $182.99 to the Sisson Company, which entry is supported by the receipted bills of the Sisson Company, among which is the bill containing the falsely described merchandise (Pros. Exs. 5 and 6).

Lieutenant Moore testified that he had not authorized accused to cause the Sisson Company to bill these family size items as company size (R. 345-346), and denied having had any discussion with accused in regard to the purchase of these supplies for the house mess (R. 458).

In defense to the allegations of this specification, accused testified that he made the purchase of these family size items and caused them to be billed to the 601st Company as company size items after he had talked the matter over with Lieutenant Moore, as they were planning to entertain the

officers of the 14th Forestry District. Accused also testified that he turned the bills for the family size items, $25.75, over to the mess steward of the company for entry in the officers' mess account, in which he said they were recorded (R. 511-512). It was stipulated that accused paid the 601st Company the value of one ration for each month and two checks, total amount $11.03, were introduced to show that accused had actually paid that amount to the 601st Company for his mess bill for the month of March, 1934 (R. 542,546-547; Def. Exs. 13 and 14).

After about March 10, 1934, Mrs. Moore and her two children resided at the house of General Immell with the family of accused, where both families messed. Accused and Lieutenant Moore ate some of their meals there, although Lieutenant Moore testified that he ate the majority of his meals at the company mess. It was agreed between Lieutenant Moore and accused that the expense of operating the mess at the house was to be divided equally between them (R. 422-423,427,469,471-473,485-486). In this connection Lieutenant Moore testified that when Mrs. Moore was living at Camp Douglas their combined rations from the company came to approximately $10.00 (R. 327-328). The council book of the 601st Company for the month of April, 1934, shows the receipt in the ration savings account of $22.06 for "Mess Account - Officers" (Pros. Ex. 5). As the entry was made on April 2, 1934, it is only reasonable to presume that this amount represented receipts for the month of March, 1934. It is therefore apparent that for the month of March, 1934, Lieutenant Moore paid the company $11.03 to cover both his own and his family's rations. Mrs. Cooley testified that at least seventy-five per cent of the mess supplies consumed at the house mess came from the 601st Company (R. 443).

From the foregoing it appears that the 601st Company was paid only $22.06 for rations furnished four adults and three children for the month of March, 1934. When it is considered that both Lieutenant Moore and accused ate a great many meals at the company mess, that seventy-five per cent of all rations used by the families of these officers was obtained from the company, and that the value of the family size supplies obtained from the Sisson Company on March 3, 1934, by accused was $25.75, it is apparent that no accurate account was kept of the supplies issued by the 601st Company to the house mess. It is also obvious that the 601st Company could not have been reimbursed by either accused or Lieutenant Moore for the family size groceries obtained from the Sisson Company on

March 3, 1934. It is probable that Lieutenant Moore benefited from this transaction as well as accused, but that does not affect the guilt of accused.

The Board of Review is of opinion that the evidence under this specification is legally sufficient to support the finding of guilty.

8. Specification 3: In that First Lieutenant, then Second Lieutenant, John C. Cooley, Engineer Reserve, while on active duty, did, at Camp Douglas, Wisconsin, on or about April 3, 1934, cause to be presented by Carl G. Frohmader, Camp Douglas, Wisconsin, for payment a claim against the United States by causing to be presented to First Lieutenant Maurice L. Moore, Infantry Reserve, the company commander of the 601st Company, Civilian Conservation Corps, Camp Douglas, Wisconsin, an officer of the United States duly authorized to pay such claim, in the amount of about $343.13 for provisions alleged to have been furnished to the United States for the use of the 601st Company, Civilian Conservation Corps, Camp Douglas, Wisconsin, which claim was false and fraudulent in that provisions in the amount of about $205.47 included in said claim of about $343.13 had not been furnished said 601st Company, Civilian Conservation Corps, by the said Carl G. Frohmader, and was then known by the said Lieutenant Cooley to be false and fraudulent.

Plea: Not Guilty.

Finding: Guilty.

Specification 4: In that First Lieutenant, then Second Lieutenant, John C. Cooley, Engineer Reserve, while on active duty, did, at Camp Douglas, Wisconsin, on or about March 12, 1934, present for approval and payment a claim against the United States by presenting to First Lieutenant Maurice L. Moore, Infantry

Reserve, the company commander of the 601st Company, Civilian Conservation Corps, Camp Douglas, Wisconsin, an officer of the United States, duly authorized to approve and pay such claim, in the amount of about $34.09 for provisions alleged to have been furnished the United States by Carl G. Frohmader, Camp Douglas, Wisconsin, which said claim was false and fraudulent in that the said Carl G. Frohmader had not in fact furnished the said provisions, and was then known by the said Lieutenant Cooley to be false and fraudulent.

Plea: Not Guilty.

Finding: Guilty.

The evidence pertaining to these two specifications overlaps somewhat so they will be discussed together. Since the offense alleged in Specification 4 occurred first, the facts with respect to that offense will be presented first, followed by the facts pertaining to Specification 3.

On or about December 28, 1933, the 601st Company opened a charge account with a general merchandise store in Camp Douglas, Wisconsin, operated by Carl G. Frohmader; and, several days later, on or about January 5, 1934, accused opened a personal charge account at the same store (R. 116, 122,144,148,517,608). Some time later, on or about March 12, 1934, accused visited the store of Mr. Frohmader and presented to him a check for $118.84, drawn by Lieutenant Maurice L. Moore as custodian of the company fund of the 601st Company. On the request of accused, Mr. Frohmader applied $84.75 of this check to the credit of the 601st Company and the balance, $34.09, to the credit of accused's personal account (R. 103-104,106,146; Pros. Exs. 11,12,14). As far as Mr. Frohmader knew, this transaction was unknown to Lieutenant Moore (R. 104). Lieutenant Moore testified that the check for $118.84 was drawn by him to cover purchases made for the 601st Company from Frohmader during the month of February, 1934, and that as far as he knew the company had received the provisions shown on Prosecution Exhibit 13, although he had no personal knowledge of their receipt, as it was his custom to rely upon his subordinates to check in the provisions (R. 334-336,347½).

The council book of the 601st Company for the month of March, 1934, shows that on March 10, 1934, the ration savings account of the company was debited $118.84 for groceries and vegetables supplied by Carl G. Frohmader, which entry is supported by voucher No. 14, which consists of three receipted bills purporting to have been signed by Carl G. Frohmader (Pros. Exs. 1 and 13). The three bills which compose voucher No. 14 (Pros. Ex. 13) were presented to Mr. Frohmader who positively identified the one in the amount of $4.20 as genuine and apparently admitted that the one in the amount of $86.04 bore his signature, although he appeared to be in doubt in regard to the delivery of these items to the 601st Company. Witness positively disclaimed all knowledge of the bill in the amount of $28.60, which purported to bear his signature (R. 105-106; Pros. Ex. 13). Accused was not asked specifically whether he prepared the false bills which accounted in part for the $118.84 check drawn by Lieutenant Moore, but he did state that at the time Mr. Frohmader was pressing him for payment of his personal account Lieutenant Moore authorized him to transfer his debt at Frohmader's to the 601st Company's account and told him to submit padded bills to the company to cover the transaction (R. 517-518,566-567).

With respect to Specification 3 of Charge I, the evidence shows that on April 2, 1934, on the request of accused, Mr. Frohmader credited accused's account with $104.94 and debited the account of the 601st Company with that amount. Subsequently, on the same day, Mr. Frohmader, again on the request of accused, debited the account of accused with $46.79 and credited that amount to the account of the 601st Company. These transactions reduced the account of accused by $58.15 and increased the account of the 601st Company by that amount (R. 95-98,100,142; Pros. Exs. 11 and 12). On the following day, April 3, accused, together with Lieutenant Moore, the company commander of the 601st Company, went to the store and presented to Mr. Frohmader a check in the amount of $343.13, payable to him, and drawn by Lieutenant Moore on funds of the 601st Company. Mr. Frohmader accepted the check, credited the account of the 601st Company with $195.81 and gave Lieutenant Moore his own check in the amount of $147.32, payable to Floyd Christensen of Necedah, Wisconsin (R. 92,95,97-101,124-126,331-332,468,574; Pros. Exs. 10 and 11). On this date the account of the 601st Company with Mr. Frohmader showed a balance due of $208.13, which amount included the $58.15 which had been transferred to that account from the personal account of accused. While

the $195.81 did not pay in full the account of the 601st Company as augmented by the transfer from accused's account, it did so approximately; and any part of the $58.15 which might be considered as not paid by this transaction was subsequently paid by the 601st Company, as no part of the $58.15 was ever retransferred to the account of accused (R. 93,100, 610; Pros. Exs. 11 and 12).

From the foregoing it is apparent that out of the check for $343.13 only $137.66 was used to pay an obligation of the 601st Company to Mr. Frohmader for provisions, and that $205.47 was diverted to other purposes.

On April 3, 1934, the ration savings account of the 601st Company was debited $343.13 (Pros. Ex. 5). The supporting voucher consisted of a number of yellow sales slips bearing the heading of Frohmader's Store, totaling $343.13 (Pros. Ex. 9). These sales slips were presented to Mr. Frohmader who testified that they were not genuine and had not been submitted by him (R. 93-94). The prosecution did not produce any evidence to show that these sales slips had been prepared by accused, but accused admitted that he had prepared them (R. 514).

Lieutenant Moore used the $147.32 check given to him by Mr. Frohmader to pay an obligation which the 601st Company owed the F. M. Reed Lumber Company, of which company Mr. Floyd Christensen was president. The debt to the lumber company had been incurred for lumber, stain, and other materials furnished to the 601st Company, for which no funds were available for legitimate payment (R. 332,333,383,435,468-469,515,616). In so far as this check for $147.32 is concerned, accused derived no personal benefit, but he did knowingly participate in the transaction and therefore must be considered a principal in the fraud (R. 92,126,383,468-469,513-514).

With respect to the $58.15 which formed a part of this fraudulent transaction, accused and Mr. Frohmader alone appear to have been the guilty parties. At the time the $343.13 check was presented to Mr. Frohmader, Lieutenant Moore believed that the amount of this check covered the debt which the 601st Company owed Mr. Frohmader plus the amount of the check which Mr. Frohmader returned to him. In other words, Lieutenant Moore believed the 601st Company owed Mr. Frohmader for supplies furnished the company the difference between $343.13 and $147.32, or $195.81, and knew

nothing of the transfers which had been effected by accused and Mr. Frohmader on April 2, 1934, whereby the account of the 601st Company had been increased $58.15 (R. 332,346,347-347½,383-384,386-387).

In defense to Specification 4, accused testified that he was unable to pay his January bill to Mr. Frohmader, and Mr. Frohmader agreed to carry his account for several months. Subsequently, some time toward the end of February, Mr. Frohmader told accused that he must pay. Accused did not have sufficient money, so he asked Lieutenant Moore for a loan of about $40.00, which Lieutenant Moore refused to grant him. A day or so later accused again asked Lieutenant Moore for a loan. At this time, according to the testimony of accused, Lieutenant Moore said: "You tell Frohmader to make a transfer from your account to the company account and you pay me back later". On the day following this alleged statement of Lieutenant Moore, Mr. Frohmader, on the request of accused, transferred $34.09 from his (accused's) account to the account of the 601st Company (R. 517-519).

In defense to Specification 3, accused admitted his knowledge of the transaction between Lieutenant Moore and Mr. Frohmader, whereby Lieutenant Moore received back a check for $147.32; but denied that he was present at the time Lieutenant Moore received the check, and that he was in any way benefited by the transaction (R. 514-515). In regard to the $58.15, accused admitted causing Mr. Frohmader to make the transfer from his account to that of the 601st Company, but testified that the transfer had been sanctioned by Lieutenant Moore. Accused also admitted that he had personally benefited by the transaction (R. 556,566,574,580, 608-610).

In defense to both Specifications 3 and 4, accused testified that he considered that he owed to Lieutenant Moore the amounts which he had caused to be transferred from his personal account to the account of the 601st Company; that around the latter part of April, 1934, he had made a trip to Camp Douglas where he conferred with Lieutenant Moore in regard to this indebtedness and they had agreed that the total was approximately $75.00, which sum accused was to pay Lieutenant Moore subsequent to July, 1934 (R. 556-557,568,580-581,610).

In Specification 3, of Charge I, it is alleged that accused caused Carl G. Frohmader to present a claim in the amount of $343.13, of which

$205.47 was false and fraudulent. In so far as $58.15 of the $205.47 is concerned, there is no question, as that amount had been transferred from the personal account of accused and debited against the account of the 601st Company, CCC, by Mr. Frohmader at the instigation of accused on the day previous to that upon which the check for $343.13 was presented to Mr. Frohmader. In regard to $147.32, which was included in the false claim of $205.47 charged, the situation is different. Lieutenant Moore and accused presented to Mr. Frohmader a check in the amount of $343.13 and requested that he give them a check covering the difference between that amount and the amount which the 601st Company owed him. Mr. Frohmader complied with their request. Upon these facts can it be said, in so far as concerns the $147.32, that Mr. Frohmader presented a false claim to Lieutenant Moore? If Frohmader did not suspect anything fraudulent about the transaction, and if he supposed that he was asked for a check payable to Christensen merely as a matter of convenience of remittance, the answer must be in the negative, he did not present a false claim so far as concerns the $147.32. But may the Board suppose that Mr. Frohmader was so innocent as not to suspect anything fraudulent in the transaction? He had already been put upon notice by previous transactions that the account between him and the 601st Company was being used for fraudulent purposes. He knew that on March 12, only three weeks earlier, a check drawn against the company fund had been given him which he had been requested to apply in part to the credit of accused's personal account (see previous summary of the evidence with reference to Specification 4). He also knew that on the day before the transaction now under consideration peculiar and unexplained transfers had been made at the request of accused between the personal account of accused and the company account. He knew that as a result of those transfers the check which he was at the moment receiving was to be applied in part to the satisfaction of accused's personal indebtedness to him. In the light of all this knowledge, can it be supposed that Mr. Frohmader was so naive as to believe that the unnecessarily large check then tendered him was being given him as a part of an honest transaction merely as a matter of convenience? Must he not have known that this unnecessarily large check was being given him to cover some fraudulent transaction, some unjustifiable payment, to Mr. Christensen? It is not uncommon for A, a person having no bank account, to pay cash to B, who has such an account, in return for a check drawn by B in favor of C, a creditor of A. Mr. Frohmader can hardly have supposed that there was any necessity for such

a course in the present case, since the company had a bank account, as he well knew, and, if the transaction were honest and aboveboard, might just as easily have drawn its own check in favor of Mr. Christensen. Under all the circumstances, the Board concludes that Mr. Frohmader must have known that, in this respect, as well as in others, the account between him and the 601st Company was being used as a cover for illegitimate transactions; and that, this being so, the acceptance by him of the check for $343.13 must be deemed to have been the presentation by him of a false claim for that amount and the contemporaneous settlement of that claim. It further appears that Mr. Frohmader was induced by accused and Lieutenant Moore to present this false claim. But the question may further be asked, is it indispensable to the validity of the conviction of this specification that it be shown that Mr. Frohmader was aware of the false and fraudulent character of the transaction in which he was an actor? Do the words "false and fraudulent" in the specification refer to Frohmader or the accused? Even if Frohmader be considered merely an innocent cat's-paw used by accused and Moore for the consummation of a fraudulent transaction, is it not enough that accused knew that the transaction was false and fraudulent? Even in such a case can it not be truthfully said that accused caused Frohmader to present a false and fraudulent claim? The Board thinks that these questions should be answered in the affirmative. The Board therefore concludes that the evidence is legally sufficient to support the finding of guilty of Specification 3, Charge I.

In Specification 4, of Charge I, accused is charged with having presented to Lieutenant Moore a false claim against the United States. The evidence in support of this specification shows that accused obtained a company fund check in the amount of $118.84 from Lieutenant Moore and used $34.09 of the check to pay a personal debt which he (accused) owed Mr. Frohmader. Lieutenant Moore was led to believe that the total amount of the check, $118.84, was to be used in payment of an obligation of the 601st Company to Mr. Frohmader for supplies furnished to the company, and the vouchers covering this expenditure, while purporting to be genuine, were in part false. The Board of Review is of opinion that the evidence supports the finding of guilty of Specification 4, Charge I.

9. Specification 8: In that First Lieutenant John C. Cooley, Engineer Reserve, while on active duty, did, at Mondovi, Wisconsin, on or about October 4, 1934, cause to be presented by the City Meat Market, Mondovi, Wisconsin, for payment a claim against the United States, by causing to be presented to him, the said Lieutenant Cooley, the commanding officer of Company 1605, Civilian Conservation Corps, Fairchild, Wisconsin, an officer of the United States duly authorized to pay such claim, in the amount of about $91.90 for provisions alleged to have been furnished to the United States for the use of the said Company 1605, Civilian Conservation Corps, Fairchild, Wisconsin, which claim was false and fraudulent in that provisions in the amount of about $80.80 included in the said claim of about $91.90 had not been furnished said Company 1605, Civilian Conservation Corps, by the said City Meat Market, and was then known by the said Lieutenant Cooley to be false and fraudulent.

Plea: Not Guilty.

Finding: Guilty.

In regard to this specification, it appears that on or about October 3, accused, who was at that time commanding officer of the 1605th Company, CCC, and enrollee Beeson, mess steward of that company, visited the City Meat Market of Mondovi, Wisconsin, which was operated by Ernest S. Engen. Beeson informed Mr. Engen that the 1605th Company had a number of bills around town which must be paid, and requested Mr. Engen to advance the money with which to pay these bills and to charge the amount advanced to the 1605th Company as meat. Mr. Engen said that he did not have sufficient money himself, but could borrow it, provided he was paid ten per cent as interest, and told "them" to come back the following day when the bank would be open (R. 228-231,259-260,263,280-281,287-288). The next day Beeson went to the City Market and received $72.72 in cash from Mr. Engen. Beeson assisted Mr. Engen in making out the bill covering this transaction. The cash advance of $72.72 was charged against the 1605th Company as bacon, pork chops and wieners to the value of $80.80 on a slip on which was

included hamburger and sausage to the value of $11.10, the latter amount only being for supplies actually furnished to the 1605th Company. The total of this bill was $91.90 and was signed by Beeson. Mr. Engen understood that he was to receive the total amount shown on this bill "through the Mess Fund". Mr. Engen testified that both accused and Beeson were present when the money was delivered, while Beeson testified that accused was not present. The weight of the evidence indicates that accused was not present and that Mr. Engen was mistaken on this particular point (R. 228-232,236,250-252,260,262-263,270,273-274,287; Pros. Ex. 28). This point is immaterial since accused admitted that he had directed Beeson to carry through this transaction (R. 539-540,584-585,592). After receiving the money, Beeson paid several bills of the 1605th Company, as he had been directed to do by accused, and turned the balance, approximately $50.00, over to the accused. Enrollee Beeson testified that he did not know what accused did with the $50.00, and that the false bill covering this transaction was given to him by Mr. Engen and he "put it in the invoice envelope on the Mess Officer's desk" (R. 262,277-283,289-290, 589).

Second Lieutenant Frederick M. Smith testified that he was mess officer of the 1605th Company at the time when this transaction occurred and that the false slip from the City Market covering the illegal transaction of October 4, 1934, was presented to him by the mess steward, enrollee Beeson. Witness also testified that he searched the mess in order to ascertain whether or not the merchandise had been delivered to the 1605th Company and found only a few wieners. The false bill was never paid by the 1605th Company, because of the discovery of the fraud and the relief of accused as company commander during the month of October, 1934 (R. 292-293,645,680-681; Pros. Ex. 28).

In defense to this specification accused testified that when he took command of the 1605th Company he was very desirous of winning the Corps Area Inspection. With this end in view and because he believed the health of his men demanded it, he purchased lumber for tent floors in excess of the money allotted for that purpose. These purchases were made while the 1605th Company was at its summer camp near Mondovi, Wisconsin, and some of them were still unpaid when the time approached for the company to return to Camp Fairchild, its permanent camp. As accused did not want to leave Mondovi with these bills outstanding against the company, he

authorized the mess steward, enrollee Beeson, to obtain money with which to pay them. Accused not only admitted having authorized Beeson to obtain the money from the City Meat Market, which offense is charged in this specification, but admitted that he had authorized Beeson to do the same thing several times before, and estimated that the total amount of money so obtained was between $150.00 and $175.00. Accused denied that he had derived any personal benefit from these transactions (R. 539-540,572-573, 580,584-585,592,602). Accused admitted that he had received the $50.00 which Beeson had received from the City Meat Market, and had not paid out, but insisted that he had used it to pay bills for the 1605th Company. He was unable to produce the receipted bills covering the expenditure of this money obtained from the City Meat Market, because, he said they had been taken from him. In this connection accused testified that when he went on leave from the 1605th Company he left some of his records in his desk and on his return he found that his desk had been broken into, rifled, and a number of his personal papers removed, including "the evidence of these bills that I had paid from the money I received from the City Meat Market, all these bills were gone, all these payments, marked receipts were missing" (R. 558-559,589). On cross-examination Captain Clifford E. Cole, 3d Field Artillery, admitted that he had opened the desk of accused and "took stuff out of the drawers" which he had turned over to the Sixth Corps Area Inspector General. Witness denied specifically having broken into the desk (R. 661-662).

In Specification 8 of Charge I accused is charged with having caused the City Meat Market of Mondovi, Wisconsin, to submit a claim for $91.90, of which $80.80 was false and fraudulent. The evidence shows that accused caused enrolle Beeson, mess steward of the 1605th Company, to obtain from Ernest S. Engen, proprietor of the meat market, approximately $72.72 in cash, which, in compliance with instructions of accused, was charged against the 1605th Company as meat to the value of $80.80. The difference between $80.80 and $72.72, or $8.08, was interest at ten per cent which Mr. Engen charged for advancing the money in this manner. The false entry in regard to meat was made by Beeson and Mr. Engen on a sales slip which included $11.10 for other meat, which was actually supplied to the 1605th Company. The total amount charged against the 1605th Company on this slip was $91.90. This charge slip was submitted by Beeson to Lieutenant Smith, mess officer of the 1605th Company. Approximately $20.00 of the $72.72

obtained by Beeson was used by him to pay bills of the 1605th Company, and the balance, approximately $50.00, was turned over by him to accused. Accused admitted receiving the $50.00, and claimed that he had used it to pay obligations of the company. Accused explained his inability to produce the receipted bills covering these payments by stating they were included in the papers taken from his desk at Camp Gilmanton by Captain Cole.

The false charge slip was never actually presented to accused for payment because of the discovery of the fraud shortly after the transaction took place. Beeson testified that he "put it in the invoice on the mess officer's desk" (R. 202), while Lieutenant Smith, the mess officer, testified the false slip was presented to him by Beeson (R. 292). In any event, the false charge slip reached the 1605th Company of which accused was the commanding officer and may be considered as constructively delivered to him. This evidence is considered by the Board of Review sufficient to support the finding of guilty of Specification 8, of Charge I.

10. In addition to the defense testimony already referred to, the following character testimony was adduced by the defense: Major Alfred M. Goldman, 3d Field Artillery, testified that accused served in the 601st Company, CCC, under him for about twenty days during December and January, 1933 and 1934, that he did not notice anything suspicious about accused, and in his opinion accused was extremely efficient and intelligent, and that he rated him either excellent or superior on all the points covered on the first page of the efficiency report (R. 308-311,313).

First Lieutenant Werner H. Zugschweidt, Chemical Warfare Reserve, testified that he had been commanding officer of the 1605th Company, CCC, at Camp Fairchild, Wisconsin, and that accused served under him during the period April 20 to July 15, 1934, as a junior officer and as mess officer. He noted no irregularities in the work of accused and testified that "the lieutenant was perfectly O.K." (R. 476-479).

Without objection by the prosecution an affidavit executed by Captain Owen W. Marshburn, 36th Field Artillery, was introduced in evidence as Defense Exhibit 3 (R. 486). This affidavit included the following statement: "In my capacity as Assistant District Commander and District Commander, 14th Forestry District, Lieutenant Cooley came under my observation weekly. I always found him honest and faithful".

The deposition of Brigadier General Ralph M. Immell, Adjutant General of Wisconsin, was admitted in evidence as Defense Exhibit 4 (R. 487). In response to an inquiry propounded by the defense to state the character of the accused, this witness testified: "This officer appears to be a very efficient and able officer from my casual observation. He appears to be of good character".

The deposition of Lieutenant Colonel Harry G. Williams, Chief Quartermaster, Wisconsin National Guard, was admitted in evidence as Defense Exhibit 5 (R. 487). In response to a question in regard to the character of accused, this witness testified: "During my contact with Lieutenant Cooley while he was stationed with the CCC Company at Camp Williams, Camp Douglas, Wisconsin, he impressed me as being intelligent, energetic, zealous, honest and faithful. He displayed a considerable amount of enthusiasm in endeavoring to perfect the CCC Company to which he was attached to the highest possible standing".

