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1941 - 1943

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Judge Advocate General's Department

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Volume XI

including

CM 215630 to CM 218166

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

Board of Review
CM 215630

MAY 21 1941

UNITED STATES	)	PHILIPPINE DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort William McKinley, Philippine Islands, November 7, 8, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23 and 25, 1940. Dismissal and confinement for fifteen (15) years.
	)	
Captain RUFO C. ROMERO (0-13350), Philippine Scouts (CE), 14th Engineers (PS).	)	

OPINION of the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Rufo C. Romero, Philippine Scouts, (CE), 14th Engineers (PS), an officer having access to secret maps pertaining to the national defense, to wit: Corregidor and Mariveles Vicinity (File No. 31 NE Copy No. 25); Tactical disposition of troops on Bataan, (File No. HI 7552 - 0176 Copy Numbers 307, 322, 424 and 452); Entrance to Manila Bay (File No. 31 Copy No. 1023); Traffic Circulation Map of Bataan (Copy No. 18) and Overlay No 1 showing Defense Plan (File No. ODE 1228 Copy No. 40), did, at Fort William McKinley, P.I., on or about October 15, 1940, willfully and unlawfully communicate the said maps to Mariano Cabrera and Anis Y. Gepte, persons not entitled to receive such information.

Specification 2: In that Captain Rufo C. Romero, Philippine Scouts, (CE), 14th Engineers (PS), did, at Pasay, Rizal, P.I., on or about October 16, 1940, unlawfully reproduce certain official maps, marked "SECRET", of military installations, to wit: Corregidor and Mariveles Vicinity

(File No. 31 NE, Copy No. 25); Tactical disposition of troops on Bataan (File No. HI 7552 - 0176 Copy Numbers 307, 322, 424 and 452); Entrance to Manila Bay (File No. 31 Copy No. 1023); Traffic Circulation Map of Bataan (Copy No. 18) and Overlay No. 1 showing Defense Plan (File No.ODE 1228, Copy No. 40), without first obtaining permission from the Commanding General, Fort William McKinley, P.I., or higher authority, said maps having no clear indication thereon that they had been censored by proper military authority.

Specification 3: In that Captain Rufo C. Romero, Philippine Scouts, (CE), 14th Engineers (PS), an officer having access to secret maps pertaining to the national defense, to wit: Corregidor and Mariveles Vicinity (File No. 31 NE, Copy No. 25); Tactical disposition of troops on Bataan (File No. HI 7552 - 0176 Copy Numbers 307, 322, 424 and 452); Entrance to Manila Bay (File No. 31 Copy No. 1023); Traffic Circulation Map of Bataan (Copy No. 18); and Overlay No. 1 showing Defense Plan (File No. ODE 1228 Copy No. 40), did, at Pasay, Rizal, P.I., on or about October 15, 1940, conspire with Mariano Cabrera and Ignacio Agbay to unlawfully communicate the said maps to Anis Y. Gepte, a person not entitled to receive such information and to effect the object of said conspiracy did, thereafter on said date, in company with the said Anis Y. Gepte, visit the building at Fort William McKinley, P.I., in which the said maps were stored.

Specification 4: In that Captain Rufo C. Romero, Philippine Scouts, (CE), 14th Engineers (PS), did, at Pasay, Rizal, P.I., on or about October 15, 1940, conspire with Mariano Cabrera and Ignacio Agbay to unlawfully reproduce certain official maps, marked "SECRET", of military installations, to wit: Corregidor and Mariveles Vicinity (File No. 31 NE, Copy No. 25); Tactical disposition of troops on Bataan (File No. HI 7552 - 0176 Copy Numbers 307, 322, 424 and 452); Entrance to Manila Bay (File No. 31 Copy No. 1023); Traffic Circulation Map of Bataan (Copy No. 18); and Overlay No. 1 showing Defense Plan (File No. ODE 1228, Copy No. 40), without first obtaining permission from the Commanding General, Fort William McKinley, P.I., or higher authority, said maps having no clear indication thereon that they had been censored by the proper military authorities, and to effect the object of said conspiracy, did, on or about October 16, 1940, remove said maps from their place of storage at Fort William McKinley, P.I., to his home in Pasay, Rizal, P.I.

3. Upon arraignment the defense stated that the accused had no special pleas to offer but moved (R. 11) that the court conduct an inquiry into the mental condition of the accused with a view to determining whether the accused was competent to conduct or cooperate intelligently in his defense and whether at the time it is alleged the offenses were committed, he was able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

a. The defense submitted testimony in support of the motion substantially as follows:

(1) A sister of the accused, who cared for him for about fourteen years from the age of one year and seven months until he graduated from grade seven testified that as a small child he was hot-tempered (R. 14, 24). At seven years of age, when he was sick six weeks with malaria, he shouted, ran and fell downstairs, was unconscious, and his nose and head bled profusely. One night he poured kerosene on the floor and lighted it. He asked for a live cow, and when a boy refused to go to get a cow with him, he beat the boy. Four or five years ago in coming from Capas he threatened to shoot a man who told him he was very fat (R. 24-25). Once he shouted in the roadway because she did not bring a brother to him from Manila. At another time in the midst of a peaceful conversation he would become very angry and call her names. As a small boy he was under a doctor's care for eight months because of the extraordinary actions he exhibited (R. 30-31). His actions are very different from ordinary men of his age. He can distinguish between right and wrong in his actions. "When his head is on the right way" he can adhere to the right "but when that abnormal mentality strikes him, he cannot tell" (R. 32-33).

(2) A housegirl who worked for accused for eighteen days before he was arrested (R. 40), testified that every time the telephone rang, accused ran downstairs and hid in the dark room. When something did not please him at the table he threw food and plates on the floor and spilled glasses of milk and of coffee. He beat the children without cause and then cried. He would enter the bathroom for a bath and pour water on himself without taking off his clothes (R. 40-42). He did not talk over the telephone at all, but when it rang, would set the telephone on the floor and run downstairs (R. 46). One day he ordered his wife to get out of the car before he dragged her out. Then he scolded and shouted at her upstairs. Later Mrs. Romero came down, with her dress torn, wet, and bloody, and her hair "scattered" (R. 48).

(3) Another housegirl for accused for six weeks about October 1940, testified that accused would beat the children with a

stick and then run downstairs and shout. At the table if he did not like the food, he would throw it on the floor. He would beat Mrs. Romero. When the telephone rang, he would run downstairs and hide (R. 56-57).

(4) The wife of accused testified that they had been married nine years. She was positive that accused was crazy. She left him three months ago because she could not stand his treatment (R. 60). When he plans to do something, or when he gets his crazy streaks, nothing can stop him. When a man asked to borrow five pesos, accused got a stick, ran after the man, took all the money they had and threw it in the man's face. When she objected to his being involved with women, he beat her, then fell and rolled on the floor (R. 62). At times he would take a bath with his clothes on. When he would come in late at night, he would go into one of his fits, rip off her clothes, throw her outside the house, and when it was over he would apologize and be sorry (R. 66, 77). Before he went to sleep, he would tell the servant to look for lice. When she complained about one of his women, he made her lick his feet (R. 66-67). She always returned to him so as to be with her children. He was afraid of the telephone, especially within the last few months when she told him G-2 was after him and the Constabulary watching him (R. 67-68). She never went to a doctor about him because he would be sane for six months at a time (R. 73).

He had been acting real peculiar for about a year, off and on (R. 77). His physical violence toward her and toward the children started about four years ago (R. 79). She tried to hide telephone calls from him because if he picked it up, he would insult somebody and get after her about it (R. 84). She never had seen him "throw one of his fits" in front of a military superior (R. 86-87).

b. Prosecution testimony on defense motion:

(1) Dr. Mariano Lazatin testified that Mrs. Romero came to his office the previous day and begged him to testify that accused had been under his care for several months past when accused had never been under his care at any time. He told her he was a Filipino, ashamed to mix in this case and could not betray his country by testifying to what was not true. He knew accused as a townmate about eighteen years previously, before accused went to West Point. He never observed any sign of insanity or abnormality in accused during that acquaintance (R. 94-97, 111). He never treated accused. Mrs. Romero never consulted him concerning mental condition of accused (R. 110). He never told Mrs. Romero he thought accused was crazy (R. 99). A month earlier Mrs. Romero cashed a check for twenty pesos at the hospital which was returned next day from the bank. He gave the check

to his attorney who wrote accused who then left a note at the hospital that he would pay the check (R. 100-103).

The wife of the accused, recalled by the prosecution, testified that she talked to Dr. Lazatin three months before, at which time he said, "Rufo is crazy"; and saw Dr. Lazatin after that - but did not talk about accused - to cash a post-dated check, for which she did not have money in the bank when it became due. She did see him the day previous to this testimony and asked if he remembered telling her about Rufo being crazy (R. 111-114).

(2) Colonel H. H. Stickney, Corps of Engineers, testified that accused was Topographical Officer and S-2 of the 14th Engineers for approximately one year under his command. He first met accused seven years before, had contact with him during the last three or four years, and sketchy contacts from July to the present date. Accused, as S-2, had a position of trust and responsibility in charge of all topographical work, was custodian of files of that office, did a great deal of survey work, and handled company of civilian laborers working in Bataan. He knew accused very well during that period. In his opinion up to the last time he saw accused intimately - when accused went on leave about June 1 - accused was sane, and knew the difference between right and wrong. He never saw accused throw any violent fits. It never had been brought to his attention that accused was suspected of being mentally incompetent in any way (R. 119-121). He considered accused as trustworthy type, an excellent officer, a quick thinker, and of very good judgment. Accused had been involved in an investigation involving debts and in one involving a quarrel with a retired soldier (R. 122-124). His opinion as to sanity of accused has not changed since accused went on leave. He saw no abnormality nor abhorrence in accused as to use of telephone while on duty (R. 124). Early in August, upon his suggestion, wife of accused came to his quarters where he told her that he could finance her trip home if she wanted to go. She stated that she wanted to go very much but was afraid to make any arrangements because she was afraid of physical violence (R. 126-127). While he was in camp with accused, accused seemed perfectly normal (R. 128-129).

(3) Lieutenant Colonel Harry A. Skerry, 14th Engineers, Fort William McKinley, testified that accused, up to October 16th, had been a member of his staff, 14th Engineers. He had known accused only a very short time, first saw him on October 15, 1940, for ten minutes and then on October 16th for five minutes. At the annual inspection, October 15th, accused answered the Department Inspector accurately and exceedingly well, as if he had not been absent for three months. Accused appeared to be a normal, sane individual. On October 16th, when accused reported to him from leave, he was perfectly calm and in com-

plete possession of his faculties. He gave accused permission, at request of accused, to go downtown to clear up debts. Accused came back after five minutes and said very calmly that he could not handle the secret maps unless he was made Assistant to the Division Engineer. He told accused that he did not plan to make accused Assistant to the Division Engineer (R. 132-135). Upon cross-examination he stated that the reputation of accused as an engineer was excellent, but his reputation as a gentleman was poor (R. 136-139).

(4) Major J. K. Evans, Assistant to the Assistant Chief of Staff, G-2, Headquarters Philippine Department, testified that his first contact with accused was on October 16th for three hours. He met accused in the residence of accused in Pasay, took him into custody in the name of the Commanding General, and was with him constantly for three hours. None of the actions or words of accused gave any idea that he was reacting other than normally. He considered accused sane. The remarks of accused indicated clearly that he knew the difference between right and wrong. After being warned by Colonel Baehr, Chief of Staff, Philippine Department (who had since departed by transport for the United States), accused stated to Colonel Baehr in Major Evans' presence that the amount he expected to realize from the transaction was fourteen thousand pesos, that his trouble was all due to becoming heavily indebted through gambling. He became depressed after he made the statement to Colonel Baehr (R. 140-144, 145).

The accused exhibited definite agitation upon being taken into custody but was entirely coherent in his remarks. Accused requested that he be not left in his house where his children, upon their return, would see him. While being taken in the car to Fort McKinley, he asked to be permitted to escape so that he could be killed in the attempt, saying that he did what he did because of his family and would be better off dead (R. 144-147).

(5) Lieutenant Colonel Harland F. Seeley, 57th Infantry, Assistant G-2 and 3, Philippine Division, testified that he had known accused and had frequent official contacts with him for three years. He had never seen accused do anything other than normal. He had seen accused use the telephone, both to call and to answer, in a normal manner without exhibiting any peculiar characteristics. It was his opinion based on daily official business with him that accused knew the difference between right and wrong (R. 148-151).

(6) First Lieutenant Myron E. Page, Jr., Adjutant, Intelligence and Topographical Officer, 14th Engineers, testified that his desk had been next to that of accused since March 12, 1940, and knew

accused very well. He had never seen accused exhibit any abnormal characteristic. The conduct of accused in answering or using the telephone was the same as that of any normal individual. He had never seen accused in what might be called a fit, nor had he seen him get down and roll on the floor (R. 152-154).

(7) Major Narciso L. Manzano, 14th Engineers (PS), testified that he had been on duty with the 14th Engineers since January 1940, and prior to October 15, 1940, had been Regimental Plans and Training Officer. The desk of accused, a staff officer, 14th Engineers, faced his. He had known accused very intimately for six years, but for the last four years their relations were mostly official (R. 158-159). Accused never showed any unusual emotion such as fear when answering the telephone. The last time accused called him over the telephone was about October 10, 1940, when accused was trying to find out where Mrs. Romero was. On the previous night when accused came to the door of his house, and at the suggestion of accused talked with him on the sidewalk, accused stated that Mrs. Romero had left home, that he had to locate her to care for the children, that she had all the money with which it was necessary to pay the official bills on the 10th, that he was desperate, and that if he could not locate Mrs. Romero that night he would commit suicide. In his contacts with accused, he never believed accused insane (R. 160-164). At the sidewalk conversation, accused said that he was so desperate that he would kill anyone hiding his wife and would wipe out his whole family if he could not find his wife that night (R. 166). At that time Mrs. Romero was at the house of Major Manzano's sister where he had arranged for her shelter because she had a bump on her forehead, a cut on her elbow, and appeared very much frightened (R. 168). During the six years he knew accused, accused reacted slightly more violently than the average person during periods of stress and strain (R. 170).

(8) Major E. R. Cowles, 57th Infantry, testified that he had known accused very well for approximately two and one-half years. During September and October 1940, witness was Acting Division Inspector, Philippine Division. About October 17th witness was directed to consult Major Evans and assist in investigating and drawing up a set of charges against accused. The charges were drawn October 19, 1940. He investigated the set of charges against accused from October 20th to about October 30th, during which period the accused was in Major Cowles' office every morning (R. 171). The accused showed an attitude of indifference throughout the investigation. From his knowledge of accused, the actions of accused during the investigation and from the evidence adduced at the investigation, he believed that accused is sane and knows the difference between right and wrong (R. 172).

During the investigation the accused was under his observation for approximately fifteen hours. The appearance of accused during the investigation differed very little, if any, from his present appearance. He believed that accused followed the investigation intelligently all of the time (R. 172-173).

(9) Major Harold W. Glattley, Medical Corps, Registrar of the Hospital, Fort McKinley, testified that he read the medical records of accused from October 21, 1931, to October 28, 1939, inclusive. There was nothing in those records to indicate that accused is afflicted with any form of insanity, or that he has ever been reported as having any form of insanity (R. 174-175). Those records show observations for short periods of time only, do not contain records of annual physical examinations, nor records of any nervous or mental examinations, and are not sufficient to determine the presence or absence of some mental disorders (R. 175-176).

c. Upon objection to the ruling of the law member that the court adjourn and make a report, in pursuance of paragraphs 63 and 35 (c) of the Manual for Courts-Martial, the court was closed (R. 184). Thereafter the following appears (R. 186):

> "PRESIDENT: The ruling of the Law Member is not sustained. The court has carefully considered the evidence presented on the motion of the defense. The court has exhausted all reasonable sources of information with respect to the mental condition of the accused and has observed the conduct and attitude of the accused during the trial. The court does not desire to adjourn and report the case to the reviewing authority as authorized by Paragraph 63 of the Manual for Courts-Martial, United States Army, 1928. The court is of the opinion that the accused is competent to conduct or cooperate intelligently in his defense, and with respect to the offenses charged against him, at the time these alleged offenses were committed, he was able concerning the particular acts charged, both to distinguish right from wrong and to adhere to the right. The trial will continue."

d. FURTHER EVIDENCE UPON MOTION.

(1) Thereafter, after the pleas and during the introduction of witnesses by the defense upon the Charges, the defense pro-

posed to put on a witness "to adduce testimony relative to accused's mental condition". The court was closed, and upon opening, the president stated that the accused might present such witnesses as he desired in continuation of his defense (R. 426).

(a) The defense at a later date presented the following witness "to the mental condition of accused" (R. 532), reopening the question of sanity (R. 533), whom the defense desired to qualify as a general practioner of varied experience but not as an expert in psychiatry (R. 535).

Dr. Antonio Vasco, testified that he had practiced twelve years following graduation in medicine from the University of Santo Tomas (R. 535, 589). He observed accused on two occasions, for about one hour and for about ten minutes, respectively (R. 595). The first time when he asked accused how he was, the accused replied in a very loose manner and said he was disgusted with his family (R. 590), that his wife and friends did not like him any more (R. 591). The second time accused came to his house, but, while they were speaking, left without justifiable cause without saying goodbye (R. 591). Dr. Vasco, "piling up observations of my own, and observations of others", concluded that accused was suffering from mental deficiency (R. 590), from a mental alteration (R. 594). There are moments in which accused is capable of distinguishing between right and wrong, there are moments in which he is not himself. There are times he is capable of adhering to the right, and there are times when he cannot (R. 594). He was not familiar with methods of psychiatric examination (R. 595), nor with the different classes of mental disorders (R. 596). He based his opinion upon own personal observation as a doctor, not as an alienist or a specialist (R. 595). He did not examine him accurately (R. 599), nor make any psychiatric examination. He did not state a conclusive nor positive opinion, only superficial observations (R. 602), but suggests that he be examined by a specialist to determine if he really suffers from a mental derangement (R. 602).

(b) Prosecution: Captain E. H. Parsons, Medical Corps, testified that he was a graduate in medicine of Vanderbilt University, 1930, specialized after graduation in diseases of nervous system for three years, was psychiatrist at Fitzsimons General Hospital, representative of The Surgeon General at Saint Elizabeths, Assistant Psychiatrist at Walter Reed General Hospital, and detailed as Psychiatrist, Philippine Department (R. 607-608). He met accused twenty months ago and had observed him on about half a dozen occasions (R. 608). A graduate of the United States Military Academy assigned to the Engineers

could not be a mental defective. He would not render an opinion on the mental health of accused without at least thirty days' study of the case (R. 609). An examination by a general practitioner in two visits of approximately one hour and fifteen minutes is not sufficient to arrive at a defensible conclusion. The only way mental deficiency can be diagnosed is by well-standardized tests (R. 610) and an opinion rendered without those tests would be based purely upon a guess and of no value (R. 610-611). A true psychosis case does not observe the clock, it is not consistently normal every morning and frequently abnormal after work hours. It is usual for psychotic cases to become more evident under stress of arduous work, than during rest periods (R. 616).

(c) The prosecution and the defense stated that they had no further evidence to offer in connection with the insanity request. After the court was closed, and opened, the following appears:

> "PRESIDENT: With reference to the suggestion of the Defense Counsel that further consideration be given to the accused's mental condition, the court has received further testimony, and it finds that the accused was free from mental defect, mental disease or mental derangement at the time of the commission of the alleged offenses; that he was able concerning the particular acts charged, both (1) to distinguish right from wrong, and (2) to adhere to the right; that he is at this time free from mental defect, mental disease and mental derangement; and that he is able to cooperate intelligently with his counsel in his defense" (R. 617).

(d) In the opinion of the Board of Review the findings of the court that accused was free from any mental defect, mental disease, or mental derangement, both at the time of the commission of the offenses and at the time of the trial, that with respect to the acts charged, he was able to distinguish right from wrong and to adhere to the right and was able to cooperate intelligently with counsel in his defense, are clearly supported by the evidence and in accord with the true facts. The action requested of the court rested in its discretion. The Board is of the opinion that no need for further inquiry was shown by the defense. The testimony for the defense showed that the accused, both in his youth and in the period preceding the trial was willful, quick-tempered, ill-mannered, and often cruel in the treatment of members of his family and others upon whom he was in a position to impose his will. On the other hand, the testimony for the prosecution showed clearly

that in his official relations he freely and fully exercised normal self restraint in his behavior, and that there was nothing in his medical record at the Station Hospital, Fort William McKinley, to indicate that he had ever been afflicted with, or had ever been reported, as having any form of insanity.

Dr. Vasco, who testified for the defense as a general practitioner and who observed accused only twice for a total period of about one hour and ten minutes and made no psychiatric examination, expressed not "conclusive opinions" nor "a positive opinion" but "only superficial observations", and expressed no more positive opinion than a suggestion that accused be examined by a specialist to determine if he really suffered from a mental derangement. Captain E. H. Parsons, M.C., Psychiatrist, Philippine Department, testified that mental deficiency could be diagnosed only by well-standardized tests, that a true psychosis case does not observe the clock by being consistently normal every morning and frequently abnormal after work hours, but that such cases become more evident under stress of arduous work than during rest periods.

It should be noted that the second finding of the court was made near the close of the trial after the court had had the opportunity to observe the accused throughout the fourteen days of the trial during which the accused in addition to making his own sworn statement had, as the record shows, been active in the conduct of his defense on many occasions.

The Board of Review is of the opinion that the issue of the mental condition of the accused was properly determined by the court, that the record amply establishes the mental responsibility of the accused, and finds no error in the action of the court in proceeding with the trial upon the charges.

4. The defense then stated that accused had no special plea to offer (R. 186). The accused pleaded not guilty to all Specifications and the Charge (R. 187). He was found guilty of all Specifications and the Charge. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to confinement at hard labor for fifteen years. The reviewing authority approved the sentence and forwarded the record of trial under Article of War 48. By a separate communication, appended to his action, the reviewing authority recommended, if the sentence is approved, that a penitentiary in the United States be designated as the place of confinement.

5. The Board of Review adopts, in substance, as a part of its opinion, the summary of the evidence under the general issue in the review of the record of trial in this case by the Division Judge Advocate, Philippine Division, which is substantially as follows:

a. For the Prosecution. - The substance of the evidence for the prosecution establishes that on October 15 and 16, 1940, the accused, a captain in the 14th Engineers, was, among other duties, assistant to the Division Engineer, having automatically resumed this duty on his return from leave October 15th. He was originally assigned to this duty in July 1939, by authority of Division Headquarters. As assistant to the Division Engineer, he was custodian of secret maps and documents in possession of the 14th Engineers and, therefore, charged with accountability of all secret documents and maps issued by the Department Engineer to the Division Engineer as a Special Staff Officer of the Division (R. 199, 200, 347). Under regulations in effect on October 12, 1940, and received by the Division Engineer on October 16, 1940, the Commanding General, Philippine Division, was the person to give authority for the reproduction of secret documents by members of the Division Engineer's organization. Instructions to reproduce secret maps came directly to the Division Engineer. In reproducing such maps he was assisted by the 14th Engineers. Under regulations in existence prior to receipt of the regulations dated October 12th, the Assistant Chief of Staff, G-2, of the Philippine Department, was the person to give authority for the reproduction of secret matter, and the Department Engineer was the agency to reproduce it. The Division Engineer had no instructions to reproduce maps on the 15th and 16th of October 1940, and gave no authority to anybody to reproduce maps on those days (R. 200, 201). Secret maps of the 14th Engineers and those held under the authority of the Division Engineer were stored in a large double-padlocked box in the map section of regimental headquarters, 14th Engineers, at Fort William McKinley (R. 203). Censored maps have indicated thereon a statement that the map has been censored by authority of the party censoring it, and the undesirable information, secrets, or designs on the map deleted therefrom (R. 204). Although rather exceptional, maps may be reproduced by photography (R. 205). Exhibits Nos. 3 to 10, inclusive, withdrawn after trial, were properly introduced and identified by the Division Engineer as seven uncensored maps and one uncensored overlay classified under existing regulations as "SECRET" pertaining to the defense of the Philippine Islands (R. 204-205). Exhibit No. 11 was identified as a photographic negative of a map showing roads and trails, corrected to February 6, 1939, of an area including the southern tip of Bataan, including the Island of Corregidor. Exhibits Nos. 12 to 18, inclusive, were identified as photographic negatives of six secret maps and one secret overlay of a map. The Division Engineer did not authorize any-

one to communicate the maps, of which these negatives were reproductions, to Mariano Cabrera and Anis Y. Gepte (R. 204-206), nor were they entitled to receive the information contained in the maps or overlay on or about October 15, 1940 (R. 212).

The evidence further establishes that on or about October 5, 1940, in a conversation with Anis Y. Gepte, a secret operative of the Philippine Army, detailed on work to check Fifth Column activities (R. 265), one Ignacio Agbay, an employee of the city of Manila (R. 215), who had known Gepte for about three months as the son of a prominent Datu in Mindanao and had been introduced to him as Datu Ding (R. 235), told Gepte, hereafter referred to as such, that if he wanted to make money, he had a plan which he would introduce to him; that there was a certain map indicating the defense plan which they might sell to the Japanese at a good price. Agbay told him that "the maps will be taken by one of his friends through an officer of the United States Army". Gepte replied that he had friends who might buy them and would look for prospects. Three days later Gepte informed him that he had such a prospect, the Sultan of Mindanao (a fictitious person) (R. 264), and asked him for the map, but Agbay stated he could not contact the man with the map that day (R. 215, 216, 236). On the afternoon of October 11th, Agbay introduced Gepte to one Mariano Cabrera who told him he had the map ready at any time if an agreement could be reached. Gepte informed Cabrera that he would have to see the Sultan (R. 217). On October 12th, Gepte met Agbay and Cabrera and told the latter that the Sultan instructed him that "if they are really on the business, they should show him any maps". Later Cabrera showed him a map of Lingayen Gulf marked "RESTRICTED" and permitted him to take it until the next day stating he could furnish any map of the Philippine Islands. Exhibit No. 2, withdrawn at the conclusion of the trial, was identified by Gepte as looking like the "RESTRICTED" map of Lingayen Gulf given him by Cabrera (R. 217, 218, 219). Gepte took the map to an official of the Philippine Army, who, in turn, took Gepte to Major Evans, G-2, United States Army, where Gepte reported what Cabrera had told him. Major Evans told him to ask Cabrera for the maps of Corregidor, Manila Bay and Channel, Disposition of Troop in Bataan, and Philippine Department Defense Plan (R. 220, 285). At the same time Gepte was turned over to Major Evans until the conclusion of the case (R. 272).

After leaving the house of Major Evans, Gepte returned the blueprint of Lingayen Gulf to Cabrera, asking him for the maps indicated by Major Evans (R. 219, 220). About October 14th after Cabrera gave him a list of four maps stating the total price of sixty-five

thousand pesos, Gepte told him he was going to see the Sultan (R. 220). Later that day Gepte saw Agbay and told him he had informed the Sultan the price was ninety-five thousand pesos instead of sixty-five thousand pesos. Agbay thereupon proposed that they tell Cabrera that the Sultan bargained for forty-five thousand pesos, and that they (apparently Gepte and Agbay) would split the fifty-five thousand pesos [sic]. Cabrera was informed that the Sultan would pay forty thousand pesos to which he agreed. On October 15th, Cabrera informed Gepte that since the business was finished, Captain Romero, the principal, wanted to see him (R. 220, 221). By previous arrangement Gepte met Agbay and Cabrera at the London restaurant between 5 and 5:30 p.m., on October 15th (R. 225, 268), after which Gepte and his son joined Agbay, Cabrera, the accused, and Mrs. Romero, and proceeded in accused's car to Luneta Boulevard. Gepte and Agbay wore white suits and Cabrera white pants and a brown camisa (R. 225). Upon reaching Luneta Boulevard, Mrs. Romero suggested that they talk the matter over at Captain Romero's house, located at 100 Del Pan, Pasay, [Rizal, P.I.] to which place the party then proceeded, where a further discussion took place, during the course of which the accused informed Gepte that they would go over to Fort McKinley that night in order to make the maps (R. 225, 226).

About 7:15 p.m., after having supper together, the party departed for Fort McKinley, where the car was parked in front of and across the street from the building containing the regimental headquarters, 14th Engineers (R. 226, 227, 204, 268, Ex. 1). The accused, Cabrera and Gepte crossed the street, proceeded up the right stairs, and after the accused unlocked the door they entered the building, proceeding next to a room containing a safe. While Gepte held a flashlight the accused opened the combination safe, from which he took a "bundle" of keys. They then went to another room on the opposite side of the building where the accused unlocked a chest on the floor and took out of this chest a bundle of maps. They next proceeded to a room which was inside this big room, and which the accused stated was the dark room. At this point the accused placed the bundle of maps on the tables and after ordering Cabrera to put on the light, explained to Gepte and Cabrera about defenses and plans and many things that referred to defenses and plans. The accused showed them maps. One of these was a map of Corregidor and the accused also mentioned Mariveles and Bataan, emphasizing the mark "SECRET" and "RESTRICTED" stamped on each map (R. 228-230, Ex. 1). Among other things, the accused explained many things about Corregidor, told them Mariveles was a very important defense, and showed Gepte the symbol for a gun emplacement (R. 240, 241). He also talked of national defense, pointing out on the maps places and troop locations (R. 256). These explanations were made to both Gepte and Cabrera (R. 259). The accused told Gepte that since it would take

two or three hours to do the mapping and departure from the building too late at night would make somebody suspicious, it would be advisable for him to make the maps at his house the next day. The accused further informed him that he would take the maps the following day from Fort McKinley and photograph them at his house at 100 Del Pan, Pasay, because by giving him the negative, "millions of copies" could be made. Accused then put the maps in the "big chest" and went to the safe and locked it. The party then returned to the accused's house about 8:30, the accused taking with him a roll of paper and Cabrera two bottles containing a liquid, which they had brought from the accused's house, for use in making the photograph of the map (R. 230, 269). Exhibits 3 to 10, inclusive, were identified by Gepte as looking like the maps that were shown him by the accused on the night of October 15th at Fort McKinley (R. 231, 232). Upon return of the party to the house of the accused, they talked about the price, and the accused asked for fifty thousand pesos. Gepte told him he would take the matter up with the Sultan (R. 232).

After further negotiation, the accused, at about 11 a.m., on October 16th, telephoned Gepte that he was going to get the maps about 1 p.m., and that he would start photographing them about 2 p.m., and asked him to come to his house at once. The accused told Gepte at this meeting of his distrust in him, and that if Gepte were a person of the law and the case came before the proper authorities, he (accused) would be accused of a crime more serious than murder. Gepte replied that if anything happened he would not go back to Mindanao but would prefer to commit suicide, to which accused replied that he would proceed with the transaction, and that he trusted him. At 2:30 p.m., Gepte accompanied the accused and Cabrera to a dark room in the basement of the accused's house, where the latter and Cabrera placed three trays containing colored liquid on the table, turned off the lights, and started the developing (R. 232, 233, 250). After about an hour, someone turned on a light and there were eight negatives in the trays (R. 250, 251). The accused then said he was finished with the developing and showed Gepte four negatives, which were still a little wet, through a light. The latter identified Exhibits 11 to 18, inclusive, as looking like the negatives that were shown him in the dark room in the accused's house (R. 234, 235), and further identified the negatives shown him by the accused as representing maps similar to the ones shown him at Fort McKinley on October 15, 1940 (R. 252). Gepte suggested to the accused that the negatives be placed in order with the original maps, in such a way that when he (Gepte) returned with the Sultan, they could check them immediately and leave the place as soon as possible. The accused agreed (R. 235, 259).

While the events indicated above were taking place, Major Evans, assistant to the Assistant Chief of Staff, G-2, Philippine Department, to whom Gepte had previously given information to the effect that he had been approached by a representative of the accused, made arrangements for searching the residences of the accused and Cabrera (R. 273).

At about 4:30 p.m., on October 16th, a Constabulary party, accompanied by Major Evans, and armed with a search warrant, which was properly introduced in evidence and read into the record, of which a certified copy is attached marked Exhibit 20, raided the residence of the accused at 100 Calle Del Pan, Pasay, Rizal, in one room of which they found the accused and Cabrera, and eight photographic negatives, apparently drying, all of them reproductions of secret maps, as well as several rolls of classified maps and overlays (R. 273, 274, 290, 293, 294). In the basement a dark room indicated recent use (R. 274, 299, 309), and an assortment of photographic materials was found therein (R. 308, 309). Certain other classified documents were found in the automobile of the accused (R. 274, 299). Ignacio Agbay was discovered about to leave the house by the rear stairway (R. 299). Major Evans took possession of all the maps and photographic negatives so as to prevent other members of the raiding party from seeing them, and also took custody of the accused (R. 274, 300). He later delivered the documents to Lieutenant Colonel Harland F. Seeley, Assistant G-2, Philippine Division (R. 279). Exhibit No. 2 was identified by Major Evans as the restricted map of Lingayen Gulf area shown him by Gepte (R. 280). Exhibits 3 to 10, inclusive, were identified by Major Evans, by his initials placed on each, and Exhibits 11 to 18, inclusive, by distinctive clippings at the corners which he made himself, as the maps and negatives which he found in the raid on the accused's residence (R. 281-283). Major Evans testified that there was no authority for the communication of these maps to Mariano Cabrera or Anis Y. Gepte. There was no authority given to the accused by the office of the Assistant Chief of Staff, G-2, Philippine Department, which coordinates and supervises reproduction of maps, to reproduce these maps or any other maps on October 16th (R. 284). Simultaneously with the raid described above, a party from the Philippine Constabulary headed by Lieutenant Villafria, Philippine Constabulary, executed a search warrant in the house of Cabrera, finding therein, among other things, a restricted map of Lingayen area. Lieutenant Villafria identified Exhibit No. 2 as the restricted map of Lingayen found in Cabrera's house (R. 312, 313). Exhibits Nos. 3 to 10, inclusive, were identified by Lieutenant Colonel Harland F. Seeley, assistant to the Assistant

Chief of Staff, G-2 and 3, Philippine Division (R. 327-329), by the initials placed on them by Major Evans in his presence, as the maps and overlay, given him by Major Evans on the night of October 16, 1940. He also testified that the maps are classified as secret and so marked. Exhibits Nos. 11, 12, 13, 14, 15, 16, 17, and 18, in turn, were identified by the same witness as reproductions of Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, and 10, respectively, and, by the clipped corners on each, as the negatives turned over to him on the evening of October 16th (R. 325, 329-333). The maps were continuously in his possession from the time of their receipt from Major Evans until they were turned over to the trial judge advocate of this court (R. 334). All authorizations for the reproduction of the maps in evidence came through the assistant to the Assistant Chief of Staff, G-2 and 3, Philippine Division, under direction of the Division Commander, who is also the Commanding General, Fort William McKinley (R. 337, 334). The accused had no authority from anyone at Headquarters, Philippine Division, to reproduce these or any other maps on or about October 16, 1940 (R. 333).