Without objection by the prosecution a letter from the Reverend Leonard C. Stieber, Sacred Heart Church, Mondovi, Wisconsin, was admitted as Defense Exhibit 6 (R. 488). In his letter Father Stieber stated that he had observed accused for some time and that "all evidence at hand points to his good character. He was respected and honored and idolized by the boys who were placed under his care. This same good character so much admired in him left a marked influence upon their behaviour. *** Don't tell me that an officer whose good character was a constant inspiration to others, who tried to guide others by his own good conduct, whose one great ambition was to have the finest camp in the country, would rob himself of a successful career, blight the happiness of a devoted wife and children, and merit forever the condemnation of others, by being guided by dishonest principles. It simply does not fit into his life as I and others know him. It is not the act of an honest nor of an intelligent man, and I and this community and the boys at the camp give him credit for both".

On cross-examination accused had been asked whether or not he had been in trouble while working for the American Telephone & Telegraph Company because of a shortage in his accounts and because he had padded his expense accounts. Accused denied any such difficulty (R. 584). On redirect examination to rebut any unfavorable inference which may have arisen because of these questions, a letter of recommendation from O. L.

Dodge, Engineering Department, American Telephone & Telegraph Company, Chicago, was admitted in evidence as Defense Exhibit 23 (R. 595). The recommendation includes the following statement: "This will advise that I have known Mr. John C. Cooley for a number of years and in my contact with him have found him to be of good character, honest and dependable. His work has shown that he is capable and that he is able to direct the work of others, he also seems to be able to readily adapt himself to new lines of work".

11. The prosecution introduced the following witnesses in rebuttal of this character testimony: Captain Clifford E. Cole, 3d Field Artillery, testified that since May 12, 1934, he had commanded the 14th Forestry District and accused had been a member of his command from that date until October 13 or 14; that during this period accused kept his council book in a very unsatisfactory manner, and that he did not think very highly of the character of accused in regard to honesty and reliability and doubted if he would believe him under oath. Witness also testified that on the efficiency report which he had rendered on accused he had rated him below average on some points, and had added the remark that he did not consider him trustworthy (R. 634-635). A letter which this witness had written accused in regard to his inefficient handling of company funds was admitted in evidence as Prosecution Exhibit 31, without objection by the defense (R. 636). Witness testified that on or about November 4 he had received as district commander a communication from the Emanuel Cafe in Fairchild, Wisconsin, which said in substance: "Mrs. Emanuel claimed that she had given Lieutenant Cooley theatre tickets to sell to the men in the Company and he was gone now and she never got any money. It amounted to about $22.65". The defense moved to have the testimony in regard to the letter from the Emanuel Cafe stricken from the record as hearsay, which was denied (R. 636-638). Witness also testified that he went out to Camp Gilmanton about 6 p.m. on October 6 and discovered that accused was absent without authority (R. 640); that he telephoned accused and ordered him to report immediately, which order accused disobeyed (R. 643). Captain Cole also testified that he had directed accused to report to him on Sunday morning, October 7, which order accused also disobeyed. As a result of this conduct of accused, Captain Cole requested his relief and the inspection of his accounts by an officer of the Inspector General's Department (R. 643-645).

Second Lieutenant Frederick M. Smith, Infantry Reserve, was also called by the prosecution as a witness in rebuttal, and testified that on the night of October 6, 1934, while in the tent of accused, accused handed him an indorsement which he had signed explaining a shortage in the camp exchange of approximately $90 for the month of September. He disregarded it, inasmuch as the accused as commanding officer and president of the council auditing the books knew of the shortage and had told him "to load the inventory on the paper as per usual" (R. 665-667). Witness also testified that at this time he smelled the odor of liquor on accused's breath and that accused directed him (witness) to go get his pistol and turn it over to accused, that he returned to the vicinity of the tent of accused and overheard accused telephone Captain Cole at Camp McCoy, and that after this conversation accused took all his effects and left camp in one of the company trucks (R. 667-668).

Lieutenant Smith further testified that he had heard accused ask the camp exchange steward to get a quart of liquor from a salesman and to charge it as cigarettes (R. 670); and that accused on different occasions went out with married women other than his wife, and also with a nurse who worked at a hospital in Eau Claire (R. 674). Witness also testified that accused was under the influence of liquor on the evening of October 6, and that on the Monday evening of Labor Day week-end accused had been so much under the influence of liquor "that he vomited all over the outside of my car" (R. 675-677). The witness also testified that accused frequently used company gasoline for his personal use, and that he would not believe accused under oath (R. 677). Witness further testified that on October 6, 1934, accused had directed him to take $9.30 out of the post exchange cash receipts and give it to accused for traveling expenses, that he asked accused how he, the witness, was to account for the money and accused replied, "That is up to you". The $9.30 was never returned (R. 677).

At this time the defense objected to the method employed by the prosecution in attacking the credibility of accused, which objection was not sustained (R. 678).

On cross-examination by the defense, Lieutenant Smith stated that he bore no animosity towards accused and denied that he had been coached regarding replies he had made to questions by the prosecution (R. 684-686).

In reply to questions propounded to him by members of the court, witness stated that he had been instructed by accused during August of 1934 to pad the inventories of the camp exchange and when the audit came out short "how to load up this inventory", and that he, accused, "instructed me to do it and showed me how" (R. 690).

12. The defense in rebuttal recalled Mrs. Kathryn Barrow Cooley, mother of the accused, who testified that accused had always been "an obedient boy" and that she had never known him to do anything dishonorable (R. 695). At the conclusion of Mrs. Cooley's testimony counsel for defense again brought to the attention of the court the fact that certain papers of accused had been seized by Captain Cole (R. 699).

13. Notwithstanding the provisions of the 31st Article of War and paragraph 51 d, Manual for Courts-Martial, that on an objection to the admissibility of evidence offered during the trial the ruling of the law member of the court is final in so far as concerns the court, the law member of this court in frequent instances made his ruling upon such an objection subject to the objection by any member of the court. In at least two such instances a member of the court did object, the court was closed, and the ruling of the law member was not sustained (R. 66-67,356).

The rulings of the court and the law member were correct in most instances. However, it is believed desirable to discuss certain of them and certain other points on which no rulings were made.

Enrollee Troyer, while testifying in regard to the receipt of certain family size groceries on or about February 1, 1934, at the quarters of accused at Camp Douglas, Wisconsin, stated that the items shown on page 3 of Prosecution Exhibit 2 were delivered to the quarters of accused (R. 59). The witness was mistaken in this matter as page 3 of Prosecution Exhibit 2 does not represent family size groceries which were delivered to the quarters of accused, but represents groceries furnished the 601st Company concerning which no issue was raised. Page 2 of Prosecution Exhibit 4 is the exhibit which contains a list of the family size groceries delivered to the quarters of accused on or about February 1, 1934 (R. 58-60). This mistake of the witness is harmless because the receipt of the family size groceries listed on page 2 of Prosecution Exhibit 4 was proved by the testimony of other witnesses and was admitted by accused (R. 33-34,50-51,

509-510). Witness' further testimony in regard to the embezzlement of the groceries, which he stated were those included on page 3 of Prosecution Exhibit 2, is also harmless as accused was acquitted of Specification 1, Charge II, which alleges the embezzlement of the groceries listed on page 2 of Prosecution Exhibit 4.

While Lieutenant Harry J. Taylor was testifying in regard to Prosecution Exhibit 18, he was permitted to testify over the objection of the defense that he had been informed by several persons, including Lieutenant Moore, enrollees William Fosbinder and J. W. Bradley, that the handwriting on Prosecution Exhibit 18 was that of accused (R. 168-169, 177-180). This testimony is obviously hearsay and its admission was error. However, this error was harmless as accused subsequently admitted that the handwriting on Prosecution Exhibit 18 is his own, and in addition he was acquitted of Specification 6 of Charge I, the only specification to which this handwriting pertained, and there is nothing in the record to indicate that the handwriting so identified was used as a standard of comparison for other questioned handwriting (R. 524).

On direct examination accused testified that while he was absent on leave from Camp Gilmanton, near Mondovi, Wisconsin, his desk had been broken into and certain personal papers removed, among which were the vouchers or receipts covering the expenditure of the money obtained from the City Meat Market of Mondovi, Wisconsin (R. 558-559). On cross-examination Captain Clifford E. Cole, 3d Field Artillery, admitted that he had opened the desk of accused at Camp Gilmanton and removed therefrom "stuff" which he had turned over to Sixth Corps Area Inspector. Captain Cole denied having broken into the desk (R. 661-662). Counsel for the defense again brought this matter to the attention of the court at the close of his case (R. 699). There is nothing in the record to indicate that any of the papers, which accused alleged were illegally seized, were used against him at the trial, hence, irrespective of the legality of this search and seizure, no part of the prosecution's case is jeopardized in any way by this contention of accused.

The next question to be considered is, if there was an illegal seizure, what effect did it have upon the defense? Accused admitted that he had caused the false claim to be submitted by the City Meat Market but claimed that he had used the money to pay obligations of the 1605th

Company. The offense charged in Specification 8, Charge I, relates only to the presentation of a false claim. What accused did with the proceeds of the false claim is not material to his guilt or innocence, although admissible as a mitigating circumstance. Furthermore, there is nothing in the record to show that accused or his counsel ever submitted a request for these papers before or at the trial, which was denied. At the trial he contented himself with a mere assertion that they had been illegally seized. Under these circumstances no substantial right of accused was prejudiced.

On cross-examination accused was asked the following questions with the evident purpose of attacking his credibility:

"Q. Isn't it a fact, Lieutenant Cooley, that you had some difficulty there (while employed by the A. T. & T. Co.) in connection with a shortage of accounts?
A. No, sir, there was not. I have a letter of recommendation from my boss over there, from the A. T. & T. Company, Mr. O. L. Dodge. I was very highly respected and recommended in the A. T. & T. Company.
Q. Didn't you have some trouble about a padded expense account?
A. I never had any trouble about any padded expense account. The reason I started with the contracting firm, I was supervising the construction of three buildings in Southern Illinois.
* * * *
Q. Isn't it a fact that you and Lieutenant Smith went out on numerous or several drinking parties together?
A. No, sir.
Q. You never did?
A. No, sir.
Q. Did you go out on any parties with him with women or girls?
A. No, sir.
* * * *
Q. I see. Were you in the habit of getting gasoline for personal use from the company supply of gasoline?
A. No, sir.
Q. Did you ever obtain gasoline for your car or for personal use from the company supply?
A. Never for my personal use." (R. 584,593,594.)

The questions in regard to accused's conduct while employed by the American Telephone & Telegraph Company were actually inquiries as to whether or not he had been accused of embezzling funds of that company and of padding his expense account while employed by them. These questions were improper on cross-examination. It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime, but nothing short of a conviction of a crime is admissible. Par. 124 b, M.C.M., p. 133; 1 Greenleaf on Evidence, 16th ed., sec. 461 b (c), p. 580; Amer. Digest, Cent. ed., vol. 50, sec. 1126; Glover v. United States, 147 Fed. 426. Furthermore, cross-examination of accused as to other separate and distinct transactions is not permissible unless they are relevant and material to the case. 28 R.C.L. 621.

In the case of the questions in regard to drinking with Lieutenant Smith and the taking of the gasoline, it is unnecessary to decide whether or not the questions themselves were improper. It is clear that these questions were not material to the proof of the offenses charged against accused; hence they were inquiries with respect to collateral matters concerning which accused could not be subsequently contradicted. 28 R.C.L. 613; Wharton's Criminal Evidence, 10th ed., secs. 429 (a) and 484; Wigmore on Evidence, 2d ed., sec. 979; Greenleaf on Evidence, 16th ed., sec. 461 e; Rou v. United States, 260 Fed. 131; People v. Greenwald, 108 N.Y. 296, 15 N.E. 404; People v. De Garmo, 179 N.Y. 130, 71 N.E. 736. However, accused was contradicted with respect to his answers to both of these questions. Subsequent to the cross-examination of accused, Lieutenant Frederick M. Smith was called as a prosecution's witness in rebuttal and testified as follows:

"Q. Did you go on parties with Lieutenant Cooley?
A. Yes, sir.
Q. What took place at those parties?
A. It has been against my objections, more or less, but one time in particular, Monday evening of the week end of Labor Day, Lieutenant Cooley had been out and came back in around suppertime and the first notice of anything irregular or the presence of any liquor or anything was when he was admonishing or reprimanding the orderly. At that time I noticed the smell of liquor on his breath. And later in the evening he asked me to join him. Twice

I refused and the third time he became quite angry and said 'Get your clothes on and let's go'. So in view of that fact, I went along with him. I had a young lady who was not married and he went out with a married woman, Mrs. Sharp, the wife of Dr. Sharp of Mondovi. We picked them up on a side street so that Dr. Sharp wouldn't know it.

* * * *

Q. Have you seen him under the influence of liquor on other occasions?

A. The previous occasion that I spoke of, on the week end of Labor Day, he was so much under the influence of liquor that I had to arouse him in the morning and practically help him to get dressed in order to attend a meeting of all Company Commanders at McCoy. The night before, or the morning before he was so much under the influence of liquor that he had vomited all over the outside of my car.

* * * *

Q. Are you familiar with the regulations for the use of gasoline?

A. Yes, sir.

Q. Do you know of any violation of those regulations?

A. Yes, sir.

Q. Describe them.

A. Several times and many times there has been gas put in Lieutenant Cooley's car.

Q. Tell what you know of your own knowledge.

A. I saw gas put in Lieutenant Cooley's car. And also, on several occasions, I allowed Lieutenant Cooley to use my own car on personal business and also for official business, at which times gas was put in the car from company tanks." (R. 674-676.)

This testimony impeached accused on collateral matters and its admission in evidence was error.

Since accused had taken the stand as a witness in his own behalf and had introduced evidence of his general good character and military

efficiency, the prosecution had the right to attack his reputation for truth and veracity and to rebut the general good character evidence and evidence of military efficiency. M.C.M., 1928, pp. 112, 133; Winthrop's Military Law and Precedents, 2d ed., vol. 1, p. 533; Wharton's Criminal Evidence, 10th ed., sec. 57; Wigmore on Evidence, 2d ed., sec. 58. It is also the rule that in rebutting good character evidence, the prosecution cannot do so by proof of particular facts and the testimony must be confined to relevant traits of character. 23 R.C. L. 623; Wharton's Crim. Law, 10th ed., sec. 487; Wigmore on Evidence, 2d ed., secs. 193 and 194; 103 Amer. St. Reps. 893, note d, 894, note a, 901, note A, and numerous decisions cited therein. In the instant case the prosecution did not limit its attack upon the good character of accused to reputation testimony relevant to traits of character involved, but proceeded to attack it by evidence of particular facts, which in some instances had no connection with traits of character put in issue by accused or in any way relevant to the offenses charged.

Lieutenant Smith testified in regard to specific cases of drinking of intoxicating liquor on the part of accused (R. 667-668,675-677), in regard to parties which accused had with women other than his wife (R. 674-675), in regard to accused directing the exchange steward to purchase a quart of liquor and charge it as cigarettes (R. 670), and in regard to the unauthorized taking by accused of $9.30 from the camp exchange funds for traveling expenses (R. 677).

Captain Clifford E. Cole testified that on or about November 4, 1934, he received a letter from the Emanuel Cafe in which it was alleged that accused had embezzled $22.65. Motion by the defense to have this testimony stricken out was denied (R. 636-638).

All of the above testimony of Lieutenant Smith and Captain Cole constituted an improper attack upon the character of accused. The testimony given by Captain Cole in regard to the letter from the Emanuel Cafe is particularly obnoxious as it was also obviously hearsay. However, in view of the fact that accused substantially admitted his guilt of each of the specifications of which he was found guilty, the Board of Review is of the opinion that the improper attacks upon the character of accused do not constitute prejudicial error.

14. It is noted that there is an apparent variance between the evidence and an allegation common to all the specifications of which accused was found guilty. Each of the specifications alleges the presentation of a fraudulent claim against the United States, whereas the evidence shows that each of the fraudulent claims was a claim against the ration savings account of a company fund of a CCC organization. The false claims alleged in Specifications 1, 2, 3, and 4, Charge I, were paid from the ration savings account of the 601st Company, CCC, while the false claim alleged in Specification 8, Charge I, although not paid from the ration savings account of the 1605th Company, CCC, was presented to the mess officer of that organization and would have reached the commanding officer of that organization for payment from ration savings had not the fraud been discovered.

In CM 202366, Fox, a case in which the facts are substantially the same as in the instant case, the Board of Review considered a great number of precedents of The Judge Advocate General and other authorities in order to ascertain whether or not a claim against the ration savings account of a CCC organization was a claim against the United States. The Board, while apparently being of the opinion that title to such funds was vested in the United States, did not reach a definite decision on the point, but held:

> "It is unnecessary, however, to reach a definite decision on the legal title to ration savings, as, even if there was a technical variance in the respect mentioned, the elaborately drawn specification apprised accused with sufficient accuracy and correctness of the offense with which he was charged, and there is not the least reason to suppose that he was misled. The variance, if in fact there was any, was a harmless error, which may be passed under the 37th Article of War."

In the instant case accused was similarly adequately apprised of the offenses charged by elaborately drawn specifications and also there is no reason to believe that he was in any way misled. Since the jurisdiction of the court in the instant case does not depend upon the offenses charged being in violation of the 94th Article of War, the variance, if any, is harmless and may be passed under the provisions of the 37th Article of War.

15. Accompanying the record of trial is a letter, signed by seven members of the court, who sat at the trial, in which clemency to the extent of remitting the sentence to confinement is recommended. On December 22, 1934, the Commanding General, Sixth Corps Area, approved the sentence but remitted the confinement adjudged.

16. At the time of the trial accused was 28 10/12 years of age, and his service is as follows:

> "2nd Lieutenant Engr-Res 6/15/29 to 5/21/34; 1st Lieutenant Engr-Res 5/22/34 to date. On active duty with Civilian Conservation Corps since November 18, 1933, per par. 19, S.O. 232, Hq. 6th C.A., Nov. 10, 1933, and par. 7, S.O. 96, Hq. 6th C.A., April 23, 1934."

17. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and warrants confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of the 94th or the 96th Article of War.

Theodore Hall, Judge Advocate.

Archibald K. Judge Advocate.

L. M. Smith, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 202782

JAN 23 1935

UNITED STATES	)	UNITED STATES MILITARY ACADEMY
v.	)	Trial by G.C.M., convened at West Point, New York, December 10, 1934. Suspension without pay and allowances until January 1, 1936, at which time he will join the then first class and thereafter serve sixty-six punishment tours.
Cadet LEA C. ROBERTS, First Class, United States Corps of Cadets.	)	

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

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

2. The accused was tried upon the charge and specifications set out below. The plea of the accused and the finding of the court with respect to the charge and each specification are set out following it.

CHARGE: Violation of the 96th Article of War. Plea, guilty. Finding, guilty.

Specification 1: In that Cadet Lea C. Roberts, First Class, United States Corps of Cadets, did, at or near Weehawken, New Jersey, on or about November 25, 1934, drink intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931. Plea, guilty. Finding, guilty.

Specification 2: In that Cadet Lea C. Roberts, First Class, United States Corps of Cadets, was at

Weehawken, New Jersey, on or about November 25, 1934, in a public place, to wit, West Shore Railroad station platform, drunk while in uniform, to the scandal and disgrace of the United States Corps of Cadets. Plea, not guilty. Finding, guilty, except the words "to the scandal and disgrace of the United States Corps of Cadets"; of the excepted words, not guilty.

No evidence of previous convictions was introduced. Accused was sentenced "to be suspended, without pay and allowances, until January 1, 1936, at which time he will join the then first class and thereafter serve sixty-six punishment tours". The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence of the witnesses for the prosecution will be abstracted, not in the order in which those witnesses were called, but in the order of the events to which they testified.

First Lieutenant James R. Pierce, Infantry (R. 10-14). I know accused as Cadet Roberts, L. C., First Class. I saw him November 25, 1934, at the end of the platform away from the station at Weehawken, New Jersey. I was detailed to inspect G and H Companies prior to entraining. Those companies were in the far cars from the station. I saw three cadets coming up the platform. The center cadet had his arms engaged by the two outer cadets. When they saw me, the two on the outside let go of accused and he staggered. I called accused over to me. He appeared unsteady. I directed another cadet to report the accused to Major Bradley. Accused was in uniform. On arrival of the train at West Point, I told accused that he was in arrest by order of the commandant. I judged that he was capable of going up the hill himself. Accused was in uniform.

Cross-examination. At the assembly point of Company G, I saw no civilians outside the train crew. The civilians who gathered to see the Corps off were 150 yards distant. Accused was neither noisy nor conspicuous. He came to my attention only by his unsteadiness. That could have originated from a sudden change of position. When I saw him about an hour and a half later when the train arrived at West Point, he was perfectly normal except that his voice was husky.

By permission of the court the defense was allowed to ask certain questions of the witness as on direct examination. In answer to such questions the witness testified as follows: I stopped at the coffee shop in the station about two minutes. I did not see accused there.

Examination by the court. I cannot answer the question as to the sobriety of the accused otherwise than that he was unsteady. As to the causes, I do not know. He answered me in a husky tone of voice but he did answer his name and company perfectly. It is possible for members of the Corps to have a husky voice after a football game. My opinion is formed more upon his physical than upon his mental condition. The staggering and the walking arm in arm would attract attention.

Major Omar N. Bradley, Infantry (R. 8-10). I saw accused about 12:40 a.m., November 25, 1934, at the formation at the train at Weehawken, New Jersey, for the return of the Corps from the Notre Dame game. I considered him drunk. He had difficulty talking, he was thick lipped, he had the odor of intoxicating liquor on his breath, and he had difficulty walking straight. Several officers and the cadets were in the immediate vicinity, and about 15 feet away was a fence, behind which were a number of civilians, who could have seen accused. They were watching the formation of the Corps.

Cross-examination. I do not think anything happened that would attract attention to accused's condition unless they had been looking in that direction when he started to walk off. His slowness in walking off looked more like incoordination than indecision.

Examination by the court. My attention was first turned to accused when he was sent to report to me.

Lieutenant Colonel Simon B. Buckner, Jr., Infantry (R. 5-8). I saw accused between midnight and 12:30 a.m., November 25, 1934, in the Weehawken station. He was drunk. He staggered. His speech was somewhat labored and of a nature which indicated drunkenness. He smelled very strongly of liquor. I asked him one or two questions. As a result of my investigation, I have no question that he was drunk. Several officers and cadets were present, and there were several hundred civilians looking

through the fence observing the cadets. Accused and the group talking to him were perhaps not more than 10 yards from the fence.

Cross-examination. I tested accused by talking to him and observing him, smelling him, being close enough to do so, and watching him as he stepped off, when he staggered. He was slightly unsteady when he saluted. The appearance of his face and eyes indicated that he was drunk. I cannot say whether the civilians present showed any particular interest in accused. He was nearer to them than any cadet, so they had every opportunity to observe him and did so. I did not see accused pass through the gate.

Major Miner F. Felch, Medical Corps (R. 14-18). I saw accused about 12:10 a.m., November 25, 1934, just within the gates at the entraining point at Weehawken. I was called from the train by Major Bradley. Accused was drunk. He had an odor of liquor on his breath and incoordination of speech and motion. "I tried the test for station, standing with eyes closed and holding out his hands", and also observed his walking. Civilians outside the gate and in the last car of the second train could have observed accused. They would most probably have observed his gait. I have practiced medicine over twenty-one years. If a person unaccustomed to alcohol takes a small amount, the reaction may be delayed. That would depend possibly on whether it was taken on an empty stomach or with food. The delay might possibly be an hour or over. It is quite possible that the reaction would set in if the person were placed in a position of mental strain or fear.

Cross-examination. Accused was unsteady in walking. I observed him from the rear of the train to the next to the last car and through that into the third car from the rear, where the examination was made. I preceded him. I did not find it necessary to aid accused in walking or in boarding the train. The civilians in the rear car were officers' families. Upon being asked whether a drunken man could write his name legibly, the witness said: "Some men are more capable under drunkenness than others. I have seen men that could sign a check and others that could not". The man's hand might be steadied and his arm supported when writing. He might make a perfect signature and yet be drunk.

Redirect examination. My opinion, as a result of twenty-one years' experience in the medical profession and of the tests, is that accused was drunk.

4. The first four witnesses for the defense were Edward F. Hoeppner, a doctor of chiropractic, having his office and residing at the Hotel St. Andrew's, Broadway and 72d Street, New York (R. 19-25); Joseph K. Emmet, manager of the Capitol Theatre, New York (R. 25,26); Mrs. Dora Sherwin, residing at the Hotel St. Andrew's (R. 26-28); and Atchel Zuckerman, a taxicab driver (R. 28-30). All these witnesses testified with reference to the conduct of accused in New York on the evening of November 24 from 5 p.m. until shortly after midnight. The testimony of these witnesses and of accused covering the same period of time (R. 40-42) is substantially in accord and may be stated together in narrative form:

About 5 p.m. accused entered the St. Andrew's Hotel in order to wash before getting dinner. Dr. Hoeppner scraped acquaintance with accused in the elevator and invited accused to his apartment, where accused washed. Mr. Emmet, a friend of Dr. Hoeppner, called, and the doctor mixed cocktails which he offered his guests. He did not know that cadets were forbidden to drink liquor. Accused at first declined, but Dr. Hoeppner persuaded him to accept. Accused at this time drank two cocktails. Mr. Emmet left and accused started to do likewise, but Dr. Hoeppner invited him to dinner. The two dined, and afterward went to the Capitol Theatre in Zuckerman's taxicab. The theatre was so crowded that they could get no seats, but they talked with Mr. Emmet and other officers of the theatre, made an inspection of it, and listened to the music. Dr. Hoeppner and accused then returned to the former's apartment. In passing through the lobby of the hotel on one of these occasions, it is not clear which, Dr. Hoeppner introduced accused to Mrs. Sherwin, and they conversed about a nephew of hers who had been a cadet and whom accused had known. After returning to Dr. Hoeppner's apartment, other friends of his called and more drinks were served. Dr. Hoeppner says that accused had one more, or three in all; but he admits taking two more, or four in all. Each of the drinks contained about an ounce of gin, to which were added cracked ice and ginger ale. Shortly before accused left, he wrote his name, company, and class on a card. He wrote on top of a file case while standing. The card is in evidence as Exhibit C, and is legible and well written. In leaving the hotel accused again had a moment's conversation with Mrs. Sherwin. Zuckerman drove accused to the ferry, and had some conversation with him on the way and on arrival.

All four of these witnesses, Dr. Hoeppner, Emmet, Mrs. Sherwin, and Zuckerman, testify that during the times that accused was in their company his behavior was perfect, that he walked and talked properly, and that there was nothing in the least to indicate that he was under the influence of liquor.

The testimony of each of the remaining witnesses for the defense may best be abstracted separately.

Cadet Private Samuel C. Campanella, Fourth Class (R. 30,31). I saw accused on the night of November 24 on the boat going across from 42d Street to Weehawken. I talked to him possibly a minute. I was with him half way across the river. I noticed nothing unusual in his conduct. I saw no liquor in his possession.

Cross-examination. Accused asked me if I had a good time and I told him that I did. He is a member of my company.

Cadet Captain Durward E. Breakefield, First Class (R. 32-34). I saw accused upon the night of November 24 in the restaurant at the Weehawken station. I was with him for about five minutes. He acted normally. I spoke to him. I did not see him drink any liquor nor did I see any in his possession. I saw him leave the coffee shop in the direction of the train. I saw Lieutenant Pierce being served at the fountain of the restaurant. He could have seen accused.

Cross-examination by the court. Accused walked in a normal manner. I saw no reason to suspect him of anything by his walking. We just exchanged greetings and asked how good a time each of us had. The conversation lasted no more than one or two minutes. It was perfectly rational and accused was perfectly normal. I was about two feet from him. He was standing up. I don't remember whether I smelled liquor on his breath or not.

Cadet Private Charles H. Waters, Second Class (R. 34-36). On the night of November 24 I saw accused coming up the platform with Lieutenant Pierce, just before assembly. I noticed nothing peculiar about accused.

Examination by the court. There was nothing peculiar about his carriage or appearance.

Cadet Regimental Commander Herbert C. Gee, First Class (R. 36-40). When I first saw accused he was walking down the platform with Cadet Shea. I next saw him when I was called to this group of officers at the end of the platform by Colonel Buckner, who asked accused to tell me how he had arrived at his place of formation. Accused obeyed the Colonel's instructions. He spoke slowly and in a normal tone of voice. I am familiar with his voice as I have lived with him for about three years in the same company. His voice is a bit heavy and has a decided Southern accent. He does not enunciate very clearly. Accused did nothing that a civilian standing there would notice. The only thing that I observed which you might call unusual was when he was directed to follow Major Felch he was a bit slow in starting. He followed Major Felch about thirty paces at a distance of five or six paces. Major Felch did not assist him. Accused did not stagger.

Cross-examination. I detected the odor of liquor on accused's breath.

Examination by the court. There was nothing noticeable about the way accused walked. He would not have been noticed on the street. The definition of drunkenness from the Manual for Courts-Martial, paragraph 145, was read to the witness, and he was asked whether, in the light of that definition, accused was drunk, and answered, "I believe not".

In addition to that part of his testimony covering events up to his arrival at the ferry, which has already been abstracted in connection with that of other witnesses, and in addition to testimony covering his movements on the ferry and at the Weehawken station, which coincides with that of other witnesses, accused further testified at his own request (R. 43-45):

I was instructed to follow Major Felch into the train. I started to ask the Commandant a question, rather to ask permission to make a statement. I was standing in the vestibule of the train when Lieutenant Pierce asked me if I could get up the hill all right. I assured him

that I could. I got out of the train, fell in with my company, marched up the hill to barracks, and went to bed. I had nothing to drink after leaving Dr. Hoeppner's apartment. I was not sick during the evening.

Cross-examination. I walked through the gate at the station alone. I was walking unassisted. The other cadets were back of me. When Lieutenant Pierce saw me I was walking with Cadets Herald and Pederson close together talking. I do not remember stumbling or staggering. They would have their arms on mine, then they would drop my arm. At times I had my arms on them and at other times they had their arms entwined in mine. I had a glass of beer at dinner time and four cocktails during the evening. By cocktails I mean a glass of gin and ginger ale.

5. The court called several witnesses whose testimony will be abstracted separately as to each.

Cadet Private F. R. Herald, First Class (R. 45-48). I walked down the platform at the Weehawken station on the night of November 24 with accused. His condition as to sobriety was perfectly normal. I did not find it necessary to assist him. However, as a friendly gesture, I took his arm from time to time and he took mine. I saw accused in the coffee shop. Then I became detached from him and later I met him near the gate, and walked with him down the platform. (The witness was twice asked where he first met accused. He answered the question the first time: "Going into the coffee shop", and the second time he declined to answer the question on the ground of self-incrimination. He was told that the question was not incriminating and was directed to answer.) I was with him all day. I went down with him and went to the game with him. I came across on the ferry with him. He and I are roommates and close friends. He did not stagger. I often put my arm through his. I do it almost unconsciously.

Cadet Private M. D. Pederson, First Class (R. 49-51). I met accused on the ferry boat and we talked all the way across. I went into the restaurant with him and walked with him down to the train. We started down to the wrong train and came back and walked to the other platform. Mr. Herald and accused and I walked down to the train together. I did

not assist accused. I was walking behind him. Mr. Herald was walking alongside of him most of the time. Accused's actions and walk were normal. His accent was a bit deeper than usual. The conversation and the words were normal. His voice was not quite normal. It was a trifle blurred. "It was my impression I believe he was sober." I was even with accused part of the time. I saw Mr. Herald lay a hand on accused's back a couple of times and he had hold of his arm some of the time but not at all times. I don't believe that it could be called assisting.

First Lieutenant James R. Pierce, Infantry, recalled (R. 52). When I first noticed accused, I saw two other cadets, one on either side of him having hold of him. They were 25 or 30 feet away when I first noticed them. I sent accused to Major Bradley to be examined for possible drunkenness. I did not give accused any test for drunkenness. I considered him abnormal. "He might have been narcotic, or something else." My observation of his actions was such that I deemed a further examination desirable. Accused was in pretty good shape as far as clothing was concerned.

6. The evidence above abstracted clearly and conclusively proves that accused drank intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, as alleged in the first specification, which offense is also admitted by the plea. The evidence also shows that accused was not drunk until he reached the platform of the station at Weehawken; but, in the opinion of the Board, it shows that he was drunk there, as alleged in the second specification. The Board believes, however, that accused's drunkenness was so slight that the court was justified in striking from the specification the words "to the scandal and disgrace of the United States Corps of Cadets".

7. Accused was admitted to the Military Academy July 1, 1931, and was 22 years of age at the time of the offenses of which he has been convicted.

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 that confirmation of the sentence is authorized by law.

9. The members of the Board think, however, that in view of the slight degree of intoxication of accused, so slight that it is doubtful whether it was noticed by any others than those few officers who have testified against him, the sentence is unnecessarily severe. It has not been usual to combine suspension and punishment tours in the same sentence.

Certain precedents involving drinking by cadets are helpful. In the recent case of Cadet Donald O. Vars, CM 201390, G.C.M.O. 5, War Department, February 23, 1934, it appeared that upon getting on the train at Boston, after a football game between the Military Academy and Harvard, the accused was found to have liquor on his breath and to show other indications that he had been drinking. He was convicted of drinking liquor but acquitted of being drunk, and was sentenced to be suspended for approximately ten months and to join the next class. The sentence was approved, but upon the recommendation of The Judge Advocate General the President commuted it to restriction and punishment tours for three months.

In CM 200436, Presnell, G.C.M.O. 7, War Department, July 12, 1933, accused was convicted of being drunk on a cadet special train returning to West Point after an educational trip, in violation of the 96th Article of War. It appeared that he staggered up the aisle of the car, slumped into a seat, that he could be aroused only by rubbing and slapping his face, and that he vomited out of the window of the car. He was sentenced to be suspended for approximately six months and to join the next lower class, which sentence was approved and confirmed.

In CM 196398, Mini, G.C.M.O. 3, War Department, January 7, 1932, accused was convicted of drinking intoxicating liquor in violation of the 96th Article of War, and of drunkenness on a public street, in violation of the 95th Article of War. The offenses occurred at New Haven, Connecticut, on a trip to attend a football game against Yale. Upon falling in in the street at New Haven to march to the game, accused was observed to be drunk. He was placed in a machine gun bus, where he vomited and gave other indications of inebriety. He was sentenced to be dismissed and the sentence was approved and confirmed.

The misconduct of accused in the present case was graver than that of Vars, but less serious than that of Presnell and Mini. The sentence may therefore properly be more severe than that imposed upon Vars but less severe than that suffered by the last two.

Though the members of the Board do not mean to say that a sentence of suspension should never be imposed, there are certain circumstances which, in their opinion, should render such a sentence exceptional. The United States gives the talents and industry of scores of officers and expends thousands of dollars in money toward the education of each cadet. It is to its interest to receive in return his services as an officer for as long a period as possible. A year out of a man's life can never be replaced, and a sentence of a year's suspension means that the young man marks time for a year, with little or no advantage to himself and with the loss of a year of his services as an officer to the United States. The members of the Board are therefore of opinion that, save perhaps in exceptional cases, a cadet who by his conduct clearly shows that he will not make a good officer should be at once dismissed or requested to resign, and, if this is unnecessary, other offenses should be punished and discipline maintained by forms of punishment which do not involve the irreparable loss, both to the cadet and to the United States, of a whole year of his life.

In a memorandum prepared in this office on liquor cases at the United States Military Academy, dated February 27, 1931 (CM 194563, Ondrick), by an officer who is a graduate of that institution and has served there as Professor of Law, it was said:

> "Many persons well acquainted with conditions at the Military Academy contend that the best example to the cadets is to have continually in their sight one of their number walking punishment tours every Wednesday and Saturday for several months, * * *."

In CM 200472, Hoebeke, G.C.M.O. 9, War Department, July 12, 1933, a cadet was convicted of being drunk at West Point. His drunkenness was slight and not in public. He was sentenced to be suspended for eight months and to join the next class. In their opinion, dated June 26, 1933,

the members of the Board of Review said:

> "The accused was a member of the class which graduated from the Military Academy on June 13, 1933. He has completed satisfactorily all of the work required of a cadet for graduation and commission as a second lieutenant. Under the circumstances, it seems a useless waste to require him to return to the Academy on January 2, 1934, and take over again the academic work of the last term which he has already completed. It would be better to permit him to graduate at some date during the summer which would place him at the foot of his class in the Army, a loss of about one hundred files in rank, which would be a sufficiently severe penalty for his offense. The Corps of Cadets knows that he was not permitted to graduate with his class, and that knowledge will have as great a deterrent effect as the execution of the sentence imposed by the court. It is therefore recommended that the sentence be confirmed and commuted to confinement to cadet restricted limits until July 15, 1933, on which date he shall be graduated and commissioned if otherwise qualified."

The above recommendation of the members of the Board was approved by The Judge Advocate General and followed by the President. The foregoing is believed to be a valuable precedent, though the offenses of the present accused were more serious in that his drunkenness was in a public place.

10. In view of all the foregoing, the members of the Board recommend that the sentence be confirmed and commuted to the usual restriction to limits and performance of punishment tours prescribed for cadets undergoing special punishment, for a period of three (3) months from the date of the President's action, and to postponement of accused's graduation until the day after the graduation of his class, when he shall be graduated and commissioned, if otherwise qualified.

[illegible] Hall, Judge Advocate.

W. A. Trumbull, Judge Advocate.

Archibald King, Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 202819

MAY 6 1935

UNITED STATES	SECOND CORPS AREA
v.	Trial by G.C.M., convened at Governors Island, New York, November 20-23, 1934. Dismissal.
Second Lieutenant LAWRENCE HERBERT ROGERS (0-18365), Cavalry.	

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

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

2. Accused was tried on twelve specifications under Charge I, violation of the 95th Article of War, and one specification under Charge II, violation of the 96th Article of War. He was convicted of all specifications and charges, with an exception and substitution under Specification 3, Charge I, and 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.

For the purposes of this opinion the specifications, pleas, and findings will in each instance be set out immediately preceding the evidence and discussion relating to that particular specification or specifications. In order to avoid unnecessary repetition, specifications, where they relate to or grow out of the same, similar or connected transactions, will be treated together.

3. There is certain undisputed evidence of record, common to all specifications and charges, which, although it has little or no real

bearing on the guilt or innocence of accused, is necessary to a full, complete and understandable statement of the facts. Such evidence will be set forth as introductory matter without record citations.

On July 2, 1927, at the age of 17 years, accused, an orphan, entered the United States Military Academy from Wyoming and graduated therefrom in 1931, standing 31 in a class of 296. He was regarded by the military authorities as an outstanding cadet, having achieved in order the grades of cadet corporal, regimental sergeant major, and cadet lieutenant, in addition to being a member of the polo team. As a result of this record he was accorded the honor of being permitted to compete for a Rhodes scholarship, which he won in competition with aspirants from a district composed of the States of Washington, Oregon, Idaho, Montana, Wyoming and North Dakota.

Accused sailed for England September 15, 1931, and upon arrival at Oxford University he selected and entered the college known as Christ Church for the study of philosophy, politics and economics. He was placed under the American Military Attache at London "for discipline and such administrative control as is necessary".

Christ Church ranks very high among the Oxford colleges, its student personnel in general being from the upper and wealthier classes of England. As a result the expenses of a student attending this college are greater than in the average college at Oxford.

During accused's first two years at Christ Church he established an enviable record and apparently bore a reputation beyond reproach, both as a gentleman and a scholar. The Rhodes Trustee at Oxford in various reports classified him as "a sound and steady type"; "probably the most able, academically, of the United States Army Rhodes Scholars";"his conduct and character have been irreproachable"; "a man of sterling character"; "has worked industriously". His efficiency reports for these two years, rendered every third month by the Military Attache, refer to him as "an excellent officer" and he is given a general rating of excellent, with from two to three ratings of superior on some reports.

Accused was also accorded the distinct honor of being elected to membership in the highly exclusive Bullingdon Club at Oxford, a hunting

and riding organization that derives its membership from "England's first families, *** whose social and financial position was assured". Few if any other American Rhodes scholars were similarly honored. As an additional distinction accused was selected as the first American captain of the Oxford Polo Team. Truly it can be said from a study of this record that until December, 1933, this young officer's future appeared to hold unlimited possibilities both for himself and the service that had afforded him his opportunities and to which he had apparently dedicated his life.

4. With these introductory statements, the Board of Review proceeds to an analysis and discussion of the evidence under the specifications and charges.

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

Specification 1: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, being at the time a Rhodes scholar and a student at the college known as Christ Church, Oxford University, Oxford, England, did, at London, England, on or about March 12, 1934, in reply to an official communication, dated March 8, 1934, from Lieutenant Colonel Cortlandt Parker, Field Artillery, then American Military Attache at London, England, to submit a statement showing his whereabouts and the reasons for his absence from Oxford University on February 24 and 25, 1934, and whether or not, during said period, he was required to be present at Oxford, did, at London, England, on or about March 12, 1934, with intent to deceive and mislead the said Colonel Parker, state in an official communication, dated March 12, 1934, to the said Colonel Parker that--

"Leave was finally granted"

and that--

"The leave was spent in London"

and elsewhere and,--

"having been granted leave by the college authorities, the matter is of no concern to the university authorities"--,

all of which said statements were false and untrue and were then known by the said Lieutenant Rogers to be false and untrue in that he then well knew that no such leave had been granted to him and that he was absent without leave from the college during the period inquired about.

Plea: Not Guilty.

Finding: Guilty.

Specification 2: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, being at the time a Rhodes scholar and student at the college known as Christ Church, Oxford University, Oxford, England, did, at London, England, on or about March 7, 1934, with intent to deceive and mislead, cause to be submitted to Mr. R. P. Longden, Jr., Junior Censor of said college, a letter, dated March 7, 1934, written on the stationery of the American Embassy, signed by Mr. Thomas Smith, a clerk of the said Embassy, and addressed to the Junior Censor of said Christ Church, in words and figures as follows,

"Embassy of the United States of America
London, March 7, 1934.

Dear Sir:

The absence of Lt. L. H. Rogers from Oxford on the 24th and 25th of February was necessary and unavoidable. It is regretted that this absence could not be explained sooner or during the absence itself.

Yours faithfully,

The Junior Censor,
Christ Church,
Oxford",

Thos. Smith

which said letter was then known to be false and misleading in that the said Lieutenant Rogers knew that his absence from Oxford on the 24th and 25th of February, 1934, was not necessary and unavoidable but, to

the contrary, was wrongful and without authority.

Plea: Not Guilty.

Finding: Guilty.

The evidence as to these specifications shows: From October 12, 1933, to April 6, 1934, accused occupied rooms at a University lodging house conducted by Mrs. Gertrude Filer at Oxford (Pros. Ex. 4). Undergraduates of Christ Church were required to be in their lodgings from 12:30 a.m. until 6:00 a.m. unless leave of absence was officially granted (Pros. Ex. 8). Accused absented himself without leave from his lodging and college on the evening of February 24-25, 1934, which fact was reported to the Junior Censor of Christ Church on February 25 (Pros. Exs. 4,5,6,7,8,9,10,11,12). On the following day this official interviewed accused, at which time the latter admitted that he was absent from his lodging on the evening of February 24-25, but stated that "he had been absent on unavoidable business of a confidential nature which he was not at liberty to disclose". Thereupon the Junior Censor "gathered the impression that he had been called away on service of a confidential nature for his government", and "told him that he regarded the action of the authorities *** as unsatisfactory but said that if a satisfactory authorization was sent to me this would suffice to excuse him". Thereupon the Junior Censor "required" accused to procure from the American Embassy a letter authorizing his absence of February 24-25. Accused stated that "he would be unable to get the nature of the business disclosed", and was told that an authorization without details would suffice. Subsequently the Junior Censor reiterated his "request" for the letter of authorization, absence without leave being regarded "as a serious offense against the college discipline" (Pros. Ex. 8). The Senior Censor of Christ Church also discussed accused's absence with him and received approximately the same information as was given the Junior Censor. This last official also insisted that accused produce a letter of authorization for his absence (Pros. Ex. 9).

On the afternoon of March 7, 1934, accused entered the American Embassy in London and accosted Thomas Smith, a clerk therein. In the conversation that ensued accused stated that he had been absent from his

college for a day or two and that it was necessary for him to have a letter to the Junior Censor authorizing the absence or he would be suspended or expelled from the college. He gave no reason for his absence, which he apparently regarded as a trivial matter, but stated that a satisfactory one could be supplied. Smith suggested that the letter be obtained from the military attache but accused replied that he was not in his office and "urged on me" (Smith) "the necessity for his having this letter". The clerk finally acquiesced, and accused made a rough draft, which was typed and which Mr. Smith signed, as follows:

"Embassy of the United States of America
London, March 7, 1934.

Dear Sir:

The absence of Lt. L. H. Rogers from Oxford on the 24th and 25th of February was necessary and unavoidable. It is regretted that this absence could not be explained sooner or during the absence itself.

Yours faithfully,

The Junior Censor,
Christ Church,
Oxford."

Thos. Smith

The letter was mailed by Smith (R. 343, Ex. 10). It was received by the Junior Censor on March 8 and was accepted by the college authorities as a confirmation of accused's statements regarding his absence, although they "were dissatisfied with the employment of undergraduates on Government Service during term time" (Pros. Exs. 8,9).

On March 8 the clerk, Smith, showed Lieutenant Colonel Cortlandt Parker, Military Attache, London Embassy, a copy of the letter that he had written for accused the day previous. Colonel Parker thereupon, on March 8, wrote accused an official letter directing him to submit without delay to the military attache's office a complete statement showing (a) the circumstances under which he secured from Mr. Smith the letter of March 7; (b) accused's whereabouts and reasons for his absence on the days in question; (c) the name of the Junior Censor to whom the Smith letter was submitted and what verbal report accused made to the Censor; (d) whether during the period February 24-25 accused was required by University authorities to be present at Oxford and, if so, for what

purpose. On March 12, four days later, accused appeared at the Embassy and endeavored to make a verbal statement to Colonel Parker. He was denied permission to do so until he had submitted a written statement in compliance with Colonel Parker's direction contained in the letter of March 8. Accused then prepared in the Embassy a letter addressed to Colonel Parker and dated March 12, and bearing accused's signature, in which he stated inter alia, "Leave was finally granted", "The leave was spent in London", and "having been granted leave by the college authorities, the matter is of no concern to the university authorities". Accused consumed from fifteen to thirty minutes in the preparation of this letter, after which it was signed and submitted by him to Colonel Parker. Following this, accused verbally stated to Colonel Parker "that the Censor at Christ Church had at first declined to authorize his absence but when Lieutenant Rogers said he had to go on business the nature of which he, Lieutenant Rogers, could not disclose, the Censor asked for a letter to give to the Dean" (Pros. Ex. 11).

Accused, testifying as a witness in his own behalf, admitted that he was absent without leave on February 24-25 (R. 250,335), and that when called to account for his dereliction by the Junior Censor he at first offered no defense. When it was suggested by the Censor that accused had been engaged in government business while absent accused denied this but gained the impression from the suggestion that the Censor was endeavoring to find an excuse for him (R. 251). Later, when pressed for a letter by the college authorities, he went to the American Embassy and procured Mr. Smith to write the letter of March 7 as an explanation of his absence. He admitted that the wording of the letter was his and that it was false (R. 254,342-344). Accused further testified that when called upon by Colonel Parker for an explanation of the circumstances surrounding his absence and the writing of the Smith letter, he, in an official communication addressed and delivered by him to Colonel Parker, stated that "leave was finally granted", "the leave was spent in London", and "having been granted leave by the college authorities the matter is of no concern to the University authorities" (R. 262,347). In defense of this action accused stated that at the time the letter was written he was being rushed and harassed by Colonel Parker, and that he did not have time to consider the import of his words, although he now realizes that he "was wrong at that time" and that his choice of the word "leave" was "unfortunate" (R. 262,332). He admitted that he had gone to London

on February 24, where he spent the night. The next day he left from Hendon and flew to a "small point" on the seacoast, where he stayed overnight and returned to London the next day (R. 337). He attempted to justify the statement that "leave was finally granted" and his use of the word "leave" in the letter by testifying that, because he had received no punishment for his absence without leave at the time the letter was written, he considered that the college authorities had condoned his absence and granted him a "retroactive" leave (R. 349).

The foregoing, in the opinion of the Board of Review, clearly establishes all of the essential averments of Specifications 1 and 2, Charge I. Indeed, they are virtually admitted by accused in his own testimony which closely borders on a confession of the offenses charged. His attempted explanation of his use of the word "leave" in his communication to Colonel Parker is disingenuous and unconvincing.

The sole legal question presented is as to whether the offenses charged were properly laid under the 95th Article of War. Certainly there can be no question as to Specification 1, which alleges the making of a false official statement with intent to deceive a superior officer. Offenses of this nature have always been recognized as falling within the purview of this article. Accused's act of causing to be submitted to his academic superior, the Junior Censor of Christ Church, Oxford University, with intent to deceive and mislead the latter, the letter signed by Thomas Smith, a clerk in the American Embassy in London, containing an excuse for accused's absence from Oxford University which accused knew to be false and misleading is closely related to the offense of knowingly making a false official statement and exhibits accused as morally unworthy to remain an officer of the Army. Thus, Specification 2 also falls within the purview of the 95th Article of War.