The accused, after having been warned that he need not answer any question or make any statements, but that if he did so, what he said might be used against him, admitted to Colonel Baehr, G.S.C., then Acting Commanding Officer, Fort William McKinley, that he was involved seriously as to his personal finances, that he had been tempted to divulge secret information, from which he could expect to receive financial return (Ex. 19).

Lieutenant Myron B. Page, Jr., 14th Engineers, whom the accused relieved as Assistant Division Engineer on October 15th, was still signed up for secret maps on that date and still had access to the map case. The accused had proceeded to check secret maps on the morning of that date, assisted by Master Sergeant Delda, 14th Engineers, preparatory to transfer of accountability therefor (R. 347, 363). While the accused was engaged in checking the maps, Sergeant Delda told him there were certain maps which had to be returned to the Department Engineer (R. 363). After the accused's departure about 12:50 p.m., October 15th, Lieutenant Page, upon instructions from the assistant to the Assistant Chief of Staff, G-2, Philippine Division, made a check of secret maps but none were missing (R. 347). Another check was made between 8:30 p.m., and 9:15 p.m., on that same day, but none of the maps were missing (R. 348). Lieutenant Page identified the figure 3 on Exhibit 1 as the location of the secret map chest (R. 352) and Exhibits 3 to 10, inclusive, as the maps detailed in the Specifications of the Charge (R. 353, 354). These specific maps were present at the check of the maps in the map chest made about 8:30 p.m., October 15, 1940 (R. 390). On the night of October 15th, there were two sets of keys to the map

chest. One set was in possession of Lieutenant Page, and the other set was in the regimental safe (R. 352). Colonel Skerry, Major Manzano, Lieutenant Page, and the accused were the persons having the combination of the safe on October 15 and 16, 1940 (R. 358, 383, 386). None of the maps in evidence were removed from the map chest between 7:30 p.m., October 15, 1940, and 4:30 p.m., October 17, 1940, by Colonel Skerry, Major Manzano, or Lieutenant Page, except that as indicated above, Lieutenant Page removed them temporarily for the purpose of checking maps, after which they were returned to the chest and securely locked (R. 383, 386, 390).

At about 7:45 a.m., on October 16th, while all other officers were attending an officers' call, the accused, who had obtained keys to the map chest from Lieutenant Page for the purpose of continuing his check of secret maps, told Sergeant Delda to get out the maps that were supposed to be returned to the Department Engineer and place them on the drafting table (R. 348, 363). Exhibits Nos. 3 to 10, inclusive, were not among those to be so returned (R. 369). After the accused was through going over the maps he told Sergeant Delda to put back those he did not take. He also told Sergeant Dangoy to wrap up what he was going to take along. He then departed in a taxicab, stating he was going to the Department Engineer (R. 363, 364). Sergeant Delda returned the keys to the map chest to Lieutenant Page about 8:15 a.m., during officers' call (R. 349). A check of all secret documents at regimental headquarters, 14th Engineers, including secret documents in the safe, by Colonel Skerry, Major Manzano, and Lieutenant Page, was commenced about 8 p.m., October 16th, and continued most of the night (R. 349, 353). When discontinued, both sets of keys to the map chest were locked in the safe and a guard was posted at regimental headquarters the rest of the night, and also during an alert held on the morning of October 17th, as well as during lunch hour that day (R. 353, 391, 396). No one entered regimental headquarters while the guard was on duty on the night of October 16-17 until Colonel Skerry relieved him on the morning of October 17th (R. 395). No one opened the safe or the map chest during the period of the alert or during the lunch hour on October 17th (R. 396). When the check of the secret map chest in regimental headquarters, 14th Engineers, was completed at 4:30 p.m., on October 17, 1940, the maps in evidence were missing from the map chest (R. 355, 391, 392), and later found to be those in the possession of Colonel Seeley (R. 392).

The evidence further establishes that about the early part of September, the accused consulted a technician of the Kodak Philip-

pines, Ltd., Manila, P. I., relative to equipment for photographic reproduction of maps (R. 569, 570, 579, 586). On September 7th, the Kodak Philippines, Ltd., Manila, P. I., delivered to the accused certain items of photographic equipment, billed to the post exchange, Nichols Field (R. 571, 572, Ex. 21). The film in this list was suitable for reproduction of line work, i.e., printed matter, pencil and ink sketches, drawings and maps, but not for portrait work. Being panchromatic film, it is capable of reproducing colors when used with proper filters (R. 572). Exhibit No. 17 (photographic negative) was identified by a photographer of the Kodak Philippines, Ltd., as film which would fit the camera sold on the invoice to the post exchange, Nichols Field, and delivered to accused, and suitable for reproduction of maps or for lithography (R. 582, 583).

Anis Y. Gepte, the principal witness for the prosecution, testified that he never made any promises to Agbay that would lead the latter to believe he was working for him on this case against the accused; and that he never promised him that he would get a job as detective or investigator if he helped him on the case, or told him there would probably be a Government reward in this case and he would share in it if he helped on the case, nor did he offer Cabrera any reward for helping him on the case (R. 412, 413).

b. For the Defense. - So far as it can be pieced together, the testimony of Ignacio Agbay, an alleged coconspirator of the accused, who was duly warned of his constitutional rights in the premises before he testified and several times during his testimony (R. 404, 405, 410, 430, 444), is, in substance, as follows:

He first met Gepte on September 15, 1940, and knew him as Datu Ding. He met him again at the London restaurant about the 10th of October (R. 433, 434). At this time he knew Gepte was a Constabulary informer as the latter had told him so on their first meeting (R. 442). In their conversation he "unconsciously" told Gepte about certain plans, consisting of house plans and blueprints, one of the latter being a map of Lingayen Gulf, which the accused had entrusted to his (Agbay's) friend, Mariano Cabrera, who had told him about the plans in his possession about eight months before (R. 454, 455, 462, 463, 474, 478). Gepte told him if he would work with him, under his instruction, he would give witness "thousands" in cash out of a reward from "the Government", as well as a recommendation for a position as secret service man or agent of the Philippine Constabulary in the event they were successful on the case he was after, which was a frame-up case on the accused, whom witness did not know

at the time (R. 447, 452). This frame-up involved the sale of plans (R. 454). As assistant to Gepte, Agbay was to introduce him to accused using Cabrera as intermediary (R. 451, 452, 455). In accordance with the agreement he made with Gepte, he had Cabrera introduce him (and apparently Gepte also) (R. 461), to the accused about five o'clock on the afternoon of October 15th (R. 461, 465), but mentioned nothing to Cabrera, his friend of seven or eight years' standing, about the plan to frame the accused (R. 464). The plan was to make Cabrera and the accused "believe that there will be a buyer of the plans in case those plans will be of value" (R. 467). (At another point during his testimony witness testified he met accused once before the meeting on the 15th of October through Cabrera, in order to do a favor for a girl friend who was looking for a job (R. 474).) He had no idea the plans in Cabrera's possession had any value, and for that reason had never reported the matter to proper authorities (R. 483, 484).

The substance of the testimony of Mariano Cabrera, another alleged coconspirator of the accused, is as follows:

He first met Gepte on October 13th through his friend Agbay (R. 511). At this meeting, after showing Gepte "the map", the latter told him that a Sultan wanted to buy maps and asked him if he could introduce them (evidently meaning Gepte and Agbay) to the accused (R. 512, 513). Cabrera thereupon grabbed the plans and maps and asked Gepte why he wanted him to do that when he was a "D.I." He knew Gepte was a "D.I." because when he met him on this occasion he saw "a whistle and a big knife" on his right side (R. 514). In a private conversation Gepte shortly after admitted to him he was a "D.I." (R. 514), and asked him to help in an investigation being made of the accused because of gambling (R. 525). Upon informing Gepte that he had had a quarrel with the accused about three or four days before, Gepte offered him five hundred pesos out of a premium from the Government and promised to recommend him as a special agent. At the same time Gepte told him to follow every instruction (R. 524, 525). Cabrera was willing to lay a trap for the accused, whom he had known for more than three years, because he could not forget the quarrel between the accused and himself, and because of Gepte's promise of a reward and his further promise that Captain Romero would not be harmed, but only discharged from the Army (R. 526). At this time Cabrera and the accused were publishing a magazine. The accused was supervisor and planned to do the photography for the magazine (R. 526, 527). On the night of October 15th, he and Agbay met Mrs. Romero and the accused, who invited them to go to his house (R. 521). Later they went to the London restaurant and picked up Gepte and his son and returned to the accused's house (R. 522). After eating he, Mrs. Romero, Gepte, Agbay

and son, and the accused drove to Fort McKinley (R. 504, 515), to enlarge pictures (R. 505). Cabrera sat in the front seat but could not remember who drove the car (R. 504, 505, 518, 519, 520). He did not know exactly why Gepte came along on this trip (R. 515, 516).

After the party arrived at Fort McKinley about 8 p.m., Cabrera, together with Gepte and the accused, entered a building there (R. 498). Upon entering this building, the accused turned on a light, and after opening a door on the left, turned off the light (R. 505). Cabrera, upon instructions from the accused, entered the dark room with chemicals and papers for enlarging pictures and negatives. The accused did not accompany him to the dark room (R. 499). Arriving in the dark room, Cabrera made preparations for the developing of pictures but discovered that one chemical was missing. As he was about to go out he met Gepte and the accused at the door, just as they were about to enter, and told the accused that he was unable to proceed with enlarging pictures. The accused told him that they would do no more. Thereupon he returned to prepare the bottles, papers, and negatives for their return. He did not see the accused carrying anything because it was dark outside the "dark room", but he could clearly see both Gepte and the accused, and would have known whether accused had maps in his hand because they were close together (R. 499, 500). Cabrera later testified that the accused and Gepte accompanied him to the dark room at first but left him. When he discovered the chemical was missing, he came out to tell the accused, whom he observed talking to Gepte at the second door, outside the dark room (R. 501, 502). Although the light was off at the time he could notice them because of the window and because "they wore white cloth" (R. 507). Cabrera estimated they were in the building about twenty minutes (R. 503, 504). He did not see the accused carry anything out of the building (R. 518). He did not help the accused with the photographic work or see any negatives the following day (R. 516, 527). When properly confronted with a signed statement made by him on October 16th, inconsistent with his testimony on this last matter, Cabrera offered the explanation that the statement was made under instructions of Gepte to give "any statement very good for him or for me", if he were forced to make a statement (R. 527, 528, 530), also because Lieutenant Villafria, to whom he made the statement, told him just to sign it and it would not harm him (R. 529).

The competent evidence of Antonio Garcia, relative to the credibility of Gepte, establishes that once in 1939, Gepte employed him temporarily as a police "especial". Gepte gave him two cans of opium and told him to put it in the Chinese store of Ah-Gong and let him know where he put it, and that then Gepte together with the Constabulary would take the opium (R. 542, 545).

Anis Y. Gepte, the principal witness for the prosecution, recalled for further recross-examination, admitted that he had once been convicted of "estafa" (fraud) about twenty-five years ago when he was very young. This was known by the Philippine Army when he was employed as an investigator. Another case, still pending against him, partly connected with his duties, involves the shooting of a person. That happened while he was already employed by the Philippine Army (R. 410, 411, 412, 422, 423).

The accused, after having his rights explained to him, elected to make an unsworn statement (R. 551-554). Insofar as it relates to denial, explanation or extenuation of the offenses charged against him, the statement, which includes a great deal of argument, is, in substance, as follows:

He was dissuaded from taking the stand in view of the opinion that insanity is recognized only by manifestations commonly known as "imbecility, amok, or apoplexy, to the exclusion of all other symptoms known to medical science". He intended to return the maps presented in evidence, together with other obsolete maps, to the Department Engineer on the day following his arrest. He told Colonel Baehr that he was prepared to destroy the evidence in question after he accomplished his plan to teach his persecutors to leave him alone. The purpose of the visit to Engineer Headquarters was to enlarge some pictures, and Mr. "X" (Gepte) insisted on coming, according to him, in order to convince the Sultan that he had been to Fort McKinley (R. 555, 556). Mr. "X" saw no maps or blueprints at Engineer Headquarters (R. 557). He told Cabrera about his plans to surprise Gepte when he came back at 5 p.m., on October 16th, and sent his children to the beach in anticipation of his plans to end all the unnecessary snooping on him. He told Colonel Baehr and Major Evans that he was aware that Constabulary operatives were snooping on him for a long period (R. 562). It never entered his mind to communicate any secret information. He always kept many maps in his quarters or residence, as he worked on them at home. The map found in Cabrera's house was one of "those restricted blueprints Sergeant Delda said were usually used for wrapping or for scratch pad work". He never mentioned to any unauthorized person that he had custody of secret documents while on duty. He did not report the matter to the proper authorities because "these were the ones bent on getting" him. He made several reports of subversive activities that came to his attention. He raided a suspect himself and turned in his findings to his commanding officer (R. 563). This year he turned in an espionage report concerning Bataan and Olongapo. Even after his arrest he gave Major Evans intelligence he gathered that some nation already has secured a copy of every secret map we have (R. 564).

6. The defense counsel, and the accused in his statement, contended that the accused was not criminally liable because of the methods of entrapment which were used for the purpose of detecting and apprehending him. The evidence is conflicting as to the person who provided the inducement under which the accused acted in committing the offenses alleged. Agbay testified that Gepte made the original proposal to procure plans from the accused in order to trap accused after he had told Gepte of certain maps which the accused had entrusted to Cabrera. Cabrera supports that testimony in part. Gepte, on the other hand, testified that Agbay suggested the plan to sell maps to the Japanese and told him that the maps would be obtained through his friend Cabrera from an officer of the United States Army. Gepte denied that he made any promises that would lead Agbay to believe Agbay was working for him on the case against accused or either promised him a job or a share in the award for his help on the case. The record shows that Agbay was an unwilling witness and displayed a marked lack of frankness while testifying. Cabrera's explanation that he was willing to frame the accused because of a quarrel with accused does not appear probable in the light of his relations with the accused. The court, by its findings, has shown that it declined to believe the testimony of Agbay and Cabrera, two co-conspirators, and that it gave credence to Gepte's testimony.

The proof that accused early in September consulted a technician of Kodak Philippines, Ltd., Manila, with respect to equipment suitable for the reproduction of maps and thereafter on September 7, 1940, there was delivered to accused by that firm equipment, including a camera and a type of film suitable for reproduction of line work, maps, or for lithography (R. 569-572, 579, 582-583, 586), all prior to the date, September 15, 1940, when Gepte first met Agbay (R. 453), supports the conclusion that the conception and the procurement of the offenses did not originate with Gepte, but in the conspirators.

From consideration of the foregoing, the Board of Review is of the opinion that the inducement to commit the offenses originated with Agbay or Cabrera. As neither of those persons was an officer of the law or of the Government, or acting in a representative capacity, the accused could not avail himself of the defense of entrapment (Polski v. United States, 33 Fed. (2d) 686). The fact that Gepte later became a representative of the Government and in that capacity asked Agbay and Cabrera to obtain certain other maps does not alter the above conclusion because there was reasonable ground at the time to believe that the law was about to be violated and under those conditions he was justified in securing additional evidence that the accused did violate the law (Casey v. United States, 76 U.S. 413).

Mr. Justice Roberts has defined entrapment as -

"* * * the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it, except for the trickery, persuasion, or fraud of the officer" (Sorrels v. United States, 287 U.S. 435, 454).

Under the evidence in this case the acts of Gepte were nothing more than the presentation of an opportunity to accused and his coconspirators, persons who were intending or willing to commit the crimes, and did not estop the Government from prosecuting therefor (Newman v. United States, 299 Fed. 128).

7. In the opinion of the Board of Review the evidence legally sustains the findings of guilty. Although Gepte, the principal witness for the prosecution to whom it is alleged that the accused communicated the maps listed in Specification 1, did not positively identify Exhibits Nos. 3 to 10, inclusive, as the maps which he saw at Fort McKinley on the night of October 15, 1940, there is evidence to show that he asked Cabrera to get maps of Corregidor, Manila Bay and vicinity, disposition of troops at Bataan and the Philippine Department defense plan. Gepte testified that on his visit to Fort McKinley the accused showed Cabrera and himself certain maps of which one was a map of Corregidor. In discussing that map accused mentioned Mariveles and Bataan and emphasized the marks "secret" and "restricted" on each map. He also explained defenses and plans and showed him a symbol of a gun emplacement. These circumstances, coupled with the finding of the eight maps specified, together with the eight negatives of those maps, in the residence of the accused on the following afternoon, justifies the conclusion that the accused communicated those particular maps to Gepte and Cabrera on the night of October 15th. The finding of the eight maps, and the eight negatives thereof, at the house of the accused, considered with the circumstances surrounding the events of the previous evening, also justifies the conclusion that the accused in fact reproduced the maps as alleged in Specification 2. Details of the proof respecting the conspiracy to communicate (Spec. 3) and to reproduce the maps (Spec. 4) are so intertwined as to make difficult any clear separation of the proof. It is the opinion the Board of Review, however, that the whole evidence with particular reference to the purpose of the conspiracy and to the acts of the alleged conspirators preceding and following the meeting at the residence of the accused on the night of October 15th, establishes the essentials, both of the conspiracy to communicate and the conspiracy to reproduce. As the offense of communication and that of reproduction of the maps are by statute separate offenses from the conspiracy to commit such offenses (50 U.S.C. 31 (d), 34, 45 b; 18 U.S.C. 88), it cannot be said that the conspiracy to communicate or the conspiracy to reproduce

merged in the corresponding completed crime (Miller Criminal Law (1934), sec. 13, 32 (d); Wharton's Criminal Law, 12th edition, sec. 1611). The admission of accused to Colonel Baehr that he was seriously involved in his personal finances and that he had been tempted to divulge secret information (Ex. 19) discloses a motive for the offenses.

8. The accused is thirty-three years of age. The Army Register shows his service as follows:

"2 lt.P.S. 11 June 31; 1 lt. 1 Aug. 35; capt. A. U. S. 9 Sept. 40; accepted 4 Oct. 40. - Cadet M. A. 1 July 27 to 10 June 31."

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the sentence and to warrant confirmation of the sentence. Confinement in a penitentiary is authorized under Article of War 42 for the offense involved in Specification 1, and for the offenses involved in Specifications 3 and 4, which offenses are recognized as offenses of a civil nature and so punishable by confinement in a penitentiary, respectively, under U. S. Code, title 50, section 31, and under section 37 of the Criminal Code of the United States (18 U.S.C. 88), and U. S. Code, title 50, section 34.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 3 1941 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Rufo C. Romero (0-18350), Philippine Scouts (CE), 14th Engineers (PS).

2. Captain Romero was convicted under four specifications, in violation of Article of War 96, involving the disclosure to unauthorized persons of secret maps pertaining to the national defense, as itemized in the draft of your letter to the President. 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 fifteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. In a separate communication appended to his action the reviewing authority recommended that if the sentence is approved, a penitentiary in the United States be designated as the place of confinement, in view of the peculiar knowledge of accused of the national defense plans and the topography of Luzon, and the attendant opportunity, due to lack of facilities for proper supervision, of transmitting such information to unauthorized persons, if accused should be confined in the Philippines.

3. The records of the War Department show that the accused was born in the Philippine Islands on November 28, 1907. He was a cadet at the United States Military Academy from July 1, 1927, to June 10, 1931. He was commissioned Second Lieutenant, Philippine Scouts, on June 11, 1931, promoted to First Lieutenant, August 1, 1935, and on September 9, 1940, promoted to Captain, Army of the United States. He received a B.S. degree from the United States Military Academy, 1931, a B.S. degree in Civil Engineering from the University of California, 1934, and was graduated in the Company Officers' Course, Engineer School, 1935.

During his commissioned service a total of twenty-three efficiency reports have been rendered on him. In six of these reports covering about three and one-half years, his general rating was superior; in fourteen of the reports covering about three years and nine months, his general rating was excellent; in two of the reports covering about one year and six months, his general rating was very satisfactory; and in one report covering about three months, his general rating was satisfactory. His efficiency file contains three commendations for excellent performance of duties, and his efficiency reports contain many commendatory remarks with respect to his general value to the service. He was once admonished

for voluntarily engaging, while on leave, in an altercation with a civilian.

4. All four offenses of which he was found guilty are serious offenses involving the production and dissemination to unauthorized persons of secret maps pertaining to the national defense.

5. I concur in the opinion of the Board of Review and recommend that the sentence be confirmed. While the period of confinement imposed is severe, I am of the opinion, in view of all the circumstances, that it should stand as adjudged. The accused breached the trust reposed in him with respect to secret documents pertaining to the national defense which were committed to his charge and which it was his particular duty to protect. I also recommend that the sentence be ordered executed, and that a penitentiary within the continental United States be designated as the place of confinement.

6. Inclosed herewith are a draft of letter for your signature transmitting the record to the President for his action, and a form of Executive action confirming and directing the execution of the sentence.

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

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

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

Board of Review
CM 215729

MAR 19 1941

UNITED STATES	)	4th DIVISION MOTORIZED
v.	)	Trial by G.C.M., convened at Fort McClellan, Alabama, January 15, 1941. Lamons: Dishonorable discharge and confinement for three and one-half ($3\frac{1}{2}$) years. Holmes: Dishonorable discharge and confinement for six (6) years. Penitentiary.
Privates PORTER T. LAMONS (6926904), Company L, 22nd Infantry; and HARRY R. HOLMES (7031791), Company C, 22nd Infantry.	)	

HOLDING by the BOARD OF REVIEW
HILL, CORRIDON and TAPPY, Judge Advocates.

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

These accused were tried jointly with Private Cecil M. Jones, Jr. (7032636), Company C, 22nd Infantry, the result of whose trial has been published in General Court-Martial Order No. 32, Headquarters 4th Division Motorized, Fort Benning, Georgia, February 20, 1941.

2. a. The three accused were tried upon the following Charges and Specifications:

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

Specification: In that Private Porter T. Lamons, Company "L" 22nd Infantry, Private Cecil M. Jones, Jr., Company "C" 22nd Infantry, and Private Harry R. Holmes, Company "C" 22nd Infantry, having been duly placed in confinement in the Post Guard House, Fort McClellan, Alabama, on or about October 6, 1940, November 22, 1940, and November 22, 1940, respectively, did, at Fort McClellan, Alabama, on or about December 3, 1940, jointly and in pursuance of a common intent, escape from said confinement before they or either of them were set at liberty by proper authority.

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

Specification: In that Private Porter T. Lamons, Company "L" 22nd Infantry, Private Cecil M. Jones, Jr., Company "C" 22nd Infantry, and Private Harry R. Holmes, Company "C" 22nd Infantry, did, at Fort McClellan, Alabama, on or about December 3, 1940, in the execution of a conspiracy to desert the service of the United States, previously entered into among them, desert the service of the United States and did remain absent in desertion until they and each of them were apprehended at Gadsden, Alabama, on or about December 3, 1940.

b. Two of the accused, Private Cecil M. Jones, Jr., and Private Harry R. Holmes were also arraigned upon the following Additional Charges:

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

Specification: In that Private Harry R. Holmes, Company "C" 22nd Infantry, and Private Cecil M. Jones, Jr., Company "C" 22nd Infantry, acting jointly, and in pursuance of a common intent, did at Fort McClellan, Alabama, on or about November 18, 1940, unlawfully enter the Supply Room of Company "C" 22nd Infantry, with intent to commit a criminal offense, to wit, larceny therein.

Additional Charge II: Violation of the 94th Article of War.

Specification: In that Private Harry R. Holmes, Company "C" 22nd Infantry, and Private Cecil M. Jones, Jr., Company "C" 22nd Infantry, acting jointly and in pursuance of a common intent, did at Fort McClellan, Alabama, on or about November 18, 1940, feloniously take, steal, and carry away six (6) Caliber .45 Automatic Pistols, value about one hundred and fifty-eight dollars and fifty-two cents ($158.52), the property of the United States, furnished for the military service thereof.

Each of the accused pleaded not guilty to the Charges and Specifications under which they were respectively arraigned.

c. The three accused were found guilty of the Specification, Charge I, excepting the words "jointly and in pursuance of a common intent" and "either", substituting for the latter the words "any one", and of Charge I; of the Specification, Charge II, except the words "in the execution of a conspiracy to desert the service of the United States, previously entered into among them". Accused Jones and Holmes were also found guilty of the Additional Charges I and II, and of their respective Specifications. A record of previous convictions in the case of accused Lamons was read to the court but was neither copied into the record nor included as an exhibit.

Accused Jones and Holmes were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twelve years. Accused Lamons was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three and one-half years.

The reviewing authority disapproved the findings of guilty as to accused Jones of Additional Charges I and II, and their respective Specifications; approved the sentence as to accused Lamons; approved only so much of the sentence as to accused Holmes as involves dishonorable discharge, total forfeitures, and confinement at hard labor for six years; and approved only so much of the sentence as to accused Jones as involves dishonorable discharge, total forfeitures, and confinement at hard labor for three and one-half years, but suspended the dishonorable discharge until his release from confinement.

In the case of the accused Jones, the reviewing authority designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, directed the execution of the sentence as modified, and published his sentence in General Court-Martial Order No. 32, Headquarters 4th Division, Motorized, Fort Benning, Georgia, February 20, 1941.

In the case of accused Holmes and Lamons, the reviewing authority designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement of each but withheld the order directing the execution of the respective sentences, and forwarded the record under the provisions of Article of War 50½.

3. The only questions requiring consideration are the finding as to accused Lamons and Holmes of the manner of termination of the desertion and the resulting maximum sentence and place of confinement as to accused Lamons.

The sole competent testimony as to the manner of termination of the desertion is that of Captain Mylod who stated that he established headquarters at the Gadsden police station for the search for the escaped prisoners, and sent out patrols to various points and over the roads leading to Gadsden; that the first patrol reported at about three o'clock "with Holmes" who was "turned over to him" at the Gadsden police station; about forty minutes later another patrol brought Lamons to the Gadsden police station where they were confined and transported back to the post guardhouse; that Privates Britman, Dean, and Brown "were the members of the patrol who brought these men in" (R. 33-35).

There is no testimony of Private Britman, Dean, or Brown or of any other member of the patrols as to the manner in which the accused came under military control prior to being turned over to Captain Mylod at the Gadsden police station.

4. In the absence of competent proof of the fact of apprehension of accused Lamons and Holmes at the time and place alleged, the evidence is legally sufficient to support only so much of the findings of guilty of the Specification, Charge II, as involves a finding as to accused Lamons and Holmes of desertion terminated in a manner not shown, for which the maximum punishment cannot exceed that fixed for desertion terminated by surrender (CM 161013, Michael; Dig. Ops. JAG 1912-30, sec. 1507 (2)).

The sentence adjudged and approved as to accused Lamons included confinement for three and one-half years. The maximum confinement authorized for desertion terminated by surrender after absence of not more than sixty days is one year, and also one year for escape from confinement (par. 104 c, M.C.M., 1928), making a total authorized confinement of two years in his case.

5. The United States Penitentiary, Atlanta, Georgia, was designated as the place of confinement of accused Lamons. Article of War 42 provides in part -

> "That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: * * *."

Confinement in a penitentiary is not authorized under the provisions of Article of War 42 for desertion in time of peace, nor

for escape from confinement (Dig. Ops. JAG 1912-30, sec. 1611 (1)).

The records of this office show that accused Lamons was, on November 8, 1940, convicted by general court-martial of an offense for which confinement in a penitentiary is authorized, and that the United States Penitentiary, Atlanta, Georgia, was designated as the place of confinement under the approved five year sentence (GCMO No. 42, Hdq. 4th Div., Dec. 13, 1940). It appears that the penitentiary was designated as the place of confinement in the instant case because of the designation of a penitentiary as the place of his confinement in that case. The fact that a soldier was previously convicted and sentenced to confinement in a penitentiary in an independent proceeding and for an independent offense, does not authorize the imposition of penitentiary confinement upon a subsequent conviction for an offense not otherwise so punishable (Dig. Ops. JAG 1912-30, sec. 1609, sec. 1607 (4)).

There is, therefore, no authority for the designation of a penitentiary as the place of confinement of accused Lamons under the sentence imposed in the instant case.

6. For the reasons above stated, the Board of Review holds the record of trial with respect to Privates Porter T. Lamons and Harry R. Holmes legally sufficient to support only so much of the finding of guilty of the Specification, Charge II, as involves a finding that each accused did, at the time and place alleged, desert the service of the United States, and did remain absent in desertion until his absence was terminated in a manner not shown at the time and place alleged. The Board of Review also holds the record of trial legally sufficient to support the sentence as to accused Private Harry R. Holmes and his confinement in a penitentiary. The Board of Review also holds the record of trial legally sufficient to support only so much of the sentence as to Private Porter T. Lamons as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary.

Walter E. Hall, Jr., Judge Advocate.

John H. Lovridge, Judge Advocate.

Thomas N. Taffy, Judge Advocate.

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

Board of Review
CM 215734

MAR 22 1941

UNITED STATES	)	PANAMA CANAL DEPARTMENT
v.	)	Trial by G.C.M., convened at Albrook Field, Canal Zone, February 5, 1941. Dismissal.
Second Lieutenant ARTHUR H. RUSH, JR. (0-360410), Infantry Reserve.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and WALSH, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Arthur H. Rush, Jr., Infantry, was at Department Training Center, Rio Hato, R de P, on or about December 16, 1940, drunk and disorderly while on duty as Provost Marshal.

Specification 2: In that Second Lieutenant Arthur H. Rush, Jr., Infantry, did at Department Training Center, Rio Hato, R de P, on or about December 16, 1940, wrongfully discharge a service pistol, caliber .45, in the vicinity of Post 4 of the guard.

Specification 3: In that Second Lieutenant Arthur H. Rush, Jr., Infantry, did, at Department Training Center, Rio Hato, Republic of Panama, on or about

December 16, 1940, wrongfully strike Corporal Edward H. Nenno, Headquarters and Headquarters Squadron, 9th Bombardment Group (H), Air Corps on the head and body with his fist.

Specification 4: In that Second Lieutenant Arthur H. Rush, Jr., Infantry, did, at Department Training Center, Rio Hato, Republic of Panama, on or about December 16, 1940, wrongfully attempt to choke Corporal Edward H. Nenno, Headquarters and Headquarters Squadron, 9th Bombardment Group (H), Air Corps.

Specification 5: In that Second Lieutenant Arthur H. Rush, Jr., Infantry, did, at Department Training Center, Rio Hato, Republic of Panama, on or about December 16, 1940, carelessly and recklessly handle a loaded service pistol, caliber .45, thereby endangering the lives of members of the guard in his vicinity.

He pleaded not guilty, was found not guilty of Specification 4, and guilty of the Charge and of Specifications 1, 2, 3, and 5. No evidence of previous convictions was introduced. He was sentenced on February 5, 1941, to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. An examination of the record of trial discloses that on the night of December 16th-17th accused was on duty as Provost Marshal at Rio Hato, Republic of Panama (R. 84), and on that night he attended a party which was given by the 1st and 5th Squadrons; that between eight o'clock and shortly before midnight he took five drinks of rum. He then went to the guard tent to see that the guard was posted (R. 105). When he went into the tent he began without any provocation to curse and abuse the members of the guard. He gave every evidence that he was grossly drunk (R. 58, 65, 66, 75). Accused went to the hangar by truck where he "grabbed" a pistol from the sentry on duty, Private First Class Richard M. Hart, pulled the slide back, thrusting a shell into the chamber, and fired it into the ground in his rear without

looking where he fired. He then ordered the guard from the truck and stood with his finger on the trigger, waving and flourishing the loaded and cocked pistol in the direction of a number of enlisted men who stood in a semicircle in front of him. Seeing that accused was intoxicated and endangering the lives of the men, the corporal of the guard asked him for the pistol. When accused refused to relinquish the pistol and while he was arguing with the corporal of the guard, Private First Class Richard M. Hart, realizing that they were all in grave danger, stepped behind accused and struck his wrist with his flashlight, causing him to drop the pistol. Private Komanski picked the pistol up and ran with it (R. 25). He struck Corporal Edward H. Nenno on the head and body with his fist (R. 45, 53, 65). A general scramble ensued, accused chased the men around cursing and abusing them, and finally several men grappled with him, overpowered him and laid him on the ground and held his arms and legs (R. 71, 72, 73). The corporal of the guard, Corporal Nenno, while accused was being held, went to the bachelor officers' club at about one o'clock a.m., to find a commissioned officer to take charge of the situation. There he found Captain Stuart P. Wright, Air Corps, who went with him to the hangar, where he found accused being held on the ground by several enlisted men. He told the men to release him and ordered him to get up. Accused made an effort to get up, but fell on his face. Two enlisted men then assisted him to arise. Accused said to them "You God-damned sons of bitches, leave me alone!". At this time he was stripped to the waist and was grossly drunk (R. 7, 8, 15, 27). Accused was put in a truck and taken to his tent where Captain Wright put him in bed. The next morning at about six o'clock he was lying in the same position in which Captain Wright had left him (R. 18).