For these reasons the Board is of the opinion that accused stands properly convicted of Specifications 1 and 2, Charge I, and that the offenses alleged therein are properly laid under the 95th Article of War.

6. Specification 3, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, then on duty as a Rhodes scholar and student at the college known as Christ Church, Oxford, England, with an annual

net income of not less than $3000.00, sufficient for all his proper and reasonable requirements, did, at Oxford and London, England, during the period from 1 January, 1933, to 1 April, 1934, unnecessarily, wrongfully and with a reckless disregard of his ability to meet the same, incur debts and obligations, in excess of his said income, to the amount of approximately $3350.00, which said debts and obligations are all past due and unpaid to the scandal and disgrace of the military service.

Plea: Not Guilty.

Finding: Guilty, except the figures "$3350.00", substituting therefor the figures "$2448.31"; of the excepted figures, not guilty, and of the substituted figures, guilty.

The evidence as to this specification shows: During the period January 1, 1933, to April 1, 1934, accused's total income as an officer of the Army and a Rhodes Trust beneficiary amounted to $4759.46, or a yearly average of $3807.00, and that during the same period he incurred debts in excess of this income to the amount of $2448.00, all of which were past due and unpaid at the time these charges were drafted (R. 139,351-354, Pros. Ex. 41). Accused in a statement made to an inspector admitted that he had no regular source of income other than his pay and allowances as an officer of the Army and what he derived from the Rhodes Trust (R. 166). By the testimony of Oxford officials and former Rhodes students it was shown that from six to seven hundred pounds was more than ample for the annual expenses of an Oxford scholar of accused's standing and social position, whereas accused's yearly income was more than eight hundred and eighty-two pounds (Pros. Exs. 8,22,23,24,25,41). Examples of specific expenditures made by accused during the period in question follow:

July 12, 1933	- 1 pair field boots	Approx.	$60.00	(Pros.Ex.26)
July 15, 1933	- 1 pair spurs	"	9.00	" " 26
May 6, 1933	- 1 suit	"	60.00	" " 27
Jan. 22-Mar. 3, 1934	- Liquor	"	40.00	" " 29

Feb. 23, 1933	- Blazer with embroidered badge	$10.00	(Pros.	Ex.	30)
May 31, 1933	- 2 pairs flannel trousers	16.00	"	"	31
Nov. 4, 1933	- 3 shirts	19.00	"	"	32
Mar. 16-29, 1934	- Hotel bill	408.00	"	"	34
Oct. 18, 1933	- 1 suit	67.00	"	"	38
Nov. 15, 1933	- 1 jacket	35.00	"	"	38
April 26, 1933	- 6 shirts	30.00	"	"	39
April 26, 1933	- 12 collars	10.00	"	"	39
April 26, 1933	- 2 sleeping suits	20.00	"	"	39
May 18, 1933	- 6 pair socks	13.00	"	"	39
June 8, 1933	- 2 pair braces	5.00	"	"	39.

Numerous expenditures for sporting goods, athletic equipment, and luxuries, including the rental of polo ponies, appear among the exhibits. Accused, while testifying as a witness, admitted owing the bills he is alleged to have contracted between the period January 1, 1933, and April 1, 1934, with the exception of one item of $21.17, but denied that they were past due (R. 353,354,356). He contended that because of his social position and polo playing it was necessary for him to spend more money than the average Oxford student.

The foregoing evidence clearly warranted the finding of guilty of the specification, with such exceptions and substitutions as were made by the court. There can be no question that it is wrongful for an officer of the Army unnecessarily to incur debts which he cannot reasonably expect to meet. Such conduct reflects unfavorably on both the individual concerned and the service which he represents. However, in the opinion of the Board, such extravagance on the part of an officer of the Army as here disclosed cannot be termed conduct unbecoming an officer and a gentleman such as that denounced by the 95th Article of War.

The Board is therefore of opinion that the record is legally sufficient to support only so much of the finding of guilty of Specification 3, Charge I, as involves a finding of guilty of the specification in violation of the 96th Article of War.

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

Specification: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, did, at London, England,

on or about January 24, 1933, knowingly, unlawfully and feloniously falsely pretend to Major W. T. Pigott, Infantry, that a remittance in an amount of more than £160, then approximately $800.00 in American currency, was on its way to him, the said Lieutenant Rogers, from a bank at Casper, Wyoming, which said pretense was false and fraudulent in that the said Lieutenant Rogers then well knew that there was no such remittance on its way to him from such a bank and that he had no reasonable ground for believing that any such remittance was so on its way; and by said false pretenses, with intent to defraud, did unlawfully and feloniously obtain from the said Major W. T. Pigott the latter's written guarantee to the said Lloyd's Bank, Ltd., dated January 24, 1933, of the payment to said Lloyd's Bank, Ltd., on demand upon him of all money and liabilities not in excess of £170, approximately $850.00 in American currency, whether certain or contingent, primary or collateral, then or thereafter owing or incurred to the bank from or by the said Lieutenant Rogers; the total amount of which indebtedness and liability so incurred by using said guarantee for that purpose is now approximately £170, all of which is still past due and payable and a legal obligation of the said Major Pigott to said Lloyd's Bank, Ltd.

Plea: Not Guilty.

Finding: Guilty.

Specification 4, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, being at the time indebted to Lloyd's Bank, Ltd., Oxford, England, in the sum of approximately £160 (approximately $800.00 in American currency), payment of which had been guaranteed by a guarantee in the amount of £170, dated January 24, 1933, by Major W. T. Pigott, Infantry, did, at London, England, on or about February 24, 1933, falsely and

fraudulently and with the intent to deceive and mislead state to and inform the said Major Pigott that the debt covered by the guarantee of said Major Pigott, dated January 24, 1933, had been paid, and that he, the said Major Pigott, was no longer involved in any financial responsibility in connection with his guarantee of January 24, 1933.

Plea: Not Guilty.

Finding: Guilty.

The evidence as to these specifications shows: On or about January 16, 1933, accused entered the office in the American Embassy, London, of Major W. T. Pigott, now retired, then Assistant Military Attache, and requested of Major Pigott permission to use his name in connection with an application being made by accused for a loan at Lloyd's Bank, Oxford. Accused at that time stated to Major Pigott "that this was a very temporary accommodation since he expected money, covering more than the amount of the loan from his bank at Casper, Wyoming, at any time within the next few days, and that he merely wanted to know if he could use my name in case there might be some delay in the arrival of the money". Major Pigott thereupon gave accused permission to so use his name. On or about January 24, 1933, accused went to a hospital in London, where Major Pigott was at that time recuperating from an appendicitis operation, and stated to the Major "that through some inexplicable delay the expected remittance from his bank at Casper, Wyoming, had not arrived, and as he desired very much to have the money as soon as possible would I sign a document from Lloyd's Bank, Oxford, which would enable him to get this money. He further stated that he expected to receive the money from Casper, Wyoming, within a few days at the most". Major Pigott made no inquiries of accused as to his financial standing because he believed accused's statement that the money was en route from Casper. On both January 16 and 24, 1933, accused represented to Major Pigott that funds in excess of the amount of the loan he desired were on their way to him from Casper. Relying on accused's representations, Major Pigott signed a document guaranteeing, in the form alleged, accused's payment to Lloyd's Bank, Ltd., Oxford, England, an amount not in excess of £170, or approximately $850.00, with interest thereon from demand at the rate of five per cent per annum.

On or about February 26, 1933, Major Pigott, while still recuperating from his operation at Rottingdean, Sussex, England, received a letter from accused in which he stated that "the expected remittance had arrived from Casper, Wyoming, that the debt covered by my guarantee had been paid and that I was no longer involved in any financial responsibility in connection with him". Major Pigott thereupon "considered the whole affair as closed *** dismissed it completely from my mind *** and did not keep Lieutenant Rogers' communication". He received no further communication, either written or verbal, from accused concerning the matter.

On or about June 1, 1934, Major Pigott received a letter from Lloyd's Bank, Oxford, notifying him that accused had failed to pay the amount owing the bank and calling upon Major Pigott, under the terms of the guarantee signed January 24, 1933, for payment of £164, 14 pence and 11 shillings, or $562.44. This letter was the first intimation that Major Pigott received that accused had not discharged the obligation. Upon receipt of a second request from the bank for payment of the amount, Major Pigott asked that the matter be held in abeyance pending adjustment of accused's affairs (Pros. Ex. 13). The debt was finally paid by accused November 10, 1934, with the proceeds of a gift. At that time it amounted to $841.53, principal and interest (R. 356,417).

Accused, under date of January 19, 1933, wrote the Wyoming National Bank, Casper, Wyoming, requesting a loan of $500.00 for six months. In this letter he stated, "I realize that my cash balance is low". The bank, on February 7, 1933, replied that at that time accused's known assets consisted of approximately $138.00 cash on deposit, 250 shares of stock of a market value of about $1.00 per share, and an insurance policy worth a loan value of $180.00, or total assets of about $570.00, and for that reason declined to make the loan (Pros. Ex. 14).

Accused in his testimony stated that in January, 1933, he was being pressed for a sum of money to pay for an operation on a lady, who later became his wife, and that there was an element of blackmail involved in the matter. He admitted obtaining Major Pigott's signature to the guarantee and further admitted that at the time he obtained the signature there were no funds en route to him from his bank in Casper and that he had no reasonable grounds for so believing. He vigorously denied, however,

that he made any such representation to Major Pigott but claimed that because of the lapse of time he could not recall the exact circumstances surrounding the transaction. He further denied writing or otherwise advising Major Pigott that the obligation had been discharged and claimed that his sole communication with Major Pigott with reference to the matter consisted of a more or less frivolous conversation, but admitted that he did inform Major Pigott in this conversation that he had reduced the debt "somewhat" and that Major Pigott had no cause to worry. He also charged that Major Pigott was a prejudiced witness because of a desire to force accused to pay the debt (R. 304-311,399-407).

If Major Pigott is to be believed, accused is guilty of every allegation of the two specifications and charges under consideration. On the question of veracity the court chose to accept the testimony of Major Pigott and to reject the testimony of accused. Such was the prerogative of the court and in the opinion of the Board the power was not abused. Accused admits that he was desperately in need of funds at the time the representations were made, thereby affording a motive for the alleged offense. He further admits that he asked Major Pigott to sign the guarantee, but professes not to remember what he said to induce the signature. Is it possible that a man of accused's brilliant mind could in a period of less than two years suffer a complete lapse of memory on a matter of such vital importance to him? On the other hand, Major Pigott's testimony as to what took place on this occasion is full, clear and convincing. It rings true, it is a fair and reasonable account and interpretation of the type of conversation that might be expected under similar circumstances. Certainly no officer of Major Pigott's age, experience and intelligence would guarantee the payment of approximately $850.00 by one drawing the salary of a second lieutenant without some very compelling representations as to the ability of the latter to meet the debt when it fell due. There can be no question as to the falsity of accused's representations. He admits, as alleged in the specification, Charge II, that no remittance was en route to him from a bank and that he had no reasonable grounds for so believing at the time he obtained Major Pigott's signature to the guarantee. The falsity of the representation is further established by testimony showing that accused did not even write his bank in Casper requesting a loan until three days after he first represented to Major Pigott that a remittance was en route to him from that bank.

The court also chose to accept Major Pigott's testimony over that of accused with reference to the allegation of Specification 4, Charge I. The former states that on or about February 26, 1933, accused advised him by letter that the obligation covered by the guarantee had been discharged and that he, Major Pigott, was no longer bound. The accused denied this but his version of an alleged conversation with Major Pigott regarding this phase of the matter is so unreasonable and improbable as to be unworthy of belief. Accused would have the court believe that Major Pigott, knowing that he was bound on a guarantee in the sum of approximately $850.00, treated the matter of the discharge of this obligation by the principal as a mere joke. Accused admits that on the one occasion he stated that he discussed the matter with his guarantor he informed him that the debt had been reduced. As a matter of fact it had not been reduced and accused must have known that this statement was false. He may not now be heard to complain that the court refused to accept his testimony over that of Major Pigott, when he virtually admitted that on one occasion, concerning a most important element of the transaction, he had lied to his guarantor, the man who befriended him in his hour of need. Accused would have the court believe that Major Pigott was a prejudiced witness and hence unworthy of belief; prejudiced, as accused said, because he hoped by making out a strong case against accused to force him to pay the debt and thereby relieve himself of responsibility. This strange and fantastic reasoning is shared by accused's civilian counsel and expressed by him both in a brief filed with the Board of Review and in a personal appearance before the Board. Such conclusions could only be reached by ignoring the fact that Major Pigott must have known that, if his testimony were accepted by the court as true, accused's dismissal from the service, if not his confinement, must necessarily follow, thereby destroying whatever hope Major Pigott might have entertained of forcing accused to meet his obligation. Had Major Pigott's testimony been influenced by personal interest it would have been to his advantage to make it as mild as possible in order to have accused retained in the service. Major Pigott further knew that accused's trial would almost certainly follow accusations by a brother officer of the making of false pretenses and conduct unbecoming an officer and a gentleman. In view of these recognized facts, accused's contention of prejudice, based on personal interest on the part of Major Pigott, must fall of its own weight.

The Board has discussed the evidence relating to these particular specifications at some length because they are regarded as the most serious of the numerous offenses charged to accused, and because, unlike most of the specifications and charges, the guilt or innocence of accused depends upon a question of veracity between him and a single witness.

Specification 4, Charge I, alleges the making of a false and fraudulent statement by accused with intent to deceive a brother officer concerning a financial transaction of some magnitude in which the two were involved. The specification does not charge, nor the evidence show, that the alleged false statement was made in any official capacity. This fact, however, does not, in the opinion of the Board, preclude a conviction under the 95th Article of War. That article denounces offenses unbecoming an officer and a gentleman and the facts alleged and proved as to this specification reveal a course of conduct on the part of accused wholly incompatible with the status of an officer and a gentleman.

For the reasons above set forth, the Board is of opinion that accused stands properly convicted of the Specification, Charge II, and Specification 4, Charge I, and that each specification was laid under the proper Article of War.

8. Specification 5, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, did, at London, England, on or about April 19, 1934, with intent to deceive and injure, wrongfully and unlawfully make and utter to The Dorchester Hotel, London, England, a certain check in words and figures as follows, to wit:

"No GH/L 1894 London, 19 April 1934

To WYOMING NATIONAL BANK (Two-pence stamp; left-side view of face of King George V)
CASPER, WYOMING

Pay to The Gordon Hotel, Ltd., or order
Four hundred and eight.....dollars
/L/ $408.00
fees 4.21
L.H.R. $412.21

LAWRENCE H. ROGERS",

in payment of that amount of money owed by the said Lieutenant Rogers to the said Dorchester Hotel for services and accommodations previously furnished by said hotel to the said Lieutenant Rogers, then well knowing that he did not have, and without any reasonable expectation that he would have, sufficient funds in said bank for the payment of said check.

Plea: Not Guilty.

Finding: Guilty.

Specification 6, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, did, at Oxford, England, on or about April 16, 1934, with intent to deceive and injure, wrongfully and unlawfully make and utter to Mrs. G. F. Filer a certain check in words and figures as follows, to wit:

"N-P
1-74 WYOMING NATIONAL BANK
90-109
Casper, Wyoming, 16 April 1934 No.....

Pay to the order of Mrs. G. F. Filer fees 4.76
$350.00 354.76
Three hundred and fifty.....Dollars

LAWRENCE H. ROGERS",

in payment of services and accommodations previously furnished by the said Mrs. G. F. Filer to him, then well knowing that he did not have, and without any reasonable expectation that he should have, sufficient funds in said bank for the payment of said check.

Plea: Not Guilty.

Finding: Guilty.

The evidence as to these specifications shows: During the month of March, 1934, accused became indebted to the Dorchester Hotel, London, in the sum of $408.00, as a result of his having been a guest at the hotel. On April 19, 1934, accused, in payment of this indebtedness, tendered the hotel a check dated as of that date, drawn on the Wyoming National Bank, Casper, Wyoming, in the sum of $408.00, payable to The Gordon Hotel, Ltd., and bearing the signature "Lawrence H. Rogers". The Gordon Hotel is the holding company of the Dorchester Hotel. The check was negotiated in the usual way and was returned dishonored (Pros. Exs. 5,6,16,34).

On April 16, 1934, accused was indebted to his lodging housekeeper, Mrs. G. F. Filer of Oxford in the sum of $350.00 for board and lodging furnished him. On that date, in payment of this indebtedness, he tendered her a check dated April 16, 1934, drawn on the Wyoming National Bank, Casper, Wyoming, in the sum of $350.00, payable to Mrs. G. F. Filer, and bearing the signature "Lawrence H. Rogers". This check was also negotiated in the usual way and returned dishonored (Pros. Ex. 4).

On April 16 and 19, 1934, accused had on deposit at the Wyoming National Bank the sum of $34.56, and for that reason the bank refused payment of the checks payable to The Gordon Hotel and Mrs. G. F. Filer (Pros. Ex. 17). The checks had not been made good at the time of the trial (Pros. Ex. 16).

For accused's explanation of his actions in giving these checks we quote from the excellent review of the assistant staff judge advocate:

> "**** Accused's explanation with reference to the checks for $408.00 and $350.00, a total of $758.00, drawn on the Wyoming National Bank at a time when his account in that bank was less than $40.00 is amazing. He claims that during his stay at Oxford University he had met a Mrs. Rita Clive, a young divorcee, who had later married an American named Mr. Alexander Fink, and that while this young woman was on a trip with her husband--apparently their honeymoon--she had written him that her husband, having more money than he knew what to do with, had insisted on giving her a part of it and that she, for no reason at all offered by the accused, had with the approval of her husband, decided to divide this gift with the

accused in the form of a settlement. While the accused was in arrest in his hotel in London, Mrs. Fink, who had returned to England, called and asked him to come out and see her and her husband. When the accused explained that he was in arrest and unable to come, Mrs. Fink then asked him about his debts, which accused had previously discussed with them. Accused stated that they were most pressing and embarrassing, whereupon Mrs. Fink came to the hotel without her husband, who had gone to Paris, and then made the unusual and amazing proposal that she would have her brand new husband immediately send to the accused's bank at Casper, Wyoming, at least $1500.00 and would thereafter make a settlement on him for an indefinite time in the amount of approximately $3000.00 a year. Mrs. Fink then apparently left to join her husband in Paris, and the accused, relying on this promise, but without making any effort whatsoever to ascertain whether or not this unusual and unexpected gift had been sent to his American bank by a comparative stranger and the husband of a new young wife who had been the former acquaintance of the accused, began immediately to draw checks on his Wyoming bank on the assumption that Mr. Fink would have money there to take care of them. The story is incredible and, as would be expected, no such remittance was forthcoming. Even if one should permit himself to believe the accused's statement that he had been promised this bounty in this unusual transaction, his conduct in drawing checks in reliance upon the same without making any effort to verify his bank account is totally inexcusable, and is sufficient in itself to sustain that part of the allegation which alleges that he gave the checks without sufficient funds in the bank and without having any reasonable expectation that he would so have them. The incredibility attached to the accused's fantastic explanation is increased by the further fact that even after his return to America he made no effort for several weeks to verify the receipt of the expected remittance in his Wyoming bank, and that although he was pressed for funds and hopelessly involved in debts which he left behind in England he made no further effort to draw upon the balance of approximately $600.00 or $700.00 which would have still been to his credit at the Wyoming bank had any such remittance been forwarded there for him. The only reasonable

conclusion is that the accused when confronted with the necessity of paying a hotel bill of $412.21 and the more important and pressing bill of $350.00 to his landlady at Oxford, where his personal and household effects were still stored, resorted to the temporary subterfuge of paying these debts with worthless checks" (R. 284-289, 379-391).

A deposition was sent to Mrs. Fink at Paris but she declined to testify (Def. Ex. 2).

For reasons apparent the Board is of opinion that the evidence clearly warrants the findings of the court on these specifications and that the offenses charged constitute violations of the 95th Article of War.

9. Specification 7, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, did, at Oxford, England, on or about March 5, 1934, with intent to deceive and injure, wrongfully and unlawfully make and utter to Mrs. G. F. Filer a certain check in words and figures as follows, to wit:

"No. PC 97824 5 7 0 4 8
March 5, 1934
National Provincial Bank Limited (Two
Cornmarket Street Branch pence
OXFORD stamp)
Pay Mrs. G. F. Filer or Order
Forty pounds only .....
£40 : 0 : 0
LAWRENCE H. ROGERS",

in payment of services and accommodations previously furnished by her to him, then well knowing that he did not have, and without any reasonable expectation that he should have, sufficient funds in said bank for the payment of said check.

Plea: Not Guilty.

Finding: Guilty.

The evidence as to this specification shows: On March 5, 1934, accused was indebted to his landlady, Mrs. G. F. Filer, in the sum of forty pounds for board and lodging furnished him. On that date, in payment of this indebtedness, he tendered her a check dated March 5, 1934, drawn on the National Provincial Bank of Oxford, in the sum of forty pounds, payable to Mrs. G. F. Filer, and bearing the signature "Lawrence H. Rogers". At the time this check was uttered accused requested Mrs. Filer to hold it for two weeks before presenting it for payment. She complied with this request and when it was negotiated two weeks later it was returned dishonored (Pros. Ex. 4).

Accused testified that at the time he gave Mrs. Filer this check he asked her to hold it until he told her to deposit it, but denied naming any specific time when she should deposit it. He admitted that he did not have sufficient funds on deposit with the bank on which the check was drawn to meet it. In his own words, he had on deposit "about a pound or so" (R. 291-293,352). Accused stated that when Mrs. Filer informed him that the check had been returned dishonored he said, "What did you expect? I told you it would not be good" (R. 293). A deposition was sent to an official of the National Provincial Bank but he declined to testify "without the customer's authority, or a Court Order" (Pros. Ex. 50). Apparently Mrs. Filer has never been reimbursed for the amount due on this check.

Here again we are confronted with a question of veracity between accused and another witness. If we accept accused's version of the conversation that took place between Mrs. Filer and himself at the time the check was uttered, he is innocent of any wrongful act; on the other hand, if Mrs. Filer is to be believed, accused is guilty as charged. The court properly chose to follow Mrs. Filer. Accused's testimony as to this specification is unreasonable and in keeping with his testimony on the preceding specifications. The fact that no testimony could be obtained from officials of the bank concerned as to the status of accused's account at the time the check was given and at the time of its negotiation is of no importance in view of accused's admissions as to this matter while testifying as a witness. The court under all the circumstances of record was, in the opinion of the Board, fully justified in finding that accused had no reasonable expectation that he would have sufficient funds on deposit to meet the check.

For these reasons the Board is of opinion that accused stands properly convicted of this specification and that the offense is properly charged under the 95th Article of War.

10. Specification 8, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, did, at London, England, on or about March 14, 1934, with intent to deceive and injure, wrongfully and unlawfully make and utter to The May Fair Hotel, London, England, a certain check in words and figures as follows, to wit:

PC 5 7 0 4 8
"No. 1 00486 14 March 1934
National Provincial Bank Limited (Two-
Cornmarket Street Branch, pence
OXFORD stamp)
Pay May Fair Hotel
Eleven pounds six shillings six pence
£ 11 : 6 : 6
LAWRENCE H. ROGERS",

in payment to the said May Fair Hotel of a debt incurred at said hotel, then well knowing that he did not have, and without having any reasonable expectation that he should have, sufficient funds in said bank for the payment of said check.

Plea: Not Guilty.

Finding: Guilty.

The evidence as to this specification shows: On or about March 14, 1934, accused became indebted to the May Fair Hotel, London, in the sum of eleven pounds, six shillings and six pence as a result of his having been a guest at that hotel. He thereupon, in payment of this debt, tendered the hotel a check dated March 14, 1934, drawn on the National Provincial Bank, Cornmarket Street Branch, Oxford, in the sum of eleven pounds, six shillings, and six pence, payable to May Fair Hotel, and

bearing the signature "Lawrence H. Rogers". The check was negotiated and returned dishonored. On March 20, 1934, the general manager of the hotel wrote accused a letter informing him that the check had been returned dishonored and invited accused's attention to the fact that this was the third such check that accused had given the hotel (Pros. Exs. 18,19).

Accused testified that the uttering of this check was due to an error on his part; that it was his intention to draw the check on another bank where he did have sufficient funds to meet it. He admitted that he did not have sufficient funds on deposit at the National Provincial Bank to meet the check at the time it was given by him to the May Fair Hotel (R. 295,329,371,372). A deposition was sent to an official of the National Provincial Bank but he declined to testify "without the customer's authority, or a Court Order" (Pros. Ex. 50). For anything that appears in the record this check also remains unpaid.