4. The defense introduced in evidence a copy of "Time", dated December 30, 1940, and a copy of "The Panama American", both purporting to show that the relations between the Republic of Panama and the United States Army were strained (R. 77, 78).

First Lieutenant John T. English, Infantry, was introduced by the defense and testified to the effect that while accused was Provost Marshal at Rio Hato, the reservation was comprised of approximately nineteen thousand acres, that there were some three thousand soldiers on the reservation, and that the conduct of accused was "generally satisfactory" (R. 79, 80).

First Lieutenant J. Grollman, Medical Corps, was introduced by the defense as an expert witness and testified that when he attended accused on December 17th he had a discoloration of the right eye, above the eye a brush wound, which was covered by a scab, another brush wound on his right shoulder and a bruise on his left wrist, and that he might have incurred similar wounds in many ways (R. 86, 87). The witness was asked a number of hypothetical questions as to the psychological effect of military service under such pressure as obtained at Rio Hato. The substance of his replies to these questions was that it would depend entirely upon the individual's temperament, that each individual reacts differently (R. 86, 88).

Accused, having had his rights as a witness fully explained to him, elected to be sworn and testified as to prominence of his ancestors, one of whom was a signer of the Declaration of Independence and another a Vice President of the United States. Arriving in Panama he was made Provost Marshal at Rio Hato, Republic of Panama, from November 17 to December 17, 1940, during which time he acquainted himself with the various villages and towns adjacent to the reservation. Shortly before his difficulty it was necessary for him to relieve Corporal Hart as sergeant of the guard on account of drunkenness. This action may have engendered ill feeling against him among the guard who may have thought that he was a little hard on them (R. 99, 100). On the night of December 16th he inspected the guard at about eight o'clock. When he went to the hangar he failed to find Corporal Hart on duty there. After eight o'clock he attended a party at the bachelor officers' quarters where he had five drinks of rum and coca cola. About midnight he went to the guard tent to see that the guard was posted. The corporal of the guard was not there, so he decided that he would rout them out himself. After calling several times and possibly using profanity he went into a tent, and finding a member of the guard seated on his bed putting on his shoes, he lifted up his chin. On the way to the hangar one of the guard said that he was drunk - to which he, accused, replied "Yes I am drunk, but, drunk or sober, I am in command of the guard". He was very tired and irritated because of the delay. Arriving at the hangar and seeing Corporal Hart he asked him where he was at eight o'clock. Seeing Corporal Hart's pistol he asked whether it was loaded. Being told that it was not loaded, he took the pistol, loaded it and shot into the ground, demonstrating how to stop a car when the driver refused to stop. He

did not point the pistol in direction of soldiers but held it pointed toward the ground. Corporal Nenno told him, accused, to bring the gun to "port arms" and give it to him, but he told Nenno to be quiet so that he could go on with his explanation. Corporal Hart then struck his wrist from behind; he thought it was Nenno who had struck him so he turned and hit him, Nenno, just below the necktie. The men then jumped on him and pinned him to the ground after striking him about five times. He remembered that he had difficulty in getting up when Captain Wright came, but it was because of injury to his left hand (R. 96-112). On redirect examination he testified that he said "I stated that if I was drunk or sober, I wanted the men to get going, and I was still the commanding officer of the guard. That's the only statement I made as far as my drunkenness was concerned" (R. 115).

5. The evidence as to Specification 1 shows that at the time accused went to the guard tent at about twelve o'clock, he was on duty as Provost Marshal, and that at that time he was grossly drunk and conspicuously disorderly; that he used such vile and abusive language toward the guard as, "Let's get these sons of bitches up" and later he called them "all in general sons of bitches". He used other words of profanity, caught one of the soldiers under the chin in a rough manner, and asked him if he wanted to fight (R. 22, 23). This evidence fully supports and warrants findings of guilty in violation of Article of War 95. The Manual for Courts-Martial, paragraph 151, lists as an instance of violation of the 95th Article of War, "being grossly drunk and conspicuously disorderly in a public place". The Manual also, in the same paragraph, describes "conduct unbecoming an officer and a gentleman" (A. W. 95) as including:

> "The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, * * *"

and states further:

> "There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing,

of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness."

6. In considering Specifications 2, 3, and 5, it should be noted that there was an appreciable lapse of time between the commission of the offense alleged in Specification 1 and the offenses alleged in the later specifications, and that accused and certain members of the guard had gone a considerable distance from the guard tent to the hangar. The later offenses are therefore deemed to be separate and distinct incidents and not merely a continuance of the drunken and disorderly conduct alleged in Specification 1.

In considering Specification 3, while it has been held (Dig. Op. JAG, 1912-30, par. 1490) that an officer may be charged under either Article of War 95 or Article of War 96 for an assault upon an enlisted man, an examination of the facts upon which the opinion is based indicates that the officer concerned was entirely sober at the time the assault was committed, and all of the circumstances related show a most flagrant disregard of the rights and feelings of the enlisted man who was assaulted. The circumstances attending the assault in the instant case portray a less flagrant case than the one cited.

The wrongful discharging of a service pistol in the vicinity of Post 4 of the guard (Specification 2), and the careless and reckless handling of a loaded service pistol, thereby endangering the lives of the members of the guard (Specification 5) are unquestionably serious offenses, but under all of the circumstances related in the record the acts alleged in Specifications 2, 3, and 5, are not of so serious a nature as to warrant findings of guilty in violation of Article of War 95, and should have properly been laid under Article of War 96.

7. The accused is a Reserve officer and is twenty-seven years of age. The record shows the following service:

Second Lieutenant, Infantry, February 7, 1938 to August 20, 1939; August 4, 1940 to August 24, 1940; September 28, 1940 to present date.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Specification 1, in violation of the 95th Article of War, and only so much of the findings of guilty of Specifications 2, 3, and 5, as finds that accused was guilty of the latter specifications at the place, time and in the manner alleged, in violation of the 96th Article of War, and to warrant the confirmation of the sentence. Dismissal is mandatory on conviction of violation of Article of War 95.

L. W. Smith, Judge Advocate.

William A. Rounds, Judge Advocate.

E. J. Walsh, Judge Advocate.

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

Board of Review
CM 215787

APR 16 1941

U N I T E D S T A T E S	)	UNITED STATES MILITARY ACADEMY
V.	)	Trial by G.C.M., convened at West Point, New York, February 13, 1941. Dismissal.
Cadet CHARLES E. REED, First Class, United States Corps of Cadets.	)	

OPINION of the BOARD OF REVIEW
HILL, CORRIDON and TAPPY, Judge Advocates.

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

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

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

Specification 1: In that Cadet Charles E. Reed, First Class, United States Corps of Cadets, did, without proper leave, absent himself from his company at West Point, New York, from about 11:00 P.M., December 29, 1940, to about 7:00 P.M., December 30, 1940.

Specification 2: In that Cadet Charles E. Reed, First Class, United States Corps of Cadets, did, at West Point, New York, on or about December 29, 1940, fail to repair at the fixed time to the properly appointed place of assembly for reveille.

Specification 3: In that Cadet Charles E. Reed, First Class, United States Corps of Cadets, did, at West Point, New York, on or about December 30, 1940, fail to repair at the fixed time to the properly appointed place of assembly for reveille.

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

Specification 1: In that Cadet Charles E. Reed, First Class, United States Corps of Cadets, acting Cadet Company Commander of Company I, United States Corps of Cadets, did, at West Point, New York, on or about December 29, 1940, wrongfully, deceitfully, and in disregard of his honor, cause Cadet Thomas H. Brown, Third Class, United States Corps of Cadets, to render a false official report of a Chapel formation, in that he, the said Cadet Reed, wrongfully detailed said Cadet Brown to command Company I, United States Corps of Cadets, at Chapel formation, December 29, 1940, and did wrongfully instruct said Cadet Brown, "You take the report from the first sergeant, I will not be reported absent," or words to that effect, with the deceitful purpose of concealing his absence from said Chapel formation.

Specification 2: In that Cadet Charles E. Reed, First Class, United States Corps of Cadets, at West Point, New York, on or about January 8, 1941, when questioned by Captain Ernest F. Easterbrook, Infantry, Company Tactical Officer, Company I, United States Corps of Cadets, respecting whether as acting company commander he had commanded the company at reveille on December 30, 1940, did, with intent to deceive the said Captain Easterbrook, his tactical officer, officially state to the said Captain Easterbrook that he, the said Cadet Reed, did not remember, or words to that effect, which statement was known by the said Cadet Reed to be untrue in that he then well knew that he had been absent without leave at reveille on December 30, 1940.

Specification 3: In that Cadet Charles E. Reed, First Class, United States Corps of Cadets, at West Point, New York, on or about January 14, 1941, when questioned by Captain Normando A. Costello, Infantry, Acting Company Tactical Officer, Company I, United States Corps of Cadets, respecting whether he had been absent without authority from any reveille formations during Christmas week, did, with intent to deceive the said Captain Costello, his tactical officer, officially state to the said Captain Costello

that he, the said Cadet Reed, did not recall, or words to that effect, which statement was known by the said Cadet Reed to be untrue in that he then well knew that he had been absent without authority at reveille on December 29 and December 30, 1940.

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

Specification: In that Cadet Charles E. Reed, First Class, United States Corps of Cadets, acting Cadet Company Commander, Company I, United States Corps of Cadets, did, at West Point, New York, on or about December 28, 1940, wrongfully, deceitfully, and in disregard of his honor, cause Cadet Alden McLellan, Jr., Second Class, Company I, United States Corps of Cadets, to fail to correct a false official report of a reveille formation of said Company I rendered by the said Cadet McLellan on or about December 28, 1940, in that he, the said Cadet Reed, did, after the said report had been rendered, wrongfully and deceitfully instruct said Cadet McLellan, in substance, as follows:

Q. (Cadet McLellan): Do I have to report you absent?

A. (Cadet Reed): No, that is just a check formation; if I'm in barracks you don't have to report me.

Q. (Cadet McLellan): Are you sure I don't have to report you as absent?

A. (Cadet Reed): No, reveille is just a check formation.

Q. (Cadet McLellan): You're sure that I don't have to report you?

A. (Cadet Reed): No, you don't have to report me.

which instructions were known by the said Cadet Reed to be wrongful and were given for the deceitful purpose of concealing his, the said Cadet Reed's, absence from said reveille formation.

He pleaded guilty to Charge I and its Specifications, not guilty to Charge II and its Specifications, and not guilty to the Additional Charge and Specification thereunder. He was found guilty of all Charges and Specifications and sentenced to be dismissed the service. No evidence of previous convictions was introduced. The reviewing

authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. No evidence was submitted bearing on the charge to which the accused pleaded guilty.

4. The evidence for the prosecution is substantially as follows:

a. The record shows with respect to the Specification Additional Charge, that the accused, while acting company commander of I Company during the Christmas holidays, detailed Cadet Alden McLellan, Second Class, to act in his place and take the reveille formation on December 28, 1940. One of the duties of the company commander was to report any unauthorized absence of the company officers. On the morning of the 28th, the first sergeant of Company I reported "all present", and McLellan later gave this report to the guard. He had noticed that the accused was not present at the reveille formation and after making his report went to Reed's room to find out if his absence was authorized. It was his intention, if the accused's absence was unauthorized, to change the report that he had made to the guard. He found accused sleeping, awakened him, and asked, "Do I have to report you absent?" Accused replied, in effect, that reveille was just a check formation and that his absence was not required to be reported since he was in barracks (R. 10-12). McLellan remained in the room about four minutes and during that time twice repeated the question. The accused on each occasion stated that his absence did not have to be reported (R. 12).

b. As to Specification 1, Charge II,the evidence shows that the accused, while acting company commander of I Company, detailed Cadet T. H. Brown, Third Class, to act in his place at chapel forma- on December 29, 1940. Brown started to question him about the matter of reports when the accused interrupted and told him to take the report from the first sergeant, (R. 20), that he (Reed) was not to be reported absent (R. 21). Accused was not present at the formation; the first sergeant reported "all present or accounted for" and this report was passed on to the guard by Brown. The defense brought out the fact that accused's comments and instructions had given Brown the impression that the accused was authorized to be absent and, therefore, would not be reported and that if the first sergeant had reported accused as absent, this report would have been passed on to the guard (R. 19-22).

c. With respect to Specification 2, Charge II, the evidence shows that on January 8, 1941, Captain Ernest F. Easterbrook, Tactical Officer, Company I, United States Corps of Cadets, in the course of an official investigation, questioned accused, acting company commander of the company during the Christmas holidays, concerning the absence of certain other cadets from the reveille formation of December 30, 1940. Accused's conduct was not the subject of the investigation. Asked if he took the reveille formation on that date, he said, "Sir, I am not sure. I just don't remember" (R. 28, 29). After calling his attention to a calendar with a view to refreshing his memory, Captain Easterbrook put the following question, "As Acting Company Commander, did you take reveille on December 30, 1940?" Reed replied, "Sir, I do not remember. I do not recall. I was on guard sometime during the Christmas holidays, but I do not remember just when that was. * * * if, I can talk with Cadet Tuttle the two of us can together determine who took reveille on December 30." (R. 30)

On January 15, 1941, Captain Easterbrook again questioned the accused relative to the reveille formation on December 30, 1940, warning him that his conduct was the subject of the investigation. The conversation of January 8, 1941, was called to the attention of the accused and he was then asked, "Did you as acting company commander, take reveille on December 30, 1940?" He replied, "Yes, sir." A little later Reed was asked where he was at reveille on December 30, 1940, and answered, "I was in New York City" (R. 31). Accused then went on to state that he realized that his unauthorized absence might cause Cadet Tuttle to make a false official statement and that he was aware that the reports as given on December 30, 1940, constituted false official statements but that he had made no effort to correct them. Asked, "Why not", he answered: "I was absent at the time and I do not believe that I should be concerned with what goes on when I am absent." (R. 32)

In a statement made to Major Charles E. Cheever, January 21, 1941, which was taken down by him, signed and sworn to by the accused, he admitted his absence from the chapel formation on December 29, 1940, and from reveille on December 30th and several other days during the Christmas holiday season but denied that he had intentionally lied to or deceived the officers who had questioned him about his absences (R. 37-39; Ex. A).

d. The evidence relating to Specification 3, Charge II, shows that on January 14, 1941, Captain Normando A. Costello, then Acting Tactical Officer of Company I, interviewed Reed relative to his

presence at certain formations on December 26, 29 and 30, 1940. The accused was asked if he was absent from reveille on those dates to which he replied, in effect, that he did not know or that he did not remember (R. 41). Further questioned on this point, he said that he was not sure. Captain Costello then took up a report made by Cadet Tuttle and said: "Mr. Reed, Mr. Tuttle has reported himself for failing to report you absent and he states he was prevailed upon by you to take the reports at reveille and to report you present or accounted for" (R. 42). Accused then stated that he had been absent on the dates mentioned. The accused at no time stated to Captain Costello that he was present on any of the days when he was reported absent, but did say that he did not remember whether he was present or absent on those dates. It was not until he knew that Captain Costello had Tuttle's report that he had "come clean" and acknowledged the absences (R. 45-47). Many answers based purely on opinions and conclusions were received and the trial judge advocate finally called this to the attention of the defense counsel who interposed no objection, merely stating, "The court can take it for what it is worth" (R.45-47).

5. Defense:

a. Three cadets, First Class, testified for the defense with respect to the intent of the accused bearing upon Charge II and upon the Additional Charge. One testified that he had seen reports of "present or accounted for" at reveille when the men were not present in formation, when an upper classman who had not been able to get out would walk to a window and say that he was coming, the formation would be dismissed, and they would not be reported (R. 55-62). The second, a Cadet Captain, testified that as Acting Battalion Commander on the week end of Labor Day, September 1940, when accused was a member of his staff, the Battalion Staff did not form as a whole but that one man would stand on the stoop of barracks and give the report, that it was understood that the report should be "present or accounted for" at reveille for any man on the staff if he was present in barracks, and if a man was not present in barracks he was on his own honor to report to that effect, but that there was no authority from the Tactical Officer to make those arrangements (R. 62-65). The third, a Cadet Lieutenant, testified that during his third class year it was an extensive practice whereby Battalion Staffs formed with one man on the stoop and other members, not in the prescribed uniforms, calling out from their windows, but that in the current year Staffs had always formed in the proper place and in the proper prescribed manner; that he had no knowledge of a Battalion

Commander being reported for false official reports for one or more non-regular formations; and that he had never observed at the Academy any member of any company reporting from a window and having his presence accounted for in rank, nor heard of any particular cadet, whether in a company or otherwise, being reported as present when in fact he was asleep in bed at reveille (R. 65-68).

b. The accused testified relative to the Specifications under Charge II and the Specification under the Additional Charge (R. 69). He admitted that the testimony brought out by the prosecution about the chapel formation on December 29, 1940 (Spec. 1, Chg. II), was "fairly close to the facts." Accused had told Cadet Brown that Brown would probably be the highest ranking cadet at the formation, loaned Brown his saber and waist belt, explained that it was his (Brown's) duty to take the report from the first sergeant, and also stated that he did not think that he (Reed) would be reported absent by the first sergeant, intimating tnat he would be absent with authority. It was his as well as Brown's opinion that the report of the first sergeant included all the men in the company and that it was the first sergeant's duty to check the entire company and to report as absent any officer not present. He had no intention of deceiving Brown, was just taking a chance that he would not be missed by the first sergeant (R. 69-70).

Relative to the allegations set out in Specification 2, Charge II, accused said that Captain Easterbrook questioned him on January 8, 1941, concerning the absence from reveille on December 30, 1940, of Cadet Mateer, and during the course of the conversation inquired whether he (Reed) had taken reveille on that date. He replied that he did not remember, that he had been absent from several reveille formations during the holidays, did not know about this particular occasion but could determine by talking with Cadet Tuttle who had been present at some of the reveille formations or by referring to his diary (R. 70). When Captain Easterbrook excused him he sought out Tuttle, told him to report to Captain Easterbrook and then went to barracks and referred to his diary. From the entries therein he decided that on December 30, 1940, he had been in New York City. This information had not been conveyed to Captain Easterbrook because he believed Tuttle had done so when he reported to him (R. 71-72).

On January 14, 1941, (Spec. 2, Chg. II) he reported to Captain Costello and this officer asked him if he was at reveille on the mornings of December 26, 29, and 30, 1940. He replied that he could not say offhand. The officer next asked, "You were absent were you

not?" and he replied, "Yes, sir. I was probably absent from some or all of the reveille formations but it would be impossible to say off-hand and without checking up on it." Captain Costello appeared quite agitated and his manner put accused in a defensive attitude and he did not feel inclined to give any information not asked for. Before being questioned he had observed Cadet Tuttle's report on Captain Costello's desk, knew that it contained among other things, the fact that Tuttle had failed to report him absent from various formations at Christmas leave. In view of this he knew that there could be no point in trying to deceive Captain Costello had he desired to do so. (R. 72-73)

With respect to the Additional Charge, accused stated that he agreed, in substance, with the testimony given by Cadet McLellan, supra. In explanation of his reason in telling McLellan that he believed it would be all right to give the report "all present or accounted for", he said that he never had been told the exact meaning of this phrase and based his interpretation of it solely on his own observations. At various times he had noted that such reports had been given when some of the cadets were not in formation but were present in camps or barracks. These observations led him to believe that such a report could be given to cover a cadet who was in his room so long as the cadet making the report knew him to be in barracks. He realized that such an act was a breach of regulations but did not believe it constituted a breach of honor (R. 72-75).

The cross-examination brought out no new matter (R. 75-109).

6. The accused pleaded guilty to Charge I in violation of Article of War 61, and to the three Specifications thereunder, alleging absence without leave for two days, and failing to repair at place of assembly for reveille on each of those days.

As to the remaining Charges and Specifications:

There is no substantial dispute in this case as to the physical acts of the accused upon which are based the inferences that his conduct was deceitful and in disregard of his honor.

The evidence clearly establishes that:

a. Cadet McLellan was acting company commander and reported the company "all present" at the reveille formation of I Company on December 28, 1940; that accused was not present at the formation; that McLellan investigated his absence and was told by the accused that he did not have to be reported since he was present in barracks; that as a result of this statement McLellan did not change the re-

port he had made to the guard. (Additional Charge)

b. On December 29, 1940, the accused detailed Cadet T. H. Brown to act as company commander of I Company for the chapel formation on that date; that Brown reported the company as "all present and accounted for" although the accused was absent; that the accused had led him to believe that his absence from the formation was authorized (Spec. 1, Chg. II).

c. On January 8, 1940, Captain Easterbrook during the course of an investigation questioned the accused relative to his presence at the reveille formation on December 30, 1940. The accused replied in substance that he did not know whether or not he was present. A week later he was again questioned on the subject and at first replied that he was present at the formation and then changed his story stating that he was in New York City on December 30, 1940. Accused also admitted that he knew that his absence might cause Cadet Tuttle to make a false official report but that he had done nothing about it (Spec. 2, Chg. II).

d. On January 14, 1941, Captain Costello, officially questioned the accused about his absence from formations on December 26, 29, and 30, 1940. Accused said that he could not remember whether or not he was present at the formations but when told that Cadet Tuttle had reported him as absent on these dates, he admitted that such was the case. (Spec. 3 Chg. II)

These facts have not been rebutted by cross examination, by defense withesses, nor by the accused in his own testimony.

7. The accused aserts his innocence of any intention of deceiving, or of lying to the officers who questioned him and insists that he does not consider any statement made to them to be in violation of the 95th Article of War. He also maintains that he did not intend to misinform or mislead, as to his status, the cadets who acted in his place at the formations from which he was absent.

Despite these denials of any deliberate intent to deceive the officers questioning him or to mislead the cadets whom he detailed to take certain formations, the evidence of his evasive replies, conflicting statements and lack of knowledge of his absence from formations, although he had been in New York City on December 29, and 30, is so persuasive as to leave no doubt of guilty intent,

as found by the court. It would be taxing the credulity of reasonable men to conclude that these acts were, in view of all the circumstances, merely the result of confusion and misunderstanding.

8. The Board of Review is of the opinion that evidence established beyond reasonable doubt the guilt of the accused as found, and warrants confirmation of the findings of guilty and the sentence. The offenses charged and approved are violative of the 61st and 95th Articles of War as charged and found.

9. The Cadet Register for the year ending June 30, 1940, shows that the accused was admitted to the Military Academy from Texas, on July 1, 1937, that he was 23 years old on October 31, 1940, and that his class standing for the academic year ending June 30, 1940, was 199 in a class of 429 members.

10. The Court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

In the opinion of the Board of Review the record of the trial is legally sufficient to support the findings of guilty and the sentence, and warrants confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of 95th Article of War.

Arthur S. Hyde, Judge Advocate

John H. Carriden, Judge Advocate

Thomas H. Tappy, Judge Advocate

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

Board of Review
CM 215788

MAR 9 1941

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Fort Riley, Kansas, January 30 and February 7, 1941. Dishonorable discharge and confinement for ten (10) years. Penitentiary.
Corporal FRED R. WHITE (6861294), 24th Ordnance Company (MM).	)	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and WALSH, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Corporal FRED R. WHITE, 24th Ordnance Company, did, at Manhattan, Kansas, on or about November 21, 1940, with intent to commit a felony, viz., rape, commit an assault upon Jewel Ling, a female, mentally incapable of giving consent to sexual intercourse, which mental condition was well known to the said Corporal White, by willfully and feloniously lying on the body of her, the said Jewel Ling, on a bed and by laying hands on her person and clothing, with the purpose of then and there having sexual intercourse with her, the said Jewel Ling.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. The record shows by the unsworn statement of the accused, that he, together with Sergeant Harrison, called at the home of Jewel Ling, on the afternoon of the day in question, to get his girl friend, Mabel O'Brien, who occupied a room upstairs in that house. Sergeant Harrison waited in the car and accused rang the bell. Receiving no response he looked through the window in the door and saw Jewel Ling, whereupon he opened the door and stepped inside. Accused knew that Jewel Ling was a deaf-mute and seeing that she noted his presence he pointed upstairs and "She shook her head, yes". Accused then called to Sergeant Harrison to come in the house as he thought it "may be sometime before the girls came down". Jewel Ling then preceded accused up the stairway and motioned him to follow. She entered several rooms on the upper floor, including Mabel O'Brien's room, and motioned, in each instance, for accused to follow her. Accused at this time had not yet reached the top of the stairway. Jewel Ling then entered another bedroom and likewise motioned accused to follow, which he did, and she thereupon closed the door. Accused stood by the door and the girl then took off her skirt and "laid down upon the bed and pulled her underskirt up". Her position on the bed was such "that throwed her legs apart". Accused then took off his coat and motioned her to take her pants off and "she did so by dropping them over her right leg, and she laid back down upon the bed". Accused then had sexual intercourse with her (R. 57-59).

In reference to the above happenings, as related by accused, there is no other proof in the record, except that in discussing this occurrence with Miss O'Brien about 5:40 p.m., that same evening, accused, in response to her question, what had happened at Lings house, stated "that he had never touched the girl" (R. 12). However, at some time later, the date not given, he wrote her a letter in which he said, "I suppose you know now that I didn't tell you the whole truth that night, and I can assure you that there was no force used on the girl" (R. 13). Proceeding from this point, accused stated that he had just completed the act of intercourse and was putting on his clothes, "I just had one arm in my coat", when Mrs. Ling, the girl's mother, walked in the room and asked accused what he had done to her daughter, to which he replied "nothing madam". Mrs. Ling then ordered accused to leave the house. Jewel Ling at this time was sitting on the edge of the bed. Accused, after reaching the head of the stairs, returned to the room to recover his hat and at this time Jewel Ling was standing at the foot of the bed "putting back on her pants" (R. 59). Mrs. Ling testifies, however, (R. 34-37) that she arrived at her home at about five o'clock and recognized accused's car sitting in front of the house but thought nothing of this because she had two girls

rooming in the house and accused "dated one of them". Upon entering, Mrs. Ling was attracted by "a man clearing his throat upstairs" and as she started up the stairs she saw a man, whom she did not know, apparently step out of the bathroom. She asked who he was and he stated "he was with Bob", that he was "invited by Mr. White". Mrs. Ling then asked where White was and he pointed to the closed door of Jewel Ling's room. When Mrs. Ling entered the room of her daughter she was lying on the bed and accused was "on top of her". He was apparently under the influence of liquor or "acted that way". Jewel Ling was "entirely undressed, all but her panties, and her skirt was up over her head. Just a part of her face showed". Accused was attempting to get up and "had managed to clothe himself". Mrs. Ling ordered accused to leave the house and noted that the condition of her daughter "was practically helpless. She was weak and just rolled her eyes. I think she was only half conscious". She described her daughter's face as "red" and her hair as "disheveled". Mrs. Ling, after accused had left, asked her daughter what he had done to her and "she would just shake her head. That is all she would say". Mrs. Ling asked her daughter whether she had been hurt "and she said yes. She rolled her head" (R. 37). Jewel Ling was sworn as a witness (R 50) and testified in pertinent part as follows:

"EXAMINATION BY THE COURT

"Questions by Lt Col Haydon:

"Q. Did you ask Corporal White to come into your room?

"A. Yes.

"'She made the sign for invite'. (Interperter)

"PROSECUTION:

"Q. Did Corporal White ask you to come to your room?

"A. Yes.

"Q. He asked you if it was all right?

"A. Yes."

4. The above account, as appearing in the record of trial, of the facts and circumstances immediately surrounding the act of intercourse supports, in the opinion of the Board of Review, the conclusion that accused used no force either before, or during, the act and was invited by the girl to have the intercourse with her. In view of this conclusion the board will next proceed to review the evidence in connection with the mental capacity of Jewel Ling and whether accused had, or should have had, knowledge of her mental condition at the time in question.

5. It is shown by the evidence that Jewel Ling was twenty-one years of age in July 1940, and had been a deaf-mute since about the

age of fifteen months. She entered a school for deaf-mutes in Kansas at the age of seven years, remained one year and then went "to Colorado School" for six years. She again entered the Kansas School in 1933 and was discharged in 1940. She was rated by the Kansas School authorities, as a result of achievement tests conducted in 1940 and others given since the date of the offense (Ex. 6,7,8), as being of a mental age of between eight and nine years. No complaints had been received by this school in reference to her morals. She was believed by a counselor of the school to be "the same as a six year old child", with reference to morals (R. 45-49). Testimony of a physician (Exhibit 5) who examined Jewel Ling immediately following the act of intercourse shows that this witness has been the Ling family physician for the past three or four years and that during his twenty-eight years of general practice he had observed and treated persons suffering with varying degrees of mental deficiency and derangement. The witness stated that, in his opinion Jewel Ling's mental age "is that of a child not to exceed seven or eight years" and while she is normal physically as to sexual organs and is apparently normal morally "she presents the mind of a mere child". Mrs. Ling testified that her daughter can read "simple things" and can write "some". She places Jewel's mental age "approximately from six to eight, somewhere along there". She stated that "you have to watch her as you would a small child". Although she did permit her to attend nearby moving picture plays alone, "she likes one where the children play more". Mrs. Ling testified further that her daughter could "not exactly" read and understand a newspaper, that "she looks at the moving picture adds, if Mickie Rooney, or Shirley Temple's picture is there, she wants to go". She stated that Jewel Ling "is totally deaf, her throat is partially paralyzed, she sort of drags one foot, a little" (R. 37-39). In considering the testimony of Jewel Ling as a witness before the court, and without regard to the question of her competency, the board will here remark upon her testimony, for the purpose only of determining her mental capacity, to the effect that her replies to obviously simple questions were in several, but not all, instances either entirely meaningless, unresponsive or incoherent (R. 51-53). Upon consideration of all of the evidence of record touching upon the mental capacity of Jewel Ling, the board concludes that this girl, at the time in question, was mentally incapable of giving consent to the acts alleged.

6. The board will therefore next consider the proof in connection with the knowledge accused had, or should have had, of Jewel Ling's mental incapacity. Mabel O'Brien testified that she had

resided at the Ling home for just about fifteen days before the incident in question and that during this period accused had visited the house to see her about "two or three times a week". She testified further that accused had not been told in her presence of Jewel Ling's mental incapacity and that "to my knowledge he didn't have any reason to believe it" (R. 30-31). Mrs. Ling testified that accused "came to the house at least three or four times a week and the girls were at my house 13 days", and that Jewel Ling was around "usually, about every time". While accused was present with others at the Ling home on one occasion and commented upon Jewel's embroidery, Mrs. Ling replied "it was so nice to think she could do things like that; that there were so many things she wasn't capable of doing". Mrs. Ling testified further that "outside of that I don't remember saying anything" to Corporal White about the condition of her daughter (R. 38). Upon cross-examination Mrs. Ling stated, with reference to accused's knowledge of Jewel's mental age that she had never told him anything, "I never did have occasion to. We didn't discuss her at all". She further testified that in her presence accused had never tried to carry on a conversation with Jewel and to her knowledge had never seen her daughter write (R. 38-42). Accused, in his unsworn statements, replied to questions by counsel that he had never been told anything about Jewel Ling's mental capacity and had never seen her write and further that he thought she was normal except for the fact that she was deaf and dumb (R. 59). Upon the question of accused's knowledge of Jewel Ling's mental incapacity the board finds no evidence in the record sufficient to warrant the conclusion that accused knew or should have known that this girl was mentally incapable of giving consent to the act of sexual intercourse. The proof, we believe, goes no further than to establish that accused had knowledge that Jewel Ling was a deaf-mute and was, as a result thereof, restricted only in her ability to hear and speak.

7. Upon the entire record of trial the board has concluded that accused committed the act of intercourse in question with the consent of Jewel Ling, that she was mentally incapable of giving such consent, but that accused did not know, or have any reason to believe that she was so mentally incapable as to be unable to legally give consent. There is no competent evidence in the entire record showing that this unfortunate young woman gave any outward evidence to the accused that she was of less than normal mentality, but there are affirmative statements in the record to the effect that neither her mother nor Miss O'Brien, who lived in the house with her, ever informed accused that Jewel Ling suffered any mental incapacity. Mental incapacity is an exceptional and abnormal condition and cannot be presumed. The law

presumes a person to be sane until the contrary is proven. So, the individual must presume all others with whom he comes in contact to be mentally normal until he has reliable information or knowledge to the contrary.

The offense here charged is assault with intent to commit rape and not statutory rape. The accused admits a consummated act of sexual intercourse with Jewel Ling which act obviously includes the lying on her body and the placing of his hands upon her person and clothing. The proof also shows that this act of intercourse was with the consent of the person named and it follows accordingly that the acts specified as the actual assault were likewise included in such consent. The specification alleges, among other things, that Jewel Ling was mentally incapable of giving consent to sexual intercourse, and that this mental condition was well known to accused. Having charged that accused well knew that the girl was mentally incapable of giving consent to sexual intercourse, it was incumbent upon the prosecution to present evidence in support thereof. Knowledge by accused of Jewel Ling's mental incapacity is an element of the offense charged and must be proven beyond a reasonable doubt.

8. The General Statutes of Kansas (annotated) 1935, at sections 21-424; 21-425, denounce rape as:

> "Rape; penalties. Every person who shall be convicted of rape by carnally and unlawfully knowing any female person under the age of eighteen years shall be punished by confinement and hard labor not less than one nor more than twenty-one years, and every person who shall be convicted of forcibly ravishing any female person shall be punished by confinement and hard labor not less than five years nor more than twenty-one years.
>
> "Rape by administering substance, liquid or drug. Every person who shall have carnal knowledge of any woman of eighteen years or upwards, without her consent, by administering to her any substance, liquid, or any potion, by inhalation or otherwise, which shall produce such stupor or imbecility of mind or weakness of body as to prevent effectual resistence, shall upon conviction be adjudged guilty of rape, and be punished as in the last section provided."

and assault with intent to commit rape at section 21-434, as:

"Assault with intent to commit felony; penalty. Every person who shall be convicted of an assault with an intent to commit any robbery, rape, burglary, manslaughter, or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by confinement and hard labor not exceeding five years, or by imprisonment in the county jail not less than six months."