The fact that no testimony could be obtained from officials of the bank concerned as to the status of accused's account at the time the check was given is of no importance in view of accused's admissions as to the status of the account. Again the court, under all the circumstances of record, was, in the opinion of the Board, wholly justified in finding that accused had no reasonable expectation that he would have sufficient funds on deposit to meet the check.

For these reasons the Board is of opinion that accused stands properly convicted of this specification and that the offense is properly charged under the 95th Article of War.

11. Specification 9, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, having been directed by the Commanding General, Second Corps Area, in an official communication, dated May 25, 1934, to submit a complete and detailed statement of his indebtedness in England, did, at Governors Island, New York, on or about June 20, 1934, with the intent to deceive and mislead the Commanding General of the Second Corps Area, state in an official communication, dated June 20, 1934, that

the list attached to said communication of June 20, 1934, was--

> "a detailed statement of indebtedness acquired by me during my detail in England",

which said statement was false and misleading in that the said Lieutenant Rogers had willfully and intentionally omitted from said list of debts debts amounting to approximately $1757.00, the existence of all of which said omitted debts was then well known to the said Lieutenant Rogers, making, as he then well knew, the true total amount of his indebtedness approximately $3357.00 instead of $1600.00, as shown on said list.

Plea: Not Guilty.

Finding: Guilty.

Specification 10, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, having been directed by the Commanding General, Second Corps Area, in an official communication, dated May 25, 1934, to submit a complete and detailed statement of his indebtedness in England, did, at Governors Island, New York, on or about June 20, 1934, with the intent to deceive and mislead the Commanding General of the Second Corps Area, state in an official communication, dated June 20, 1934, that the list attached to said communication of June 20, 1934, was--

> "a detailed statement of indebtedness acquired by me during my detail in England",

which said statement was false and misleading in that the said Lieutenant Rogers had willfully and intentionally omitted from said list of debts a

debt of approximately £160 (about $800.00 in American currency) to Lloyd's Bank, Oxford, England, payment of which said debt had been guaranteed by Major W. T. Pigott on a guarantee dated January 24, 1933; a debt in the sum of £78.10.9d (approximately $408.00 in American currency), past due and payable to The Dorchester Hotel, London, England, and a debt of approximately £15, or about $75.00 in American currency, as an additional amount past due and owing to Bowring, Arundel & Company, London, England, the existence of each and all said debts then being well known to the said Lieutenant Rogers.

Plea: Not Guilty.

Finding: Guilty.

The evidence as to these specifications shows: On May 25, 1934, after accused's return to this country and while he was stationed at Governors Island, New York, the Commanding General, Second Corps Area, in an official written communication, directed accused to submit among other things a complete and detailed statement of his indebtedness in England. No reply having been received to this communication on June 14, he was directed in writing to indicate by indorsement the date a reply might be expected. In 1st indorsement, dated June 15, accused stated that the delay was due to an effort on his part to locate by cable certain friends and that having ascertained "their approximate whereabouts" he was expecting a reply "in the course of the next few days". He further stated that upon receipt of this reply he would be able "fully and satisfactorily" to reply to the communication of May 25. He concluded by stating that if no reply were received from his friends by June 20 he would comply with the directions contained in the communication of May 25.

Accused having failed to sign this indorsement, it was returned to him by 2d indorsement dated June 16. In this latter communication he was warned of the seriousness of the matter and cautioned to "carefully weigh every statement you desire to make before making the statement of record".

On June 20, 1934, accused addressed a written communication to the Commanding General, Second Corps Area, in which he stated in paragraph 1 thereof, "Attached hereto is a detailed statement of indebtedness acquired by me during my detail in England". Accompanying this communication was a list of debts totaling approximately $1632.85 (Pros. Ex. 3).

On June 20, 1934, at the time accused specifically reported to the Commanding General, Second Corps Area, that his indebtedness in England totaled approximately $1632.85, his indebtedness in England was in fact $3748.99, a difference of $2116.14. Among the bills not reported by accused were the following:

Lloyds Bank, Oxford, England	$841.53
The Dorchester Hotel, London, England	408.00
Bowring, Arundel & Company, London, England	75.00
May Fair Hotel	59.21
Bullingdon Club	190.73,

all of which were past due and owing at the time the report was rendered (R. 138, Pros. Exs. 3,4,5,6,11,13,16,18,19,21,26-40,42-47).

In explanation of his omission of debts from the list submitted, accused testified that he did not know that a debt of $350.00 owed Mrs. Filer and the debt of $408.00 owed The Dorchester Hotel had not been paid by the Wyoming National Bank at the time he rendered his report (R. 299,330). He merely forgot the bill of $59.21 owed The May Fair Hotel (R. 329,373) and the one of $190.73 owed the Bullingdon Club (R. 330,331,374). As for the debt of $841.53, owed the Lloyds Bank of Oxford and guaranteed by Major Pigott, accused stated that he did not consider this the type of debt he was required to report. Because of the relationship existing between himself and Major Pigott he did not believe that it was a debt "for which I was or would be ever pressed" (R. 330). He did not report the full amount owed Lesley & Roberts because he did not "really stop and consider the matter. If I had I would have suspicioned that there was a further amount owed" (R. 369,370). He admitted that all the debts charged against him were correct with the exception of one owed Jarvis & Hamilton, which he contended was excessive to the amount of $21.17 (R. 353,354). None of these debts has been paid, with the exception of the one owed Lloyds Bank (R. 355).

Such evidence requires no extended discussion or comment. All essential allegations of the two specifications are virtually admitted by accused in his testimony. His explanations of his failure to report all of his debts as directed are absurd and incredible. He received the order to report the debts on May 25, and rendered his report on June 20. In the meanwhile, he was officially warned to weigh carefully every statement made in his report, yet, despite this opportunity for thought and in the face of this specific warning, he rendered a report showing less than half of his true indebtedness, omitting debts totaling $2116.14. Among these were such amounts as $841.53, $408.00, $350.00, $75.00, $190.73, $84.67. The court could not be expected to believe that this officer really thought, as he testified, that the $408.00 and $350.00 bills had been paid by him with checks given on a bank where, as previously shown in this opinion, he knew that he had insufficient funds to meet them. Nor could the court be expected to believe that accused forgot a debt of $190.73 to his club, or that he forgot a debt of $59.21 which he had incurred only two months previously and in settlement of which he had given a bad check. It would strain human credulity to accept accused's story of his failure to include in his report the debt of $841.53 due Lloyds Bank guaranteed by Major Pigott. The only permissible conclusion under all the circumstances is that accused deliberately and willfully omitted these debts with the intention of deceiving the corps area commander as to the true status of his financial condition, and that his testimony with respect to these specifications was false. Under such circumstances the court properly found as it did.

Specification 9 is in part duplicated by Specification 10. However, this duplication in pleading did not prejudice accused's substantial rights and it did not affect the sentence adjudged.

For these reasons the Board is therefore of opinion that the findings of guilty of Specifications 9 and 10, Charge I, are fully warranted by the law and the evidence, and that the offenses charged in these specifications constitute violations of the 95th Article of War.

12. Specification 11, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, did, at Governors Island, New York, on June 15, 1934, with intent to

deceive and mislead the Commanding General, Second Corps Area, state in an official communication, dated June 15, 1934, that--

> "It has been necessary for me to send a series of cables to locate my friends who are at present on a world tour. I have ascertained their approximate whereabouts and am expecting a reply in the course of the next few days",

which said statement was intended to and did refer to a friend or acquaintance of the said Lieutenant Rogers who he claimed had promised to settle a sum of money on him and which said statement was false, untrue and misleading in that the said Lieutenant Rogers, as he then well knew, had not sent any such cablegrams, had not ascertained the approximate whereabouts of the alleged friends, and had no reasonable ground for expecting a reply from them in the course of the next few days.

Plea: Not Guilty.

Finding: Guilty.

Specification 12, Charge I: In that Second Lieutenant Lawrence Herbert Rogers, Cavalry, did, at Governors Island, New York, on or about July 5, 1934, with intent to deceive and mislead, state to Major Louis A. Craig, The Inspector General's Department, who was then, in his capacity as Assistant Corps Area Inspector, conducting an official investigation into the financial difficulties of the said Lieutenant Rogers, that during the last week of May and the early part of June he had dispatched several cables by the Postal or Western Union Telegraph Company at Lexington Avenue in New York City in an

effort to locate a Mr. and Mrs. Fink, who had agreed to make a money settlement on him, which said statement was then known by the said Lieutenant Rogers to be false and misleading in that he had not dispatched any such cables.

Plea: Not Guilty.

Finding: Guilty.

The evidence as to these specifications shows: Upon receipt of a letter dated June 14, 1934, signed by the Adjutant General, Second Corps Area, containing directions of the corps area commander that he reply by indorsement as to when a reply might be expected to the letter of May 25, previously sent to him, accused, in 1st indorsement dated June 15, 1934, addressed to the Commanding General, Second Corps Area, stated, among other things,

> "2. It has been necessary for me to send a series of cables to locate my friends who are at present on a world tour. I have ascertained their approximate whereabouts and am expecting a reply in the course of the next few days" (Pros. Ex. 3).

On July 5, 1934, Major Louis A. Craig, Inspector General's Department, was engaged, at the direction of the Commanding General, Second Corps Area, in making an official investigation "to determine the reasons for certain apparent omissions in a letter to the Commanding General in which his indebtedness had been covered, and, also, more fully establish certain other facts mentioned in that letter". Accused appeared before Major Craig on that date and was informed of the general purpose of the investigation and as to his rights under the 24th Article of War (R. 40,41). Accused was then sworn as a witness and in the course of his testimony stated to Major Craig that during the last week in May or the early part of June he dispatched several cables by the Postal or the Western Union Telegraph Company on Lexington Avenue in New York City in an effort to locate Mr. and Mrs. Alexander Fink, who had agreed to make a money settlement on him (R. 171,172). Accused agreed to go with Major Craig to the offices of the telegraph companies for verification of this statement

but stated that he doubted if he could find the place from which he sent them (R. 179,188). On either July 6 or 7, after Major Craig had made arrangements to search the files of the telegraph companies for copies of the cables, he sent for accused (R. 173). When accused appeared, Major Craig informed him that arrangements for the search had been completed. Accused then stated to Major Craig that he had "just discovered that no one of these cables had been sent. He stated that the cables had been written by him and turned over to his wife for transmission and for undetermined reasons had not been sent" (R. 174). Representatives of the Western Union and the Postal Telegraph Companies testified that no record could be found in their respective offices of cables such as were described by accused (R. 120-128). The wife of accused, called as a witness by the defense, testified in substance that the latter part of May she had a conversation with her husband with reference to the sending of some cables to the Finks. Accused wrote out these cables and left them with her as they were undecided at that time whether to send them (R. 213,214). About two days later accused phoned his wife and asked her if she would send them and she said, "Yes". She did not send them because she did not approve of this method of raising funds. Some time later in June, she thought about two weeks after she was supposed to send them, accused called her by phone and asked if she had sent the cables by Western Union or Postal Telegraph and was informed by her that she had not sent the cables (R. 215,216,218,219).

Accused testified that his wife's testimony was substantially correct but he "was under an impression that there was a longer time" (R. 299). He needed funds and wanted to contact the Finks regarding the promised settlement. About the last week of May he prepared five cables to the Finks and gave them to his wife. A few days later he called her and instructed her to send them (R. 300,301,410,411). On July 5 he told Major Craig that he was willing to go with him to find the office where the cables were sent, but he did not know which company had dispatched them. When he returned home that night he was informed by his wife that she had not sent the cables and the following day he, of his own volition, went to Major Craig and informed him of this fact (R. 301,302). When, in his communication to the Commanding General, he stated that he had located the Finks approximately, he meant that due to his knowledge of their travel plans he had, by a process of elimination, reached a conclusion as to their

whereabouts (R. 203). He referred to the Finks in his statements made to the Commanding General and Major Craig regarding the sending of the cables (R. 409).

The story of accused's wife is highly improbable, but, if it be true, it does not clear accused for he knew not later than the 15th or 20th of June that the cables he claimed to have drafted had not been dispatched, yet on July 5, in sworn testimony, given in the course of an official investigation, he stated that he had sent the cables, a statement which he must have known was wholly false and must have been made with the obvious purpose of deceiving the inspector.

The Board is therefore of opinion that the evidence warrants accused's conviction of Specifications 11 and 12, Charge I, and that the offenses charged were properly laid under the 95th Article of War.

13. Other than as referred to above, the record contains no legal question deemed worthy of discussion.

14. We now treat the matter of the sentence. Dismissal is a severe punishment and one warranted for the most serious offenses only. Accused in this case stands properly and legally convicted of eleven specifications in violation of the 95th Article of War, of one specification in violation of the 96th Article of War, and of one specification laid under the 95th Article of War but which in the opinion of the Board is a violation of the 96th Article of War. For the offense laid under the 96th Article of War the court might have adjudged a sentence to confinement in addition to dismissal. Such being true, it cannot be said that the sentence is unnecessarily severe, but on the other hand any less sentence would, in the opinion of the Board, fail to meet the requirements of justice and discipline.

In arriving at the foregoing conclusions careful consideration has been given to the brief filed with The Judge Advocate General by civilian counsel for accused, and also to the argument made by this counsel in his personal appearance before the Board of Review. Both the brief and argument may well be characterized as nothing more than pleas in mitigation. It is contended that accused's offenses were those of a careless, immature

youth, and do not involve moral turpitude, and it is urged that the sentence be commuted to loss of files and accused retained in the service. The Board of Review is unable to concur in these views for the reason that it is firmly of the opinion that accused has by his conduct conclusively demonstrated that he is "morally unworthy to remain a member of the honorable profession of arms".

The Government has been more than kind to this accused in the past. It gave him one of the finest educations that a youth could ask for, an education that stressed honor above all else. At the completion of that education it permitted him to go abroad as a beneficiary of the Rhodes Trust and attend one of the finest English universities in order that his already splendid education might be augmented. It had the right to expect that in his relations with foreign youths he would conduct himself as an officer and a gentleman, thereby reflecting credit upon the Army and his country. How and in what manner did accused repay this generosity of his Government? As conclusively shown by this record of trial, shortly after his arrival in England he began to lead a life of extravagance and soon stooped to lying, deceit, cheating, and false pretenses. More despicable is the fact that numbered among his victims was a brother in arms who responded to his plea for assistance at a time of great need. When his conduct was questioned, accused, in an effort to save himself, entered upon a course of evasion and deceit which culminated in the present trial.

The conclusion is inescapable that accused has, in England, placed a stain upon the good name and reputation of the United States Army that only years can remove; yet counsel argues that it would reflect less unfavorably on the service if this sentence were commuted than if it were carried into effect. He assigns no grounds for this unique contention. In other words, we are asked to believe that the reputation of the service will suffer less if accused's serious offenses be condoned rather than punished according to their gravity. The Board is unable to appreciate such an argument. The Board is of opinion that the honor and good name of the service require that this accused be dismissed.

15. Accused is 25 years of age. The statement of his service as it appears in the Army Register is as follows:

"Cadet M.A. 2 July 27; 2 lt. of Cav. 11 June 31."

16. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. However, for reasons previously stated, the Board is of the opinion that the record is legally sufficient to support only so much of the finding of guilty of Specification 3, Charge I, as involves a finding of guilty of the specification in violation of the 96th Article of War. 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. The Board of Review is further of the opinion that the record is legally sufficient to support the sentence and warrants confirmation thereof.

[signature], Judge Advocate.

W. A. Trumbull, Judge Advocate.

[signature], Judge Advocate.

To The Judge Advocate General.

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

Board of Review
CM 202846

MAR 25 1935

UNITED STATES	)	PHILIPPINE DIVISION
v.	)	Trial by G.C.M., convened at Fort William McKinley, P. I., December 1, 3, and 15, 1934. Dismissal.
Captain BYRON E. SHIRLEY (0-10326), 26th Cavalry (PS).	)	

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

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

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

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

Specification 1: In that Captain Byron E. Shirley, 26th Cavalry (PS), did, at Camp John Hay, P.I., on or about 1:30 a.m., November 14, 1934, unlawfully enter the quarters of 2d Lieutenant David H. Buchanan, with intent to commit a criminal offense, to wit, assault therein.

Specification 2: In that Captain Byron E. Shirley, 26th Cavalry (PS), did, at Camp John Hay, P.I., on or about November 14, 1934, with intent to do him bodily harm, commit an assault upon 2d Lieutenant David H. Buchanan, by forcibly and unlawfully entering said Lieutenant Buchanan's quarters and advancing on him in a threatening manner.

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

Specification: In that Captain Byron E. Shirley, 26th Cavalry (PS), was, at Camp John Hay, P.I., on or about November 14, 1934, in a public place, to wit, the Dormitory, Camp John Hay, drunk and disorderly.

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

Specification: In that Captain Byron E. Shirley, 26th Cavalry (PS), was, at Camp John Hay, P.I., on or about November 14, 1934, drunk and disorderly in quarters.

Accused pleaded not guilty to and was found guilty of all the charges and specifications. Evidence of one previous conviction was introduced, General Court-Martial Order No. 27, Headquarters Philippine Division, November 28, 1934, which showed accused to have been convicted of being drunk in command at Fort Stotsenburg, P. I., September 26, 1934, and to have been sentenced to be reduced on the promotion list 200 files. In the present case the court sentenced accused to be dismissed the service. The reviewing authority disapproved the findings of guilty of Charge III and the specification thereunder, presumably because, as stated by the division judge advocate in his review, page 8, that specification constitutes a duplication of the preceding one. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The events to which the specifications and testimony relate occurred at Camp John Hay, P. I., on the second floor of a building known as the Dormitory, between the hours of 12:15 and 2:00 a.m., November 14, 1934. It appears from the testimony that certain apartments on the second floor of the Dormitory were occupied as follows:

Number	Occupants
17	Major Horace L. McBride, 24th F.A.
18	2d Lt. David H. Buchanan, 31st Inf., and wife.
19	Accused and wife.
20	Capt. Russell D. Powell, 24th F.A., and wife.

All of these apartments opened on a porch, which apparently was the usual method of access to them, and which was lighted.

The most important witness for the prosecution was Lieutenant Buchanan, whose testimony may be summarized as follows (R. 12-29): I know accused. I went to bed between 12:15 and 1:00 a.m. I didn't get to sleep because, beginning about a quarter to 1:00, there was a disturbance in the next room, No. 19. There was pounding and a good deal of noise as though light objects were being knocked together. Voices were raised. This disturbance lasted a half or three quarters of an hour. There were lulls. It was either in 19 or on the balcony outside. There was slamming of doors. I could hear a man's voice raised in argument and I got the impression a scuffle was going on in the room. I phoned Captain Besse's quarters. I thought he should know about it. I thought maybe I could help and went to my door. I didn't open my door because someone left the room and walked down the balcony and for a few minutes the disturbance passed. I went back to bed. I did not stay there because the disturbance moved from apartment 19 out on the balcony. I could hear voices. There was a lot of noise, beating on and banging of doors. Some man was striding down the balcony. I heard Major McBride ask if that was necessary. A voice said, "You'd be surprised". I heard loud and incoherent talk. I observed the person on the balcony. I did not know who it was but later I found out that it was accused. Five, ten, or maybe fifteen minutes after I phoned Captain Besse, accused commenced knocking on my door. I told him to quit or I would kill him. Accused moved from my door, which was locked, to my window, which was secured by a hook and eye latch. He pushed the screen open and I engaged him in conversation. I told him to get away and leave me alone; if he didn't, I was going to kill him. I made no move to open the doors or windows. My wife was with me in the room. Accused said, "I am coming in there and take your gun and beat you over the head with it". I thought that accused would force the door down and I got the gun to protect myself. After accused pushed in the screen, either unlatched it accidentally or intentionally, I told my wife to call Lieutenant McDaniel and bring the guard down. Accused stood very quietly beside my window for what seemed a long time. I just talked nonsense with him. I talked about Notre Dame football, Kentucky, Virginia, and the British diplomatic service. It seemed a long time to me. Then he put his left leg over my window sill. I told him, "You put your other

leg across, and I am going to kill you". He put his other leg over. I let him take one full step, because with the screen opening in it kept me from getting a good swing at him. I let him clear the screen and I hit him with the gun and my right hand (probably the reporter's error for "in my right hand") on top of his head. The gun dropped out of my hand and we had a scuffle. I hit him with my fist and threw him on the floor. On the way down he banged his head on the corner of the bureau. I hollered to my wife to turn on the lights. She turned the lights on while we were lying on the floor. I saw a Philippine sentry stick his head through my window. He said, "Don't kill him". I said, "Come in and get this man". He didn't come in but Major McBride did. I asked him who this fellow was. Then the phone rang and Captain Besse called. I told him to come down. Major McBride told Captain Besse to come. I think accused was very drunk. I did not go into accused's room during the evening.

Cross-examination. From my bed I can hear what goes on in the adjoining room. From the main room I don't hear very much. The noises on the veranda were very loud, talking, hollering, what sounded like banging on the door and beating on the wall and walking up and down. I looked out of my window and saw accused but no one else. He passed my apartment twice. His words were very incoherent. He said he wanted somebody to come out on the balcony and fight, that he was from Kentucky and that down there they didn't wait that way. I don't know how long a time elapsed between accused's statement that he was coming in and take the gun and hit me over the head with it and the time he actually entered the room. It seemed to me a long time. While we were talking about these foolish subjects accused did not talk incoherently. His talk was not unfriendly. It was thick-tongued. He did not stagger that I noticed. He did not suddenly become more vicious than he had been during the conversation. I thought the man was drunk and didn't know what he was going to do. His attitude changed between the time he tried to come in and the foolish conversation. I thought Lieutenant McDaniel was going to get there with the guard before he came in. I was trying to stall him off. Our conversation died out and there was silence for a short while. Then he came through. I was to his right oblique approximately one full step. When I struck him I was standing abreast him. In my opinion accused was

very drunk. He talked crazy, unlogical.

Redirect examination. I got an awful whiff of alcohol from him.

Examination by the court. I did not know accused before this night. He tried to force my lock. He made no threatening gestures that I saw at any time.

Major Horace L. McBride and Captain Russell D. Powell, both 24th Field Artillery (PS), testified for the prosecution; and, so far as their opportunities for observation allowed, confirmed the testimony of Lieutenant Buchanan. Major McBride's testimony may be summarized as follows (R. 32-41): On the night of November 13-14, 1934, I was at Camp John Hay, P. I., and occupied apartment No. 17, adjoining that of Lieutenant Buchanan. I retired some time before midnight but got up later because of a very loud noise outside my room. Accused was opening and closing and slamming the screen door to his room. I yelled to him, "Is it necessary to make all of that noise?" He made no reply but stopped closing the door. Then the noise started again. I heard a Filipino voice call to him, apparently from the reading room of the Dormitory. I saw accused walk past my room toward the reading room muttering. In about thirty seconds he returned. In a few seconds after that the noise was resumed, that is, slamming of doors. I heard Lieutenant Buchanan call to accused to get away from in front of his room. Considerable incoherent conversation took place between Lieutenant Buchanan and accused. I gathered that accused was attempting to get into Lieutenant Buchanan's room and the latter was attempting to prevent this by conversation. This conversation continued for four or five minutes. I got up to put on a dressing gown and just then I heard a very loud crash, which apparently came from quarters No. 18. On the porch I passed a Filipino soldier who was standing in front of Lieutenant Buchanan's window. I met Mrs. Buchanan as she came out of No. 18, and I entered, followed by the Filipino soldier, and found Lieutenant Buchanan and accused in the former's quarters. Accused was on his knees with his forehead on the rug about five feet inside the window. Lieutenant Buchanan was standing over him. He had his right hand on the back of accused's neck and in his left hand he had a .45 caliber automatic, holding it by the barrel. This was a few minutes after

1:30 o'clock. Accused was drunk. I base this opinion on his conduct and conversation. I detected no odor. After the above, I visited apartment 19. The door was open and lights on in the main room, the porch and the bathroom. The main room was quite disorderly, bureau drawers open, towels on top of the bureau, some broken glass on the floor in the bathroom, the towels were on the floor, and other articles badly disarranged. I got a coat. Accused was told to put it on and sit in a chair on the porch and wipe his face with a towel, and he complied. He remained on the porch about ten minutes.