It is obvious from the above that the specification in the instant case was not intended to be a restatement of the Kansas Statute, the state in which the offense here alleged was committed, and, even should the contrary be accepted, it is equally obvious that these statutes do not incorporate mental incapacity of the victim as a statutory provision.

The rule to be followed here appears to be that announced in State v. Helderle (186 S.W., 696 (1916)). There the court, in reference to the rule of presumption of sanity, said:

"* * * This distinction is that, since all persons are presumed to be of sound mind, this presumption attends every woman who is over the age of consent. No such presumption exists as to age. All females are, we know, at one time or another, below the age of consent, so that there can be no presumption as to the age of any individual. * * * But all women are not insane; per contra, all women are presumed to be sane. Since, then, such a presumption of sanity exists, even one charged with rape is entitled to be protected by it till proof comes in to dislodge it.

"* * * We know that there are individuals so palpably suffering from idiocy and insanity as that upon mere sight of them knowledge could and ought to be inferred as a circumstance not requiring direct proof. * * * But there is not in this case any substantial evidence of such facts and circumstances as would warrant the jury in inferring that defendant had or ought to have had knowledge of prosecutrix's condition of mind. * * *."

The board finds no reports in point under the Kansas Statutes and examination of other jurisdictions indicates that except in California, where insanity of the female is a provision of the statute, the rule announced in the Helderle case appears to be followed elsewhere.

9. It is therefore the opinion of the board that knowledge of the mental incapacity of Jewel Ling, at the time of the act in question, cannot be imputed to accused and that the record of trial offers no proof warranting the conclusion that accused otherwise was informed of her mental incapacity. Consequently, the failure to prove this element of the offense constitutes error fatal to the conviction.

10. For the reasons above indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

L. M. Smith, Judge Advocate.

William H. Rounds, Judge Advocate.

E. J. Walsh, Judge Advocate.

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

Board of Review
CM 215861

APR 16 1941

UNITED STATES	SECOND CORPS AREA
v.	Trial by G.C.M., convened at Fort Totten, New York, February 8, 1941.
Private First Class BERNARD A. TOMALENAS, (6979317), Battery F, 62d Coast Artillary (AA).	Reduction to grade private, confinement for six (6) months and forfeiture thirteen dollars ($13) per month for like period. Fort Totten, N. Y.

OPINION of the BOARD OF REVIEW
HILL, CORRIDON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private, First Class, Bernard A. Tomalenas, Battery F, 62d CA did, at Fort Totten, New York, on or about January 14, 1941, feloniously take, steal and carry away one Post Exchange Coupon Book, value about two dollars and fifty cents, ($2.50), the property of Private First Class, Donald H. Springer, Battery F, 62d CA (AA).

He pleaded not guilty to the Charge and Specification. He was found of the Specification of the Charge: "Guilty, except the words 'feloniously take, steal, and carry away' substituting therefor, the words 'fraudulently convert to his own use'; of the excepted words, not guilty; of the substituted words, guilty; and of the Charge: "Not guilty, but guilty of violation of the 96th Article of War."

No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of private, to be confined at hard labor for six months, and to forfeit $13 per month for a like period. The reviewing authority approved and directed the execution of the sentence, and designated Fort Totten, New York, as the place of confinement. The sentence was published in General Court Martial Order No. 40, Headquarters, Second Corps Area, March 8, 1941.

3. The evidence shows that Private Springer on January 14, 1941, left his overcoat, containing in a pocket, Post Exchange Coupon Book No. 4375H with coupons worth approximately $2.50, in the latrine for about fifteen minutes. When he returned the overcoat had been removed to another hook but the coupon book was missing from the pocket. The accused was one of three soldiers in the latrine when Private Springer left the latrine but no one was there when he returned (R. 14-18). On January 18, 1941,the accused presented coupon book No. 4375H at the Post Exchange in payment of his purchase (R. 27). The coupon book looked soiled as though it had been in water (R. 30). Upon being questioned by his Battery Commander, after a warning that anything he said might be used against him, accused stated that he found the coupons in front of the Post Theater, that he did not report his find because he "thought it did not matter" and that "I thought I could get away with it." (R. 24-25)

The accused testified that he went to the theater on January 16, 1941,to buy a book of tickets; upon being refused permission to draw them, he left and "at the bottom of the stairs on the outside all wet" found "a book of coupon checks"; after waiting a day and finding no loss was reported on the bulletin board, he went ahead on the advice of another private to whom he had stated his find, and used them; upon being questioned successively by the bar steward and the Post Exchange Steward, he stated that he found the book; he denied that he stole or took away the coupons from anybody's pocket (R. 37-38).

4. Fraudulent conversion is a lesser offense and included in that of embezzlement. (CM145164, Hunter et al; CM 145710, Schwarz.)

5. In CM 182393, Braunstein, in which the accused was charged with larceny of money, but by exceptions and substitutions was found guilty of fraudulently converting it to his own use and benefit, the

Board of Review (1928) held that the finding was illegal. The board said in part:

"In Specification 2, Charge I, accused is charged with theft of $140.00, property of Private Barker. The court found him of this specification guilty excepting the words, 'feloniously take, steal and carry away,' substituting therefor the words, 'fraudulently convert to his own use and benefit,' of the excepted words, not guilty, of the substituted words, guilty. By this action the court acquitted the accused of the larceny charge and attempted to create and convict him of a specification charging fraudulent conversion.

"The court erred in attempting to carve out of a specification charging larceny a lesser included offense of fraudulent conversion. It is an elementary principle of law that larceny, and embezzlement, including fraudulent conversion, are separate and distinct offenses. Courts and text writers are a unit in recognizing and upholding this distinction. Paragraph 299, MCM., 1921.(par. 78C, M.C.M., 1928), specifically prohibits a finding of guilty of a lesser included offense which is entirely separate and distinct in its nature from that charged. Not all of the elements of the offense of fraudulent conversion are included within the offense of larceny and this is declared to be the true test of the doctrine of lesser included offenses. C. M. 144811, Davis, 1921. That vital element of conversion, that the original acquisition was lawful, is wholly lacking in offense of larceny and thus the inquiry at hand fails totally to meet the prescribed test.

"The Judge Advocate General, in a response to an inquiry from a Corps Area judge advocate as to the legality of a conviction by exception and substitution of larceny when embezzlement was charged, replied: ' In the administration of military justice the offenses of embezzlement and larceny have always been considered so distinct and separate that upon a trial

for alleged commission of one an accused cannot be properly convicted of the other by way of exception and substitution of terms in the charges. In the opinion of this office the action of the court in finding as it did was not authorized by established precedent and was contrary to the rules of pleading and practice to the effect that an accused cannot be properly convicted of an offense which is not set out or included in the charges upon which he is tried. ' C. M. 170613, Williams, 1925. This well established rule was recognized and adhered to in the following cases: C. M. 144811, Davis; C. M. 138865, Wolfson (officer); C. M. 127673, Gainer; C. M. 120948, Garcia; C. M. 106837, Dillon; C. M. 123417, Beer."

6. The Board of Review is accordingly of the opinion that the offense, fraudulent conversion to his own use in violation of Article of War 96, of which the accused by exception and substitution was found guilty, is not an offense lesser than and included in the specification alleging larceny, but an entirely different offense.

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

Arthur F. Huff Jr., Judge Advocate.

John H. Gordon, Judge Advocate.

Thomas N. Jaffey, Judge Advocate.

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

Board of Review
CM 215881

APR 5 1941

UNITED STATES	)	FIRST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened
	)	at Fort Bliss, Texas,
Private ALBERT J. MADRID, JR.	)	February 18, 1941.
(6953902), Troop C, 12th	)	Dishonorable discharge
Cavalry	)	and confinement for three
	)	months. Fort Bliss, Texas.

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification : In that Private Albert J. Madrid, Jr., Troop C, 12th Cavalry, did at Fort Brown, Texas, on or about Friday, January 15th, 1941, feloniously take, steal, and carry away, one woolen O.D. shirt, valued at or about three dollars and eighty-one cents ($3.81) the property of the United States Government duly issued to Corporal Edward Bowen, Troop C, 12th Cavalry for use in the Military Service.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three months. The reviewing authority approved the sentence, designated Fort Bliss, Texas, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. The evidence sufficiently shows that about the date alleged

accused stole from Corporal Edward Bowen, a member of accused's troop, a shirt which Corporal Bowan testified he had had for about three years. The shirt was introduced in evidence. It was marked 2-8-1-3, the last four figures of Corporal Bowen's serial number (R. 7-8).

There is no evidence in the record that the shirt was the property of the United States, or had been issued for use in the military service, as charged. The fact that the shirt was the type used in the military service does not justify an inference that it was government property, for it is a matter of common knowledge that uniform articles of this kind may be privately purchased and personally owned by soldiers. The failure to prove the ownership of the shirt, as charged, was fatal to the conviction (C.M. 192952, Scoles).

4. For the reasons above indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

F. M. Smith, Judge Advocate.

William A. Rounds, Judge Advocate.

H. H. Kelley, Judge Advocate.

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

Board of Review
CM 215996

UNITED STATES	APR 8 1941 THIRD DIVISION
v.	Trial by G.C.M., convened at Fort Lewis, Washington, March 17, 1941. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private JOSEPH O. BURTON (6576585), Company F, 15th Infantry.	

HOLDING by the BOARD OF REVIEW
HILL, CORRIDON and TAPPY, 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 found guilty of absence without leave for seven days (Charge I) and of larceny of a Lord Elgin wrist watch, value about $55 (Charge II). With respect to the value of the watch, the evidence shows that the owner purchased it for $55 about seven months prior to the larceny, that it was pawned by the accused for $12, and that the pawnbroker recalled the transaction because "a twenty-one jewel Elgin is something outstanding". The watch was received in evidence.

3. Except as to distinctive articles of government issue or other chattels which, because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 212983, Dilsworth; CM 213765, Krueger, et al; CM 214367, Kasalajtis). The proof in this case does not establish a market value of $55 as alleged and found, but only of some value greater than $20 but less than $50.

The evidence is legally sufficient to support only so much of the finding as to value under the larceny specification as involves a finding of some value greater than $20 but less than $50. The evidence is legally sufficient to support the sentence.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding

of guilty of the Specification, Charge II, as involves a finding of guilty of larceny by the accused at the time and place and of the ownership alleged, of the watch described in the Specification, of a value greater than $20 but less than $50; and legally sufficient to support the sentence.

Walter S. Mills, Jr., Judge Advocate.

John H. Gordon, Judge Advocate.

Thomas N. Tappy, Judge Advocate.

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

Board of Review
CM 216004

MAY 29 1941
EIGHTH DIVISION

UNITED STATES v. Privates WILLIAM W. ROBERTS, Jr. (14036012); and DALE M. MILLER (14036011), both Medical Department, Station Hospital, Fort Jackson, South Carolina.	Trial by G.C.M., convened at Fort Jackson, South Carolina, March 11, 1941. As to each: Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William W. Roberts, Jr., Detachment Medical Department, Station Hospital, Fort Jackson, South Carolina, and Private Dale M. Miller, Detachment Medical Department, Station Hospital, Fort Jackson, South Carolina, acting jointly and in pursuance of a common intent, did, near Columbia, South Carolina, on or about January 3, 1941, feloniously take, steal and carry away one automobile, a Ford Tudor Sedan, value about $200.00, the property of Private First Class C. V. Ballentine, Company B, 118th Infantry, Fort Jackson, South Carolina.

They pleaded not guilty to the Charge and Specification and were found guilty of the Specification, except the words, "feloniously take, steal and carry away", substituting therefor the words, "unlawfully take and carry away without the consent of the owner", of the excepted words not guilty, of the substituted words guilty, and of the Charge, not guilty, but guilty of violation of the 96th Article of War.

No evidence of previous conviction was introduced. Each accused was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for one year. The reviewing authority approved each sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that Private Clyde V. Ballentine, Company B, 118th Infantry, 30th Division, Fort Jackson, South Carolina, parked his 1935 two-door Ford sedan at the Pie Pan Inn, Columbia, South Carolina, between 9:30 p.m., and 10 p.m., January 3, 1941, with the ignition switch locked and the keys in the glove compartment. At about 11 p.m., he discovered his car was missing and reported it to a Military Policeman who was standing nearby. Some thirty minutes or more later the car was found about four hundred yards from the Pie Pan Inn on the road leading from the Inn toward Fort Jackson, with a ten-inch hole in the windshield, and the front end damaged and covered with mud. Mr. Peacock, who lived near the scene where the wrecked car was later found, was awakened by some person using rough language in the street outside his house, which prompted him to get up and look out. While he was dressing he saw one of the accused getting into a car and later saw one of them walk down the street away from the house and the other walk up on the left side of his porch. The police were notified of the accused's presence, as was Mr. Hensley, who was living next door. The police received the call at 11:20 and arrived on the scene at 11:30. They took the two accused into custody. At the time of their arrest accused denied that they were soldiers and denied that they knew anything about the wrecked car. The driver's license of Private Ballentine was found in the wrecked car. Mr. Peacock had his car parked in front of his house when he retired, but it had been moved about seventy-five yards from where he had left it. Mr. Peacock saw the larger accused - the one who was bleeding - get into his car. Mr. Hensley's car doors were open and there was blood on the running board. There was also blood on the right-hand side of the wrecked car, over the outside with little pieces of glass in it and over the outside of the windshield. Both of the accused had been at the Inn that evening. Shortly before eleven o'clock they became engaged in a fight with several other people at which time accused Miller was struck by a bottle causing blood to flow from his head. One of the officers accompanied the accused Miller to the hospital and picked some three-ply safety glass out of Miller's hair while the nurse was dressing his head. The glass was about an inch in length, half an inch in width, and of the same type as the glass in the windshield of the wrecked Ford.

4. The defense called two witnesses who testified, in substance, that on January 3, 1941, at about 7:30 in the evening they left Fort

Jackson with both the accused in a taxicab to go to town; they stopped in Columbia and bought a pint and a half of liquor and then went on to the Pie Pan Inn; they arrived there about 8 p.m., "pretty well lit up"; that between 10:30 and 11 p.m., they saw and heard an argument in which both of the accused were involved, during which Miller was struck with a bottle causing blood to flow from his head; and that shortly thereafter, both accused ran out of the place and were not seen again that evening.

5. To establish the offense of which the accused each stand convicted it was necessary to prove by direct or circumstantial evidence the joint taking and carrying away by the accused of the automobile as alleged. It is well established that all of the elements of the offense may be proved by circumstantial evidence (16 C.J. 766; CM 207591, Nash, et al.). But it is equally well established that mere conjecture or suspicion do not warrant conviction (16 C.J. 779, and cases cited).

The only evidence tending to connect the two accused with the (a) taking of the automobile is their presence at the Pie Pan Inn between 8 and 11 p.m., on January 3, 1941, thus affording them an opportunity to take the automobile. Hence, the first essential fact - the taking - must of necessity, have been inferred by the court from the circumstantial evidence. Such evidence standing alone, is not sufficient to warrant the inference or conclusion, that it was taken by the accused.

> "Proof of mere opportunity to commit a crime is not sufficient to establish guilt." (CM 154726, Hall; CM 197408, McCrimon.)

Likewise, the record contains no evidence to establish the fact that (b) the two accused carried the automobile away from where it was last parked by Private Ballentine, except such as may be derived from the circumstances that the accused, about thirty minutes after they left the Pie Pan Inn, were found in close proximity to the place where Ballentine's car was found, and from their unusual actions from the time they were first heard in front of Mr. Peacock's house up to their arrest by the police.

The other materially essential fact - the carrying away - must also have been inferred by the court from the circumstances. As to this proposition, it is said:

> "Proof which goes no further than to show that an injury could have occurred in an alleged way, does not

> warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause." (Southern Ry. Co. v. Dickson, 100 So. Rep. 665; Georgia Power Co. v. Edmunds, 171 So. Rep. 256, 258.)

In the Tyson case (CM 195705), the Board of Review in citing the case of Buntain v. State (15 Texas App., 490), remarked that in the latter case -

> "* * * the question on appellate review was not one of weighing conflicting evidence or passing upon the credibility of witnesses or determining whether facts relied on to prove the ultimate fact in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justified the conclusion of guilt as a logical inference from such circumstantial facts. * * *."

The Board then quoted from the cited case as follows:

> "'While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions * * *. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen.'"

In the present case the evidence shows that the automobile of Private Ballentine was parked outside of the Pie Pan Inn about 9 p.m., and was found to be missing about 11 p.m., January 3, 1941. As there was a large crowd there, an opportunity was afforded persons other than the accused to take and carry the car away. For all that appears, it may have been taken and carried away from where it had last been parked by the owner prior to the time the accused were seen to leave.

"The burden of proof never shifts from the state in a criminal case. Where the evidence tending to connect the defendant with the crime is entirely circumstantial, the humane provision of law is that there should not be a conviction unless to a moral certainty it excludes every other reasonable hypothesis than that of the defendant's guilt. No matter how strong the circumstances, if they can be reconciled with the theory that some other person may have done the act, then the defendant is not shown to be guilty by that full measure of proof the law requires. * * *

"Facts and circumstances that are only suspicious of guilt will not suffice." (Sturdivant v. State, 143 So. Rep. 201, 205.)

See also a leading case, People v. Razezicz (206 N.Y. 269; 99 N.E. 557), wherein circumstantial evidence was held insufficient to support a conviction because the facts shown were not sufficiently conclusive to exclude all other inferences but that of guilt.

There is no evidence of record in this case, which in principle, differentiates it from the basis of the holding in the Tyson case, supra, where the Board of Review gave thorough consideration to the doctrine of persuasiveness of circumstantial evidence as enforced in criminal tribunals, State and Federal, in reaching its conclusion that the evidence was too slightly inculpatory even to approximate proof of the offense charged.

"As there was no direct evidence to establish the fact that the defendant made any promise or offer or gave any money or other thing of value to Blanton, but the conviction was secured solely upon circumstantial evidence, the question to be determined now is whether this evidence was of such a nature as to warrant a submission of it to the jury. Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted." (Vernon v. United States, 146 Fed. 121, 123.)

Applying the principles as laid down in the foregoing cases to the instant case, it follows that the evidence does not support an inference that accused Roberts unlawfully took the car, nor the further inference that he carried the car away, and that the humane provision of law, that there should not be a conviction unless to a moral certainty it excludes every other reasonable hypothesis than that of the defendant's guilt, no matter how strong the circumstances, if they can be reconciled with the theory that some other person may or could have committed the act, was not observed by the court. Accordingly, the Board of Review is impelled to the conclusion, that the evidence is not legally sufficient to support the findings that Roberts participated in the unlawful taking and carrying away of the automobile as alleged in the Specification, and of which he stands convicted.

The only items of evidence tending to connect the accused Miller with the offense alleged which do not similarly apply to accused Roberts, are those which show that Miller received an injury from a bottle while at the Pie Pan Inn shortly before leaving; that blood was found on the right-hand side and over the outside of the wrecked automobile, and on the running board of Mr. Hensley's automobile; that the windshield of the wrecked car was broken; that there was a hole in the windshield; and that a small piece of three-ply glass taken from Miller's hair by the police officer, while Miller was receiving medical aid at the hospital, was similar to that in the windshield of the wrecked car.

With respect to this evidence, the Board of Review is of the opinion that the taking and carrying away of an automobile, even for a short distance of some four hundred yards as was shown, requires some mechanical operation of the automobile. If the blood on the right-hand side of the wrecked car flowed from Miller's injuries, and if the piece of broken glass found in Miller's hair at the hospital came out of the broken windshield of the wrecked car, then such evidence strongly indicates that someone other than Miller himself drove and operated the automobile. Such evidence tends to negative any presumption or inference that Miller drove the car. Any conclusion or inference based upon such evidence would constitute a violation of the rule laid down by the authorities heretofore cited, viz., that where circumstantial evidence is relied upon, the proof must not only be consistent with the guilt of the accused, but that it must be inconsistent with his innocence.

6. The Board of Review is, therefore, of the opinion that the evidence in this case is not sufficient to establish the guilt of either accused, and that the findings as to each must be set aside because - adopting the language of the court in the case of People

v. Razezicz, supra (99 N.E. 566) -

> "The inferences from the facts shown are not sufficiently conclusive as we have seen to exclude all other inferences and to justify the judgment obtained against him. * * *."

7. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings and the sentence as to each accused.

_____, Judge Advocate.

_____, Judge Advocate.

Dissent _____, Judge Advocate.

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

(76)

Board of Review
CM 216004

MAY 31 1941

UNITED STATES v. Privates WILLIAM W. ROBERTS, Jr. (14036012); and DALE M. MILLER (14036011), both Medical Department, Station Hospital, Fort Jackson, South Carolina.	EIGHTH DIVISION Trial by G.C.M., convened at Fort Jackson, South Carolina, March 11, 1941. As to each: Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

DISSENTING OPINION by Van BENSCHOTEN, Judge Advocate.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William W. Roberts, Jr., Detachment Medical Department, Station Hospital, Fort Jackson, South Carolina, and Private Dale M. Miller, Detachment Medical Department, Station Hospital, Fort Jackson, South Carolina, acting jointly and in pursuance of a common intent, did, near Columbia, South Carolina, on or about January 3, 1941, feloniously take, steal and carry away one automobile, a Ford Tudor Sedan, value about $200.00, the property of Private First Class C. V. Ballentine, Company B, 118th Infantry, Fort Jackson, South Carolina.

Accused pleaded not guilty to the Charge and Specification and were found guilty of the Specification, except the words, "feloniously take, steal and carry away", substituting therefor the words, "unlawfully take and carry away without the consent of the owner", of the excepted words not guilty, of the substituted words guilty, and of the Charge,

not guilty, but guilty of violation of the 96th Article of War. No evidence of previous conviction was introduced. Each accused was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for one year. The reviewing authority approved each sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The primary question presented by the record in this case requiring consideration is whether the evidence is legally sufficient to support the findings of guilty.

4. The evidence for the prosecution shows that on January 3, 1941, between 9:30 and 10 p.m., Private Clyde V. Ballentine, Company B, 118th Infantry, 30th Division, Fort Jackson, South Carolina, parked his 1935 model Tudor Ford sedan at the Pie Pan Inn, Columbia, South Carolina, with the ignition switch locked and the keys in the glove compartment (R. 9, 10). At about 11 p.m., he discovered his car missing. He had given no one permission to move the car (R. 11), and reported it to a military policeman standing nearby (R. 16). Some thirty minutes or so later the Ford car was found about four hundred yards from the Inn with "a place about ten inches broken out of the windshield", "fresh blood inside and outside of it" (R. 33), with the front end damaged and covered with mud (R. 21). Both accused had been at the Pie Pan Inn on this evening, leaving Fort Jackson about 7:30 p.m. (R. 37), and after stopping to purchase some liquor, arrived about an hour later at the Inn "pretty well lit up" (R. 38), and there additional liquor was purchased (R. 42). About 11 p.m., accused, who were in civilian clothes, became engaged in an argument at the Inn (R. 13). Miller (one of accused) was hit with a round bottle (R. 38) "just a little bit", which bottle did not break (R. 39), and one witness saw no blood on either of accused during the fight (R. 17). (A defense witness said one of accused was hit with a bottle and cut and he saw blood on his forehead (R. 42) . Both accused were found and arrested by the police in close proximity to the wrecked car of Private Ballentine where they had been heard and observed by Mr. Peacock and Mr. Hensley for some time prior to their arrest (R. 20, 27). Mr. Peacock, who lived near where the wrecked car was found, was awakened by some person using rough language in the street outside his house which prompted him to get up and look out. While dressing, he saw one of accused getting into a car and later saw one of them walk down the street away from the house and the other accused walked up on the left side of his porch (R. 29, 30). The police were notified of accused's presence and Mr. Hensley, who lived next door, was aroused (R. 20).

The police received the call at 11:20 p.m., and arrived on the scene at 11:30 p.m., and took both accused into custody. It was then discovered that Mr. Peacock's car had been moved about seventy-five yards from where it was parked in front of his house (R. 28), and Mr. Hensley's car doors were open and had blood on the running board (R. 22). Shortly thereafter, the automobile of Private Ballentine, containing his driver's license, was found off the road in a ditch, with windshield broken, front end damaged and covered with mud; that fresh blood was also found on the inside and outside of Ballentine's car (R. 33, 35), with little pieces of glass stuck in it up and over the outside of the windshield (R. 22). At the time of their arrest, the accused denied that they were soldiers or knew anything about the wrecked car (R. 33).

One officer who accompanied the accused Miller who was cut on the hands and face (R. 23), to the hospital, picked some three-ply safety glass out of Miller's hair while the nurse was dressing his head. The glass was about an inch in length, a half inch in width and of the same type as the glass in the windshield of the wrecked Ford (R. 35).

The testimony indicates that each of accused had been drinking but knew what they were doing (R. 36).

5. The defense called two witnesses who testified, in substance, that on January 2, 1941 (R. 38, 41), at about 7:30 p.m., they left Fort Jackson with both accused in a taxicab to go downtown; that they stopped in Columbia and bought a pint and a half of liquor and then went on to the Pie Pan Inn, arriving there about 8 p.m.; that about 11 p.m., they saw and heard an argument in which both of the accused were involved during which Miller was struck with a bottle and that shortly thereafter both of accused disappeared.

6. To establish the offense of which the accused each stand convicted, it was necessary to prove by direct or circumstantial evidence (a) the taking by the accused of the automobile as alleged and (b) the carrying away by accused of such property. It is well established that all of the elements of the offense may be proved by circumstantial evidence (16 C.J. 766; CM 207591, Nash, et al.). It is equally well established that mere conjecture or suspicion do not warrant conviction (16 C.J. 779, and cases cited, as well as the following opinions heretofore quoted with approval by the Board of Review, CM 197408, McCrimon; CM 206523, Young) with respect to circumstantial proof.

There was no direct evidence to establish the fact that the accused took and carried away the automobile in question except, (1) that accused were at the Pie Pan Inn between 8 and 11 p.m., of the night the car was wrecked, thus having the opportunity to take the automobile; (2) they were found in the immediate vicinity of the wrecked car, shortly after leaving the Inn and shortly before the discovery of the wreck, crawling in and out of other parked cars at least one of which had been moved some distance; (3) blood on one of accused and in and on wreck as well as on some of the parked cars; (4) fresh injury to accused Miller of the kind and nature often occurring from sudden stopping of automobiles, throwing occupant into windshield; (5) broken glass from wrecked car in accused Miller's hair.

> "To prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture, * * *." (Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 Pac. (2nd) 314, 322.)

> "'Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.'" (Georgia Power Co. v. Edmunds, 171 So. Rep. 256, 258.)

When evidence is of sufficient probative force, a crime may be established by circumstantial evidence, provided that there is positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts (People v. Razezicz, 99 N.E. 557, 564).

The Board of Review, in CM 195705, Tyson, discussed the probative value of circumstantial evidence and found the evidence in that case insufficient. The only evidence in that case was that accused who had access to quarters which had been rifled, had gone absent without leave at approximately the time the theft was discovered. The present case, as outlined above, is materially different.

The two accused are shown to have been together till 11 p.m., and then again from at least 11:20 p.m. They left the Pie Pan Inn about 11 p.m., and the police received a complaint of their activities at 11:20 p.m., from a place a quarter of a mile away, prior to which time they were seen and heard in the street by several witnesses for an appreciable period. They were engaged in molesting other automobiles

parked on the street in the vicinity of the wrecked Ford. No presumption need be entertained as to accused Miller for the fresh blood from his injury found on and in the wrecked car as well as on at least one other car, identifies him with the wreck and together with the piece of windshield glass found in his hair is direct and compelling evidence that he was in the car at the time it was run into the ditch. The circumstances allow of no other fair and reasonable conclusion. In United States Fidelity and Guaranty Company v. Des Moines National Bank (145 Fed. 279, quoted with approval in Vernon v. United States, 146 Fed. 121), Justice Van Deventer says:

> "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature and are so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them."

Whatever may be established by direct, may be established by circumstantial evidence in criminal cases. Only few convictions could be had if direct testimony of eye-witnesses were required and the rule is one of necessity (20 American Jurisprudence 273).

The evidence, so complete and compelling in the case of accused Miller is less plain as to accused Roberts. The blood on the right-hand side of the wreck indicates Miller was the passenger. Roberts, his partner in all the night's activities, when arrested said they were trying to have a good time (R. 20-21), was the other occupant of the wrecked car. Natural presumptions are those founded on the natural, ordinary and usual course of things. A state of facts once shown to exist is presumed to continue (In re Paul, 14 Fed. (2nd) 703).

Where there is substantial evidence to establish all the elements of the offense charged, verdict for the accused cannot be directed on the theory that the evidence is insufficient to convince the jury of accused's guilt beyond a reasonable doubt (Hays v. United States, 231 Fed. 106).

> "When a series of facts, distinctly and unequivocally proved, manifestly tends to one conclusion, and another fact is proposed in contradiction to that conclusion, the mere inability to account for such opposite fact is not sufficient to destroy the inference deduced from the others,

but the positive inconsistency should be fully shown." (Burrell on Circumstantial Evidence, p. 35.)

"* * * 'a few circumstances may be consistent with several solutions, but the whole context of circumstances can consist with one hypothesis only; and the wider the range of circumstances is, the more certain will it be that the hypothesis which consists with, and reconciles them all, is the true one.' * * *." (Burrell on Circumstantial Evidence, p. 192.)

Moral certainty is a strong presumption, grounded on probable reasons, and which very seldom fails or deceives us (Burrell on Circumstantial Evidence, p. 199).

7. I, therefore, conclude that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification, and to support the sentence.

Charles McDonald Burchstead Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUL 1 1941 - To the Secretary of War.

1. The record of trial and accompanying papers in the case of Privates William W. Roberts, Jr. (14036012); and Dale M. Miller (14036011), both Medical Department, Station Hospital, Fort Jackson, South Carolina, together with the holding thereon of the Board of Review, signed by only two of the three members, the third member being unable to concur in the views expressed in the holding, are transmitted herewith pursuant to Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724), for your action.

2. The holding of the Board of Review finds that the record of trial is legally insufficient to support the findings and sentence. I do not concur in this holding, but, for reasons hereinafter set forth, am of the opinion that the record of trial is legally sufficient and that the action of the reviewing authority should be confirmed.

3. The evidence shows that on January 3, 1941, between 9:30 and 10 p.m., Private Clyde V. Ballentine, Company B, 118th Infantry, 30th Division, Fort Jackson, South Carolina, parked his 1935 model Tudor sedan at the Pie Pan Inn, Columbia, South Carolina, with ignition locked and the keys in the glove compartment. He gave no one permission to move the car, but about 11 p.m., he discovered it missing and so reported it to a military policeman nearby. Some thirty minutes later the Ford car was found about four hundred yards from the Inn with about ten inches broken out of the windshield, fresh blood inside and outside and with front end damaged and covered with mud. Both accused had been at the Pie Pan Inn on this evening, leaving Fort Jackson about 7:30 p.m., and after stopping to purchase liquor, arrived at the Inn about an hour later "pretty well lit up". About 11 p.m., accused, who were in civilian clothes, became engaged in an argument at the Inn, Miller (one of the accused) being hit "just a little bit" with a round bottle which did not break, and at about this time both accused disappeared from the Inn. (Another defense witness said one of accused was hit with a bottle and cut and he saw blood on his forehead.) Both accused were found and arrested by the police in close proximity to the wrecked car of Private Ballentine, where they had been heard and observed by Mr. Peacock and Mr. Hensley for sometime prior to their arrest. Mr. Peacock, who lived near where the wrecked car was found, was awakened by some person using rough language in the street outside his house, which prompted him to get up and look out. While dressing, he saw one of the accused getting into a car and later saw one of them walk down the street away from the house and the other accused come up on the left side of his porch. The police were notified at 11:20 p.m., of the presence of accused and took both accused into custody at 11:30

p.m. It was then discovered that Mr. Peacock's car had been moved about seventy-five yards from where it had been parked in front of his house and Mr. Hensley's car doors were open and had blood on the running board. The Ford car of Private Ballentine, containing his driver's license, was then found nearby in a ditch, with windshield broken, and with fresh blood both inside and outside, with little pieces of glass stuck in it. At the time of their arrest, accused denied they were soldiers or knew anything about the wrecked car. An officer who accompanied accused Miller, who was cut on the face and hand, to the hospital, picked some three-ply safety glass out of Miller's hair while the nurse was dressing his head. The glass was about an inch in length, a half inch in width, and of the same type as the glass in the windshield of the wrecked Ford. Both of accused had been drinking but knew what they were doing.

4. To establish the offense of which the accused stand convicted, it was necessary to prove by direct or circumstantial evidence the taking by the accused of the automobile, as alleged, as well as their carrying away of such property. It is well established that all of the elements of the offense may be proved by circumstantial evidence.

There was no direct evidence to establish the fact that the accused took and carried away the automobile in question except (a) that the accused were at the Pie Pan Inn between 8 and 11 p.m., of the night the car was wrecked, thus having the opportunity to take the automobile; (b) they were found in the immediate vicinity of the wrecked car shortly after leaving the Inn and shortly before the discovery of the wreck, crawling in and out of other parked cars, at least one of which had been moved some distance; (c) blood on one of accused and in and on the wrecked car as well as on some of the parked cars; (d) fresh injury to accused Miller of the kind and nature often occurring from sudden stopping of automobiles, throwing the occupant into the windshield; (e) the broken glass in accused Miller's hair similar to broken glass from the wrecked car.

When evidence is of sufficient probative force, a crime may be established by circumstantial evidence, provided that there is positive proof of the facts from which the inference of guilt is to be drawn and that that inference is the only one which can reasonably be drawn from those facts (People v. Razezicz, 99 N.E. 557, 564).

The accused are shown to have been together until 11 p.m., and then again from at least 11:20 p.m. They left the Pie Pan Inn about

11 p.m., and the police received a complaint of their activities at 11:20 p.m., from a place a quarter of a mile away, prior to which time they were seen and heard in the street by several witnesses for an appreciable period. They were engaged in molesting other automobiles parked on the street in the vicinity of the wrecked Ford. No presumption need be entertained as to accused Miller for the fresh blood from his injury found on and in the wrecked car, as well as on at least one other car, identifies him with the wreck and together with the piece of windshield glass found in his hair is direct and compelling evidence that he was in the car at the time it was run into the ditch. The circumstances allow of no other fair and reasonable conclusion.

Whatever may be established by direct, may be established by circumstantial evidence in criminal cases. Only few convictions could be had if direct testimony of eye-witnesses were required and the rule is one of necessity (20 American Jurisprudence 273).

The evidence, so complete and compelling in the case of accused Miller is less plain as to accused Roberts. The blood on the right-hand side of the wrecked car indicates Miller was the passenger. Roberts, his partner in all the night's activities, who when arrested, said they were trying to have a good time, was the other occupant of the wrecked car. Natural presumptions are those founded on the natural, ordinary, and usual course of things and a state of facts once shown to exist is presumed to continue.

5. Under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724), you have authority to confirm the action of the reviewing authority, in approving the sentence, or to disapprove the sentence.

6. I recommend that the action of the reviewing authority approving the sentence be confirmed. A form of action to accomplish such confirmation is included herewith, marked "A". A form of action to disapprove the sentence in accord with the holding of two members of the Board of Review, marked "B", is also inclosed for your use, should you deem such action appropriate.

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

4 Incls -
Incl 1 - Record of trial.
Incl 2 - Holding of Bd. of Rev. with dissenting opinion.
Incl 3 - Action marked "A".
Incl 4 - Action marked "B".

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

JUL 8 1941

SUBJECT: Record of trial by general court-martial in the case of Privates William W. Roberts, Jr. (14036012); and Dale M. Miller (14036011), both Medical Department, Station Hospital, Fort Jackson, South Carolina.

TO: The Commanding General, Eighth Division, Fort Jackson, South Carolina.

1. Inclosed herewith are the holding by two members of the Board of Review, the dissenting opinion by one member, my views and recommendations to the Secretary of War, and copy of the action of the Secretary of War in the above case.

I invite your attention to the direction of the Secretary of War that the dishonorable discharge be suspended and that, if the conduct of the accused while in confinement is good, they be restored to duty. Under the provisions of Article of War 50½, you now have authority, subject to those directions, to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office by indorsement hereon, they should be accompanied by the foregoing holding, the dissenting opinion, and my indorsement thereon. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 216004).

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

RECEIVED
JUL 10 1941
HEAD QUARTERS
8TH DIVISION
FORT JACKSON, S. C.

4 Incls -
Incl 1 - Holding by two members of Bd. of Rev.
Incl 2 - Dissenting opinion by one member.
Incl 3 - Indorsement by JAG.
Incl 4 - Copy of action by Sec. of War.

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

Board of Review
CM 216028

APR 23 1941

UNITED STATES	)	SIXTH DIVISION
v.	)	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, February 21, 1941. Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for six (6) months. Disciplinary Barracks.
Private CLAYTON C. NIX (6594426), Battery A, 18th Coast Artillery.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

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

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

Specification 1: In that Private Clayton C. Nix, Battery A, 18th Coast Artillery, Fort Stevens, Oregon, did, on or about the 17th day of March, 1940, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Collins, Colorado, on or about the 19th day of December, 1940.

He pleaded "Guilty, except the words 'desert' and 'in desertion', substituting therefor respectively, the words, 'absent himself without leave from' and 'without leave'; of the excepted words, Not Guilty, of the substituted words, Guilty. * * * Not guilty of violation of the 58th Article of War but guilty of the 61st Article of War". He was found not guilty of desertion in violation of the

58th Article of War, but guilty of absence without leave in violation of the 61st Article of War, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for six months. No evidence of previous convictions was introduced. On March 27, 1941, the reviewing authority approved the sentence but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court Martial Order No. 28, Headquarters, Sixth Division, Fort Snelling, Minnesota, March 27, 1941.

3. The only question presented by the record in this case requiring consideration here is whether or not the accused was tried by a legally constituted tribunal. This question was not raised by the accused at the trial, but was raised for the first time in the Office of the Judge Advocate General. It is the opinion of the Board of Review that the accused was not tried by a legally constituted tribunal.

4. The record shows that Major Roy F. Walker, Infantry, the officer preferring the charge, sat as a member of the court throughout the trial of the accused, notwithstanding that "no officer shall be eligible to sit as a member of such court when he is the accuser, or a witness for the prosecution" (A. W. 8 (CM 152893, Pentecost)). On pages six and seven of the record it appears that Major Roy F. Walker, Infantry, appeared before a summary court officer as the accuser in this case, and took oath that he signed the charge and specification, and further that he had personal knowledge of the matters set forth in the specification and charge, and he believed the same to be true in fact. It is not understood how it could more plainly appear that Major Walker is the accuser. It thus appearing that the officer in question was ineligible under the 8th Article of War to sit as a member of the court, it follows that the proceedings and sentence are null and void as having been taken and adjudged by an illegally constituted court.

5. The court was not legally constituted. For this reason the Board of Review is of the opinion that the record is not

legally sufficient to sustain the findings and sentence; and that the findings and sentence therefore should be vacated as null and void ab initio.

F. W. Rouse, Judge Advocate.

William A. Rounds, Judge Advocate.

H. H. Schaff, Jr., Judge Advocate.

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

Board of Review
CM 216029

MAY 12 1941

UNITED STATES)	NINTH CORPS AREA
)	
v.)	Trial by G.C.M., convened at Presidio of San Francisco, California, March 4, 1941. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
)	
Corporal ROBERT A. BROWN (6565582), Company A, 30th Infantry.)	

HOLDING by the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, Judge Advocates.

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

2. The accused was tried upon a single Charge and Specification as follows:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private 1st class, Robert A. Brown, Company "A", 30th Infantry, did, at Presidio of San Francisco, California, on or about March 31, 1940, present for payment a claim against the United States by presenting to Lieutenant Colonel E. F. Ely, Finance Department, Finance Officer, U.S. Army, at Fort Mason, California, an officer of the United States, duly authorized to pay such claim, in the amount of Eighty Three dollars and Seventy Seven Cents ($83.77), for clothing money allowance due soldier upon discharge, which claim was false and fraudulent in that the soldier's final statement upon which the clothing money allowance was to be paid had been fraudulently altered subsequent to certification by Major E.M. Sutherland, 30th Infantry, and was then known by the said Private 1st class Robert A. Brown to be false and fraudulent.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous conviction was introduced. The court sentenced the accused to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard

labor for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that just prior to accused's termination of enlistment and discharge on March 26, 1940, Sergeant Robert C. Lott, company clerk of accused's organization, prepared a final statement including an item for clothing money allowance due the accused upon discharge, and after obtaining the signature of Major E. M. Sutherland, 30th Infantry, approving it, altered the figures representing money due for clothing allowance by increasing the amount from $33.77 to $83.77. Two other items of money due the accused, travel pay of $25.05, and accrued pay of $26, were included in the final statement. A check dated March 26, 1940, in the aggregate sum of $123.15 was issued on the Treasury of the United States signed by Lieutenant Colonel E. F. Ely, Finance Officer, payable to the order of accused. The check was cashed through the Anglo-California National Bank on the 26th day of March 1940. Colonel Ely testified that his only connection with the transaction was payment of the voucher after checking the signature of approval of the certifying officer. He identified the photostatic copy of the check which he issued in payment thereof. It is satisfactorily proven by comparison of known specimens of accused's handwriting that he indorsed the check, and by the accused's own testimony that he received the money and later gave Sergeant Lott $25 or one-half of the unauthorized amount paid to him.

4. The Specification alleges that the accused did at the Presidio of San Francisco, California, on or about March 31, 1940, present for payment a claim against the United States by presenting to Lieutenant Colonel E. F. Ely, Finance Officer, United States Army, at Fort Mason, California, an officer of the United States duly authorized to pay such claim, in the amount of $83.77, which claim was false, etc.

One of the indispensable elements of the offense charged is the presenting of the false claim to someone duly authorized to pay it. In this case that person was Lieutenant Colonel E. F. Ely. Hence, it was incumbent upon the prosecution to show by competent evidence that it was so presented by the accused in order to prove the commission of the offense. 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."

The Board of Review, in CM 202601, Sperti, April 10, 1935, adopted the principle laid down in the Cameron case, supra, that the words, "presentation" or "present", indicate something more than a mere delivery, or the placing in the legal possession of the presentee of the thing presented; that 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.

5. Lieutenant Colonel Ely refers in his testimony, to the statement in question, Exhibit A, as a -

> "* * * photostatic copy of my Voucher No. 1630 for the month of March, 1940. It is stated to cover the final payment of Robert A. Brown, Private First Class, Company A, 30th Infantry, on which payment was made in the net amount of $123.15".

He refers to Exhibit B, as a -

> "* * * photostatic copy of my check No. 1072709 on the Treasury of the United States, dated March 26, 1940, payable to the order of Robert A. Brown in

> the amount of $123.15, covering payment of Voucher No. 1630 of March, 1940, accounts. * * * On the reverse side of the check there appears the name of Robert A. Brown, which indicates that the check was cashed through the Anglo-California National Bank on May /March/ 26th."

The record is entirely silent of any proof as to the travel of the final statement from the time that Sergeant Lott altered the figures, until the signing of the check by Colonel Ely. The only reference to the final statement during that period is the answer of Sergeant Lott, "I guess he cashed it", to the question, "What happened after you altered the figures? Then what happened to the final statement?" This testimony falls far short of proving the essential allegation that the accused presented the final statement to Lieutenant Colonel Ely, nor does any satisfactory proof appear elsewhere in the record. The record is wholly void of any evidence as to how, or by whom this final statement was presented, and to whom the finance officer, or some person at his direction, delivered the check.

6. It is, therefore, the opinion of the Board of Review that the essential element of presenting the false claim to Lieutenant Colonel Ely as charged was not proven and because thereof, the evidence is legally insufficient to support the findings and the sentence.

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

_____, Judge Advocate.

Thomas N. Tappy, Judge Advocate.

_____, Judge Advocate.

Military Justice
CM 216029 1st Ind.

War Department, J.A.G.O., JUN 3 1941 - To the Secretary of War.

1. I do not concur in the foregoing holding by the Board of Review that the record of trial in the case of Corporal Robert A. Brown, Company A, 30th Infantry, is legally insufficient to support the findings of guilty and the sentence.

2. The accused pleaded not guilty to but was found guilty of violating Article of War 94, in that he presented to a finance officer for payment, on or about March 31, 1940, at the Presidio of San Francisco, California, a fraudulently altered claim (a final statement) against the United States in the amount of $83.77, clothing money allowance allegedly due the soldier upon discharge.

Evidence, including admissions and testimony by the accused, was introduced to the effect that the company clerk of Company A, 30th Infantry, prepared the accused's final statement (R. 25); that the correct amount due the soldier for clothing money allowance was $33.77; that this amount originally was entered upon the statement (R. 26); that two or three days before the statement was prepared the company clerk told the accused that he was going to overpay him and that he (the company clerk) "was to get some money in return for doing it" (R. 26); that the accused voluntarily testified to the arrangement as follows:

> "Sergeant Lott, when he made this proposition to me, I didn't care to get myself into any trouble whatever; I didn't want any extra money that wasn't to be mine. But he said that he would take the blame for this if anything ever happened about it, and he explained to me that the company commander was the only man who had available records to check my clothing allowance, and he gave me the impression that when the company commander signed my final statement that the amount of $83.00 would be entered on my final statement and thereafter that no one would have available records to check that amount entered on the statement" (R. 31);

that to accomplish the fraud, the amount specified on the statement for clothing money allowance was raised from $33.77 to $83.77, by the company clerk, after the correct amount had been certified by the company commander; that the accused secured a check from the disbursing officer in final settlement, payable to his order for $123.15 (Exhibit B), which included an overpayment of $50 on the clothing money allowance.

item; that the accused endorsed the check (Exhibit B and R. 19), cashed the same, and gave the company clerk $25 out of its proceeds (R. 32).

3. The holding by the Board of Review that the record of trial is legally insufficient to support the findings and sentence is premised on the alleged lack of evidence to show that the accused presented the false claim (included in the final statement) for payment.

4. Admitting that the act of presenting the claim is an indispensable constituent of the offense, and that it was incumbent upon the prosecution to show by competent evidence that the claim was presented by accused in order to prove the commission of the offense, and without disagreeing with the authorities cited by the Board of Review as to the necessity of a showing that there must be an actual presentation of the claim, the conclusion of the Board of Review, in my judgment, cannot be sustained. Though there is no evidence that accused personally took the final statement to the disbursing officer and physically presented it for payment, still the proof is sufficient that the claim was presented by accused or by someone duly authorized by him.

Army Regulations 345-475 and 35-120 prescribe the method of payment of enlisted men to be discharged. These regulations provide that the final statement will ordinarily be entrusted to the discharged enlisted man with instructions to present it to the proper disbursing officer for payment. When so presented, a check will be issued and delivered only to the payee, upon positive identification; or mailed where positive identification cannot be made; or where impracticable to deliver or mail the check, as above specified, to deliver or mail the same to an official designated by the post commander in writing, or an official of similar authority, for distribution to the payee. Under these regulations which I presume were followed, in the absence of contrary evidence, the accused or someone in his behalf presented accused's final statement for payment to the disbursing officer for payment.

Whether accused personally presented the final statement or whether it was presented by someone in his behalf is immaterial. In transactions where the principal authorizes a demand to be made or a notice to be given, the party giving the notice or making the demand acts for the principal and such act is the act of the principal. Where the principal takes the benefit of the act, he assumes responsibility for the means by which the benefits were procured (2 Mechem on Agency, 2nd Ed., 1348-9). This is so, even where the act done is a crime (Richardson v. U.S., 181 Fed. 1; 104 CCA 69).

5. There is sufficient evidence in the record to sustain a finding that the fraudulent claim was presented by or on behalf of the accused in that the plan proposed by Sergeant Lott and assented to by the accused contemplated, (1) a raised fraudulent voucher of the final statement of the accused, (2) a presentation of the voucher to finance officer and (3) payment by latter. While evidence is lacking as to the actual means employed to present the raised voucher, it is believed the accused in assenting to the fraudulent transaction and receiving the benefit therefrom in fact and in law made such agency his own, if he did not personally present the voucher for payment. Therefore, in my judgment, there was evidence in the record to sustain the specification that the accused presented a false claim against the United States for payment.

6. Under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724), you have authority to confirm the action of the reviewing authority, in approving the sentence, or to disapprove the sentence.

7. I recommend that the action of the reviewing authority approving the sentence be confirmed. A form of action to accomplish such confirmation is included herewith, marked "A". A form of action to disapprove the sentence in accord with the holding by the Board of Review, marked "B", is also inclosed for your use should you deem such action appropriate.

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

3 Incls.
Incl. 1 Record of Trial.
Incl. 2 Form of action marked A.
Incl. 3 Form of action marked B.

Secretary agreed with J.A.G.

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

Board of Review
CM 216046

APR 25 1941

UNITED STATES	)	35TH DIVISION
v.	)	Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, March 25, 1941. Dismissal.
Second Lieutenant FRANK E. ROFF (0-392686), 137th Infantry (Rifle), National Guard United States.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

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

CHARGE I: Violation of the Sixty-first Article of War.

Specification 1: In that Frank Elmer Roff, Second Lieutenant, 137th Infantry (Rifle), did, without proper leave, absent himself from his regiment at Camp Joseph T. Robinson, Arkansas from about March 2nd, 1941 to about March 4th, 1941.

CHARGE II: Violation of Ninety-sixth Article of War.

Specification 2: In that Frank Elmer Roff, Second Lieutenant, 137th Infantry (Rifle), was at the Police Station in North Little Rock, Arkansas, on or about March 3rd, 1941, drunk and disorderly.

Specification 3: In that Frank Elmer Roff, Second Lieutenant, 137th Infantry (Rifle), was, at North Little Rock, Arkansas, on or about March 3rd, 1941, drunk and disorderly, in that he did at Fisher's Restaurant

leave the presence of two law enforcement officers, in an automobile at a dangerous and reckless rate of speed, to wit fifty-five miles per hour, said officers having theretofore ordered the said Frank Elmer Roff to remain at said Restaurant, and having theretofore ordered that neither the said Frank Elmer Roff and one Frank Musgrove, drive said automobile on account of drunkenness, all of which conduct is to the prejudice of good order and military discipline.

ADDITIONAL CHARGES:

CHARGE I: Violation of the Sixty-ninth Article of War.

Specification 1: In that Frank E. Roff, Second Lieutenant, having been duly placed in confinement in his quarters in the 137th Infantry area at Camp Joseph T. Robinson, Arkansas, on or about March 4, 1941, did on or about March 18, 1941, escape from said confinement before he was set at liberty by proper authority.

Charge II of the original charges dated March 8, 1941, contained four specifications. This Charge and the four specifications thereunder were referred for trial by command of Major General Truman, the convening authority, by first indorsement thereon dated March 13, 1941. Upon arraignment the trial judge advocate stated in open court "On the second charge there were originally four specifications. Two of those specifications have been withdrawn by order of Major General Truman" (R. 4). The accused was not arraigned under Specifications 1 and 4 of Charge II.

The indorsement referring the Additional Charges for trial states "Charge II, Specification 1. Withdrawn."

In pleading to Specification 3, Charge II of the original charges, accused, at one and the same time, pleaded in bar to, and made a motion to strike, this specification (R. 7). Based on legally insufficient reasons, the court sustained both the plea and the motion (R. 7).

Accused pleaded guilty to, and was found guilty of, Charge I and its specification (absence without leave), Charge II, Specification 2 (drunk and disorderly), and Charge I and its

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NAVY DEPARTMENT

specification of the Additional Charges (escape from confinement). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but in his action improvidently stated "Pursuant to Article of War 50½ the order directing execution of the sentence is withheld." The record was forwarded to the Board of Review where it has been acted upon under the provisions of Article of War 48.

3. No testimony was offered by either side. The conviction is sustained solely by the accused's pleas of guilty. The accused orally and personally made an unsworn statement to the court "to present some matters in mitigation." Prior to so doing the trial judge advocate explained to him in open court "his rights as the accused and the penalties for the violations of the charges and specifications to which the accused had pleaded guilty. The accused stated that he understood the maximum penalties before entering his pleas of guilty" (R. 7).

The unsworn statement is in question and answer form, all questions having been propounded by the defense counsel. The answers of accused which are relevant and material to the offenses to which he pleaded, and of which he was found guilty, are as follows:

"Q. What happened at the North Little Rock police station with reference to your being drunk or disorderly. What did you do or say on this occasion?
A. I can't really recall anything I did in any manner unbecoming.
Q. Had you been drinking?
A. Yes, sir. I had been drinking.
Q. You did know enough to be interested in getting Mr. Musgrove out of trouble?
A. Yes, sir. I knew that.
Q. What day was that you were at the police station?
A. That was the morning of March 3rd.
Q. What time in the morning?
A. About two-thirty, I believe.
* * * * * *
Q. You went A.W.O.L. from your station?
A. Yes, sir.
* * * * * *

Q. How about the next day?
A. Well, that night, I got quite interested in a girl in North Little Rock.
Q. You were A.W.O.L. the next day?
A. Yes, sir.
Q. Two days you were absent without leave?
A. That is true.
Q. Then, you were placed under arrest the 2nd day?
A. Yes, sir.
Q. What date was that you were placed in arrest?
A. March 4th.
Q. After these charges with having broken arrest or escaped - why did do that?
A. I had been confined to my tent two weeks to a day, I believe, and my tent wasn't very big.
Q. In restricted quarters that time?
A. Only place I could go was the latrine.
Q. Your meals were served in your tent?
A. Yes, sir.

* * * * * *

Q. When you broke your arrest where did you go?
A. Went into town.
Q. Did you have any idea of being away permanently from camp?
A. As I said, I was interested in this girl in North Little Rock. I went back where she was working and got her.
Q. You intended to come back to camp?
A. Yes, sir.
Q. You had been in confinement for two weeks?
A. Yes, sir.

* * * * * *

Q. I will ask you this. Isn't it a fact you told me you would plead guilty to anything under the sun to get out the day after you were brought back from your escape?
A. Yes, sir." (R. 8, 9).

The pleas of guilty are sufficient in the absence of any evidence by the prosecution to justify the findings of guilty. The unsworn statement made by accused includes admissions both as to his absence without leave and his escape from confinement. No

statement therein, made by either accused or his counsel, is inconsistent with his pleas of guilty or indicates such pleas had been entered improvidently or through lack of understanding of their meaning and effect.

4. The charge sheet shows that accused, who is now 22 years of age, has served two enlistments in the National Guard, both in Headquarters Company, 137th Infantry, the first from September 16, 1936, until his discharge on October 1, 1937; and the second from February 16, 1938, until his discharge on December 22, 1940. It also shows that he was commissioned December 23, 1940, in the 137th Infantry.

Accompanying the record of trial is an indorsement from the captain of Headquarters Company, 137th Infantry, Wichita, Kansas, dated December 23, 1940, addressed to the Commanding General, Seventh Corps Area, which states that:

> "Second Lieutenant Frank Elmer Roff, Infantry, NGUS (0-392686), entered upon active duty at Wichita, Kansas, December 23, 1940, pursuant to the order of the President, November 30, 1940."

5. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. The sentence is legal.

L. M. Smith, Judge Advocate.

William A. Sounds, Judge Advocate.

H. H. Blackf, Judge Advocate.

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

Board of Review
CM 216098

April 19, 1941.

UNITED STATES)	1ST ARMORED DIVISION
)	
v.)	Trial by G.C.M., convened at Fort Knox, Kentucky, February 24, 1941. Dishonorable discharge and confinement for one and one-half (1½) years. Disciplinary Barracks.
Private MEYER WEINBERG (7003570), Company B, 69th Armored Regiment.)	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

2. Accused was found guilty of the larceny of one gold ring, value about $27.50, the property of Private First Class Shelton L. Powell (Specification 1, Charge I), and one Ronson cigarette lighter, value about $5, the property of Private First Class Shelton L. Powell (Specification 2, Charge I), in violation of Article of War 93. He was also found guilty of obtaining from Private First Class Carl S. Flynt the sum of $2, by fraudulently pretending that he was the owner of a certain gold ring, in violation of Article of War 96 (Specification of Charge II).

The ring and the cigarette lighter were received in evidence (Exs. A,B). Private Powell testified that the "value" of the ring was $27.50, that he had purchased it from a jeweler in July 1940, and had paid that amount for it. During the month of December Private Powell was on furlough in Birmingham, Alabama. Shortly after leaving that city, on December 27, he remembered that he had left his ring at the home of Miss Edna Jenkins. He telephoned Miss Jenkins from a nearby town, requesting that she mail the ring to him at Fort Knox, Kentucky (R. 7-10).

It was stipulated between the defense counsel and the prosecution that if Miss Edna Jenkins were present she would testify as follows:

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"On Monday, December 30th, 1940, I addressed to Shelton L. Powell, Company 'E', 69th Armored Regiment, Fort Knox, Kentucky, a package containing a United States Army Military Academy ring with a red stone with 'Shelton L. Powell' engraved on it; also a brown and cream Ronson cigarette lighter with 'S.L.P.' engraved on it, enclosed in a Hanover jewelry box. The package was neither registered nor insured but my return address was on it." (R. 8.)

It was proved by the testimony of Technical Sergeant Melvin Short (R. 16-18), and Sergeant Luther R. Cardle (R. 19-20) that accused, as mail orderly, had access to incoming mails at Fort Knox from sometime in October 1940 to January 6, 1941. Private First Class Carl S. Flynt testified that he had seen Corporal Powell, during the months of June and July 1940, wearing the ring (Ex. A), and that on January 6, 1941, accused sold him the ring for $2, representing that it was his property and that he had "bought it from a fellow in the Regimental Headquarters of the 69th." Later he sold witness a lighter (Ex. B) for thirty-five cents. Accused stated that he had bought it from "a fellow in the Regimental Headquarters." Later Private Flynt showed the articles to Private Powell, who identified the ring as his property, but said he had never seen the lighter before. Witness estimated the value of the lighter at between $2 and $5 (R. 11-15).

3. It is well established that, except as to distinctive articles of government issue or other chattels which because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is the market value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 212983, Dilsworth; CM 213765, Krueger, et al.). There is no competent testimony in the record as to the market value of the ring and cigarette lighter described. Neither of the soldiers who testified as to his estimate of value was shown to be qualified as an expert or shown to be otherwise qualified to express his opinion as to value. The articles were before the court but from mere inspection the court was not authorized to find more than that they were of some substantial value. It cannot be legally assumed that the members of the court-martial possessed such expert trade knowledge as to enable them to determine definite market values. The market value of a used gold ring and cigarette

lighter is not a matter of such fixed and common knowledge as to justify a court in taking judicial notice of such value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 213765, Krueger, et al.). The evidence shows that the theft of the ring and lighter was committed at the same time and place and that both articles were contained in the same package. The theft of the two articles should, therefore, have been alleged in one specification. The Manual for Courts-Martial provides:

> "*** So also the larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification ***." (M.C.M., par. 27.)

The Manual also provides:

> "Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification." (M.C.M., par. 149g.)

The theft of several articles at the same time and place and in the same manner constitutes but one larceny (CM 164838, Anderson; CM 166326, Cannon; CM 185535, Goode).

In this case the larceny of the ring and the lighter was substantially one transaction. Nevertheless the larceny of each of the articles was improperly made the basis of a separate specification. By reason of this unwarranted multiplication of specifications the maximum punishment by confinement would be six months for each offense alleged under Charge I, notwithstanding the fact that there is no competent evidence in the record showing that the total value of the two articles amounted to as much as $20.

The maximum punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, for obtaining money or other property under false pretenses (Specification, Charge II, violation of the 96th Article of War), of which offense accused was also convicted, is, when the amount obtained is $20 or less, confinement at hard labor for six months.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as adjudges dishonorable discharge, total forfeitures, and confinement at hard labor for one year.

[illegible], Judge Advocate.

William A. Founds, Judge Advocate.

[illegible], Judge Advocate.

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

Board of Review
CM 216143

MAY 2 1941

UNITED STATES	)	FIRST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Bliss, Texas, March 3, 1941. Dishonorable discharge and confinement for five (5) months. Fort Bliss, Texas.
	)	
Private JAMES W. GAINES (6296099), Headquarters Troop, 16th Quartermaster Squadron.	)	

HOLDING by the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, 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 under (a) a Specification alleging larceny of a shirt and a pair of trousers, property of the United States, issued to Private First Class John D. Rhodes, Headquarters Troop, 16th Quartermaster Squadron, for use in the military service, in violation of Article of War 93 (Charge I); and (b) a Specification alleging the sale of a shirt and a pair of trousers, issued for use in the military service of the United States, in violation of Article of War 84 (Charge II). The accused pleaded not guilty to, and was found guilty of both Specifications and Charges, and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for one year. The reviewing authority approved the sentence, reduced the confinement to five months, designated Fort Bliss, Texas, as the place of confinement, and forwarded the record of trial under Article of War 50½. The only question requiring consideration is the finding of guilty of the larceny.

3. With respect to the larceny alleged, the evidence shows that a shirt and a pair of trousers issued to Private Rhodes were removed from his bed during the early evening of December 8, 1940. Private First Class William C. Dennis, Band, 124th Cavalry, testified by deposition that about 7:30 p.m., December 8, 1940, the accused, at Fort Bliss, offered to sell a shirt and trousers, which he had saved out of his clothing allowance, to Dennis for $5. Dennis paid accused $5 for the shirt and trousers and returned them to the first sergeant, 16th Quartermaster Squadron at Fort Bliss. A shirt and trousers were

turned over to First Sergeant Ira L. Harper, Headquarters Troop, 16th Quartermaster Squadron, on December 20, 1940, during the course of an investigation conducted by him for stolen property in the band of the 124th Cavalry. The shirt and trousers so received were introduced in evidence, and identified as issued to Private Rhodes by the stamp "Hq" and the last four numbers "4134" of Rhodes' serial number stamped in each garment.

4. The record fails to connect the accused with the shirt and trousers introduced in evidence which were shown to have been issued to Rhodes. The purchaser of the shirt and trousers does not establish by any identification that the shirt and trousers so purchased were those taken from Rhodes' bed. First Sergeant Harper fails to establish that the shirt and trousers which he produced in court were in fact turned over to him by Dennis and in that manner traced to the hands of the accused.

In the absence of any proof identifying the shirt and trousers issued to Rhodes, and introduced in evidence, as the particular shirt and trousers sold by accused to Dennis, the record wholly fails to connect the accused with the missing shirt and trousers.

5. For the reasons above indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification.

The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 216152

MAR 3 1941

UNITED STATES)	FOURTH CORPS AREA
)	
v.)	Trial by G.C.M., convened at
)	Barksdale Field, Louisiana,
Major EVERETT R. WELLS)	February 20, 1941. Dismissal.
(0-10863), Signal Corps.)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Major Everett R. Wells, Signal Corps, did, at Shreveport, Louisiana, on or about April 15, 1940, with intent to deceive Mrs. G. H. Jarratt, a person then and there authorized to rent a certain apartment sought to be rented by the said Major Wells and a woman accompanying him, falsely state in substance and represent to the said Mrs. G. H. Jarratt, that the said woman, to-wit: Mable Gradolph East, was the wife of the said Major Wells, which statement was known by the said Major Wells to be untrue, in that the said woman was not the wife of the said Major Wells.

Specification 2: In that Major Everett R. Wells, Signal Corps, did, at Shreveport, Louisiana, on or about April 15, 1940, rent a certain apartment

for the use of himself and one Mable Gradolph East, a woman, not his wife, and with the said woman, under and by virtue of such rental, did enter into occupancy of, and did occupy, the said apartment as husband and wife from on or about April 15, 1940, until on or about October 20, 1940.

Specification 3: In that Major Everett R. Wells, Signal Corps, did, at Barksdale Field, Louisiana, on or about October 22, 1940, cause Government quarters to be furnished him, and with one Mable Gradolph East, a woman, not his wife, did enter into occupancy of, and did occupy the said Government quarters as husband and wife from on or about October 22, 1940, to on or about November 12, 1940.

Specification 4: (Disapproved by reviewing authority.)

Specification 5: (Finding of not guilty.)

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

Specification 1: In that Major Everett R. Wells, Signal Corps, being then and there a married man, having a lawful living wife and not being divorced, did, at Shreveport, Louisiana, from on or about April 15, 1940, until on or about October 20, 1940, wrongfully, dishonorably and unlawfully, live and cohabit in a state of open adultery with one Mable Gradolph East, a woman not his wife.

Specification 2: In that Major Everett R. Wells, Signal Corps, being then and there a married man, having a lawful living wife and not being divorced, did, at Barksdale Field, Louisiana, from on or about October 22, 1940, until on or about November 12, 1940, wrongfully, dishonorably

> and unlawfully live and cohabit in a state of open adultery with one Mable Gradolph East, a woman not his wife.

He pleaded not guilty to both Charges and the Specifications thereunder. He was found, of Specification 1, Charge I, guilty; of Charge I: As to Specification 1 only, not guilty, but guilty of a violation of the 96th Article of War; of Specification 2, Charge I, guilty; of Specification 3, Charge I, guilty, except the words "cause Government quarters to be furnished him and", "did", "the said", of the excepted words, not guilty; of Specification 4, Charge I, guilty; of Specification 5, Charge I, not guilty; of Charge I, guilty; and guilty of Specifications 1 and 2, Charge II, and Charge II. Evidence of two previous convictions was introduced. He was sentenced to be dismissed the service. The sentence was not announced in open court. The reviewing authority disapproved the finding of guilty of Specification 4, Charge I, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence as to the Specifications and Charges of which accused was found guilty, and which were not disapproved by the reviewing authority, shows that accused married Helen Louise Schmidt in Coblenz, Germany, on April 19, 1922 (deposition of Mrs. Helen Louise Schmidt Wells - Pros. Ex. 1), and that she remained his lawful wife until November 12, 1940 (petition of E. Roy Wells filed in the 26th Judicial District Court in and for the Parish of Bossier, State of Louisiana, and the judgment of the said court decreeing an absolute divorce "a vinculo matrimonii", dissolving the bonds of matrimony heretofore existing between E. Roy Wells and Helen S. Wells - Pros. Ex. 2). There were introduced in evidence properly authenticated copies of pay vouchers of accused for the months of April to November 1940, inclusive. The vouchers of April to October 1940, inclusive, show "Helen L. Wells (wife)" as a dependent of accused. The voucher for November 1940 shows: "Divorced Helen on November 12, 1940. Married Mabel on November 13, 1940" (Pros. Ex. 3). It was stipulated between the prosecution and the defense that accused, under the name of E. Roy Wells, obtained a full and complete divorce from Helen Louise Schmidt Wells on November 12, 1940, and that on the same day he married Mabel Gradolph East, and that at no time between the dates April 15, 1940 and November 12, 1940, did accused live in the State of

Louisiana with Helen Louise Schmidt Wells (Pros. Ex. 4). These exhibits were introduced in evidence at pages 8, 9, 10 and 11 of the record.