Captain Russell D. Powell, 24th Field Artillery (PS) (R. 41-48): On the night of November 13-14, I lived in the Dormitory at Camp John Hay, apartment No. 20, adjoining No. 19, occupied by accused and wife. I went to bed about 8 o'clock. Some time after midnight my wife called my attention to a disturbance in quarters 19. I heard voices of more than one person in the next room. I heard a double door slam in quarters 19. A short time thereafter I heard a sound as of beating or pounding on a wall or door with some soft object. I went into the front room of my apartment. The noise recurred. Then I heard accused walking up and down on the balcony mumbling to himself. I turned out the light in our quarters to avoid trouble. Accused came to our door, No. 20, and beat on the door regular strokes about a second apart. Mrs. Powell and I remained quiet and accused left our door and went to Lieutenant Buchanan's quarters, No. 18, and beat on the door there. Accused demanded entrance to Lieutenant Buchanan's quarters. The latter remonstrated with him, trying to keep him from coming in, and accused then threatened retaliation if he were not admitted. This conversation occupied several minutes. I then went into my closet to find a pair of slippers. That took a couple of minutes. I then went out on the balcony and found Major McBride in charge of the situation. Accused was standing on the balcony, clothed in trousers and an undershirt. He was bleeding from a gash in his head. Major McBride had him sit down in a chair. I followed Major McBride into accused's room, which was in very great disarray. I then went into Lieutenant Buchanan's apartment where I saw a pool of blood, I would estimate about half a pint, about seven feet from the window. When accused was walking on the balcony and when he came to my door, I am absolutely certain that he was very drunk. When I observed him on the porch after he had been hit, he could either have been drunk or suffering from shock.

Cross-examination. When accused passed my window he was halting in his walk, but not staggering.

Very soon after the entry of accused into Lieutenant Buchanan's room and the blow by the latter, four officers were summoned and came to the Dormitory, namely, First Lieutenant Edward H. McDaniel, 45th Infantry (PS), Captain Lloyd R. Besse, 45th Infantry (PS), Major Leonard T. Gerow, 45th Infantry (PS), and Captain Paul Hayes, Medical Corps. Their testimony, so far as material, will be abstracted in the order in which they are named above, which seems more logical than that in which they testified.

First Lieutenant Edward H. McDaniel, 45th Infantry (PS) (R. 57-59): About 1:30 a.m., I was awakened by the telephone and found Mrs. Buchanan on the phone saying that there was a crazy person in the Dormitory and that she was afraid. I asked if Lieutenant Buchanan was there. She said yes, but that he couldn't handle him alone. (Defense stated that it had no objection to the foregoing testimony.) I immediately called Captain Besse, the mess officer, and started dressing. When I arrived at the Dormitory I went upstairs and saw a number of people on the balcony. Accused was sitting in a chair, and a sentry at his side. I saw blood just inside the window of Lieutenant Buchanan's room. Accused was smoking a cigarette and at that time was quiet. Pretty soon he started mumbling to the sentry and started to get up. I pushed him into the chair, and with other incoherent talk he remained seated. Captain Besse and another sentry arrived. Captain Besse ordered the sentry to take accused downstairs. He made some resistance to the sentries and I got behind him and picked him up and we went downstairs. I would say that accused was drunk. At least he was not in full possession of his faculties and he smelled of liquor.

Examination by the court. Captain Besse told the two sentries to take accused downstairs. He stood up with a sentry on either side of him. He started going backward and resisted going forward, so I got behind him and picked him up from behind, lifted his feet off the floor, and went downstairs with him.

Captain Lloyd R. Besse, 45th Infantry (PS) (R. 48-55): About 1:30 in the morning, November 14, I was awakened by the telephone ringing and

found it was Lieutenant McDaniel calling me. I have the general administration of the Dormitory. In consequence of this message I went there. Upon arriving on the balcony upstairs, I saw accused sitting in a chair just outside Lieutenant Buchanan's suite. Accused was smoking a cigarette and talking, apparently out of his head. He had several cuts on his forehead and blood was streaming down his face. I formed the opinion that he was drunk. I detected the odor of intoxicating liquor. Contributing factors to that opinion were his conversation and his actions which were not those of a normal man. I stayed with him until he was put in an ambulance. Room No. 19 was in a state of untidiness. A screen door was ripped off, the telephone mouthpiece was off and on the floor, one of the glass shades that was over one of the beds was broken and the glass all over the floor. There were cigaretts butts on the floor. The sleeping porch and bathroom were in a most untidy condition. The doors and balconies are visible from a public paved road running in the rear of the Dormitory down to the quartermaster area.

Cross-examination. I observed no one on that road at that time.

Major Leonard T. Gerow, 45th Infantry (PS) (R. 29-32): In consequence of a telephone call from Captain Besse, I went to the Dormitory. There I found accused, Captain Hayes, Captain Besse, and two or three enlisted men downstairs on the porch. Accused was sitting in a chair held by two enlisted men. He was talking, bleeding and struggling to get up. In my opinion he was drunk. I am convinced of this because of his incoherent language, his efforts to get away from the guard, his dress, and his physical condition. I did not detect the odor of liquor. I visited accused's room and found that the screen door had been broken, or the screen pulled out from the upper half of the door. The interior of the room was in a very disorderly state. One of the glass shades over the lamps had been broken and the glass strewn on the floor.

Cross-examination. This was a little after 2 a.m.

Examination by the court. Accused was dressed in white civilian trousers which were quite dirty, an undershirt, also quite dirty, and an issue raincoat.

Captain Paul Hayes, Medical Corps (R. 55-57): I am post surgeon at Camp John Hay. I was called to the Dormitory about 2 a.m., November 14, by Captain Besse. Upon arrival there I found accused on the front porch being held by two soldiers. He was covered with blood. My diagnosis was alcoholism, acute, two lacerations on his forehead, one in his scalp, and several contusions on the back of his head.

4. The defense introduced certain character testimony which may be abstracted as follows:

Major Henry L. Krafft, Medical Corps (R. 66-71): I was stationed with accused from April, 1928, until 1930, at Marfa, Texas, a regimental post garrisoned by the 1st Cavalry. I was post surgeon. I was casually acquainted with the accused and talked with him on professional matters on a few occasions. I thought his professional work as commanding officer of a troop compared favorably with that of other officers.

Cross-examination. I made monthly physical inspections of the men and of the messes of the organizations. I was not called upon for other inspections. I did not know accused quite as well as other officers. I met him at social gatherings and called at his house professionally. My opinion as to his professional work was based on my inspection of his troop, such as physical inspection and inspection of the mess, and I understood from other officers' comments that his troop compared favorably with others. I have never come in contact with accused from that service until December 3.

Defense Exhibit A was General Orders 5, Headquarters 1st Cavalry, July 8, 1931, announcing the award of the Curtis cup and guidon to Troop B, 1st Cavalry, commanded by accused, for having attained the highest general military proficiency for the training year 1930-31. The order also gives a tabular statement of the percentage rating of the troops in the regiment, showing Troop B as leading, and expresses the commendation by the commanding officer of the officers and men of Troop B.

The defense also introduced as Exhibit B a report of desertions, trials and admissions to hospital not in line of duty of men in each troop

of the 1st Cavalry for the year to include July, 1931. The report showed Troop B, commanded by accused, to have had one desertion, one trial, and two admissions to hospital not in line of duty. This was a smaller number of desertions and of trials than in any other troop in the regiment, and a smaller number of hospitalizations than in any other troop except one, which had the same number as Troop B.

Lieutenant Colonel Kenneth S. Perkins, Inspector General's Department (R. 71-73): I am assistant to the inspector, Philippine Department, and have been since December 25, 1931. I was brought in contact with accused at the time of the annual inspection of Fort Stotsenburg made by Colonel Henry C. Merriam, inspector general, Philippine Department, assisted by myself, between September 24 and October 4, 1934. I had charge of the inspection of all funds and records of administration. Among the organizations inspected was the Machine Gun Troop, 26th Cavalry, of which accused was in command. No large irregularities were discovered in the fund or other administrative matters of the Machine Gun Troop. A few minor irregularities were discovered which were either corrected at the time or were of such minor importance that they were not reported. The record shows no irregularities in the condition of the barracks. The record shows that accused's troop was above the average, although the records of administration throughout the regiment were very good.

Cross-examination. No communications concerning accused have come to my attention as assistant to the department inspector.

Captain Ernest F. Dukes, Cavalry (R. 73-78): I have known accused about three years. I am now commanding officer, Machine Gun Troop, 26th Cavalry, and have been such about a month. Prior to that I was regimental plans and training officer about nine months, and before that regimental adjutant for little over two years. I think accused came to the regiment in June, 1932. He was at first with Headquarters Troop as a junior captain and then took the Machine Gun Troop and had it until about two months ago. I inspected the quarters and stables of his troop and found them in excellent condition. The administration of the troop was better conducted than the average. In the regimental trail test, 1933-34, the rating of the Machine Gun Troop was excellent with minor exceptions. From the

association that I have had with accused at Fort Stotsenburg, I think he is an excellent organization commander. His professional conduct has been excellent. When I took over the troop which had been commanded by accused, it was in excellent condition. I checked the property personally. It was in as good condition as property could be expected to be. I have had very little social association with accused.

Cross-examination. The general reputation of accused as to social fitness was that people were a little afraid to be too closely associated with the Shirleys. As to his general reputation as to honor, integrity and fitness as an officer and a gentleman, that is a rather hard question to answer other than it is not any too good. I cannot of my own knowledge give any specific instance where it has proved not good.

It was stipulated that Colonel Archibald F. Commiskey was in command of the 26th Cavalry up to June 24, 1934, at Fort Stotsenburg; that about June 20, 1934, Colonel Commiskey called accused to his office and congratulated him on making a smooth-running organization out of the Machine Gun Troop, an organization that had in the past caused considerable concern, that everything in the troop was as straight as a string.

The defense introduced, after the prosecution had stated that it had no objection thereto, a deposition transmitted by radio from the United States Army Transport "Grant" of Lieutenant Colonel Walter P. Davenport, Medical Corps, as follows: I was stationed at Fort Stotsenburg with accused during 1933 and until June, 1934. Colonel Archibald F. Commiskey, accused's commanding officer, said to me that accused had one of the most efficient organizations in the regiment.

Lieutenant Colonel Charles C. Hillman, Medical Corps (R. 80-84), testified with respect to his professional observation of accused during a period of hospitalization at Sternberg General Hospital beginning December 1, 1934. The witness testified that accused when admitted was mentally agitated, nervous and had evidently not been eating or sleeping well. It was the witness' impression that accused was suffering from some of the reactions that any normal person would suffer who was in trouble or worried. His testimony was negative as to the finding of any

mental disorder, as was also certain other incidental testimony in the record. In this connection it may further be remarked there have been transmitted to this office the proceedings of a disposition board at Sternberg General Hospital, Manila, P. I., December 14, 1934, of which the witness, Lieutenant Colonel Hillman, was senior member, which, after stating that accused had been under observation for mental disease, concluded that no such disease was found and expressed the opinion that accused was fit for full military duty and recommended that he be returned to his proper station. This report was approved by the commanding officer of that hospital and the Surgeon General.

Accused, at his own request, testified in substance as follows (R. 85-98): Prior to July 1, 1934, I had never been tried by general court-martial, disciplined under the 104th Article of War, or reprimanded officially. During the past six months I have had matters occur in my private life that cause me worry. Going back a little way, shortly before sailing for the Islands, my wife's father died leaving an estate. It was absolutely necessary to raise $2000 to prevent foreclosure on some of his property. My brother-in-law furnished part of the money. I borrowed $1000 from two banks. They carried this account with moderate reductions until about September of this year. At that time both banks officially reported the nonpayment of the amount through military channels. I finally arranged to settle with one bank by assignment of a cash and loan value on an insurance policy. I adjusted the other with an allotment to be paid by the Finance Officer in Washington. There was much correspondence that could have been avoided if mail had been quicker. Sometimes I used radio. Furthermore, after Colonel Commiskey sailed on the June transport, a lieutenant colonel of Cavalry arrived and assumed command until Colonel Sterling arrived in October. This lieutenant colonel rendered an efficiency report on me for that period which rated me unsatisfactory in field duties, physical endurance, attention to duty, and tact. I never saw the efficiency report which Colonel Commiskey rendered on me when he left the regiment because it never came to me, but the adjutant told me it was between excellent and superior. The only prior unfavorable efficiency report that I had was one about four years ago returned to me because of a minor matter. During the period of which I have been speaking, my wife became extremely nervous and I sent her to

Baguio. I discharged the cook on account of expense. I lost a great deal of sleep and traveled more or less on a diet of coffee and cigarettes. I was not drinking any liquor. They had these two banks still in the air, they had the efficiency report, and I had two sets of charges which this same officer preferred against me. I mean the acting regimental commander. The first set came to trial and I was found not guilty of all but one specification, and guilty of that. I had an ulcerated tooth and took some brandy and they found me under the influence of liquor. I have never been inside a civilian jail or court. This trial caused me considerable anxiety and worry because I had a clean record for sixteen years, my period of service as a commissioned officer. On November 5 I went to Baguio. I know Major McBride and Captain Powell. I did not know Lieutenant Buchanan prior to going to Baguio. I had seen his face. About 4:30, November 13, Mrs. Shirley and I came home, took a shower and changed our clothes. Between 4:30 and 6:30 we both had two jiggers of brandy and soda. After dinner we stopped at an apartment occupied by some Navy friends. At that apartment we had two jiggers apiece of whisky, plus a glass of ice water. Mrs. Shirley and I rode down town to Baguio and back to the post. A little after 8:30 we went to our apartment, and about 9:30 I mixed two hot brandy and milk punches, which we took. I wrote a couple of letters. Prior to the incident to which Lieutenant Buchanan and others testified, Mrs. Shirley had gone downstairs to the apartment of another lady. We had had a disagreement, not violent in nature, relative to getting on the December transport, which I said was impossible. Mrs. Shirley had started to pack a few things. That may have accounted for the drawers being out of order. A short while after Mrs. Shirley left, I went out on the balcony. I do not remember knocking at Captain Powell's apartment. I do not remember Major McBride shouting at me. I tried to get into the door which I thought was that of my apartment, but it was Lieutenant Buchanan's as I afterwards found. It was about fifteen inches away from the door of my apartment. I can't remember anything that Lieutenant Buchanan and I talked about. I do not remember pushing open the window. I knew I had been hit, and if I knew somebody was on the inside of a dark room telling me he was going to shoot me, I certainly wouldn't walk in. The next definite thing I remember is Captain Hayes telling me at the hospital it was going to hurt when he put the stitches in. I had no personal animosity against Lieutenant Buchanan. I don't think my failure to remember the things to

which these witnesses have testified was occasioned by the liquor to any appreciable extent. I had gone down town to Baguio a couple of days before and purchased some toilet articles for my wife, and came back to the post and thought that I had not purchased them, and went back and purchased exactly the same things the second time. I thought I would get better at Baguio but I seemed to get worse. I used to sign my name three or four times on a scratch pad and then quickly shift to whatever I had to sign so it wouldn't look like an eight year old child's writing.

Cross-examination. The charges that were dropped were for using abusive language to a Filipino officer living next door and for being drunk in quarters. The specification charging abusive language was settled under the 104th Article of War and the other specification was dropped completely. I wrote two letters after returning to my apartment, sealed them and put stamps on them. I don't know definitely whether they were posted because I came back next morning and hurriedly packed and left.

Examination by the court. On the night of November 13-14 it is my opinion that I was drunk. I began to feel the effects when I was writing the second letter.

5. Major Percy D. Moulton, Medical Corps, called for the prosecution in rebuttal, testified in substance as follows (R. 98-99): Accused reported for hospitalization at Fort Stotsenburg about the middle of November. He was in a highly nervous state, complained of being unable to sleep and loss of appetite. He had marked tremors, could not sit still, and presented all the evidence of a man under emotion from some worry or something which had upset him. He was treated at first in quarters and then in hospital until the 1st of December when he was transferred to Sternberg General Hospital. During the interim he had shown quite a bit of improvement. In my opinion the cause of the nervousness was the reaction to the strain which he had been undergoing. His personal troubles would be sufficient to worry almost any man and put him in the condition which he exhibited.

6. In considering whether the evidence supports the findings of guilty, it is more convenient to begin with Specification 2, Charge I, alleging assault upon Lieutenant Buchanan by forcibly and unlawfully entering his quarters and advancing on him in a threatening manner. Forcibly and unlawfully entering another's quarters is not per se an assault; so those words must be considered, not as descriptive of the offense itself, but of attendant circumstances only. The rest of the specification, alleging assault by advancing upon Lieutenant Buchanan in a threatening manner, is sufficient as a matter of pleading; but, was the "threatening manner" shown by actions or by words merely? It is elementary that words alone do not constitute an assault, but that there must be an offer or attempt to strike a blow or otherwise to apply unpermitted force to the body of another person. 5 Corpus Juris 617; Kramer v. Rickameier, 159 Iowa 48, 139 N.W. 1091, 45 L.R.A.N.S., 928; Grayson v. St. Louis Transit Co., 100 Mo. App. 60, 71 S.W. 730; French v. Ware, 65 Vt. 338; Stearns v. Sampson, 59 Me. 568. Lieutenant Buchanan testified (R. 29) that at no time did accused make any threatening gestures toward him. In view of that testimony, the Board cannot see that this specification was proved, and concludes that the record is legally insufficient to support the finding of guilty of it.

7. Specification 1, Charge I, alleges an unlawful entry of the quarters of Lieutenant Buchanan with intent to commit assault therein, in other words, housebreaking. The Board has recently held that wrongful entry of a room with intent to commit an offense by one rightfully in the building may constitute housebreaking. CM 202951, Wyatt. However, the crime is not committed by an unlawful entry without a then existing intent to commit an offense, even though the intent has previously existed or may later come into existence. The act and the intent must coincide. Did accused, at the moment of his entry, have the intent to assault Lieutenant Buchanan? It appears from the testimony of Lieutenant Buchanan that at one time accused said: "I am coming in and take that gun and beat you over the head with it" (R. 18). At that time accused undoubtedly had the intent to commit assault, but after that the two officers "talked nonsense" "for what seemed a long time" (R. 19). Their conversation was "not unfriendly" (R. 25). Then the conversation "died out and there was

silence for a short while. Then he came through" (R. 26). From the foregoing it seems extremely doubtful whether accused retained until the moment of his entry his intent to assault Lieutenant Buchanan. This doubt is increased by the circumstance that a drunken man's intent changes more easily and quickly than that of a sober man. Because of his liquor it would be more difficult for him to retain an intent in his mind for some time. For the foregoing reasons, the Board concludes that it is not proved that the criminal act and intent coincided or that the offense of housebreaking was committed. It is, however, undeniable that accused wrongfully entered Lieutenant Buchanan's quarters, which action constitutes a lesser included offense in violation of the 96th Article of War. It is therefore the opinion of the Board that the record is legally sufficient to support only so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty of wrongfully entering the quarters of Second Lieutenant David H. Buchanan, at the time and place alleged, in violation of the 96th Article of War.

8. The Specification, Charge II, alleges that accused was drunk and disorderly in a public place, in violation of Article of War 95. That accused was drunk and disorderly was proved beyond doubt. The Board thinks that the porch where accused's offense was committed was a public place. It was visible from a public paved road running in rear of the Dormitory (Besse, R. 53). The porch also seems to have been the means of access to all the apartments on the second floor of the building. Major Besse testified that there were three electric lights on the porch which were lighted when he arrived (R. 55), though it does not definitely appear that they were lighted at the time of accused's misbehavior. The fact that only army personnel and their wives were present is immaterial, since it is a mistaken notion that the army can be disgraced or discredited by the misconduct of one of its members only if that misconduct is seen by outsiders. Dig. Ops. JAG, April-Dec., 1917, p. 107.

The next question is, was accused's conduct unbecoming an officer and a gentleman, in violation of the 95th Article of War? In the effort to resolve this question the Board has considered several prior cases of drunkenness and disorder by officers or cadets involving the distinction between violation of the 95th and of the 96th Articles of War.

Among the cases which throw some light upon the problem are the following:

a. CM 195373, Beauchamp. Driving while drunk and drunkenness in a public place, to wit, a police station. A policeman arrested accused for driving while drunk. While being booked at the police station accused used abusive, vulgar, and profane language, not fit to be repeated in court because of the presence of the lady reporter, threatened to shoot a policeman, and when locked in a cell, shook the bars and gate. Held, violation of the 96th but not of the 95th Article of War.

b. CM 196063, MacIver. Specification 1: Drunk and disorderly at Boston airport. At a social gathering attended by officers, ladies, and civilians, accused was observed sitting on a bench, in uniform, with his head in his hands. He started for the door but fell against and broke the glass in it, cutting his face, and then fell to the floor. Being unable to walk without staggering, accused was assisted by two other officers to the surgeon's office. There he resisted the efforts of the surgeon to treat him to such a degree that it was necessary for others to hold him. After first aid treatment he went to the toilet and returned from it with his trousers open. He had urinated on his trousers and asked the flight surgeon an obscene and insulting question. Held, a violation of the 95th Article of War.

Specification 2: Drunk in uniform on a public street, Langley Field, Virginia. Accused was seen at night to cross a lighted street at Langley Field and stagger up the sidewalk with his uniform coat unbuttoned and his hat on the back of the head. Held, a violation of the 96th but not of the 95th Article of War.

Specification 3: Drunk and disorderly in quarters, Langley Field, Virginia. Accused's wife returned from an operation at the post hospital to his quarters under the care of a civilian trained nurse. That evening accused was unable to put his child to bed because of his drunkenness. Between 11:00 p.m. and 2:00 a.m. he was downstairs drunk and creating general disorder. His wife was made exceedingly nervous by his drunkenness. About 2:00 a.m., the nurse found him lying on the floor asleep but rolling and tossing and with the radio going loud, notwithstanding a request by

her earlier in the evening that he turn off the radio because it annoyed his wife. The nurse telephoned the medical officer, who, with the officer of the day, came to accused's quarters, where they found him drunk and asleep on the floor of the living room with some of the furniture overturned.

The Board of Review said:

> "As to Specification 3, the evidence likewise shows that accused was drunk and disorderly in his own quarters at the time and place alleged, in the presence of a trained nurse attending his wife, who was sick as a post-operative patient. The Board of Review can come to no other conclusion but that the evidence supports the finding that accused, under all of the circumstances, was in a state of gross drunkenness unbecoming an officer and a gentleman attended by disorderly conduct in his quarters. In this instance his very drunkenness itself was so gross as to be in violation of the 95th Article of War when measured by the inhumanity which it caused him to display to his wife, who was at the time in the care of a trained nurse in his quarters and of whose condition he was utterly unmindful."

Specification 5: Drunk in quarters, Langley Field, Virginia. Accused's little daughter was heard crying in his quarters in such a way that it caused three ladies who lived in adjacent quarters to enter accused's quarters and take the child away. Accused was drunk at the time. Held, violation of the 96th but not of the 95th Article of War.

c. CM 196426, Fleming. Drunk and disorderly in uniform in various public places in Colon, R. P. Accused was first seen on the street leaning against a wall in a sagging, helpless posture in uniform but without a cap. He went into a bar and upset a waiter's tray. He rented a taxicab, gave contradictory orders to the driver, became engaged in an argument with him, grabbed the driver by the throat and tore his shirt. He was finally taken to the provost marshal's office, where he called an officer and enlisted men of the military police insulting and obscene names.

The Board of Review thought this conduct a violation of the 96th Article of War only, but The Judge Advocate General held to the contrary that it constituted a violation of the 95th Article of War. The President followed the view of The Judge Advocate General.

d. CM 197398, Mini. Accused, a cadet, was convicted of being drunk in uniform on a public street at New Haven, Connecticut. Upon the Corps of Cadets falling in preparatory to marching to the football game with Yale accused was observed to stagger and was directed to fall out of ranks. He was placed in a reconnaissance car and left there during the game with a medical attendant. He sat slouched in his seat but vomited several times and also dropped off to sleep. At times he joined in the cheering that could be heard from the spectators at the game.

The Board with the concurrence of The Judge Advocate General held that the evidence supported the finding of guilty of the specification as a violation of Article of War 96 only, and recommended that the sentence be confirmed. The President followed this recommendation.

e. It is considered unnecessary at this point to state the facts in CM 198724, Clark, and CM 202290, Lowry, further than to say that the drunkenness was accompanied by indications of illicit sexual desire, in which respect those cases were quite unlike that now before the Board. In the former of those cases both the Board of Review and The Judge Advocate General considered accused's conduct a violation of the 95th Article of War. The Board thus characterized it:

> "The Board of Review has no hesitation in reaching the opinion that such disorderly conduct is 'morally unbefitting and unworthy' an officer and a gentleman, that it offends so seriously against morality and decorum as to expose the accused to disgrace socially and as a man, has brought dishonor and disrepute upon the profession which he represents, * * *."

The present accused was inconsiderate of others in the Dormitory, noisy, and belligerent, but nothing worse. The Board does not consider his

conduct, bad as it undoubtedly was, such as to bring dishonor and disrepute upon the profession which he represents.