Mrs. G. H. Jarratt, Shreveport, Louisiana, testified that a few days prior to April 15, 1940, accused and a woman companion came to her residence in Shreveport, Louisiana, that accused introduced himself to her and then introduced his companion as his wife. He then rented from Mrs. Jarratt an apartment consisting of a living room, dining room, den, two bedrooms, bath, breakfast room, kitchen and screened front porch. There was a double bed in each of the bedrooms. Had witness not believed that the woman accompanying accused was his wife she "certainly would not" have rented the apartment to them (R. 17). Three photographs showing different views of the house in which the apartment was located were received in evidence (Pros. Exs. 5,6,7; R.11-14). Accused and the woman he had introduced as his wife began moving into the apartment about April 18, and it was not until some seven to ten days later that the front bedroom was in any condition to be used due to the fact that painting was going on in that room. During this time accused and his woman companion occupied the back bedroom which contained only one bed. While accused and the alleged Mrs. Wells occupied the apartment witness saw them in bed together upon numerous occasions as she came in from her garage which was in the rear of the apartment. On these occasions, during the summer season, accused would have nothing on but his shorts and the woman would be attired in her underwear or nightgown. Accused and his companion, during the time they occupied the apartment (between April 18 and October 20, 1940) treated each other as man and wife and seemed very much in love. Upon one occasion while they were occupying the apartment there was a fire in the neighborhood during the night. Accused and his alleged wife appeared on the back porch of their apartment together. He was attired only in his shorts and she in a nightgown. While accused and his alleged wife were living in Mrs. Jarratt's apartment she, Mrs. Jarratt, visited them at a camp where accused had rented a one-room cabin, in which there was only one bed (R. 12-19). On cross-examination the witness testified that she had never seen accused and his alleged wife go to bed, that she did not know of her personal knowledge that they ever slept in the bed in the back room, but that she had seen them in bed together many times in that

back room (R. 20), and that the bed in the front room was never used until after Mrs. Sykes, a friend of "the Major and Mrs. Wells", came to visit them, at which time it gave evidence of having been used. Accused's son, a boy about sixteen years of age, visited his father in the apartment for about ten days during the summer months (R. 19-21).

Mr. Grady H. Jarratt, the husband of the lady from whom accused rented the apartment in Shreveport, Louisiana, testified that he first met accused and the woman who was introduced to him by his wife (Mrs. Jarratt) as accused's wife about the middle of April 1940 when they came to his home for the purpose of renting an apartment, that in passing through his back yard when he came in at about six in the evening he occasionally saw accused and his alleged wife lying on their bed which was placed against the window looking out on his garage. Upon these occasions the accused had on nothing but shorts and the lady had on an ordinary nightgown (R. 30). The witness was shown Exhibit 7, a photograph which showed the rear of his home, and identified the window marked B as belonging to the room occupied by accused. Accused treated his companion "just as any other man would treat his wife" (R. 28-31). On cross-examination witness admitted that he had been convicted of assault with intent to commit murder and had been sentenced to confinement for a period of not less than three nor more than five years, but added that he "did only seven months of it" and that "they never did say that I lied about anything" (R. 32).

Mrs. Ada Marie Sykes testified that she had known the present Mrs. Wells for about fifteen years and had known accused for two years, that she visited accused and Mabel Gradolph East during the time they occupied an apartment in the home of Mr. and Mrs. G. H. Jarratt between April 15 and October 22, 1940; that accused and Mabel Gradolph East occupied an apartment together at Barksdale Field between October 22 and November 12, 1940, that Mabel Gradolph East, the person who occupied the apartment in Shreveport, Louisiana, and the quarters at Barksdale Field with accused, and his present wife (since November 12, 1940) are one and the same person (R.35-36). She testified on cross-examination that when she visited the apartment in Shreveport she and Mabel Gradolph East occupied the front bedroom and accused occupied the back bedroom, that she never saw

any improper conduct between Mrs. East and accused. She testified further that she had known of the impending wedding between Mrs. East and accused for six or eight months prior to November 12, 1940 (R. 42), that she witnessed the marriage of accused and Mrs. East which took place at Bossier City, Louisiana, November 12, 1940, between the hours of 11 and 12 a.m. (R. 33-44, 77-79).

Captain Louis B. Eidson, Signal Corps Reserve, testified that he visited the apartment of accused in Shreveport, and that the introduction by the accused of the woman who was occupying the apartment with him was such as to give him the impression that she was his wife (R. 46,48). He further testified that he visited the quarters occupied by accused at Barksdale Field subsequent to October 22, 1940, and that the woman he knew as Mrs. Wells at the Shreveport apartment was at accused's quarters on the post (R. 44,48).

At this point the prosecution introduced Exhibit No. 8, the same being a duly authenticated copy of Special Order No. 8, Headquarters Air Corps Specialized Flying School, Barksdale Field, Louisiana, dated October 23, 1940, paragraph 8 of which confirmed verbal orders assigning accused to quarters at Barksdale Field (R. 49).

The deposition of Lieutenant Colonel John Bellinger Patrick, Air Corps, was introduced as Prosecution's Exhibit 9 (R. 50). Colonel Patrick deposed that he was squadron commander at Barksdale Field from October 15 to November 12, 1940, that he never was introduced to anyone during that period by the name of Mabel Gradolph East, but that he met a woman as Mrs. Wells, that public quarters were assigned to accused at Barksdale Field by paragraph 8, Special Order No. 8, Headquarters Air Corps Specialized Flying School, Barksdale Field, Louisiana, dated October 23, 1940, that to the best of his knowledge accused occupied these quarters between October 15 and November 12, 1940, that he had seen his (accused's) car in front of his quarters many times, that on November 12, 1940, he visited accused's quarters at 10:20 a.m., and found a woman in there.

Captain Louis B. Eidson, Signal Corps Reserve, was recalled by the court and testified further that accused was assigned quarters at Barksdale Field on October 22, 1940, but he did not know positively whether he actually began living in the quarters on

that date, that he visited accused at his quarters three or four times prior to November 12 and that he saw Mrs. Wells there (R. 50-53). (Obviously the Mrs. Wells referred to by witness was not Helen Louise Schmidt Wells for she stated in her deposition (Pros. Ex. 1) that she did not live with accused as his wife in the State of Louisiana between the dates of April 15 and November 12, 1940.)

Loyd Napier testified that during the spring and summer of 1940 accused rented from him at his lake resort a one-room cabin containing one double bed. However, he could not swear that accused ever spent a night in the cabin "by himself or with a lady" (R. 56-60).

Captain C. E. Beasley, Infantry, testified that on October 15, 1940, he was Post Adjutant, Barksdale Field, that on that day accused was in his office and asked him if he would like to meet his, accused's, wife. Witness replied that he would, whereupon they went downstairs to a car which was parked on the area of post headquarters, and that he, accused, "introduced me to his wife". Witness further testified that he had since that time seen the same woman once or twice in a car "that looked like the Major's" (R. 61-63). Again it is obvious that the woman to whom Captain Beasley was introduced by the accused was not Helen Louise Schmidt Wells since she did not live with accused in Louisiana between the dates April 15 and November 12, 1940 (Pros. Exs. 1,4).

At this point the prosecution introduced a duly authenticated copy of the marriage license issued to accused and Mrs. Mabel G. East on November 12, 1940, which license bears the certificate of W. B. Sapp, Justice, that he "celebrated Marriage between Mr. Everett Roy Wells and Mrs. Mabel G. East *** according to law, this 12th day of November, 1940 ***" (Pros. Ex. 10, R. 68).

Mrs. W. H. Gradolph testified that she is the mother of Mabel Gradolph Wells, the present wife of accused, that about two years ago accused asked permission to marry her daughter, Mabel, when he obtained a divorce, that she agreed to the proposed marriage, and that she knew Mabel was occupying an apartment with accused and Mrs. Sykes, and that she did not think there was anything wrong with the arrangement (R. 80,83).

Accused, having been advised of his rights as a witness, elected to remain silent.

4. There is abundant direct evidence that accused, on the date alleged in Specification 1, Charge I, did, for the purpose of renting an apartment, falsely state and represent to Mrs. G. H. Jarratt that the woman, Mabel Gradolph East, who accompanied him, was his wife. There is ample evidence that accused did rent and occupy the said apartment with Mabel Gradolph East, a woman not his wife, from about April 15, 1940, until about October 20, 1940, as alleged in Specification 2, Charge I. There is ample evidence that accused did, at Barksdale Field, Louisiana, occupy Government quarters with Mabel Gradolph East, a woman not his wife, from about October 22, 1940, to November 12, 1940, as alleged in Specification 3, Charge I. All of these specifications are laid under the 95th Article of War. There is also ample circumstantial evidence that accused did, at Shreveport, Louisiana, wrongfully, dishonorably and unlawfully live and cohabit in a state of adultery with Mabel Gradolph East, a woman not his wife, from about April 15, 1940, until about October 20, 1940, as alleged in Specification 1, Charge II, and there is ample circumstantial evidence that accused did, at Barksdale Field, Louisiana, wrongfully, dishonorably and unlawfully live and cohabit in a state of adultery with Mabel Gradolph East, a woman not his wife, from about October 22, 1940, until about November 12, 1940, as alleged in Specification 2, Charge II. These two latter specifications are laid under the 96th Article of War.

While the evidence as to actual adultery, as alleged in Specifications 1 and 2, Charge II, is circumstantial, by reason of the nature of the offense committed, it is believed to be sufficient to sustain the findings of the court. Adultery is sexual intercourse between a married person and one of the opposite sex, not a spouse, whether married or single (Underhill's Criminal Evidence, 3d Ed., sec. 580). The rule as to the measure of evidence required to prove adultery has been well stated as follows:

> "The act of sexual intercourse may be inferred from the man and woman occupying the same bed and room, occupying the same room, being seen together in bed, or from being found partially disrobed in the same room.
>
> "Evidence fixing no time as the specific commission of the adulterous act, but which leaves no doubt

as to the adulterous relation, is sufficient. For example, proof that the parties lived together for some time, occupying the same bed, is ample proof of intercourse." (2 C.J.S., sec. 24.)

5. The first three specifications (Charge I) of which accused was found guilty are laid under the 95th Article of War. As to the first specification he was found not guilty of violation of the 95th Article of War but guilty of violation of the 96th; as to the second and third he was found guilty as charged. The 95th Article of War denounces "conduct unbecoming an officer and a gentleman". Perhaps the most comprehensive and at the same time most succinct definition of such conduct to be found in all the many commentaries on military law is that given by Colonel Winthrop, which is as follows:

> "*** Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behaviour 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's Military Law and Precedents, page 713.)

Certainly, in the light of the evidence adduced before the court, this definition fits the conduct of which accused was found guilty "as the glove fits the hand".

6. Accused is 48 years of age. The Army Register shows his service as follows:

> "Pvt. Co. K, 5 Inf. and Sig. C. Nebr. N.G. 28 June 16 to 16 Feb. 17; pvt. corp. and sgt. Co. B, Sig. C. Nebr. N.G. 16 July 17 to 19 Apr. 18; 2 lt. Sig. Sec. O.R.C. 16 Apr. 18; accepted 18 Apr. 18; active duty 20 Apr. 18; 1 lt. Sig. C. U.S.A. 28 Aug. 18; accepted 6 Sept. 18; vacated 1 Oct. 20. - 1 lt. Sig. C. 1 July 20; accepted 1 Oct. 20; capt. 1 Feb. 32; maj. 15 Aug. 39."

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 216192

UNITED STATES	)	APR 29 1941 FIRST DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Devens, Massachusetts,
Privates ALFRED W. RIGGAN	)	March 24, 1941. As to each:
(13014444); and MICHAEL S.	)	Dishonorable discharge and con-
ZEMSKY (12020700), both	)	finement for six (6) months.
Company D, 26th Infantry.	)	Fort Devens, Massachusetts.

HOLDING by the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, Judge Advocates.

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 sentences, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentences as approved by the reviewing authority (CM 212505, Tipton).

Lester S. Hill, Jr., Judge Advocate.

Thomas W. Tappy, Judge Advocate.

Charles Van Benschoten, Judge Advocate.

1st Ind.

War Department, J.A.G.O., Board of Review, April 29, 1941 - To The Judge Advocate General.

For his information.

Lester S. Hill, Jr.,
Colonel, J.A.G.D.,
Chairman, Board of Review.

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

Board of Review
CM 216239

MAY 21 1941

UNITED STATES v. Private First Class JAMES C. GIBSON (6973393), 1st Company, 4th Student Training Battalion (Enlisted), Infantry School Service Command.	4TH DIVISION MOTORIZED Trial by G.C.M., convened at Fort Benning, Georgia, March 21, 1941. Dishonorable discharge (suspended) and confinement for five (5) months. Fort Benning, Georgia.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

2. The accused was tried on March 21, 1941, upon a single Charge and Specification, as follows:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class James C. Gibson, 1st Company, 4th Student Training Battalion, Infantry School Service Command, did, at Fort Benning, Georgia, on or about February 18, 1941, feloniously take, steal, and carry away one (1) leather jacket value about $18.00, the property of Corporal Warren E. Fuller, 1st Company, 4th Student Training Battalion, Infantry School Service Command.

He pleaded not guilty to, and was found guilty of, the Charge and Specification, and was sentenced to be dishonorably discharged the

service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five months. The reviewing authority on April 15, 1941, approved only so much of the findings of the Specification and the Charge as involves a finding that the accused willfully and knowingly misappropriated and applied to his own use the jacket alleged, in violation of the 96th Article of War. The sentence was approved but the execution of that portion thereof adjudging dishonorable discharge was suspended until the prisoner's release from confinement. This action was promulgated in General Court-Martial Order No. 60, Headquarters 4th Division Motorized, Fort Benning, Georgia, April 15, 1941.

3. The evidence adduced before the court clearly supports the finding of guilty as charged and, in fact, the accused admitted that he took the jacket in question while the owner was on furlough and later pawned it, using the name "James Tillman". He testified that upon an earlier occasion Corporal Fuller, the owner of the jacket, had authorized him to pawn it (R. 40-45). Corporal Fuller specifically denied that he had ever authorized accused to pawn his jacket (R. 46).

4. The only question presented in this case requiring consideration is whether the offense of accused as modified and approved by the reviewing authority, i.e., willfully and knowingly misappropriating and applying to his own use the property described in the Specification, in violation of the 96th Article of War, is lesser than, and included in, the offense charged, i.e., larceny, in violation of the 93d Article of War.

5. Misappropriation connotes lawful possession or custody by the offender of the property in question, while larceny "is the taking and carrying away, by trespass, of personal property ***." (M.C.M., par. 149g.)

In the case of Christopher (CM 197396 - 1932) it was remarked by the Board of Review:

> "*** In the light of the authorities cited, our conclusion on the question before us is that the descriptive words in the accusation, 'feloniously take, steal, and carry away', indivisibly signify and contain the inexpugnable element of a taking of the

property in question by the accused, and do not impliedly include the appropriation thereof by him, either fraudulent or wrongful."

In the joint case of Allen and Sharp (CM 207203 - 1937), in which accused were charged with larceny, in violation of the 93d Article of War, and found guilty of knowingly and willfully misappropriating and applying to their own use and benefit the property alleged, in violation of the 96th Article of War, it was said by the Board of Review:

"Accused pleaded not guilty to the charge and specification. Each was found guilty of the specification except the words 'feloniously take, steal, and carry away', substituting therefor the words 'knowingly and willfully misappropriate and apply to their own use and benefit', and not guilty of the charge but guilty of violation of the 96th Article of War ***.

* * * * * *

"5. *** In view of the established meaning of the words substituted by the court in this case, the offense of misappropriation as found can only be construed to involve an element of control or supervision by the offenders over the property misappropriated, although such control or supervision was not proved.

"The offense of larceny as charged did not include an element of control or supervision by the offenders but was predicated upon trespass which excluded the possibility of rightful possession, control or supervision. To prove the offense charged, it was not, therefore, necessary or even legally permissible to prove rightful possession, control or supervision by accused, an essential element of the offense found. It follows that the offense found was different from and not included in that charged. CM 199841, Miotke; CM 197396, Christopher. The authority of the Manual for Courts-Martial to make exceptions and substitutions by its findings does not extend to the substitution by its findings of an offense not included in that charged. Par. 78 c, M.C.M."

6. In view of the evidence adduced in this case, and in the light of the above-cited cases, the Board of Review is of the opinion that the record is not 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 216297

UNITED STATES	)	FIFTH DIVISION
v.	)	Trial by G.C.M., convened at Fort Custer, Michigan, February 17, 1941. Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Disciplinary Barracks.
Private ANDREW H. SNYDER (6990243), Company C, 1st Engineer Battalion.	)	

HOLDING by the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, Judge Advocates.

The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence. In reaching this conclusion the Board has followed the precedents enumerated below:

CM 154752, Reynolds (1923)
CM 169920, McGhee (1926)
CM 169922, Pruitt (1926)
CM 170081, Allen (1926)
CM 173644, Getchell (1926)
CM 187576, Lanfair (1929)
CM 187588, Errigo (1929)
CM 188240, Mercer (1929)
CM 190115, Treat (1930)
CM 190127, Hammond (1930)
CM 200328, Boutiller (1933)
CM 200942, Cole (1933)
CM 203802, Braman (1935).

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Board of Review
CM 216316

MAY 15 1941

UNITED STATES	)	FOURTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Barksdale Field, Louisiana,
Private First Class JAMES	)	March 6, 1941. Dishonorable
A. THOMAS (6966927), 51st	)	discharge and confinement for
Materiel Squadron, 38th	)	two (2) years. Disciplinary
Air Base Group.	)	Barracks.

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

2. Accused was tried on a single Charge, violation of the 93d Article of War, and sixteen Specifications thereunder, each alleging larceny. He pleaded not guilty to, and was found guilty of, the Charge and all the Specifications thereunder, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority disapproved the findings of guilty of all of the Specifications except the findings as to Specifications 4, 5 and 6, approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years, but remitted six months of the confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Accused was found guilty of the larceny of one 4-piece suit, value about $30 (Specification 4); one suit, value about $16.90 (Specification 5); one 4-piece suit, value about $25, 2 ties, value about 50¢, 3 pairs socks, value about 30¢, one lounging robe, value about $3, and one sweater, value about $5 (Specification 6).

At the threshold of the trial the trial judge advocate stated in open court:

> "*** I have in the Courtroom, all the articles alleged to have been stolen by Private Thomas. It is requested that I be authorized to introduce these articles collectively as evidence to be identified individually by different witnesses, and then withdraw them from the record because of their bulk."

The request was granted and in this manner the articles of clothing referred to were before the court at the trial (R. 9).

The only evidence of record of the value of the four-piece suit described in Specification 4 is found in the deposition of Private James H. Blasingame, Air Corps Detachment, Puerto Rican Department, the alleged owner (R. 12), which reads as follows:

> "Eighth interrogatory: What was the value of your suit?
> Answer: $30.00." (Ex. E)

The sole reference in the record to the value of the suit described in Specification 5 is found in the stipulated evidence of the alleged owner (R. 12), Private Kenneth M. Hauge, Company A, Air Corps Detachment, Puerto Rican Department, which reads:

> "That the package contained 1 green suit with white pin stripe - $16.90;". (Ex. F)

The only evidence of record with respect to the value of the articles described in Specification 6 is found in the stipulated evidence of Private Lawrence R. Cramer, Company A, Air Corps Detachment, Puerto Rican Department, the alleged owner (R. 14), which reads as follows:

> "That he later identified the following articles which also had been packed in his bag originally for shipment to his home, in the room occupied

by Private THOMAS: 1 green 4 piece tweed suit - $25; 2 ties - 50¢; 3 pair socks - 30¢; lounging robe - $3; 1 green-grey sweater - $5; handkerchiefs - some value;". (Ex. H)

4. Except as to distinctive articles of government issue or other chattels, which, because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 212983, Dilsworth; CM 213765, Krueger, et al.). The record discloses no competent evidence as to market value. While the articles referred to were before the court, the court was not authorized, from a mere inspection of same, to find that they were more than of some substantial value. To hold that the court could determine the definite market values of these articles "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208481, Ragsdale; CM 208002, Gilbert; CM 209131, Jacobs).

The evidence is legally sufficient to support only so much of the findings as to value under Specifications 4, 5 and 6 of which accused stands convicted as involves a finding, as to each, of some substantial value not in excess of $20. The maximum punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, for larceny of property of value of not more than $20 is confinement at hard labor for six months.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specifications 4, 5 and 6 as involves a finding of guilty as to each of these Specifications, of larceny by the accused as alleged, at the place and time alleged, of the property described in the Specifications, of some substantial value not in excess of $20, and of ownership as alleged; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months.

J. L. M. Smith, Judge Advocate.
William A. Sounds, Judge Advocate.
[illegible], Judge Advocate.

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

Board of Review
CM 216361

(133)

MAY 6 1941

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G.C.M., convened at Jefferson Barracks, Missouri, April 4, 1941. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private EVERETT H. WEBER (16007846), Air Corps Unassigned, Hawaiian Department, Jefferson Barracks, Missouri.	)	

HOLDING by the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, 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 arraigned on the following Charges and Specifications:

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

Specification 1: In that Private Everett H. Weber, Air Corps Unassigned, Hawaiian Department, attached 31st School Squadron, Air Corps, did, at Jefferson Barracks, Missouri, on or about January 30, 1941, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Jefferson Barracks, Missouri, on or about February 8, 1941.

Specification 2: In that Private Everett H. Weber, Air Corps Unassigned, Hawaiian Department, attached 26th School Squadron, Air Corps, did, at Jefferson Barracks, Missouri, on or about February 17, 1941, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Jefferson Barracks, Missouri, on or about March 9, 1941.

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

Specification: In that Private Everett H. Weber, Air Corps Unassigned, Hawaiian Department, attached 26th School

> Squadron, Air Corps, having been duly placed in arrest at Jefferson Barracks, Missouri, on or about February 10, 1941, did, at Jefferson Barracks, Missouri, on or about February 17, 1941, break his said arrest before he was set at liberty by proper authority.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous conviction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The undisputed evidence shows that accused (a) who had been notified that he was a member of a detachment to be shipped to Lowry Field, Denver, Colorado, on January 30, 1941, absented himself without leave at Jefferson Barracks, Missouri, on January 30, 1941, and surrendered himself at that post on February 8, 1941; (b) was on February 10, 1941, placed in arrest and restricted to the limits of the reservation; and (c) on February 17, 1941, breached that restriction and absented himself without leave until he again surrendered himself at the same post on March 9, 1941.

4. The accused testified that he had been getting letters from home about some trouble with a girl; that on January 30, 1941, while getting ready to depart for Lowry Field, he drank too much beer and came to in Chicago after riding on a bus ticket which accused stated a companion said he had purchased for accused. He then went to his home in Wisconsin, to see about the trouble with the girl, who accused him of being the father of an unborn child and wanted him to marry her and get out of the Army, and then returned to Jefferson Barracks and turned in. He went home the second time to get the latest developments and perhaps settle the matter. After learning that his lawyer planned to have a blood test made after the birth of the child, he returned to Jefferson Barracks and turned in (R. 14-18).

5. The only evidence in the record that accused intended to desert the service is whatever inference may be drawn as to Specification 1, Charge I, from absence without leave for nine days; and as to Specification 2, Charge I, from an absence of twenty days and the fact that accused was in arrest and restricted to the post at the time of his departure. The Manual for Courts-Martial, 1928 (p. 143) provides:

"If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent. * * *."

The Board of Review has repeatedly expressed the view that in order to sustain the findings of guilty, there must be in addition to the fact of absence without leave for a short period some evidence tending to show a motive for desertion or some other evidence from which a court might reasonably infer that accused intended not to return to the military service (CM 189658, Hawkins; CM 195988, Parr; CM 196187, Roath; CM 196776, Maioloha; CM 198750, Knouff; CM 200601, Rowland). There is no such evidence in the instant case. None of the circumstances stated in paragraph 130, Manual for Courts-Martial, 1928, from which an inference of intent to desert may be inferred are present in this record. The possible inference that the second absence, while in arrest, might have been with the intention of avoiding a continuance of the arrest is rebutted by his surrender at his proper post from that absence. The accused stated an explanation for each absence entirely consistent with an intent to return to the military service, as he did in fact return.

6. In the absence of evidence from which the court might reasonably conclude either as to Specification 1 or Specification 2, Charge I, that the accused intended to desert, it follows that the record is, with respect to Specification 1, Charge I, legally sufficient to support only so much of the finding of guilty as involves a finding of guilty of absence without leave for the period alleged in that Specification (9 days), and with respect to Specification 2, Charge I, legally sufficient to support only so much of the finding of guilty as involves a finding of guilty of absence without leave for the period alleged in that Specification (20 days). The maximum punishment for the two absences aggregating twenty-nine days, is fixed by paragraph 104 c, Manual for Courts-Martial, 1928, at confinement at hard labor for eighty-seven days and forfeiture of two-thirds pay per month for a like period.

7. The maximum punishment for breach of arrest under Charge II is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

8. The record shows (R. 4) that prior to arraignment, upon being given the opportunity to exercise his rights as to challenge,

the defense stated that the accused did not desire to challenge any member either for cause or peremptorily. At the close of the testimony of the accused the defense inquired whether it could then exercise a peremptory challenge. The law member stated that a peremptory challenge could not be made at that stage of the proceedings, but a challenge for cause could be made. The defense then challenged peremptorily one member, whom it was stated had replaced another officer as commander of the train in the troop movement. The law member stated that, in his opinion, it was too late to exercise a peremptory challenge. The member challenged was then asked, apparently by the law member (R. 18), whether he had any knowledge or had formed any opinion that would cause him to be prejudiced in the case. The member replied that he had knowledge only that one man or possibly two were not present when the train left. The record then shows that the challenged member withdrew, the court was closed, voted upon the challenge by secret ballot, and upon being opened, the president announced that the challenge was not sustained, and the challenged member resumed his seat. The prosecution asked what was the decision of the law member on the right of accused to a peremptory challenge after a challenge for cause was not sustained. The president then stated (R. 19):

> "President: There will be no peremptory challenge. The only ground for challenge at this time is for cause. The court has been closed and a majority of the members have voted on not sustaining the challenge."

The statement of the law member that it was then too late to exercise a peremptory challenge and that of the president that the only ground for challenge at that time was for cause, were sound. Paragraph 58 c, Manual for Courts-Martial, 1928, provides that only challenges for cause can be made subsequent to arraignment (CM 197231, Casmay).

9. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification; legally sufficient to support only so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty of absence without leave from January 30, 1941, to February 8, 1941, and to support only so much of the finding of guilty of Specification 2, Charge I, as involves a finding of guilty of absence without leave from

February 17, 1941, to March 9, 1941, in violation of Article of War 61; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for five months and twenty-seven days, and forfeiture of two-thirds pay per month for a like period.

Walter J. Field, Judge Advocate.

Thomas N. Jaffy, Judge Advocate.

Charles W. Van Benthuysen, Judge Advocate.

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

Board of Review
CM 216397

MAY 28 1941

UNITED STATES	)	44th DIVISION
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, March 14, 1941. Dishonorable discharge and confinement for one (1) year. Correctional Institution.
Private ROBERT J. FLEMING (20224217), Headquarters Company, 114th Infantry (Rifle).	)	

HOLDING by the BOARD OF REVIEW
HILL, TAPPY and Van BENSCHOTEN, Judge Advocates.

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

2. The accused was tried on the following Charges and Specifications:

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

Specification: In that Robert J. Fleming, Private, Headquarters Company, 114th Infantry (Rifle) having been duly placed in confinement in the Fort Dix, New Jersey, guard house, on or about January 8, 1941, did at Fort Dix on or about 18 February 1941 escape from said confinement before he was set at liberty by the proper authority.

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

Specification 1: In that Robert J. Fleming, Private, Headquarters Company, 114th Infantry, did, at Pointville, N.J., on or about February 18, 1941, in violation of Title 2, section 145-6, New Jersey Revised Statutes, and Title 18, section 468, as amended, United States Code, 1934 Edition, take unlawfully one 1940 Ford Coupe, value about $500, the property of Mr. Lyn Williamson of Pointville, N.J.

Specification 2: In that Robert J. Fleming, Private, Headquarters Company, 114th Infantry, did, at Mount Holly, N.J., on or about February 19, 1941, in violation of

Title 2, section 145-6, New Jersey Revised Statutes, and Title 18, section 468, as amended, United States Code, 1934 Edition, take unlawfully one 1940 Plymouth Coach, value about $500, the property of Mr. Daniel Smires, of Mount Holly, N.J.

Specification 3: In that Robert J. Fleming, Private, Headquarters Company, 114th Infantry, on or about February 19, 1941, knowing that one 1940 Plymouth Coach, value about $500, the property of Mr. Daniel Smires of Mount Holly, N.J. was stolen, did transport said motor vehicle from Camden, N.J. to Philadelphia, Pa., in violation of the National Motor Vehicle Theft Act, Title 18, section 408, United States Code, 1934 Edition.

Accused pleaded not guilty to all Specifications and Charges. He was found guilty of the Specification, Charge I, and of Charge I; not guilty of Specification 1, Charge II; and guilty of Specifications 2 and 3, Charge II, and of Charge II. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for eighteen months. The reviewing authority approved the sentence, reduced the period of confinement to one year, and designated the Federal Correctional Institution, Danbury, Connecticut, as the place of confinement, and forwarded the record under Article of War 50½.

3. The first question requiring consideration is the legal sufficiency of the record to support the findings of guilty of Specifications 2 and 3, Charge II, and of Charge II.

Mr. Smires testified, in substance, that his 1940 Plymouth coach was out of his possession in February 1941, from eleven o'clock one day from the place where he had left it in front of the Episcopal Church on High Street in Mount Holly until 10:30 p.m., the following day when he obtained the car from a garage in Daleville, near Scranton, Pennsylvania, some one hundred and twenty-three miles from Mount Holly. He had given the car to no person during that period. He reported its loss to the state police at Bridgeboro, New Jersey.

A member of the Military Police Detachment, Fort Dix, New Jersey, testified that around the 20th of February he went to the State Police Barracks, Wyoming, Pennslyvania - near Scranton - received the accused and two other soldiers from the state police and brought them back.

The only other witness as to those Specifications was Gerard K. Sandweg, Special Agent of the Federal Bureau of Investigation, who testified that accused made a voluntary statement to him which was reduced to writing and signed by the accused. When two typewritten pages were shown Sandweg for the purpose of refreshing his recollection, the defense objected, stating that if it was a signed statement it should be introduced rather than used to refresh the recollection of the witness. The "Court" overruled the objection (R. 35), and refused to permit defense then to examine witness as to the preparation of that statement (R. 36). The witness testified that accused stated that he and another soldier, Hopkins, escaped from jail; that near Pointville, New Jersey, Hopkins left him and came back in a 1940 Ford coupe which they drove until it ran out of gas near Pemberton; that near Camden the next day Hopkins got in a 1938 brown Plymouth coach which they left on the road near Mount Holly when the gas ran out; that they got into a 1940 black Plymouth sedan with New Jersey plates, MX over M8966; that they came in that car to Fort Dix, went through Trenton to Morrisville, Pennsylvania, and were taken to the State Trooper Barracks at Daleville, Pennsylvania. Upon cross-examination Mr. Sandweg stated that the two sheets from which he had read "practically word for word" were not the original signed statement, which original signed statement, to the best of his recollection, was in the files in Newark, and that he did not know who prepared that particular paper from which he had been reading (R. 38). The defense stated that witness was reading word for word from the statement which was not prepared by the witness, that witness did not know who made it, and the defense wanted to know if it was the same as the original statement. The defense moved to strike out the statement of Mr. Sandweg as to what the accused testified on the ground the best evidence was the original signed statement. That motion was denied (R. 39-40).

The only evidence which in any way connects accused with the offenses alleged in Specifications 2 and 3, Charge II, is that of Mr. Sandweg reciting the confession of the accused. The timely objection of the defense, twice stated, invoked the best evidence rule which requires that a writing is the best evidence of its contents and must be introduced to prove the contents, with the exception that if a writing has been lost or destroyed, or it is otherwise satisfactorily shown that the writing cannot be produced, then the contents may be proven by a copy or by oral testimony of witnesses who have seen the writing (par. 116 a, M.C.M., 1928; Wigmore's Code of Evidence, 1935, rule 139; 16 C.J. 732). There was no attempt to show that the original was lost, or destroyed, or was otherwise unavailable. In fact, it was shown that the original, to the best recollection of Mr. Sandweg, was in the files in Newark. Even if the original had been shown to be unavailable, there was no proof of the

authenticity of the purported copy, from which Mr. Sandweg had read "practically word for word" in refreshing his recollection. Mr. Sandweg testified that he did not make the copy before him and did not know who made it.

The court erred in refusing to permit defense to examine Mr. Sandweg prior to his use of the two typewritten pages in refreshing his recollection and in overruling the subsequent motion of defense to strike out the testimony of Mr. Sandweg as to the statement of accused in view of the proof that the original signed statement was available. Excluding such testimony of Mr. Sandweg, there is no proof to support the findings of guilty of Specifications 2 and 3, Charge II, and of Charge II.

4. On the morning of the day of trial upon the instant Charges, the accused had been tried upon a specification alleging larceny of another automobile. All of the six members who sat at the first trial were present at the opening of the second trial, and, in addition, two members who had been challenged and excused from the first trial. One Specification, of which accused was found guilty at the first trial, alleged larceny of an automobile, while at the second trial, one Specification alleged the taking of a car, in violation of a state and Federal statute, and a second alleged the interstate transportation of that car, in violation of the National Motor Vehicle Theft Act, all closely related offenses.

At the second trial the defense challenged Captain Wagner for cause upon the ground that he was a member of the court which that morning had convicted accused in his first trial and was of necessity prejudiced against accused. Captain Wagner was sworn and testified that he could not impartially hear and determine further charges against accused, and that he was not prejudiced but "imagined" that the trial that morning might influence his decision that afternoon (R. 2-4). The challenge was not sustained. It should be noted that four of the six members who passed upon that challenge, sat at the first trial of accused and were likewise subject to the same challenge as the member whose eligibility they were then determining.

The Board of Review has concluded that the two Specifications relating to the taking and transportation of the car are not supported by competent evidence. The only remaining specification is that alleging the escape of accused from confinement, an offense which bears no relation to the nature of the offense of larceny upon which accused was tried by the court of which five of the six members of the court in the instant case sat.

The Board of Review is of the opinion that under those circumstances and in view of the compelling proof of escape from confinement, the failure to sustain the challenge for cause as to Captain Wagner did not injuriously affect the substantial rights of the accused under Article of War 37. It is the function of the court to determine the existence or nonexistence of alleged grounds of challenge (CM 170551, Hayes).

5. For the reasons above indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 2 and 3, Charge II, and of Charge II.

The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support the sentence.

Walter S. Hill Jr., Judge Advocate.

Thomas N. Tabby, Judge Advocate.

Charles H. Van Swearingen, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 5 1941 - To the Commanding General, 44th Division, Fort Dix, New Jersey.

1. In the case of Private Robert J. Fleming (20224217), Headquarters Company, 114th Infantry (Rifle), I concur in the foregoing holding by the Board of Review and, for the reasons therein stated, recommend that the findings of guilty of Specifications 2 and 3, Charge II, and of Charge II, be disapproved.

Article of War 42 does not authorize confinement in a penitentiary unless the confinement adjudged is more than one year. Confinement in a Federal correctional institution or reformatory is not authorized under the letter dated February 26, 1941 (AG 253, 2-6-41,E), from The Adjutant General to all Commanding Generals, "Subject: Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law.

Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence, provided a place other than a penitentiary, or Federal reformatory or correctional institution is designated as the place of confinement.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 216397).

REC'D JUN 19 J.A.G.O.

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

1 Incl -
Record of trial.

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

Board of Review
CM 216707

JUL 10 1941

UNITED STATES	)	31ST DIVISION
v.	)	Trial by G. C. M., convened at Camp Blanding, Florida, May 5, 12, 13 and 14, 1941. Dismissal.
Second Lieutenant HORACE D. HESTER (0-366390), 124th Infantry.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, 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 61st Article of War.

Specification 1: In that Second Lieutenant Horace D. Hester, 124th Infantry, did, without proper leave, absent himself from his organization at Camp Blanding, Florida, from about April 26, 1941, at 6:00 o'clock A.M., until about April 28, 1941, at 9:00 o'clock P.M.

Specification 2: (Finding of not guilty)

CHARGE II: Violation of the 85th Article of War.

Specification: In that Second Lieutenant Horace D. Hester, 124th Infantry, was, at Camp Blanding, Florida, on or about March 16, 1941, found drunk while on duty as the Adjutant of

the Second Battalion, 124th Infantry, on parade in the regimental parade ground.

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

Specification 1: In that Second Lieutenant Horace D. Hester, 124th Infantry, was, at Camp Blanding, Florida, on or about March 16, 1941, in a public place, to-wit, the regimental parade ground, drunk while in uniform.

Specification 2: (Finding of not guilty)

Specification 3: In that Second Lieutenant Horace D. Hester, 124th Infantry, was, at Orlando, Florida, on or about March 31, 1941, in a public place, to-wit: Berger's Tavern, drunk and disorderly while in uniform.

Specification 4: (Nolle Prosequi)

He pleaded not guilty to all Charges and Specifications. He was found, of Specification 1, Charge I, guilty; of Specification 2, Charge I, not guilty; of Charge I, guilty; of Charge II and its Specification, guilty; of Specification 1, Charge III, guilty; of Specification 2, Charge III, not guilty; of Specification 3, Charge III, guilty; and of Charge III, not guilty, but guilty of a violation of the 96th Article of War. The prosecution, by direction of the appointing authority, entered a nolle prosequi as to Specification 4, Charge III (R. 9). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were not announced in open court. The reviewing authority approved the sentence but in his action improvidently stated, "Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld." The record was forwarded to the Board of Review where it has been acted upon under the provisions of Article of War 48.

3. The evidence as to the Specifications and Charges of which accused was found guilty may be summarized as follows:

As to Specification 1, Charge I, the accused stipulated that he was "away from his organization at Camp Blanding from about 6:00 A.M.,

April 26th, until about 9:00 P.M., of April 28, 1941." (R. 10, 25; Ex. A) His company commander, Captain Alphonse H. Fritot, testified that he gave accused no authority to leave nor did accused obtain his permission to absent himself from his station on April 26 (R. 18). Lieutenant Colonel Maxwell C. Snyder, 124th Infantry, accused's battalion commander, did not give him permission to be away from Camp Blanding from April 26 to April 28, and he knows that accused was not present for duty on April 27 (R. 22). Colonel Fred A. Safay, regimental commander of the 124th Infantry, did not give accused leave for the period in question (R. 24).

The evidence of record as to Charge II and its Specification, and Specification 1 of Charge III, may be summarized as follows:

An agreed statement of facts received in evidence by consent of both sides recites that -

> "accused was, on the afternoon of March 16, in uniform, in a public place, the parade ground of the 124th Infantry, at Camp Blanding, and that he was at said time acting and on duty as the Adjutant of the Second Battalion." (R. 11)

Accused's company commander, Captain Fritot, testified he was drunk on that occasion (R. 11, 13a, 14) and was staggering on the parade ground (R. 13). Captain Fritot saw accused immediately prior to the time of the formation on the parade ground and he was pretty drunk. His conversation was abnormal (R. 19). He sounded like he might have had a few drinks or had been under some sort of drug. One of the officers there from another tent got some wet towels and put them on his face and head and tried to sober him up. Witness talked to him and found out the condition he was in and told him that they were getting ready to parade, that he was representing the battalion commander as adjutant, and that he had better straighten up (R. 19).

Accused's battalion commander, Lieutenant Colonel Maxwell C. Snyder, referring to this parade, testified as follows:

> "Q. Did you see the accused on that occasion?
> A. I did.
> Q. What was his condition as to being drunk or sober?
> A. I didn't see the accused until we got on the field. He had been sent forward to align himself with the

other battalion adjutants. I chose him as my adjutant for that day as my adjutant was away. We had an understanding the day before that the adjutants would align themselves up in position and the respective battalion commanders would come into position. I didn't notice him in an intoxicated condition until such time as he came out to place himself in position in front of the battalion with me.

Q. On that occasion did you have the opportunity to observe the accused?

A. I did.

Q. From what you observed -- from what you saw, what was the accused's condition as to being drunk or sober?

A. He was staggering.

Q. Was he drunk or sober?

A. I couldn't say whether he was drunk or sober, but he looked like he was drunk to me. Yes, he was drunk.

Q. Anything else?

A. He didn't fall down, but he was wobbly as we came off the field. Just about that time, a messenger came up to me from the stand that the Colonel wanted to see me, that is, Colonel DeCottes, our executive officer. It was just at that time that I saw clearly in his mannerisms that he was intoxicated.

Q. From what you saw, were you able to judge the accused's condition?

A. I think so.

Q. Was he drunk or sober?

A. From my estimation he was too drunk to be in the parade." (R. 21-22)

Captain Thurman A. Hancock, the regimental adjutant of the 124th Infantry at the parade on March 16, saw, observed and talked to the accused on that occasion. In his opinion accused was drunk when he spoke to him (R. 35).

Second Lieutenant Clarence D. Gray, Company C, 124th Infantry, was present in camp and in the officers' quarters on March 16, but was

not in the parade in the regimental area on that date. He saw accused about a half hour before the parade and in his opinion he was not drunk (R. 42). The parade was around 4:30 in the afternoon and he last saw accused between 3:30 and 4:00 in his tent drinking (R. 43).

First Lieutenant James H. Johnson, Jr., 124th Infantry, witnessed the parade from a point near the reviewing stand, saw accused acting as adjutant of the 2d Battalion, and in his opinion he was sober, although he smelled liquor on him (R. 45). The regimental adjutant requested witness to go out on the field and see what was wrong with accused, if he could carry out his assignment and duties, and to relieve him of his sidearms and take his place if accused said that he could not carry on (R. 46). He went out on the parade ground and spoke to accused, who told him, "I have never failed to perform any duty given me to do, and I can carry out the parade" (R. 46, 51).

After the parade Lieutenant Colonel Snyder directed accused to report to him the next day, at which time Colonel Snyder "reprimanded him severely for having gotten himself in an intoxicated condition on that day" (R. 22). Accused voluntarily admitted that he had been drinking on that occasion and

> "that it was a bad habit with him, and he agreed that he would do his best, and he made me believe that he was sincere at that time, and he told me that I didn't have any cause to worry about him getting in that condition again" (R. 23).

Accused admitted that he had been drinking that day, but said he did not do anything out of order. He admitted drinking heavily but did not admit that he was drunk (R. 55). While talking about his condition he made no statement to Colonel Snyder complaining of any illness or sickness on the occasion of the parade (R. 24).

Testifying in his own behalf accused explained to the court his condition on that day, as follows:

> "A. The day before the parade Colonel Snyder picked me to act as adjutant because his regular adjutant was not present. This would be the first time that I ever acted as adjutant and I wanted to make good at the job. The following day was Sunday, and I had few drinks; later I left my tent and went to the parade ground. I had to line my battalion up on a line with the first battalion's, and I lined

myself up on the adjutant of the first battalion. I had to move my battalion into the position of the second battalion, which I did but had to move them a little in order to do it. At the proper time I commanded them to pass in review. One other thing, after, that is, when Colonel Snyder came up to his position before the battalion, and in front of me, I had myself in line with the adjutant of the first battalion. While the music was playing, Colonel Snyder was moving up and down on his toes, keeping time with the music, and I was doing the same thing — keeping time with the music. We then came to front and center, returned, marched to the motor pool, marched passed the reviewing stand and marched off the field. After I left my position, my duty being over, Captain Fritot called me, told me that my application for leave would be held up. I admitted to him that I had been drinking, had a few drinks, but, I was not drunk. He asked me why I went through with it, and I told him that I had never failed to perform my duty when called upon, and that I thought it was the right thing to do. He admitted to me in front of other officers, that maybe it was better to carry out an assignment.

Q. You did have several drinks, but were not drunk?

A. Yes. Over a period of three or four hours, I had several drinks." (R. 47-48)

The evidence of record pertinent to the offense charged in Specification 3 of Charge III which, in substance, alleges accused was drunk and disorderly in uniform in Berger's Tavern, a public place, in Orlando, Florida, on March 31, 1941, may be summarized as follows:

The accused's version of the occurrence, related by him as a sworn witness in his own behalf, is this:

"A. We went on that march to Sanford. We had a reception at Colonel DeCottes' home. All the officers of the regiment were invited and on that occasion we were introduced to the Commanding Officer of the 31st Division, and we all met the general. We had as many drinks as we wanted. I

asked the company commander if he wanted me to do anything, he told me to go anywhere I wanted, just so long as I would be back for reveille. We went down to Orlando, had some friends there to visit. We got to Orlando, and went to this bar, Lieutenant Eddy and Lieutenant Wilson and myself, — we had a drink and Major Scott came in with his party and I offered to buy them a drink. We had all been at the party together, and I thought it proper and saw no harm in it. I thought I'd show my feelings toward him and I bought a drink. I went back to my table, and a little while later went to Major Scott, and offered to buy another drink, he told me that he didn't care to have any more, and I insisted that he do. When he was getting up from his chair, I put my hand on his shoulder not thinking what I was doing, and then these two boys told me to go somewhere else. We started out and it was raining and I told them I wouldn't go back because of the rain and that I was going to stay over and report in the morning. It just so happened that at Sanford that night, a good many tents were blown down." (R. 49)

Major Douglas G. Scott, Medical Corps, 124th Infantry, testified that this incident happened around 11 o'clock at night -

"Q. Just tell the court what happened.
A. On that occasion I had my wife and two of my officers who were at Sanford with me, we stopped into Berger's Tavern for a cocktail and after we'd been there a short time, the Lieutenant, the accused, showed up and he said how'd do, and went back to the party, and a few minutes later, he came over, leaned on the table and said he wanted to buy my party a drink, that he would pay for the drinks, I told him that we had just ordered some drinks, and he said he's pay for those. After discussing whether he should pay for the drinks or not, I decided to let him do so, and he did, and went off. Then, I think it was about a half hour later, he came back and wanted to buy another drink and I said no, I'd rather not, and then he said he definitely wanted to buy another

drink, then I said, at least I told Lieutenant Hester, I'm sorry I buy my own drinks, and his reply was, what's the matter with my money, is it no good, I then said, Lieutenant I much prefer if you'd leave, I started to get up, and when I did he grabbed me by the shoulders and slapped me down into my seat. Suddently there were other officers there and it was fortunate they were able to get him away from our table." (R. 36-37)

Lieutenants Price and Wilson were the two officers who carried accused away from Major Scott's party in the bar at Berger's Tavern (R. 54). At sometime after the incident (date not stated) accused went to Major Scott's tent and apologized for his conduct (R. 38).

Major Scott's testimony as to whether or not accused was drunk or sober at the time of this occurrence is stated thus:

"Q. What was his condition with reference to being drunk or sober?
A. He was drunk, that is, under the influence of alcoholic beverages.
Q. His actions, his conduct, his appearance, was he drunk or sober?
A. He was definitely under the influence of alcohol. You say was he drunk or sober, I can't state definitely whether he was drunk or sober.
Q. Well, I'll ask you was he drunk?
A. He was under the influence of alcohol and not in command of his faculties.
* * * * * *
Q. At that time was his gait steady?
A. His entire actions was not steady." (R. 36, 37)

Second Lieutenant Benjamin C. Price, Company G, 124th Infantry (R. 27), a friend of accused (R. 29), accompanied him from Sanford to Orlando, and was with him the greater part of the time he was in Orlando. He saw accused in Berger's Bar, which is connected with a hotel, about 9:45, having a conversation with Major Scott, Medical Department, who was there accompanied by his wife and a Lieutenant Pusic, also of the Medical Department (R. 30a). He last saw accused about 11 p.m., in a hotel where he decided to stay for the night rather than accompany witness

and Lieutenant Wilson back to the bivouac area at Sanford. At that time accused could walk "fairly well" from the desk to the elevator (R. 28), but when witness left accused was drunk (R. 29). He did not know how much liquor accused consumed that night but "it wasn't a small amount" (R. 29).

First Lieutenant Hugh A. Wilson, 124th Infantry, together with accused and Lieutenants Price and Eddy, went to Orlando on the evening of March 31 (R. 31). They arrived between 9 and 10 o'clock and the four of them took a table at Berger's Bar which is located across an alley from the rear entrance of a hotel which is either the San Juan or the Angebilt, witness is not sure of the name (R. 31, 32). He was there with accused about one-half or three-quarters of an hour except for temporary absences. Witness and Lieutenant Price tried to induce accused to return with them to camp but he refused, entered the hotel and signed for a room. Witness left him between 10:30 and 11 o'clock, at which time accused was in the hotel lobby headed for the elevator and witness considered him drunk (R. 32).

Second Lieutenant Roy N. Eddy, Company G, 124th Infantry, was one of the four officers who were with accused at Berger's Tavern on March 31, 1941 (R. 39). He had occasion to observe him while there and in his opinion accused "was under the influence of liquor, but was not drunk", nor while he was "in the back" with Lieutenant Eddy was he disorderly (R. 40). This witness was formerly a policeman in Tampa and Miami and he would not testify that a person was drunk "unless they were plumb out" (R. 41).

4. The evidence of record discloses that accused was drunk in a public place on two occasions, first on the parade ground at Camp Blanding, Florida, during a parade of his regiment on March 16, 1941, in which military ceremony he participated in a conspicuous official capacity, i.e., as a battalion adjutant, and again in a tavern or public bar in Orlando, Florida, on March 31, 1941. On this latter occasion he was not only grossly drunk but conspicuously offensive and disorderly by his boorish conduct in interfering with the private party of other guests in the place and by pushing down into a chair an officer of field grade who was there present with his wife and friends. His conduct on both these occasions was clearly of such a nature as to bring discredit on the military service, in violation of the 96th Article of War.

The evidence of record as to Specification 3, Charge III (drunk in uniform in a public place, Berger's Tavern), fails to establish

the fact alleged in the specification that accused was in uniform. The words "while in uniform" should have been excepted by the court in arriving at a finding on this specification. However, the gist of this offense is the drunkenness in a public place. Had it been proven that accused was in uniform that circumstance would have constituted an aggravation, but not a change in the nature or substance, of the offense, which was properly laid under the 95th Article of War and also properly found as a violation of the 96th Article of War. Whether in uniform or in civilian clothes, an Army officer who is drunk in a public place is guilty of conduct of a nature which brings discredit on the military service. There is no testimony of record indicating that there were civilians present watching the regimental parade on March 16, or that they were among the guests at Berger's Tavern on March 31. On the occasion of the parade the drunkenness of the accused was seen and observed by the accused's company and battalion commanders, the executive officer of the regiment, the regimental adjutant, and a first lieutenant of the 124th Infantry. It is a reasonable inference of fact that many other officers and enlisted men observed the accused's intoxication on this occasion. It is well established that the Army can be disgraced or discredited by the conduct of one of its members notwithstanding that this misconduct is seen only by Army personnel (Dig. Ops. J.A.G., April-Dec., 1917, p. 107; CM 202846, Shirley). The parade ground in a regimental area cannot be deemed other than a public place within the commonly accepted meaning of that term. This same observation is obviously applicable in a greater degree when applied to a tavern or public bar, alleged in the Specification as a public place. On this occasion the drunkenness and disorderly conduct of accused were seen, observed and protested against by Major Scott, was observed by the members of his party, and by Lieutenants Price, Wilson and Eddy. Again the fact that apparently only Army personnel was present at the time of this offense is immaterial, and the finding of guilty is fully justified.

The court sustained a motion for a finding of not guilty as to Specification 2 of Charge I (R. 39,47). There were certain irregularities in the procedure. The defense should have specified the particular section of the Court-Martial Manual relied upon, which obviously was paragraph 71d, page 56. The court, upon sustaining the motion, should have forthwith entered a finding of not guilty as to Specification 2 of Charge I. The court, however, voted not guilty on this Specification at the time it made its findings (R. 57).

The answer to a question directed by the prosecution to Colonel DeCottes, a witness, "was stricken from the record upon request of the Law Member" (R. 25a). The record should show the answer as well as the

question so that both reviewing and confirming authority might have before them a basis upon which to determine whether or not the rights of the accused were prejudiced by the ruling of the law member.

On motion of the prosecution, and without objection by the defense, the court amended Specification 3, Charge III, in order to cure the defective allegation therein as to the place where the offense was committed (R. 31,32,38). The court proceeded immediately with the trial upon such amendment being made, it clearly appearing that accused was not in fact misled in the preparation of his defense or that a continuance was necessary for the protection of his substantial rights (M.C.M., par. 73, p. 57).

5. From the viewpoint of both legality and the appropriateness of the punishment involved, accused's drunkenness on the parade ground on March 16, 1941, although one transaction, has been made the basis of two separate charges, viz., found drunk on duty, in violation of the 85th Article of War, and being drunk in uniform in a public place, in violation of the 95th Article of War (Spec. 1, Charge III). In the opinion of the Board of Review this procedure constitutes an unreasonable and unnecessary multiplication of charges and is in contravention of the policy set forth in paragraph 27, p. 17, Manual for Courts-Martial, 1928. The offense should have been charged under either one or the other aspect.

On several occasions throughout the record (R. 16,48,51) the defense counsel stated, in substance, that accused had been punished because of his drunken condition on the parade ground on March 16 (R. 16) by having his request for leave denied and by being confined for two weeks to the regimental area (R. 17), thus involving by implication the question of former jeopardy without properly raising that issue by a special plea. Testifying in his own behalf as a witness, accused makes it clear that immediately after the parade on March 16 (Specification 1, Charge III), and after the regiment had marched off the field and accused had left his position, his duty being over, Captain Fritot called him and told him that his application for leave would be held up. He admitted to the captain that he had been drinking but was not drunk (R. 48). The day following he went to Captain Fritot -

> "and he asked me if I was drinking, I told him, and he said for punishment, I was denied permission to go home. He said I had a nerve asking for leave after the way you acted yesterday, and he said for me to stay there." (R. 48)

Accused was to stay in camp until he was notified that he could get a leave (R. 50). Accused was asked on cross-examination by the prosecution whether or not he was given any further punishment for the charge of being drunk on March 31 (Specification 3, Charge III), to which he replied, "I would stay in camp and be in charge of the company while the other officers would go home" (R. 50). There seems to be no doubt that accused's application for leave submitted on the day following his drunken appearance on the parade ground in uniform on March 16 was refused because of that conduct (R. 51), and that he was again denied leave privileges subsequent to the occurrence in Berger's Tavern on March 31. On neither of these occasions was the disciplinary action of the company commander taken under the provisions of the 104th Article of War but was rather an exercise of his personal judgment and discretion in making a decision with respect to routine administration of his company. In other words, his action consisted merely of a non-punitive measure such as a commanding officer is authorized and expected to use to further the efficiency of his command, but which was not intended or imposed as a punishment for a military offense but purely as a corrective measure to create and maintain efficiency.

6. The record discloses that the court closed for deliberation on the findings at 5:35 p.m., May 13. One hour and twenty-one minutes later, 6:56 p.m., the court opened and recessed until 9 a.m., the next day, May 14, 1941 (R. 56). The court met the next morning, May 14, at 9:27 a.m., arrived at findings (R. 57), opened for evidence of previous convictions, of which there was none, heard the data read from the charge sheet as to the age, pay, service and restraint of accused, closed, and sentenced the accused to dismissal (R. 58). The court then opened and the president stated that the findings and sentence would not be announced, and at 10:21 a.m., recessed until 10 a.m., May 15, 1941 (R. 59). The court had been in session on this last occasion fifty-four minutes.

Ten days after the trial Lieutenant Hester, while still in confinement at the camp stockade, Camp Blanding, Florida, awaiting the result of trial, addressed a letter, dated May 24, 1941, to Major General Morris B. Payne, Camp Blanding, Florida, in which he makes the following statement with reference to his trial:

> "After the jury had delibrated from 5 until 7 P.M. they could reach no verdict and the trial was adjourned until 9 A.M., next morning. In the middle

of the jury's delibration next morning a letter from the Commanding General of the 31st Division was handed to the jury by the prosecuting attorney. This letter contained instructions for the jury. After the reading of this letter the jury reached a verdict within thirty minutes. Immediately after the trial my council disclosed to me the contents of the letter which instructed the jury to dismiss any officer from the service if there was any evidence of his guilt. My council told me that in his opinion I had been discrimated against and in all of his experience in courts, both Civil and Military, he had never before seen letters brought to a jury while they were delibrating."

The letter to which he refers reads as follows:

"HEADQUARTERS THIRTY-FIRST DIVISION
Office of the Division Commander 11/FWB/ctl

Camp Blanding, Florida,
February 14, 1941.

SUBJECT: General Courts-Martial Punishments.

TO: All Members General Court-Martial, Camp Blanding, Florida.

1. The severity of the punishment to be adjudged in any particular case is a matter within the legal limits and sound discretion of General Courts-Martial, but it is the desire of the division commander to call the attention of court members to certain general guiding principles which will be taken notice of by them.

2. The division commander in this division is the appointing authority for both general and special courts-martial and as such it is within his province to select the particular kind of court to which each case will be referred for trial. Special courts-martial can neither adjudge confinement or forfeitures in excess of six months nor dishonorable discharge; therefore, when a case is referred for trial to a general court-martial, such reference alone will be considered as an indication that should the accused be found guilty the sentence

should adjudge confinement and forfeitures in excess of six months, otherwise the case would have been referred to a special court in the first instance. For a sentence in excess of six months to be legal the court must, in addition thereto, also adjudge dishonorable discharge. (Par. 104a, M.C.M., 1928). Therefore, when a case is referred to a general court, it may be considered as a fixed policy that should the accused be found guilty the court will, in the absence of unusual circumstances, sentence the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a fixed period in excess of six months.

3. Attention is invited to the fact that the division commander as the reviewing authority can reduce, remit or suspend all or any part of a sentence but can not in any instance increase a sentence. Thus, where a sentence is excessive or the accused is entitled to special consideration because of mitigating circumstances, the reviewing authority may take appropriate action; but where an inadequate or inappropriate sentence is adjudged, no remedial action can be taken and the end sought to be obtained in the administration of military justice has been thwarted.

By Command of Major General PERSONS:

(Signed) T. D. Nettles, Jr.,
(Typed) T. D. NETTLES, JR.,
Major, A.G.D.,
Acting Adjutant General."

Lieutenant Hester's complaint was referred to the Commanding General, IV Army Corps, who, on June 3, 1941, by telegram to The Judge Advocate General's Office, War Department, and by letter of confirmation, requested that action on this case be withheld pending the outcome of an investigation of the irregularity alleged by Lieutenant Hester. On the same date he referred the matter to the Staff Judge Advocate, IV Army Corps, for investigation and report.

The investigating officer interrogated six of the eight members who sat at the trial. The other two members who participated were absent from Camp Blanding and were not available for questioning. He also examined the accused, Lieutenant Hester, his two defense counsel, the trial judge advocate and the acting assistant staff judge advocate and the court reporter who recorded the proceedings.

The findings of the investigating officer based on the facts disclosed by this investigation are as follows:

"a. The letter, and the only letter, that Lieutenant Hester had reference to in his allegation is appended hereto marked Exhibit B. (Note: This is the same letter quoted hereinabove)

"b. This letter was published February 14, 1941, for distribution to officers then detailed or to be detailed as members of general courts-martial and as regimental court-martial advisers, 31st Division. It was published in an endeavor to instruct these officers with respect to what constituted an adequate sentence. It was not prepared to influence the members of any particular court in any particular case but was a letter of general instruction.

"c. This letter had no application to trials of officers. Officers are excepted from the jurisdiction of special courts-martial and the purpose of this letter was to provide a policy to be followed in cases referred to general courts-martial that might legally have been referred to special courts-martial.

"d. This letter did NOT by words, implication or otherwise 'instruct the jury (court) to dismiss any officer from the service if there was any evidence of his guilt', as alleged by Lieutenant Hester, and he was not advised that it did by his counsel.

"e. The general court-martial that tried Lieutenant Hester was created and originally convened on May 5, 1941, on which date Lieutenant Hester's trial commenced. Immediately after he was arraigned a continuance for several days was granted. Shortly after May 5, 1941, the trial judge advocate, with approximately five cases on hand to be tried (including Lieutenant Hester's)and with no particular case in mind, suggested to the Assistant Judge Advocate, 31st Division, that it would be appropriate to furnish each member of the court with a copy of the War Department letter outlining the guide

for the measure of punishment. He had in mind War Department letter dated January 22, 1941, (AG 250.47 (1-2-41)E) subject: 'Administration of Military Justice.' (Exhibit D) The Assistant Judge Advocate, 31st Division, understood the suggestion to be that the members of the court be given information as to the policy of the War Department and the division commander as to sentences to be imposed and sent a copy of Exhibit B for each member of the court. These were taken to the court room prior to the convening of the court on May 14, 1941, by the reporter, who placed them, clipped together in a pile, on the table in front of the place where the president was to sit. At the time they were placed there the court had not convened that day, but was about to, and there was no one seated at the table. A copy of this letter from this pile was given to each member of the court by the president thereof just prior to the time the court convened, or shortly thereafter.

"f. Immediately after the court convened on May 14, 1941, it was closed to continue deliberation upon the findings in Lieutenant Hester's case which it had commenced at 5:35 P.M. and continued until about 6:56 P.M., May 13, 1941, when it recessed until the next morning.

"g. The letter, Exhibit B, did not influence the members of the court in arriving at the sentence adjudged in Lieutenant Hester's case.

"h. The policy stated in the letter, Exhibit B, is not objectionable. The distribution of copies of that letter to the members of court in this case was untimely. However, this letter was not applicable to Lieutenant Hester's case and its distribution did not prejudice any of his substantial rights."

This report of investigation, including the findings quoted above, has been approved by the Commanding General, IV Army Corps.

7. This circumstance raises a legal question requiring determination as to whether or not, after examination of the entire proceedings, the irregularity complained of has injuriously affected, or was prejudicial to, the substantial rights of the accused.

The subject of the letter in question is "General Courts-Martial Punishments". It deals solely and exclusively with the type and severity of the punishments to be imposed by a general court operating under

the jurisdiction of the Commanding General, 31st Division, Camp Blanding, Florida. It directs "all members" of general courts-martial at Camp Blanding that, as a matter of "fixed policy", any accused found guilty by such courts should "in the absence of unusual circumstances" be sentenced to dishonorable discharge, total forfeitures, and confinement in excess of six months. By no reasonable construction of its text can it be said that this letter introduced into the deliberations of the court the convening authority's personal view of the evidence or of the merits of the case, but neither can it be definitely assumed that this letter introduced into the deliberations of the court prior to its findings, had no bearing or effect on the vote of the members as to the guilt or innocence of the accused.

When considered in connection with the sentence to dismissal this letter takes on a different and more serious aspect. By a strict, and withal reasonable, interpretation of its text the letter may be said to refer only to sentences in the case of enlisted men. The maximum limits of punishment prescribed by the Executive Order in the Court-Martial Manual and cited in the letter itself (par. 104, M.C.M.) apply only to enlisted men and general prisoners not dishonorably discharged. Officers are not dishonorably discharged, they are dismissed, but the analogy in this case is unmistakable. It is particularly significant that this mandatory general policy as to punishment, prescribed by the convening authority and published February 14, 1941, was laid before each member of the general court in this case by direction of the trial judge advocate, and apparently with the knowledge and consent of the staff judge advocate's office, on May 14, 1941, three months after its publication, and at a time when that court had deliberated without result one hour and twenty minutes the day before. In the opinion of the Board of Review the distribution of this letter to each member of the court just prior to his vote on the findings and sentence so far oversteps the limits of propriety as to constitute coercion. This act tended to overcome the volition and independent judgment of the members of the court, and in the opinion of the Board of Review it vitiates both the findings and the sentence.

8. The functions of a court-martial and the convening authority are, and should remain, separate and distinct. It is the function and duty of the court-martial alone to pass upon questions arising during the trial (with certain authorized exceptions not here material), to arrive at findings on the guilt or innocence of the accused based upon the evidence of record, and upon conviction to impose a legal, appropriate and adequate sentence. No higher authority, or for that

matter no authority whatever, should be consulted by, or should directly or indirectly interfere with or influence the action of the court in its closed sessions. This principle is fundamental and its violation strikes at the very root of justice and opens the door for undue influence.

9. For the purpose of applying the provisions of the 37th Article of War, the Board of Review has examined the entire record of this case to determine whether the error complained of was prejudicial to the substantial rights of the accused, but such examination sheds but little light on the situation for the obvious reason that there neither is, nor can there be, a written report of the proceedings of the court in closed session. Under these circumstances the Board has every reason to believe that the fundamental rights of the accused have been violated and concludes that the error complained of prejudiced the accused's substantial rights.

10. The Board of Review is of the opinion that, for the reasons stated above, the record of trial is not legally sufficient to support the findings of guilty and the sentence, and that the sentence ought not to be confirmed.

H. L. McSmith, Judge Advocate.
William H. Sounds, Judge Advocate.
K. H. Chase, Judge Advocate.

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

Board of Review
CM 216708

JUN 19 1941

UNITED STATES	)	1st ARMORED REGIMENT
	)	
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, April 30, 1941. Dismissal.
	)	
Second Lieutenant SILAS LINDSAY LOCKHART, Jr. (0-390290), 69th Armored Regiment (Medium).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON, TAPPY and Van BENSCHOTEN, Judge Advocates.

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

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

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

Specification: In that 2nd Lieutenant Silas Lindsay Lockhart, Jr., 69th Armored Regiment (M), did, without proper leave, absent himself from his station at Fort Knox, Ky., from about January 3, 1941, to about January 9, 1941.

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

Specification 1: In that 2nd Lieutenant Silas Lindsay Lockhart Jr., 69th Armored Regiment (M), being indebted to the Post Exchange, Ft. Knox, Ky., in the sum of Ninety Nine dollars and two cents ($99.02) for September, 1940, account, which amount became due and payable on or about October 10, 1940, did, at Ft. Knox, Ky., from October 10, 1940 to January 16, 1941, dishonorably fail and neglect to pay said debt.

Specification 2: In that 2nd Lieutenant Silas Lindsay Lockhart, Jr., 69th Armored Regiment (M), being indebted to the Post Exchange, Fort Knox, Kentucky, in the sum of Seventy-three dollars and ninety-eight cents ($73.98) for October, 1940, account, which amount became due and payable on or about November 10, 1940, did, at Fort Knox, Kentucky, from November 10, 1940, to January 16, 1941, dishonorably fail and neglect to pay said debt.

Specification 3: In that 2nd Lieutenant Silas Lindsay Lockhart, Jr., 69th Armored Regiment (M), being indebted to the Post Exchange, Fort Knox, Kentucky, in the sum of Twenty-five dollars and eighty-eight cents ($25.88) for November, 1940, account, which amount became due and payable on or about December 10, 1940, did, at Fort Knox, Kentucky, from December 10, 1940, to January 16, 1941, dishonorably fail and neglect to pay said debt.

Specification 4: In that 2nd Lieutenant Silas Lindsay Lockhart, Jr., 69th Armored Regiment (M), being indebted to the Post Exchange, Fort Knox, Kentucky, in the sum of Twenty-seven dollars and forty cents ($27.40) for December, 1940, account, which amount became due and payable on or about January 10, 1941, did, at Fort Knox, Kentucky, from January 10, 1941, to January 16, 1941, dishonorably fail and neglect to pay said debt.

Specification 5: In that 2nd Lieutenant Silas Lindsay Lockhart Jr., 69th Armored Regiment (M), being indebted to the Officer's Mess, 69th Armored Regiment (M), Ft. Knox, Ky., in the sum of Twenty Seven dollars and sixty cents ($27.60) for October 1940 mess account, which amount became due and payable on or about November 10, 1940, did, at Ft. Knox, Kentucky, from November 10, 1940 to January 16, 1941, dishonorably fail and neglect to pay said debt.

Specification 6: In that 2nd Lieutenant Silas Lindsay Lockhart, Jr., 69th Armored Regiment (M), being indebted to the Officers' Mess, 69th Armored Regiment (M), Fort Knox, Kentucky, in the sum of Twenty-eight dollars and eighty cents ($28.80) for November, 1940,

mess account, which amount became due and payable on or about December 10, 1940, did, at Fort Knox, Kentucky, from December 10, 1940, to January 16, 1941, dishonorably fail and neglect to pay said debt.