In the Lowry case the Board of Review thought accused's conduct a violation of the 95th Article of War, but The Judge Advocate General held it an offense under the 96th Article only, and the President followed his view. The Judge Advocate General quoted with approval and apparently adopted as the proper test the following language of Major General George B. McClellan (G.O. 111, Army of the Potomac, 1862):

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

Applying the above test to the present case, the Board does not feel that the record shows accused to be one with whom his brother officers cannot associate without loss of self-respect.

When we pass from tests expressed in general terms to comparison of accused's conduct with that of Lieutenants Clark and Lowry, the Board considers it not so bad as that of Lieutenant Clark and at least no worse than that of Lieutenant Lowry. Both Lieutenant Lowry and the present accused entered the apartment of another officer at night after having been told to keep out. But Lieutenant Lowry entered an apartment known by him to be occupied by a woman and a child only, whereas the present accused entered an apartment known by him to be occupied by an able-bodied armed man who proved himself fully able to defend it. As Lieutenant Lowry's conduct has been held not a violation of the 95th Article of War, the Board is unable to see how that of the present accused can be.

The Board will not take time to make detailed comparison of the conduct of accused with that of Captain Fleming, Lieutenants MacIver and Beauchamp, and Cadet Mini; but contents itself with saying that in its opinion his case more nearly resembles those in which it was held that the conduct in question constituted a violation of the 96th Article of War

only, than those in which it was held that the 95th Article of War was violated.

The Board therefore expresses the opinion that the record is legally sufficient to support only so much of the finding of guilty of the Specification, Charge II, and Charge II, as involves a finding of guilty of the specification in violation of the 96th Article of War.

9. But one question remains for consideration, namely: whether, in view of the Board's conclusion that one specification is not supported at all, and the others supported only in so far as they involve less serious offenses, the sentence should remain unchanged. Notwithstanding those circumstances, accused stands convicted of being drunk and disorderly and of wrongfully entering another officer's quarters at night. The evidence shows that accused's conduct, though not violative of the 95th Article of War, was grossly inconsiderate of the comfort of others in the Dormitory, and involved extreme belligerency toward another officer who had given not the least cause of offense. In other words, the drunkenness and disorder, though not so gross or of such a character as to justify a conviction under the 95th Article, were nevertheless present to a marked degree. Dismissal is legally authorized, though not required, upon conviction of violation of the 96th Article of War. It is unnecessary to consider whether, if the present conviction stood alone, the sentence ought to remain unchanged; because the present conviction does not stand alone. There was introduced at the trial evidence of one previous conviction, namely, of having been drunk in command at Fort Stotsenburg on September 26, 1934, less than two months before the commission of the offenses involved in the present trial. The reduction of a legally permissible sentence is in substance the exercise of clemency; and, in considering clemency, the Board and all higher authorities may take into account matters outside the record of trial. When this is done, the Board notes the subsequent conviction of accused of breach of arrest at Fort Stotsenburg, P. I., December 20, 1934. This makes three instances of misconduct by accused within three months, all of sufficient gravity to result in conviction by general court-martial.

Accused's wife has appeared in person before the Board of Review and The Judge Advocate General and has made oral representations on behalf

of her husband. Certain of these related to alleged harsh treatment of accused since his trial; and, if true, are irrelevant to the questions now to be decided. Mrs. Shirley further alleged that her husband was denied the counsel whom he desired, and that the officer who acted as special defense counsel was incompetent and lacking in faithful devotion to his client's interests. Questions of availability of counsel are primarily for determination by the convening authority, and his decision will not be reviewed except upon a showing of abuse of discretion. No such showing has been made. So far as the record of trial shows, the counsel who defended accused performed their duty with at least average ability and diligence. The records of The Adjutant General's Office show that the special defense counsel (Captain Sheets) spent two years at law school, though he did not graduate, practiced law for over two years before entering the army, and has since served creditably as defense counsel. Those records also show that the regularly detailed defense counsel, Captain Tourtillott, has had several months' experience as trial judge advocate of general courts-martial. Both of those officers have a general efficiency rating of excellent, and Captain Sheets' file contains several recent superior efficiency reports and letters of commendation. Accused is, according to the Army Register and his wife's statement, himself a law graduate and member of the bar, though he has never practiced law.

Mrs. Shirley also maintained that accused's three offenses resulting in three trials and convictions in three months were the result of a physical and mental breakdown caused by nearly three years' tropical service. The Surgeon General has stated officially that more than two years' tropical service is apt to be disadvantageous to a white man's health; but the medical evidence in the record (Hillman, R. 80-84; Moulton, R. 98,99) and the report of the disposition board at Sternberg General Hospital both show that accused, though not in the best physical and nervous condition, is and was at the time of his offenses fully responsible for his actions.

In view of all that has been said, the Board recommends that no modification of the sentence be made.

10. Accused is 39 years of age. The statement of his service as it appears in the Army Register is as follows:

"2 lt. Cav. Sec. O.R.C. 27 Nov. 17; accepted 27 Nov. 17; active duty 27 Nov. 17; 1 lt. of Cav. U.S.A. 23 Feb. 19; accepted 24 Feb. 19; hon. dis. 9 Oct. 19.--1 lt. of Cav. 1 July 20; accepted 25 Nov. 20; A.S. 2 Aug. 21 to 7 Feb. 22; capt. 28 Mar. 30."

The Army Register further shows that accused received the degree of Bachelor of Laws from Illinois Wesleyan University in 1917, and graduated from the Cavalry School, Troop Officers' Course, in 1927.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board is of opinion that the record is legally insufficient to support the finding of guilty of Specification 2, Charge I; is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I, and Charge I, as involves findings of guilty of wrongfully entering the quarters of Second Lieutenant David H. Buchanan, at the time and place alleged, in violation of the 96th Article of War; and legally sufficient to support only so much of the findings of guilty of the Specification, Charge II, and Charge II, as involves findings of guilty of the Specification in violation of the 96th Article of War. The Board is further of opinion that the record is legally sufficient to support the sentence and warrants confirmation thereof.

Theodore Hall, Judge Advocate.

W. A. Trimble, Judge Advocate.

Archibald King, Judge Advocate.

To The Judge Advocate General.

1st Ind.

War Department, J.A.G.O., APR 5 1935 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Captain Byron E. Shirley (0-10326), 26th Cavalry (PS), together with the foregoing opinion of the Board of Review.

2. Upon examination of the file of the accused officer in The Adjutant General's office, the following matters with respect to his service are noted, in addition to those mentioned in paragraph 10 of the opinion of the Board of Review:

Accused served in the American Expeditionary Forces, France, from June 27, 1918, to June 29, 1919, and took part in the Meuse-Argonne offensive and in the occupation of a defensive sector. Since the World War accused served at various stations in the United States until June 17, 1932, when he arrived in the Philippine Islands, where he remained until after the trial now under review. Accused's efficiency reports have, in general, been either satisfactory or excellent (or the equivalents formerly used, average and above average) in performance of duty and in other respects. The only reports rating the officer either better or worse than the above in performance of duty are the following:

a. February 19 to June 30, 1921, Camp Harry J. Jones, Douglas, Arizona, rated by Colonel A. V. P. Anderson, 1st Cavalry, as superior in performance of duty as exchange officer.

b. August 15, 1921, to February 14, 1922, Air Service Pilot School, Carlstrom Field, Florida, rated by Major Ralph Royce, A.S., as below average in ground instruction. Accused was relieved from detail with the Air Service at his own request.

On an entirely favorable efficiency report for the period from July 1, 1931, to May 15, 1932, by Lieutenant Colonel Robert M. Cheney, commanding 1st Squadron, 1st Cavalry, at Fort D. A. Russell, Texas, the commanding officer of that regiment, Colonel William A. Austin, placed an indorsement in which inter alia he said of accused: "Laxity in regard to his personal credit and finances seriously impairs the efficiency of the officer concerned".

An efficiency report covering the period from July 1 to September 30, 1934, at Fort Stotsenburg, P. I., by Lieutenant Colonel Robert M. Cheney, 26th Cavalry, rated accused as satisfactory in the performance of duty as troop commander. On two items, initiative and force, accused was rated excellent. On ten items, accused was rated as satisfactory. He was rated unsatisfactory in performance of field duties, military bearing and neatness, and attention to duty, and inferior in tact. The reporting officer would object to having accused serve under him "due to his continuing trouble from debts and liquor". He further stated that accused has a weakness, "debts and liquor"; that he is not qualified for his grade because of "his condition due to debts and liquor", or for any command in peace or war. As a general estimate, the reporting officer said, "Once considered an excellent officer, he is now ruining himself by debt and drink".

On the above report there are numerous indorsements in certain of which accused takes issue with the reporting officer as to the factual basis for and justice of his ratings and remarks. In others the reporting officer undertakes to justify them. In 12th indorsement on the above report, November 4, 1934, Brigadier General Francis LeJ. Parker, commanding Fort Stotsenburg, rated accused as satisfactory in attention to duty and tact, and as professionally qualified as captain, peace or war. Otherwise General Parker concurred in the report.

Except for the report last mentioned, accused's efficiency reports have been better of late years than earlier. Many contain favorable comments and there are a few ratings of superior in particular characteristics.

5. I concur in the conclusions of the Board of Review and recommend that the President disapprove the finding of guilty of Specification 2, Charge I; approve only so much of the findings of guilty of Specification 1, Charge I, and Charge I, as involves findings of guilty of wrongfully entering the quarters of Second Lieutenant David H. Buchanan, at the time and place alleged, in violation of the 96th Article of War; and approve only so much of the findings of guilty of the Specification, Charge II, and Charge II, as involves findings of guilty of the specification in violation of the 96th Article of War. I further recommend

for the reasons stated by the Board of Review that the President confirm the sentence.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the above recommendations should they meet with approval.

5. In accordance with a request previously made by him through The Adjutant General, Honorable James Hamilton Lewis, United States Senate, has this day been informed by this office that the record of Captain Shirley's trial is being forwarded to the Secretary of War.

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

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

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

Board of Review
CM 202849

FEB 4 1935

UNITED STATES v. Private 1st Class THEODORE T. MIX (6680266), Headquarters Troop, 1st Cavalry Brigade.	FIRST CAVALRY DIVISION Trial by G.C.M., convened at Fort Clark, Texas, December 17 1934. Dishonorable discharge and confinement for two (2) years and five (5) months. Penitentiary.

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

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

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

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

Specification: In that Private First Class, Theodore T. Mix, Headquarters Troop, 1st Cavalry Brigade, did, at Fort Clark, Texas, on or about October 1, 1934, feloniously take, steal, and carry away four pair of window drapes, value about fifteen dollars ($15.00), one pair of evening shoes, value about six dollars and fifty cents ($6.50), and one silk night dress, value about seventeen dollars and fifty cents ($17.50), property of Mrs. Clark L. Ruffner, of the total value of about thirty nine dollars ($39.00).

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

Specification: In that Private First Class T.T. Mix, Headquarters Troop, 1st Cavalry Brigade, Fort Clark, Texas, did, on or about the 1st day of October, 1934,

with intent to defraud, falsely make in its entirety a certain acknowledgment of notice in words as follows, to wit:

"O.K. By.

(Sig) T.T. Thornburgh
1st Lt. T.T. Thornburgh
1st Cav. Brig. Fort Clark, Texas."

on an assignment executed by him, the said Private Mix, in words and figures as follows, to wit:

"Received from Sgt. Alfred Ord. Dept. $10.00 dollars, which I authorize 1st Lt. T.T. Thornburgh to pay to Sgt. Alfred from my orderly pay on Nov. 2nd 1934."

which said acknowledgment of notice was a writing of a private nature which might operate to the prejudice of another.

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

Specification: In that Private 1st Class T.T. Mix, Headquarters Troop, 1st Cavalry Brigade, Fort Clark, Texas, with intent to defraud Sergeant John Alfred, Ord. Dept., did, at Fort Clark, Texas, on or about October 1st, 1934, unlawfully pretend to the said Sergeant Alfred that on November 2, 1934 there would be due him, the said Private Mix, the sum of ten dollars ($10.00) for services rendered and to be rendered to 1st Lieutenant T.T. Thornburgh, Cavalry, as orderly, and further that the said Lieutenant Thornburgh had executed a signature purporting to be that of the said Lieutenant Thornburgh on a certain document in words and figures as follows, to wit:

"Fort Clark, Texas.

Received from Sgt. Alfred, Ord. Dept. $10.00 dollars, which I authorize 1st Lt. T.T. Thornburgh to pay to Sgt. Alfred from my orderly pay on November 2, 1934.

T. T. Mix (Sig)
Pfc T.T. Mix
Hq. Tr. 1st Cav. Brig.
Fort Clark, Texas.

O.K. By

T. T. Thornburgh (Sig)
1st Lt. T. T. Thornburgh
1st Cav. Brig. Ft. Clark, Tex."

well knowing that said pretenses were false and by means thereof did fraudently obtain from the said Sergeant Alfred the sum of ten dollars ($10.00).

Accused pleaded not guilty to all charges and specifications and was found guilty of all, except that of specification 2 Additional Charge II, he was found guilty, upon the substitution of "nine dollars ($9.00)" for "ten dollars ($10.00)". The court sentenced accused to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three years. The reviewing authority approved only so much of the findings of guilty of the specification, original charge, as found accused guilty of larceny of four pairs of window drapes and one pair of evening shoes, at the time and place and of the ownership alleged, of some value not exceeding twenty dollars. He disapproved so much of the finding of guilty of the specification, Additional Charge II, as involved a finding of guilty of a false pretense that there would be due the accused ten dollars, and of the obtaining of a sum in excess of $1.50. He approved only so much of the sentence as involved dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for two years and six months. Because of the length of time the accused had been in confinement he remitted one month of the above term. He designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and withheld the order directing execution of the sentence pursuant to A. W. 50½.

3. In the opinion of the Board of Review the record is legally sufficient to support the finding of guilty of the original charge and specification, alleging larceny, as modified by the reviewing authority. The evidence with respect thereto will not be set out.

4. The evidence with respect to the additional charges and specifications will be set out only so far as necessary to illustrate and support the position taken by the Board of Review.

5. The Specification, Additional Charge I, alleges forgery of the signature of 1st Lieutenant T. T. Thornburgh, Cavalry. That officer's testimony with respect to the additional charges and specifications is found on pages 18-20 of the record. He testified positively (R. 19) that the signature purporting to be his was not so, but he was not asked, nor does he anywhere say, that he did not authorize the writing or the placing of his name on the paper in question, nor is there in the record

any evidence from which absence of such authority may be inferred. That proof of absence of authority to affix the alleged forged signature is necessary has been held many times by the Board of Review and The Judge Advocate General. In CM 114211, Meyers, it was said,

> "But, as the case stands, it was necessary that the prosecution, in addition to proving that the accused produced and indorsed the check and obtained value upon it, should prove not only that the signature on the check was not that of J. R. Glazier, but also that J. R. Glazier had not authorized the accused or any other person to sign this check for him."

In CM 123118, Harbin, it was said,

> "The foregoing creates a strong moral impression that the accused wrote and signed the check as alleged in Specification 1, of Charge II, but, from the point of view of legal evidence, leaves the matter in doubt. In addition to this, there was no evidence at all before the court that, if he did write and sign the check, such acts were without authority. Apparently there was such a person as Druen Bird, capable of authorizing the use of his or her name in this way. It is elementary law that, in establishing a case of forgery, want of authorization to sign or utter must be shown. The finding of guilty of Specification 1, Charge II, was therefore without legal support in the evidence."

To the same effect are CM 115048, Rainey; CM 122618, Dynes; CM 124572, Hough; CM 185417, Sadler; Dig. Op. JAG 1912-30, sec. 1567.

CM 122215, Foster, Dig. Ops. JAG 1912-30, sec. 1569 (3), illustrates an exception to the above general rule. In that case a troop clerk was convicted of forging checks on the troop fund and uttering them. He was accustomed to keep the check book and to prepare checks for the troop commander's signature. It was held that he knew that he was entitled to nothing from the fund and that this guilty knowledge rendered unnecessary direct proof of lack of authority to sign the checks.

The Board of Review thinks that the present case is within the rule and not the exception. The record does not show that, at the time the alleged forgery was uttered, Lt. Thornburgh owed

nothing to accused and accused knew it, or that otherwise he had guilty knowledge in the premises. Lieutenant Thornburgh testified (R. 20) that he advanced to accused his pay as orderly for October, because accused's wife had been sick in hospital, causing accused unusual expense; but Lieutenant Thornburgh does not state the date of this advance, and there is nothing to show whether it was before or after the date (about October 2, R. 21) when accused presented the alleged forged paper to Sgt. Alfred. If, as seems probable, it was after that date, accused did not know on October 2 that nothing would be due him from Lieutenant Thornburgh at the end of the month.

The Judge Advocate, 1st Cavalry Division, undertakes (his review, par. 2g (4)) to take the case out of the general rule above stated by arguing that the signature in question was made by tracing over an impression of a rubber stamp, and that an authorized signature made in good faith would not be so written. Neither on the facts nor on the law is this argument convincing to the Board.

The Board of Review therefore concludes that the record is legally insufficient to support the finding of guilty of Additional Charge I and the specification thereunder.

6. After the substitutions and exceptions by the court and the reviewing authority have been made, all the allegations that are left of the specification, Additional Charge II, are those stating that accused unlawfully pretended to Sgt. Alfred that the signature purporting to be that of Lieutenant Thornburgh was his, well knowing that such pretense was false, and by means thereof did fraudulently obtain $1.50 from Alfred. It is obvious that the finding of guilty of these allegations must also fail, since, for the reasons already stated, it is not shown by competent evidence that what purported to be Lieutenant Thornburgh's signature was forged or that accused knew it to be so. The Board of Review therefore concludes that the record is legally insufficient to support the finding of guilty of Additional Charge II, and the specification thereunder.

7. The maximum sentence which may lawfully be imposed upon conviction of the original charge and specification, as modified by the reviewing authority, is dishonorable discharge, forfeiture of all pay and allowances, and confinement at a place other than a penitentiary for six months.

8. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the original charge and specification thereunder, as modified by the reviewing authority; legally insufficient to support the findings of guilty of additional Charges I and II and the specifications thereunder, as modified by the court and the reviewing authority; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six (6) months at a place other than a penitentiary.

Gustave Hall, Judge Advocate.

W. A. Trumbull, Judge Advocate.

Archibald Hux, Judge Advocate.

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

Board of Review
CM 202861

FEB 4 1935

UNITED STATES v. Private 1st Class WILLIAM C. NORBECK (6841831), 11th Ordnance Company.	HAWAIIAN DIVISION Trial by G.C.M., convened at Schofield Barracks, T.H., December 21, 1934. Dishonorable discharge and confinement for four (4) months. Disciplinary Barracks.

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

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

2. Neither paragraph 2b, A.R. 600-395, January 30, 1930, nor any other regulation or order of which the Board is aware, authorizes confinement in the United States Disciplinary Barracks in a case where the confinement imposed is of so short a duration as in the present case.

3. 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 four months at a military post, but not at the United States Disciplinary Barracks.

[illegible], Judge Advocate.

N. A. Turnbull, Judge Advocate.

Archibald King, Judge Advocate.

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

Board of Review
CM 202928

MAR 6 1935

UNITED STATES	SECOND DIVISION
v.	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, January 22, 1935. Dishonorable discharge and confinement for six (6) months. Fort Francis E. Warren, Wyoming.
Private CHARLES O. COOLEY (6252995), Battery C, 76th Field Artillery.	

HOLDING by the BOARD OF REVIEW
HALL, KING and SMITH, L.M., Judge Advocates.

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

2. Accused was tried upon a single charge and specification as follows:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Charles O Cooley Battery C 76 Field Artillery did at Ft F E Warren Wyo between the period of Nov 1st to Dec 23rd 1934 steal and carry away ten sacks of oats of the value of about $17.10 property of the United States furnished and intended for the military service thereof.

Accused pleaded not guilty to and was found guilty of the specification and the charge. The court sentenced accused to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. The reviewing authority approved the sentence and designated Fort Francis E. Warren, Wyoming, as the place of confinement, but withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that, in consequence of information received, Sergeant Cranmer, of the Provost Guard Detachment, lay in wait on the south part of the reservation at Fort Francis E. Warren near the boundary, and about 9:15 p.m., December 27, observed a civilian named Fred Ferguson enter the reservation riding one horse and leading another. When he noticed the sergeant, Ferguson started to leave the reservation. Sergeant Cranmer arrested him (R. 10). Later in the evening the provost marshal of the post, Major Bonham, Sergeant Cranmer, and the under-sheriff of the county went to Ferguson's house, which was south of the reservation and apparently not far from it, and searched the premises. There they found pillow cases, fatigue clothes, and olive drab shirts, all bearing a laundry mark (R. 10,14) which was proved by the clerk of the post laundry to be that used on the laundry of accused (R. 19,20). A barrel half full of oats was also found in Ferguson's stable (R. 11). The next morning Sergeant Cranmer searched that part of the reservation south of the artillery stables and found two sacks of oats of approximately one hundred pounds each, one in a tin can and the other covered with a blanket (R. 10). The place where the oats were found was about as far as a city block from the stables of Battery C. The ground was not level, but there were small knolls, and a man coming there on horseback would be more or less concealed (R. 12). Accused was at the time and had been since December 1 on duty as stable orderly. As such it was his duty to assist in feeding the animals of Battery C. There are 81 animals in that battery, which consume an average of 774 pounds of oats a day (R. 4-7). The government was then paying $1.71 a hundred pounds for oats (R. 8).

A written confession by accused was also introduced by the prosecution. Sergeant Cranmer testified that he warned accused of his rights, promised him no immunity or favors, that he does not remember any sheriff or deputy being present (R. 11,13). Major Bonham testified to finding on his desk an unsigned confession by accused, to asking him if he knew what he was doing, telling him that he did not have to sign it, and that it might be used against him. Accused said that he wanted to get it over with and signed the paper. "After this was over", Major Bonham told accused that he would try to get him a minimum sentence (R. 15,16). Private Petsco testified that he was called into the provost marshal's office to witness the signing of a paper by accused,

that he did so, that accused signed the paper without coercion (R. 21). The paper so identified was as follows (Ex. 1):

"29 Dec 34

After being warned of his rights, Private Charles Cooley, Btry C 76 FA has made the following statement.

About the First of November,1934, I met Fred Ferguson at the stable shack Btry C 76 FA. He made me a proposition that if I would get him some oats he would give me one dollar a sack for them. He told me that if I would get the oats out of the stables and hide them that he would come after them. We arranged for them to be left at a certain spot near the C&S tracks in rear of the Artillery stables. I carried the oats to this spot from Btry C stables and left them, sometimes I would meet Ferguson there when he came after them. Altogether I sold him ten sacks and he paid me ten dollars. Sometimes he would pay me at the stable shack and other times, when he came after the oats. It was about Dec 22nd or 23rd when I took the last two sacks of oats to the hiding place.

(sgd) Charles O. Cooley
Charles Cooley
Pvt., Btry C 76 FA

WITNESSES:
E. W. Cranmer (sgd)
Eugene W. Cranmer
Sgt., P.G. Det.

Peter M. Fetsco (sgd)
Peter M. Fetsco
Cpl., P.G. Det."

4. For the defense, accused made an unsworn statement that Sergeant Cranmer spoke of turning accused over to civilian authorities to be tried by them, that while Sergeant Cranmer was questioning accused a sheriff came into the provost marshal's office, and the sergeant said to

him, "You are just the man I want to see. We have a couple of men for you to take down to your jail house". The confession was made so that accused might not have to go down town to be tried.

5. There are several irregularities and questionable points in the case, which will be severally considered.

a. The specification omits the words "feloniously take" and merely charges that accused did "steal and carry away" oats. The word "take" is a word of art in criminal pleading, and an indictment which omits it is fatally defective. 1 Hawkins' Pleas of the Crown, 8th ed., 142; 36 Corpus Juris 812. Nevertheless, the Board of Review is of opinion that the 37th Article of War was put into the military code for the express purpose of getting away from such technical requirements as this. The verb "steal" implies wrongdoing. The specification fairly informed the accused as a man of ordinary understanding with what he was charged. The Board cannot see why this variation from the approved form (M.C.M., appendix 4, form 110) should have been made or permitted, but for the reasons just stated concludes that it is not fatal to the validity of the conviction. CM 169893, Elkins, and CM 171269, Boardman, though not squarely deciding the point here presented, tend to support the Board's view.

b. In respect of the time of the offense, the specification is inaptly worded and covers a considerable period. It says, "between the period of Nov 1st to Dec 23rd 1934", and objection was made to it by the defense on the ground of the indefiniteness of the time (R. 4, top). However, the oats according to accused's confession were taken one or two sacks at a time, and the pleading could hardly have been otherwise. The Board thinks that the specification is not objectionable in this respect.

c. The law member was excused for cause (R. 2). At numerous places in the record it is stated that the law member made certain rulings (R. 4,6, and elsewhere). The reference is presumably to the president of the court. The record is ambiguous and irregular in this respect, but so little doubt exists that the president ruled that the irregularity is not considered fatal.

d. In the foregoing rulings the person described as law member, who presumably was the president, ruled on his own responsibility and did not state that his rulings were subject to objection by any member of the court. He clearly should have done so; but, unless some of the rulings were fatally erroneous, his omission did not injuriously affect the substantial rights of accused and may be passed under the 37th Article of War.

e. The record is replete with hearsay evidence. Among the instances of the introduction of such evidence may be mentioned the following:

(1) Testimony of Sergeant Cranmer as to former actions of Ferguson (R. 10). The witness might properly have testified that following information received he lay in wait, etc., but should not have been allowed to go further. However, this error does not seem to have been seriously harmful to accused.

(2) Testimony of Sergeant Cranmer as to accused's laundry mark (R. 10). This matter was later covered by first-hand testimony of an employee of the laundry, Miss Muse (R. 19 et seq.), so that the error was not harmful.

(3) The long statement with which Major Bonham opened his testimony (R. 14,15) contained more hearsay than first-hand matter. It covered points (1) and (2), and others. However, such points were either not seriously harmful to accused or were afterwards completely proved by other witnesses.

f. Some question may be raised whether the search of Ferguson's house, to which Sergeant Cranmer (R. 10) and Major Bonham (R. 14) testified, was lawful. Neither witness states that Ferguson consented to the search nor that they had a search warrant. However, the point was not raised by the defense; and, in the absence of any statement one way or the other, the Board does not believe that it ought to assume that the searchers had neither a warrant nor the consent of the occupant.

g. The next, and, in the opinion of the Board, the most serious question concerning the validity of the record is whether the corpus delicti was sufficiently proved to justify admission of accused's confession. There was no testimony concerning shortage of oats from accused's battery or any other government stock, nor were the oats

identified. However, in a full discussion of the corpus delicti by the Board in CM 202213, Mallon, it was held that all that is necessary is some evidence touching the offense and tending to prove its commission. To the same effect is 1 Wharton on Criminal Law, sec. 357. In the present case two sacks of oats were found near the artillery stables, both concealed (R. 10,15). It is inconceivable that oats from any civilian store or source of supply would be brought upon the military reservation and hidden near the government stables. The only reasonable inference to be drawn from the finding of oats at such a place and so concealed is that they were government oats temporarily placed there until they could be carried further away. Besides the corroborating evidence of the finding of the above oats, there is considerable other corroboration, namely, that accused was on duty at the stable of his battery and had access to government oats, that Ferguson was seen to enter the reservation riding one horse and leading another, that he turned and started to leave the reservation when approached, that oats were found in his stable, and that clothes and bed linen bearing accused's laundry mark were found in Ferguson's house. If proof of a shortage or absolute identification were required in cases involving the larceny of goods kept in bulk, such as grain, hay, or coal, no one could ever be convicted unless the amount taken were very large. A moderate quantity would not be missed and the articles themselves are not susceptible of marking or other means of identification. In CM 202988, 7/2 Sastre, the Board of Review and The Judge Advocate General upheld the conviction of a soldier of larceny of hay though no definite shortage in any government stock could be shown and no positive identification was possible. The Board of Review concludes that the corpus delicti was sufficiently proved to justify the admission of the confession.

h. The defense also contended that accused's confession was not voluntary. This is an issue of fact, on which the court, which saw and heard the witnesses, was in a better position than the Board of Review to reach a correct decision. The Board would therefore in any event be loath to overturn the court's decision unless there was in the record strong evidence showing the court to be wrong. The record contains no such evidence, and the Board thinks that the decision made was correct.

i. The unsworn statement of accused is, according to our practice, made in narrative form. M.C.M., par. 76; Appendix 6, foot p. 266.

The irregularity in permitting the present accused to make his statement in answer to questions by his counsel was an error in favor of accused and may therefore be passed.

6. The Board therefore concludes that none of the numerous errors, irregularities and questionable points appearing in the record is fatal to the validity of the conviction. It has, nevertheless, written this review for two reasons, first, lest it be thought to have overlooked those points; and, second and more important, because it believes the preparation of a reasoned opinion to be the best test of the correctness of its conclusions.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 202940

FEB 15 1935

UNITED STATES	)	FIRST CAVALRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Ringgold, Texas, January 16, 1935. Dishonorable discharge and confinement for four (4) months. Fort Ringgold, Texas.
Private HERSCHEL M. RIGGS (6650119), Troop E, 12th Cavalry.	)	

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

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

2. Accused was tried on a single charge and specification which may be abstracted as follows:

CHARGE: Violation of the 93d Article of War.

Specification: Larceny on October 22, 1934, of one serge shirt, value about $6.00, the property of Private Hickey, Troop E, 12th Cavalry.

The court found accused guilty of the specification and the charge and sentenced him to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for four months. The reviewing authority approved the sentence, designated Fort Ringgold, Texas, as the place of confinement, and withheld the execution of the sentence pursuant to Article of War 50½.

3. The Board of Review adopts, with certain additions, the summary of the evidence in chief for the prosecution found in the review of the

assistant judge advocate, First Cavalry Division, as follows:

Private Hickey, of Troop E, 12th Cavalry, bought a tailored serge O.D. shirt made by Sigmund Eisner (R. 17) from Corporal Lewis for $6.00. The shirt (Ex. A, R. 5) had certain characteristics that made it possible to identify it, such as places from which corporal's chevrons had been removed, a snag in the front, a bulge in the sleeve between the buttons, and the maker's label (R. 6,8,13). During the later part of October, 1934, Hickey was in the hospital for a short while. On his return the shirt was missing from his locked wall locker, and he reported the loss to the acting first sergeant (R. 6,7,8,10). On November 28 Corporal Lewis and Hickey recognized the shirt as one being worn by Private Hottal. They recovered the shirt from him (R. 8,9,13). Hottal had first seen the shirt in the house of "accused's girl" (Mrs. Sigle) in Rio Grande City, about November 5. He bought the shirt from the accused for cash (money owed him by the accused) and another shirt. Later the accused delivered the shirt to him on the post, and the same day (November 28) it was recognized by Hickey as his shirt and was turned over to Hickey by Hottal. The accused said that he had bought the shirt from Private Forster (R. 12). Private Temple testified (R. 14-16) that he was acquainted with Forster, formerly a soldier in Troop E, who had offered to sell two shirts to the witness, one of serge and the other of dark gaberdine. Exhibit A, the shirt previously identified by Corporal Lewis and Private Hickey, is not the same shirt as either of those offered for sale by Forster. The witness pointed out certain differences between the shirts offered him for sale by Forster and Exhibit A. The prosecution also offered in evidence the deposition of Albert Forster, a civilian, taken at Port Arthur, Texas, to the effect that the witness knew accused for three years during his service in the Army at Fort Ringgold, Texas; that the witness offered to sell to accused a serge shirt between October 21 and 24. He offered to sell the same shirt to Private Temple and also offered to sell Temple a gaberdine shirt. No sale was made and both shirts are still in the witness' possession at Port Arthur.

4. For the defense the accused, at his own request, was sworn and testified (R. 16-19) that on October 21 Forster sold him (accused) a shirt at the house of Mrs. Oleta Sigle in Rio Grande City for a coat and $3.50 in cash; that the shirt which he bought at that time and place is the same shirt before the court, concerning which witnesses for the

prosecution testified (Ex. A), and that later he (accused) sold the shirt to Private Hottal, as testified by the latter. Forster at the same time as the sale of the shirt in question offered a gaberdine shirt for sale. Mrs. Sigle was a witness to the sale of the shirt by Forster to accused. The defense also introduced the deposition of Mrs. Iris Oleta Sigle, waitress, taken at Fort Worth, Texas, in which she testified that on October 21, 1934, she saw accused buy a shirt from Private Albert Forster for which he agreed to give a blue serge coat and $3.50. The shirt was an Army shirt with a torn place on one shoulder and had marks where chevrons had been removed.

5. By way of rebuttal the prosecution called First Sergeant Blank (R. 20,21), Sergeants Adams (R. 21,22) and De Ferrieire (R. 22,23), all of Troop E, 12th Cavalry, who testified that they had known accused for several years. The first two witnesses testified that accused's reputation for truth and veracity in the troop was bad. Sergeant De Ferrieire testified that accused's reputation for truth and veracity was "only fair". Members of the court questioned all three of the above witnesses concerning Forster, the former soldier in the troop from whom accused testified that he bought the shirt in question, which statement was denied by Forster in his deposition. The three witnesses all stated that they were acquainted with Forster. First Sergeant Blank testified (R. 21) that his opinion of Forster as to truthfulness was very good. Sergeant Adams testified (R. 22) that he thought Forster was a "pretty nice boy". Sergeant De Ferrieire testified (R. 23) that Forster's reputation was good. The prosecution also called as a witness in rebuttal Corporal Lewis, Troop E, 12th Cavalry, who testified that he had known Mrs. Sigle about two years, during which time she lived in McAllen and Rio Grande City; that she was married but did not live with her husband; and that her reputation for truth and veracity was pretty bad (R. 23).

6. The defense made no attempt to attack the credibility of Forster though it did offer evidence contradicting him. Such contradiction does not constitute impeachment, and it is well settled by many decisions of the courts and opinions of The Judge Advocate General that testimony to the good reputation of a witness for truth and veracity may not be introduced to bolster his testimony when his character for veracity has

not been impeached, even though his testimony has been contradicted. The matter was elaborately discussed in CM 201997, Mellon, and what was there said by the Board need not be repeated. Besides the Mellon case, other opinions and decisions to the same effect are CM 190259, Sheffield; CM 195687, Stansbury; CM 198865, Sosebee; CM 201710, Reynolds; CM 202250, de Ramos; Louisville & Nashville Railroad Co. v. McClish, 115 Fed. 268; Ford v. United States, 3 Fed. (2d) 104; Harris v. United States, 16 Fed. (2d) 117. The testimony as to the character of Forster elicited by members of the court was therefore clearly inadmissible under the rulings cited.

7. The assistant judge advocate, First Cavalry Division (his review, par. 3 b), and the judge advocate of that division (par. 1) admit the principle of the law of evidence to be as above stated, but attempt to show that the present case is not within it. The assistant judge advocate says that the court may properly ask any questions that either side might ask (M.C.M., p. 127) and that the questions as to Forster's reputation might have been asked by the defense. The statement may be literally true that the defense might have asked a witness his opinion as to the reputation of Forster, but general expressions in the Manual such as that cited by the assistant judge advocate, First Cavalry Division, must not be taken too broadly. It was obviously impossible for the authors of the Manual when writing it to think of every case which might arise, some of which, though within the letter of what they wrote, are clearly not within its spirit or intent. The objection to the testimony with respect to Forster's reputation is not so much to the questions asked as to the answers elicited, which violated the well settled rule that the reputation of a witness cannot be bolstered until and unless it has been impeached. In the Sheffield, Stansbury, Sosebee, and de Ramos cases, above cited, the testimony bolstering the reputation of a witness who had not been impeached was brought out by questions by members of the court, and in all of them its admission was held to constitute fatal error.

The judge advocate, First Cavalry Division, bases his argument for the validity of the conviction on a different ground, namely, that the testimony of Forster was compelling and the error therefore harmless. The Board of Review is wholly unable to agree with this view. Forster testified that he did not sell a shirt to accused and is supported to some extent by Temple. On the other hand accused and Mrs. Sigle testified positively that Forster did sell to accused the identical shirt which is the subject of

the controversy. We have therefore a square issue of veracity with two witnesses on either side. Under the circumstances the Board does not see how the testimony on one side can be called compelling. It is certainly no more so than was the testimony in the cases already cited which have come before the Board, in all of which the admission of testimony of this kind was held to be erroneous and fatal to the validity of the conviction. The Board can find no reasonable ground for distinguishing the present case from that of Mellon and the other cases cited.

8. For the reasons 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 202951

MAR 14 1935

UNITED STATES	)	FOURTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, January 21, 1935. Dishonorable discharge and confinement for six (6) years. Disciplinary Barracks.
Private RICHARD L. WYATT (6383115), Service Battery, 17th Field Artillery.	)	

HOLDING by the BOARD OF REVIEW
HALL, KING and SMITH, L.M., Judge Advocates.

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

2. Accused was tried upon charges and specifications as follows:

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

Specification: Desertion at Fort Bragg, North Carolina, December 30, 1934, terminated by apprehension at Warsaw, North Carolina, December 31, 1934.

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

Specification: In that Private Richard L. Wyatt, Service Battery, 17th Field Artillery, did, at Fort Bragg, North Carolina, on or about December 30, 1934, unlawfully enter the Supply Room of Service Battery, 17th Field Artillery, with the intent to commit a criminal offense, to wit: larceny therein.

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

Specification: Larceny at Fort Bragg, North Carolina, December 30, 1934, of four Colt pistols, value $105.52, and 400 rounds ammunition, value $7.05.

He pleaded not guilty to and was found guilty of all charges and specifications, and was sentenced by the court to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for twelve years. The reviewing authority approved the sentence, reduced the period of confinement to six years, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence shows that accused had access to the furnace room in the barrack of his battery for the purpose of firing the furnace, that he broke open the door between that room and the supply room, entered the latter room, broke into an arms chest, took thence four pistols and a quantity of ammunition, departed from the post without leave, and was apprehended the next day some fifty miles distant.

4. The Board of Review sees no reason to question the validity of the conviction of Charges I and III and the specifications thereunder.

5. The Specification, Charge II, was evidently intended to charge housebreaking. It alleges, and the evidence shows, the unlawful entry, not of a building, but of a room. The crime of housebreaking was unknown to the common law. M.C.M., 1921, par. 443 (V), adopted the definition of housebreaking contained in section 823, Code of the District of Columbia of 1901. That statute expressly included the unlawful entry of a room. But M.C.M., 1928, in this respect as in others, has abandoned the Code of the District of Columbia as a means of defining various crimes. In its paragraph on housebreaking (149 e) it makes no mention of the Code of the District of Columbia, but thus defines housebreaking, as that word is used in the 93d Article of War:

> "Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein."

The Board understands that the omission from the 1928 Manual of this and other definitions in the 1921 Manual taken from the District of Columbia Code was not inadvertent, but was due to the belief that the Code of the District of Columbia was adapted to the needs of the people of that district, was not necessarily adapted to other regions, and was not intended by Congress to have any effect elsewhere.

The definition above quoted from the 1928 Manual mentions entry of

a "building" only. Does it necessarily follow that the act of this accused was not housebreaking? The common law offense of burglary is usually defined as breaking and entering another's dwelling house in the nighttime with intent to commit a felony therein. 1 Hawkins' Pleas of the Crown, 8th ed., 129; 4 Blackstone's Commentaries 224; 1 Bishop's New Criminal Law, sec. 129. Yet it has been held with respect to burglary that the breaking need not be of an exterior wall or door or window, but may be a breaking by a person rightfully in the house of an interior door. Thus in 1 Hawkins' Pleas of the Crown, 8th ed., 131, it was said:

> "But it is certain, that he would have been guilty thereof" (i.e., of burglary) "if * * * having entered by a door which he found open, or having lain in the house by the owner's consent, he had but unlatched a chamber door."

In Edmonds' Case, Hutton 20, 123 English reprint 1071, arising in 1619, an apprentice, sleeping in his master's house, arose in the night, drew the latch of the door at the foot of the stair leading to his master's bedroom, mounted the stair, entered the bedroom, and with intent to murder assaulted his master with a hatchet. It was held by all the judges of England (one doubting) that this was burglary. To the same effect are 4 Blackstone's Commentaries 226; 9 Corpus Juris 1012, 1013; Rex v. Gray, 1 Strange 481, 93 English reprint 648; United States v. Bowen, 4 Cranch C.C. 604, Fed. Case 14,629, and many other cases.

6. It is commonly understood that housebreaking is the same as burglary, except that it need not be shown:

a. That the offense occurred in the nighttime.
b. That there was any breaking.
c. That the house was a dwelling.
d. That accused intended a felony, but merely any criminal offense.

The building here in question, being a barrack where many soldiers slept, was a dwelling; and there was a sufficient breaking, under the authorities just cited. Also accused intended a felony. Hence accused's

act would have been burglary, if it had taken place at night. Is it possible that the very act, which would have constituted burglary if it had been committed at night, is not housebreaking by day? The Board thinks that it ought not to lay down a stricter rule with respect to housebreaking than the commentators and judges of the common law have laid down with respect to burglary.

7. It may be argued that the definition in the Manual for Courts-Martial (par. 149 e, quoted ante, par. 5) is clear and unambiguous, and that it speaks of a "building" and not a room. But so do the definitions of burglary speak of a dwelling house, and not of a room therein; yet, as has been shown, breach of the door of such a room may be burglary. Furthermore, a definition such as that quoted must not be taken too literally. In CM 202940, Riggs, the Board said:

> "It was obviously impossible for the authors of the Manual when writing it to think of every case which might arise, some of which, though within the letter of what they wrote, are clearly not within its spirit or intent."

The above is applicable to the present case.

8. It may further be argued that, admitting that the evidence shows housebreaking, the specification does not allege that offense. But a room is of necessity part of a house. The Board has endeavored to show that what occurred was housebreaking, and the specification alleges in plain language what occurred. No more is required than "a statement in simple and concise language of the facts constituting the offense" (M.C.M., par. 29), and that is what we have.

9. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the approved sentence. CM 197115, Froelich, supports the view here taken.

Theodore Hall, Judge Advocate.

Archibald King, Judge Advocate.

S. M. Smith, Judge Advocate.

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

Board of Review
CM 202976

MAR 2 1935

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Sheridan, Illinois, January 24, 1935. As to each accused: Dishonorable discharge, suspended, and confinement for six (6) months. Fort Sheridan, Illinois.
Private 1st Class JOHN F. BAKER (6805088), Private RUDOLPH F. KRUEGER (6827659), and Private ROBERT JOHNSON (6830118), all of Troop B, 14th Cavalry.	)	

OPINION of the BOARD OF REVIEW
HALL, KING and SMITH, L.M., Judge Advocates.

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

2. The three accused were tried jointly on a single specification alleging larceny of a radiator cap, value $7, and fender light, value $1, from John J. Bresnahan, in violation of the 93d Article of War. All pleaded not guilty and all were found guilty and sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months. The reviewing authority approved the sentence and designated Fort Sheridan, Illinois, as the place of confinement; but suspended the execution of the dishonorable discharge until the soldiers release from confinement. The findings and sentence were announced in General Court-Martial No. 12, Headquarters Sixth Corps Area, February 9, 1935.

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

About 9:40 p.m., December 21, 1934, John J. Bresnahan parked his

car near Pearl's Tavern, Highwood, Illinois, entered that tavern, and remained about five minutes. Upon coming out he discovered that there were missing from his car a radiator cap, value about $7.50, and two fender or guide lights, which cost installed about $4.50. In consequence of something said by a bystander, Mr. Bresnahan at once drove to Fort Sheridan and reported his loss to the officer of the guard (R. 7-9). Shortly thereafter the officer of the guard observed three soldiers entering the post and sent the sergeant of the guard to intercept them and bring them to him. As the sergeant was conducting the three soldiers (who are the three accused) to the officer of the guard in column of files along a path through the snow, something was seen to "flash out" and fall into the snow. The sergeant picked it up and it proved to be the missing radiator cap. No other person was present who could have thrown the cap except one of the three accused (R. 10,22,28,44). The three accused were searched but nothing was found on them. They were then confined, and, after that had been done, accused Johnson voluntarily drew from "inside of the trouser, down in the boot that mounted men wear" "a long stem light about 18 inches tall with a bulb in it. *** the type that one sees on automobile fenders", and turned it over to the officer of the guard (R. 29).

4. At the close of the prosecution's case the defense moved for a finding of not guilty, among other reasons, because the radiator cap and fender light had not been produced, and because it had not been shown that the fender light found on Johnson came from Mr. Bresnahan's car. The prosecution offered to produce the radiator cap and fender light if desired by the court. The court did not accept the offer at that time and denied the motion (R. 51,52).

The defense then moved for a finding of not guilty in respect of Baker and Krueger, because no evidence had connected them with any property of Mr. Bresnahan. This motion was also denied (R. 52-54).

5. The defense called three witnesses who testified that the accused were together in the North Shore Tavern, Highwood, Illinois, on the evening in question, and that they were drunk. The defense also called certain character witnesses.

6. After the defense had rested, the prosecution introduced in evidence a radiator cap and fender light and had them properly identified as having been on Mr. Bresnahan's car, and picked up in the snow and turned over by Johnson, respectively, as above stated.

7. The question is presented whether the evidence supports the conviction of Baker and Krueger. Here there is no evidence that those two soldiers were present at the moment that the cap and light were stolen from Bresnahan's car except the fact that they were seen with Johnson near the time and place of the larceny. For all that appears Johnson may have momentarily left the other two while in Highwood, detached the cap and light, concealed them in his clothing and said nothing about them to Baker and Krueger. But, even if from the fact that they were all three together at other times that evening, it may be inferred that they must have been together at the time and place of the larceny, does it necessarily follow that all three are guilty? In Hicks v. United States, 150 U.S. 442, the Supreme Court of the United States held that a defendant who was present at the scene of a crime but contributed neither by words nor actions to its commission could not be convicted as a principal. To the same effect are 16 Corpus Juris 125-132, especially sections 116, 120; Golden v. State, 18 Tex. Cr. App. 637; White v. People, 139 Ill. 143, 28 N.E. 1083; CM 186947, Bopp, Dig. Ops. JAG, 1912-30, par. 1310 (2). There is no evidence whatever that Baker and Krueger contributed by word or deed to the crime. It may be admitted that one of the three accused threw the radiator cap into the snow, but the evidence does not show which one did so, or that the other two were aware of his possession of it. Nor is there the least evidence of concert among the three to steal the cap and light.

8. The case may be approached from another angle. In CM 202720, Clem, the Board of Review said:

> "It is laid down by all the authorities that, in order that a presumption of guilt of larceny may arise, the unexplained possession of recently stolen articles by the defendant must be personal, conscious. and exclusive."

The Board cited numerous authorities in support of the above principle, among which are 36 Corpus Juris 869 et seq.; 17 Ruling Case Law 73;

Ex parte La Page, 216 Fed. 256; CM 163072, Dig. Ops. JAG, 1912-30, par. 1575 (6). The principle is directly applicable to the present case, in that even if the possession of any one be considered the possession of all three, that possession was not, as to Baker or Krueger, shown to be personal, conscious, or exclusive.

9. For the reasons stated, the Board concludes that the record is legally insufficient to sustain the conviction of Baker and Krueger.

10. The question may next be asked whether the record is legally sufficient even as to Johnson. It should be borne in mind that at the close of the prosecution's case the defense moved for a finding of not guilty as to all three accused (R. 51). At that time the radiator cap and fender light had not been identified or introduced in evidence, and the fact that this had not been done was the basis of the motion. Was the denial of that motion an error injurious to the substantial rights of Johnson? [The introduction in evidence of the property stolen is not indispensable to conviction. Sometimes the stolen article has been consumed, as in the case of food; sometimes it has been burned, lost, or thrown away; sometimes because of distance, the bulk of the article, or other reason, it is impracticable to introduce it in evidence. In his testimony given before this motion was made, Mr. Bresnahan swore that the radiator cap which was picked up in the snow was that taken from his automobile (R. 10). He did not so testify as to the fender light, and at that time had not even seen it since it had been recovered (R. 11); but Lieutenant Ondrick, the officer of the guard, testified that the light which he took from Johnson was "the type that one sees on automobile fenders" (R. 29).

Is this sufficient? Suppose, after the fender light had been taken from Johnson, as testified by Lieutenant Ondrick, and before trial, it had been destroyed in a fire in the provost marshal's office where it was being kept. The Board does not feel that a conviction of Johnson would therefore have become impossible. Neither is it indispensable that some witness positively identify the article found on accused as that stolen. It is sufficient if the court upon consideration of all the evidence be convinced beyond a reasonable doubt that they are the same.

11. But here the case is stronger for the prosecution, in that in the consideration of such a motion as the present all inferences and presumptions are in favor of the prosecution. M.C.M., par. 71 d, p. 56. The Board concludes that, although the court clearly ought then and there to have accepted the prosecution's offer to produce the radiator cap and fender light, it committed no fatal error in overruling the motion for a verdict of not guilty as to Johnson.

12. The Board of Review is therefore of opinion that the record of trial is legally insufficient to support the findings and sentence as to accused Baker and Krueger, but legally sufficient to support the findings of guilty as to accused Johnson except in so far as they indicate a participation in the alleged offense by the accused Baker and Krueger, and legally sufficient to support the sentence as to accused Johnson.

_____, Judge Advocate.

Archibald King, Judge Advocate.

L. W. Smith, Judge Advocate.

To The Judge Advocate General.

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