Specification 7: In that 2nd Lieutenant Silas Lindsay Lockhart, Jr., 69th Armored Regiment (M), being indebted to the Officers' Mess, 69th Armored Regiment (M), Fort Knox, Kentucky, in the sum of Twenty-one dollars and ninety-five cents ($21.95) for December, 1940, mess account, which amount became due and payable on or about January 10, 1941, did, at Fort Knox, Kentucky, from January 10, 1941, to January 16, 1941, dishonorably fail and neglect to pay said debt.

CHARGE III: Violation of the 94th Article of War.
(Finding of not guilty.)

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

Specification: In that 2nd Lieutenant Silas Lindsay Lockhart, Jr., 69th Armored Regiment (M), did, at Fort Knox, Kentucky, on or about January 25, 1941, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Knox, Kentucky, on or about April 8, 1941.

ADDITIONAL CHARGE II: Violation of the 69th Article of War.
(Finding of not guilty.)

He pleaded not guilty to all of the Charges and Specifications and was found guilty of Charge I and its Specification; of Charge II and the seven Specifications thereunder; not guilty of Charge III and its Specification; of the Specification, Additional Charge I, guilty, except the words, "desert" and "in desertion", substituting therefor, respectively, the words, "absent himself without leave from", and, "without leave", of the excepted words, not guilty, of the substituted words, guilty; of Additional Charge I, not guilty, but guilty of violation of the 61st Article of War; of the Specification, Additional Charge II, and of the Additional Charge II, not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The accused absented himself without authority from his post and duties at Fort Knox, Kentucky, January 3, 1941, and remained absent without authority until January 9, 1941. On the latter date the accused was taken from the city jail, Milwaukee, Wisconsin, by Major Richard B. Wheeler, 69th Armored Regiment (Medium). After placing the accused in arrest, Major Wheeler brought him back to Fort Knox, on the same day, and turned him over to the Medical Officer of the Day at the station hospital, reminding the accused in the presence of the medical officer that he was still in arrest.

On January 25, 1941, the accused was discharged from the station hospital for duty, but failed to report to his organization. He again absented himself without authority from his station at Fort Knox, Kentucky, on January 25, 1941, and remained absent until April 8, 1941, when he surrendered at Fort Knox, Kentucky, to his commanding officer, First Lieutenant E. P. Curtin. At the time of his surrender he was dressed in civilian clothes and offered no explanation of his unauthorized absence.

Preceding his first unauthorized absence the accused had obtained credit at the post exchange, Fort Knox, Kentucky, for the months of September, October, November, and December of 1940 in the sum set opposite each month, as follows:

Month	Account	Credit	Balance Due
September 1940	$135.46	$36.44	$99.02
October 1940	73.98	None	73.98
November 1940	25.88	None	25.88
December 1940	27.40	None	27.40
Total indebtedness due			$226.28

The steward at the post exchange, Fort Knox, Kentucky, testified concerning the transactions during these months from the records kept by him and showed a balance of $200.09 to be due and unpaid as of January 16, 1941. The seeming discrepancy in these total sums was explained by the witness by showing that a payment of $30 on the total indebtedness of $226.28 was made on some date prior to January 16, 1941, and that additional charges, principally for cleaning, were made later in the month, leaving a total balance of $200.09 due on January 16, 1941. This balance represented an accumulation of indebtedness dating back through the month of September 1940.

Preceding his first unauthorized absence the accused had likewise obtained credit from the Officers' Mess for the months of October, November, and December, in the sum set opposite each month as follows:

Month	Account	Credit	Balance Due
October 1940	$27.60	None	$27.60
November 1940	28.80	None	28.80
December 1940	21.95	None	21.95

Total indebtedness due $78.35

It was established by competent and undisputed evidence that the accused was absent from his organization and station from January 3rd to January 9, 1941, on which date Major Richard B. Wheeler, at the direction of the regimental commander, arrived in Milwaukee and went to the city jail where he found the accused, placed him in arrest and accompanied him back to Fort Knox. It was likewise established by competent and undisputed evidence that he was absent from his organization and station without proper authority from January 25, 1941, following his discharge from the station hospital, to April 8, 1941, on which date he surrendered at Fort Knox, Kentucky.

It was proven by competent and undisputed evidence that the accused was indebted to the post exchange, Fort Knox, Kentucky, for the month of September 1940, in the sum of $99.02, which became due and payable on October 10, 1940; that he was indebted to the post exchange, Fort Knox, Kentucky, in the sum of $73.98 for the month of October 1940, which became due and payable on November 10, 1940; that he was indebted to the post exchange, Fort Knox, Kentucky, in the sum of $25.88 for the month of November 1940, which became due and payable December 10, 1940; that he was indebted to the post exchange, Fort Knox, Kentucky, in the sum of $27.40 for the month of December 1940, which became due and payable January 10, 1941, and that the total indebtedness during this period aggregated $226.28, plus additional charges, principally for cleaning, during the month of January, less the sum of $30 which was paid on the account sometime prior to January 16, 1941, leaving a balance due as of January 16, 1941, of $200.09.

Similarly it was proven by competent and undisputed evidence that the accused owed the Officers' Mess at Fort Knox, Kentucky, for the month of October 1940, the sum of $27.60, which became due and payable November 10, 1940; that he owed the Officers' Mess for the month of November 1940, the sum of $28.80, which became due and payable December 10, 1940; and that he owed the Officers' Mess for the

month of December 1940, the sum of $21.95, which became due and payable January 10, 1941; that the aggregate total indebtedness was $78.35.

The accused had knowledge of these delinquent accounts and besides the monthly statements which had been mailed to him in the regular course of business, he had been warned, personally, on at least two occasions by his commanding officer, the first one being about the middle of October 1940, and the second one late in November 1940. The evidence also shows that the accused's commanding officer received a communication from the post exchange through the regimental commander of accused's regiment about the middle of October 1940, to the effect that the accused was indebted to the post exchange to the extent of $135.46, and that this communication was indorsed to the accused for the purpose of obtaining a reply from him. Sometime later when no reply was received, he was again asked by his commanding officer what became of the communication so indorsed to him, and accused's answer was that "he had placed it in his car and it had probably blown from the car" (R. 31), but assured his superior that he was taking care of the indebtedness.

The total unpaid balance of accused's indebtedness to the post exchange, Fort Knox, Kentucky, was paid on or about February 4, 1941, from the proceeds of a check which came from some member of his family, and the total unpaid balance of accused's indebtedness to the Officers' Mess was likewise paid on February 7, 1941, in cash from the proceeds of this check, through Second Lieutenant J. Herman Shuppas, Summary Court Officer.

No evidence was offered by the defense.

The court having found the accused not guilty of Charge III and its Specification, and of Additional Charge II and its Specification, the only questions presented in the record for consideration by the Board of Review are, whether the evidence is legally sufficient to support the findings of guilty of Charge I and its Specification; of Charge II and the seven Specifications thereunder; and the findings of guilty by exceptions and substitutions of Additional Charge I and its Specification, and whether the record as a whole warrants confirmation of the sentence.

With respect to Charge I and Additional Charge I -

"Absence without leave by a commissioned officer is always a serious offense, and the circumstances of this case show that the accused's offense was not only without excuse of any kind but shows that he has little, if any, regard for his military duties. * * *." (CM 205427, Dwyer.)

With respect to Charge II and the seven Specifications thereunder -

"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." (CM 202253, Dosher.)

In arriving at its conclusion the Board of Review has not overlooked CM 123090, Hansbrough (sec. 1494 (2), Dig. Ops. JAG 1912-30), in which it was held that neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges, nor CM 202290, Lowry, in which it was 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. In the last-mentioned case the conduct of the accused was an isolated incident or escapade, but in the instant case, the evidence conclusively shows a continued and persistent disregard of obligations and promises covering a period of more than four months, in the face of warnings, both oral and written, by the superior officers of the accused.

It is not altogether clear as to who issued the check, the proceeds of which were used to pay the accused's indebtedness to the post exchange and to the Officers' Mess, which he had incurred, but it is strongly indicated that some member of his family furnished the funds. While such an act is extremely commendable, it can in no sense inure to his moral benefit or constitute an extenuation of his offenses.

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 promises to make payment of 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., 1928).

The Board of Review is, therefore, of the opinion that the only reasonable conclusion that may be reached after a fair consideration of the whole record is that the accused by his conduct has demonstrated an attitude which renders him unfit longer to retain his commission in the Army of the United States.

At the time of the trial the accused was twenty-two years of age. The statement of his service is as follows:

> Appointed second lieutenant, Infantry, Officers' Reserve Corps, May 31, 1940. Ordered to extended active duty by paragraph 28, Special Orders No. 161, Headquarters Third Corps Area, July 2, 1940, for one year, effective July 10, 1940.

4. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and warrants confirmation thereof. Dismissal is authorized for conviction of absence without leave, in violation of the 61st Article of War; and dismissal for dishonorable failure to pay debts, in violation of the 95th Article of War, is mandatory.

(On leave), Judge Advocate.

Charles L. Grasson, Judge Advocate.

Thomas N. Taffy, Judge Advocate.

Francis W. Vandenburgh, Judge Advocate.

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

Board of Review
CM 216764

JUN 20 1941

UNITED STATES	31st DIVISION
v.	Trial by G.C.M., convened at Camp Blanding, Florida, May 12 and 15, 1941. Dismissal.
First Lieutenant CLYDE RANDLE HARRIS (0-404211), D.C., Medical Detachment, 124th Infantry, Camp Blanding, Florida.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

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

Specification 1: In that First Lieutenant Clyde R. Harris, D.C., 124th Infantry, was, at Sanford, Florida, on or about December 16, 1940, in a public place, to-wit, the Armory, drunk and disorderly while in uniform.

Specification 2: In that First Lieutenant Clyde R. Harris, D.C., 124th Infantry, was, at Camp Blanding, Florida, on or about January 10, 1941, in a public place, to-wit, the Regimental Dispensary, drunk and disorderly while in uniform.

Specification 3: In that First Lieutenant Clyde R. Harris, D.C., 124th Infantry, was, at Camp Blanding, Florida, on or about January 19, 1941, drunk and disorderly in his quarters while in uniform.

Specification 4: (Finding of not guilty.)

Specification 5: (Finding of not guilty.)

CHARGE II: Violation of the 85th Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

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

Specification: In that First Lieutenant Clyde R. Harris, D.C., 124th Infantry, did, without proper leave, absent himself from his organization at Camp Blanding, Florida, from about April 25, 1941, to about April 29, 1941.

He pleaded not guilty to all the Charges and Specifications and was found not guilty of Specifications 4 and 5, Charge I; and not guilty of the Specifications of Charge II and of Charge II. He was found guilty of Specifications 1, 2, and 3, Charge I; not guilty of Charge I, but guilty of a violation of the 96th Article of War; and guilty of Charge III and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but in his action improvidently stated "Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld". The record was forwarded to the Board of Review where it has been acted upon under the provisions of Article of War 48.

3. The evidence in support of the Specifications and the Charges of which the accused was found guilty will be summarized with respect to each Specification.

With reference to Specifications 1, 2, and 3, Charge I, the evidence may be summarized as follows:

As to Specification 1 -

On December 16, 1940, the Medical Detachment of the 124th Infantry, to which the accused was attached, was stationed and quartered at the Armory in Sanford, Florida. At about eight o'clock the accused was in the Armory at Sanford, Florida, in uniform, very drunk, boisterous, and indulging in vile, obscene and vulgar language (R. 9, 33, 36, 39, 40).

At about 9 or 9:15 of the same evening some of the enlisted personnel learned that Major Douglas G. Scott, Medical Detachment, 124th Infantry, was coming to the Armory and in order that he might not see the accused in his drunken condition, and learn of his improper conduct, three of these enlisted men of the Medical Detachment put the accused in Private Robert M. Sheafer's automobile and drove the accused around in order to sober him up. They drove out from Sanford on the road leading to Deland, Florida, and kept driving with the accused in Private Sheafer's car until sometime shortly before 12 o'clock midnight, when as a result of interference by the accused with the driver of the car, an accident occurred, causing the automobile to run into a ditch. Following the accident, one of these enlisted men, Private First Class Lloyd C. Preston, Jr., accompanied the accused in an automobile of a civilian back to the Armory in Sanford, arriving there about midnight. The accused was still in a drunken condition and remained drunk throughout the remainder of the night until about 5:45 a.m., on December 17, 1940. After returning to the Armory at about midnight of December 16th, the accused continued to be boisterous and to use vile, profane and vulgar language. He was cursing very loudly and cursing everyone that came in the Armory and everyone he saw, using such words as "Goddamnit, son of a bitch, bastard", and like words. He was also abusive and cursing throughout the time he was being driven around in the automobile, and anyone who talked with him or said anything to him he would curse them. After he had been sent back to the Armory in Sanford, at least two witnesses saw and observed the accused again about three o'clock on the morning of December 17th engaged in a game of poker with several enlisted men. In response to a question as to whether the accused was winning in the poker game, one of these witnesses answered, "I don't know. He was using his clothes, his uniform". And in response to another question as to what he was doing with his clothes, the answer was, "Using them in the pool and he wound up with only his shirt". These witnesses watched the poker game and observed, in addition to the accused, at least five enlisted men participating therein. The accused was in uniform throughout the entire period.

As to Specification 2 -

Between December 17, 1940, and January 10, 1941, the Medical Detachment, 124th Infantry, to which accused was attached, was transferred to Camp Blanding, Florida. On January 10, 1941, at about two o'clock in the morning, the accused went into the regimental dispensary of the 124th Infantry, remaining there until about four o'clock of the

same date. He was dressed in uniform, was drunk, cursing and raising a disturbance. He had a cut on his hand which was treated and bandaged by the medical attendant and each time his hand was bandaged, the accused took the bandage off, repeating this act several times. Sergeant Robert I. Marlowe, Medical Detachment, 124th Infantry, testified that his speech was blurred and several times in order to remain standing, the accused supported himself by placing his hand on the wall (R. 20, 21). Sergeant Marlowe finally succeeded in getting the accused to his quarters and sometime later heard the accused calling for him in the company street.

As to Specification 3 -

The officers of the 124th Infantry were quartered in tents at Camp Blanding, Florida, one of which was occupied by accused. On Sunday afternoon, January 19, 1941, the accused was drunk in the area of the officers' tents, at which time he was using profane language, talking in a loud and boisterous manner in the presence of the visiting wives, relatives, and sweethearts of the officers. Second Lieutenant John S. Brand, who had heard the profane language and observed the conduct of the accused on that occasion, took him off of Officers' Row into his own tent and bawled him out. When he remonstrated with the accused and requested him to desist, informing him that ladies were present, the accused answered "fuck the ladies". The accused was extremely drunk and later it became necessary for Major Scott to order him put to bed in his tent, to place a guard over him, and administer one quarter grain of morphine to quiet him.

4. With reference to Charge III and its Specification, the evidence may be summarized as follows:

The superior officers of the accused testified that he was absent without leave on April 26, 27, and 28, 1941 (R. 29, 46, 53). It is not clear as to the circumstances under which the accused was returned to military control but Captain Thurman A. Hancock, Adjutant, 124th Infantry, testified that he caused the accused to be apprehended by the military police at Green Cove Springs, Florida, April 28, 1941. The accused was returned to Camp Blanding, Florida, and confined to the camp stockade at 9:15 p.m., on that date (R. 46; Ex. A).

5. The testimony for the defense with reference to the Specifications and Charges of which he was found guilty, may be briefly summarized as follows:

The accused testified that he was drinking on January 10, 1941, in the regimental dispensary and that, prior to visiting the dispensary, he had visited different officers' tents where he had had some drinks; that he had several drinks at the dispensary; was under the influence of liquor and that he "was unaware of about everything going on that night, that might be serious" (R. 63). He admitted that he had been drinking during the day of January 19th, which was on Sunday, and admitted that he had an argument with Major Scott on that date; he remembered that Major Scott had administered morphine to him but did not recall any conversation with Lieutenant Brand or that ladies were present. He could not remember seeing any ladies in the vicinity of the officers' tent area on the afternoon of January 19th, and did not remember saying anything to Lieutenant Brand on that date. He admitted getting back to his quarters between three and four o'clock in the morning after his presence in the dispensary on January 10th, and admitted that Private Wilbur R. Foltz drove him to Stark, Florida, for the purpose of getting something to eat after he left the dispensary about 2 a.m., on that date; that he went to sleep in the car. He admitted that Sergeant Marlowe requested him to go to his quarters because he was creating a disturbance at the dispensary and that he was drinking but was not drunk. He admitted being absent without leave from his station (R. 64).

Second Lieutenant Frank H. Crow testified that he saw the accused around 10:30 or 11:30 p.m., January 10, 1941, and that the accused was drinking but not drunk. Second Lieutenant Clarence Darrow Gray and Second Lieutenant Clarence R. Gibbs testified that the accused was drinking on January 19, 1941, but that he was not drunk. The accused had no trouble in getting around but his walk was slightly unsteady.

6. Specification 1, Charge I, alleges that accused was drunk and disorderly while in uniform in a public place, in violation of the 95th Article of War. That he was drunk and disorderly in uniform in the Armory in Sanford, Florida, where his organization was quartered on December 16-17, 1940, was proven beyond a reasonable doubt. The Armory in Sanford, Florida, where this offense was committed was open to and was used in common by the officers and enlisted personnel of the 124th Infantry to which the accused was attached, and must be deemed to have been a public place within the commonly accepted meaning of that term (CM 202846, Shirley; CM 207887, Lowry). He was seen and observed by various members of the enlisted personnel of his organization (R. 13-14), and was also seen by at least one civilian at the time he entered the Armory when he stopped and talked to the guard and then slapped him on the back (R. 16). The entrance to the Armory in Sanford, Florida, is ap-

parently visible from a public street, since at least one witness testified that -

> "I was sitting in the car with my wife at the Armory, and Lieutenant Harris and I don't remember how many others with him, came up to the guard. Lieutenant Harris spoke to the guard about a half a minute, slapped him on the back and went into the Armory. The way he was acting, you could tell that he had one or two drinks. * * *." (R. 16.)

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 conduct of one of its members, only if that misconduct is seen by outsiders (Dig. Ops. JAG April-Dec. 1917, p. 107; CM 202846, Shirley).

7. Specification 2, Charge I, alleges that accused was drunk and disorderly while in uniform in a public place on January 10, 1941. This allegation is likewise fully sustained by the evidence, which is positive and clear. What has been said with reference to the Armory as a public place, is applicable to the regimental dispensary at Camp Blanding, Florida. On this occasion the drunkenness and disorderly conduct of the accused was seen and observed by several members of the enlisted personnel, including Sergeant Marlowe. Again the fact that only Army personnel was present at the time this offense was committed is immaterial, on the authorities cited above, and a finding of guilty was fully justified.

8. Specification 3, Charge I, alleges that accused was drunk and disorderly in his quarters, which consisted of a tent, while in uniform, January 19, 1941. That he was drunk and disorderly, and that he used vulgar and obscene language in the presence of and within hearing range of various officers and visiting ladies is amply proven and undisputed. It was shown by competent evidence that the accused's conduct was so loud, boisterous, and offensive, that it was necessary to remove him from the officers' tent area and that later it was necessary in order to quiet him that morphine be administered. The accused did not deny the Charge as to his conduct on this occasion but merely denied seeing any ladies present or having knowledge of their presence, and denied remembering that Lieutenant Brand removed him from the officers' tent area or having any conversation with Lieutenant Brand on that occasion.

It was clearly proven that the accused was absent on April 26, 27, and 28, 1941 (R. 19, 46, 53), and that permission to be ab-

sent had not been given to the accused. This unauthorized absence was admitted by accused in his testimony (R. 64). He was apprehended at Green Cove Springs, Florida, by the military police, returned to his station at Camp Blanding, Florida, and confined in the camp stockade at 9:15 p.m., April 28, 1941 (R. 46; Ex. A).

On the whole, the evidence gives substantial support to the theory of continued forbearance on the part of accused's superiors extending over a period from December 16, 1940, to April 28, 1941, and in the light of the uncontradicted, compelling testimony, as well as the testimony of the accused that he was drinking, but not drunk, on the occasions alleged, the Board of Review is of the opinion that it was shown beyond a reasonable doubt that this officer was drunk and disorderly as charged in Specifications 1, 2, and 3, Charge I; that he was absent without leave as alleged in the Specification, Charge III; and that this conduct was clearly of a nature to bring discredit upon the military service, in violation of the 96th Article of War.

At the time of the trial, the accused was twenty-seven years and ten months of age. The statement of his service is as follows:

> Lieutenant (jg) U. S. Naval Reserve, April 6th to August 22, 1940. First Lieutenant, Dental Corps, Florida National Guard, August 1, 1940. Inducted into Federal Service November 25, 1940, with Medical Detachment, 124th Infantry.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence, and to warrant confirmation thereof. A sentence of dismissal is authorized for violation of the 61st and 96th Articles of War.

(On leave), Judge Advocate.

Chas. L. Cresson, Judge Advocate.

Thomas N. Taffy, Judge Advocate.

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

Board of Review
CM 216890

JUN 23 1941

UNITED STATES	)	SECOND ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Benning, Georgia, May 31,
Corporal MAURICE E. AUD	)	1941. Dishonorable discharge
(6665616), Battery B, 14th	)	and confinement for ten (10)
Field Artillery (Armored).	)	months. Fort Benning, Georgia.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Corporal Maurice E. Aud, Battery B, 14th Field Artillery (Armored), did, at Company Six, Second Armored Division Replacement Center, Fort Benning, Georgia, on or about March 15, 1941, feloniously take, steal and carry away two chickens of the value of about two dollars ($2.00), property, of the United States, furnished and intended for the military service thereof.

Specification 2: "In that Corporal Maurice E. Aud, Battery "B", 14th Field Artillery (Armored), did, at Fort Benning, Georgia, on or about March 15, 1941, feloniously take, steal and carry away a quantity of luncheon meat, cheese, lard, butter, apples, oranges and bananas of a value of less than twenty ($20.00) dollars, property of the United States, furnished and intended for the Military Service thereof."

He pleaded not guilty to the Charge and its two Specifications and was found guilty of the Charge and Specifications. No evidence of previous conviction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence but remitted two months of the confinement, designated the Post Detention Barracks, Fort Benning, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Specification 1 alleges the theft of two chickens of the value of about $2, property of the United States, and Specification 2 alleges the theft of a quantity of articles of food of a value of less than $20, property of the United States.

As to the first Specification, proof of the larceny of two chickens is established beyond question by the deposition (R. 16) of Private Embert J. Wedding offered and received in evidence as Exhibit 1, wherein he testified as follows:

> "I saw him take two chickens out of the kitchen. These chickens were for use in the mess and were the property of the United States. He first took a suitcase outside and put it in a car belonging to a barber in the replacement center. He then came back into the kitchen and got the two chickens and went out. He said he was going to see his girl.* * *."

Another witness for the prosecution, Private Woodrow W. Smith, testified (R. 20) that "I saw him take two chickens, put them in a sack and walk out the door" (meaning the door of the mess hall). He further went on to testify that the two chickens were taken, placed in paper sacks and carried out of the kitchen in those sacks. No testimony was offered or received showing a shortage of any chickens in the mess, but inasmuch as the accused was seen to take them, it was not essential that the shortage be shown. The witness Smith testified later on (R. 21), that he was in the mess hall talking to Private Wedding who was dressing chickens, saw the accused put the two chickens in the two small paper sacks, similar to paper sacks used in preparing lunches for men in the field, and then saw him come through the back door of the mess hall.

No evidence was offered or received as to the value of the chickens so taken by the accused, but the court was justified in concluding that they were of some value less than $20.

As to the second Specification, it is very loosely drawn, is indefinite and uncertain, merely alleging, "a quantity of certain articles of food". There is no definite proof of the shortage of this quantity of food from the mess and again no testimony whatsoever was offered or received as to the value of the articles alleged to have been stolen in the Specification.

First Lieutenant Arthur P. Evans, a witness for the prosecution, testified (R. 13) that he found a tan suitcase on a shelf in the kitchen and had the accused open it, finding therein certain articles of food, but the articles were not specified, nor did he testify as to the value of any of these articles. When the accused was asked why the food was in the suitcase he replied that "it was a reserve ration that was kept for off hours eating which was going on, and in order to have food available for this eating, that he kept a stock for that purpose so they would have some". The officer thereupon directed the accused to return the food to its proper place but did not remain to see whether his orders were complied with and did not know whether the articles of food had been restored to their proper place. Lieutenant Evans further testified (R. 15) that he did not at any time actually see the accused remove any property from the kitchen.

Private First Class H. C. Ensor testified (R. 17, 18) that "We had meats - ham, apples, came up missing, a few things like that". In response to the question how did you know the food was missing, the witness testified "I saw him leave the other kitchen with a suitcase", and later on the witness testified in response to a similar question, "I saw him leave with it, and the other mess sergeant told me it was missing". When asked whether he saw what was in the suitcase when it was being carried away by the accused the witness replied, "I could not swear to that. It might have been empty. I just saw him leave from one kitchen to the other"; all of this took place after supper and Lieutenant Evans found the food in the suitcase in the afternoon prior thereto.

Private Tip McCully (R. 11) testified that he loaned his suitcase to the accused on or about March 15, 1941, who stated he wished to have some clothes dry-cleaned. Mrs. Adell McLendon testified that she had a date with the accused on March 15th and that he arrived at her home between 8:30 and 9 o'clock that evening with a suitcase; that he took out of the suitcase some Hershey candy and told her he had brought his clothes in to the cleaners and that was why he was late getting there; that he gave her the laundry ticket or slip and asked her to get his clothes for him on Monday; that there was nothing else in the suitcase except the two pound packages of Hershey chocolate candy.

As previously stated, there is absolutely no proof of the value of any of the articles alleged to have been taken in this Specification, nor is there any positive or definite proof that such articles or anyone of them were missing from the mess. No one saw the accused take the articles, or carry them away except the witness Ensor (R. 17, 18), who afterwards testified that the suitcase might have been empty. Thus in the absence of any testimony showing a shortage of the articles alleged and in the absence of any testimony showing beyond a reasonable doubt that the accused took and carried the articles away, the finding of guilty cannot be sustained. For these reasons the Board of Review is of the opinion that the finding of guilty of Specification 2 should be disapproved.

As to Specification 1, the evidence is legally sufficient to support only so much of the finding as to value as involves a finding of some value not in excess of $20. The maximum punishment by confinement authorized by paragraph 104 c, Manual for Courts Martial, 1928, for larceny of property of value of not more than $20 is confinement at hard labor for six months.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Specification 1, and the Charge, as involves a finding of guilty of larceny by the accused as alleged, at the time and place alleged, of the property described in the Specification, of some value not in excess of $20 and of ownership as alleged; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

(On leave), Judge Advocate.

Charles Cressey, Judge Advocate.

Thomas N. Jaffe, Judge Advocate.

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

Board of Review
CM 216904

JUN 28 1941

UNITED STATES	)	SEVENTH DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Ord, California, June 3, 1941. Dismissal and total forfeitures.
	)	
First Lieutenant JOHN A. FRANKIE (0-342045), 32nd Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that First Lieutenant John A. Frankie, 32nd Infantry did, at Fort Ord, California, on or about March 26, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Oakland, California on or about May 14, 1941, at about 6:30 P.M.

He pleaded not guilty to the Charge and Specification and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed in the service, and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, but in his action improvidently stated "Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld". The record was forwarded to the Board of Review where it has been acted upon under the provisions of Article of War 48.

3. The competent evidence with respect to the Charge may be summarized as follows:

First Lieutenant Eugene A. Trahan testified that on or about March 17th, the 32nd Infantry went on maneuvers near Jolon, but that accused did not accompany his regiment because he was in arrest in quarters; that he had been given instructions while being in arrest to report to the witness as Regimental Adjutant every few hours; that the accused first failed to report to him as directed on or about Saturday, March 22nd, and went absent without leave on or about March 26, 1941 (R. 8; Ex. 1). He remained in that status until he was apprehended in front of his residence in Oakland, California, by Captain Horace M. Whetbeck, on May 14, 1941. At the time of his apprehension he was dressed in civilian clothes and had just returned to his home from a gasoline service station where he was employed (R. 10, 11). The accused had, previous to his unauthorized absence, submitted his resignation as an officer of the military service (R. 8), but no final action had been taken thereon by proper authority, either at the time of his unauthorized absence, or at the time of his apprehension on May 14, 1941. Major Edward H. McDaniel, a witness for the prosecution, testified that after the accused had been warned by him of his rights, the accused made a written statement that -

> "* * * he had been trying to get out of the army, get his discharge acted upon, because he had a job offered in Montana and had lost that job the week before because he hadn't received his discharge. * * *." (R. 15.)

At this point Major McDaniel was given a copy of a statement purporting to have been made by the accused while he was acting as investigating officer, and it was stipulated by and between the prosecution and the defense that it was the statement made by the accused. It is apparent that the statement which was alluded to and about which the witness was testifying is that statement among the allied papers marked Inclosure 5, dated and sworn to on the 17th day of May 1941. This statement was neither offered nor received in evidence. The witness further testified -

> "Refreshing my memory, I would like to state that he said that he had a job up in Montana in the Chandler Mine if he could have left within a week, but since he didn't get his discharge he lost the job. * * * 'I had a job in Oakland and my wife had a job there also, which lasted until May 17, 1941.' * * * 'I would like to get a discharge and

> report back to my job in Oakland so as I may save enough to get up to Montana before I lose another job on account of the army.' * * * 'I have been earning $24.50 a week in Oakland and I worked hard for my money and I would not trade jobs.'" (R. 16.)

Major McDaniel further testified that the statement about which he was testifying, or using to refresh his memory, had been written out in pencil by the accused, that it was then typed up, signed and sworn to by him.

The testimony for the defense may be summarized substantially as follows:

Captain Wood G. Joerg testified that he was Company Commander of the Service Company of the 32nd Infantry while the accused was a junior officer in that organization during the months of December 1940, and January, until February 6, 1941; that the accused was Motor School Officer, training the new drivers for the 32nd Infantry; that he visited the classes of the accused several times; that the accused produced excellent results; that he must have trained three hundred and fifty to four hundred drivers in the 32nd Infantry, and at the conclusion of the motor school instruction, he was motor maintenance officer until he (Captain Joerg) left the organization about February 6th. In response to the question, "Are you able to state the general reputation of the accused for truth, honesty, and integrity in the community of Fort Ord?", the witness answered -

> "As far as I know, there wasn't any question as to honesty or integrity. Nothing ever to indicate a question of that kind. It is more of a negative statement than a positive statement." (R. 19.)

Master Sergeant Otis R. Bowles, Service Company, 32nd Infantry, testified that the accused was in charge of the student drivers who came from different companies within the regiment; that he was in a position to see the results of the accused's work, which were good; that while the accused was acting as motor school officer, training the drivers in the regiment, he seemed to be happy and contented in his work, but that after this work was finished, the accused had no particular job to do and appeared to be dissatisfied with his work, seemed to lose interest in the work around the motor pool and just walked around once in a while performing some odd job.

The accused was sworn and testified, in substance, that he was having marital difficulties with his wife; that she had incurred large bills which he could not pay; they could not live on his salary of $265; and he was dissatisfied with his position as an officer because of these facts. After having a conversation with Colonel Adams on or about March 6, 1941, with reference to tendering his resignation, he left Fort Ord for Oakland, California, on March 27, 1941. In response to a question from Colonel Adams as to why he wanted to resign he answered -

> "* * * I told him I wanted to resign on that morning and he asked me my reason and I told him that I didn't have anything to do up at the motor pool and I did not care to take $265.00 a month to sit around up there. * * * He took me over to Lieutenant Trahan, and Lieutenant Trahan made up a resignation and I signed it." (R. 24.)

Accused stated he inquired every day to find out whether his resignation had been accepted, asking Lieutenant Trahan what would be done if he just left, but that neither Lieutenant Trahan nor he, the accused, knew; that he did not intend to come back and did not know whether his resignation had been accepted. He also admitted on cross-examination that on or about May 12th his wife had talked to Colonel Erickson, in charge of recruiting in Oakland, California, and learned that he, the accused, was being carried as a deserter.

When the statement marked Exhibit 2 was introduced and read to the court, the accused testified that it was in error, insofar as his knowledge of the fact that he was being carried as a deserter was concerned. His wife withheld this information from him and also that Colonel Erickson had told his wife to have him come in and see him as there might be some way found for him to return to the service. The reason he did not go and see Colonel Erickson was that he had just obtained a job and was too busy. On redirect examination by defense counsel the accused testified that his intention not to return to the service, as he had previously admitted, was conditioned upon his resignation being accepted, that he had no idea that the resignation would not be accepted, but no one had told him it had been accepted.

Lieutenant Trahan was recalled and testified that he had told the accused prior to his departure from his station, that in his opinion the resignation would be accepted, but at no time told him that it had been approved, or that Washington had approved it, his opinion that the resignation would be accepted was an opinion only, not a fact.

The accused, recalled, testified that if he had been notified that his resignation had been rejected he would have returned to military service of his own accord, for he did not at anytime intend to desert the military service.

4. The evidence is clear and convincing that at the time and place alleged in the Specification, the accused absented himself from his organization and station without authority, remained in that status until May 14, 1941, when he was apprehended in front of his residence at Oakland, California, as alleged; that he was aware of the fact that he had no authority to be absent, and also of the further fact that his resignation had not finally been acted upon by superior military authority.

At the time of his apprehension in Oakland, California, the accused had been absent for a period of forty-nine days; had obtained employment at a gasoline service station in Oakland, California, and had just returned from work to his home when apprehended. Previous to this employment he had applied for employment on at least two other occasions following his initial absence.

Time is a decisive factor which alone, if much prolonged, permits an inference of his intent to remain permanently absent (par. 130 a, M.C.M., 1928). Similarly distance traveled from a soldier's station is another factor, which permits an inference of intent to desert. The distance between Fort Ord and Oakland, California, is approximately one hundred and twenty-five miles. This, with the time element of forty-nine days' absence, together with the fact that he was employed at the time of his arrest, are sufficient to supply the basis for a reasonable inference that the accused intended not to return to his station. In addition to these facts, the accused admitted that he had not intended to return, but later qualified this statement by saying that such an intention was conditioned upon his resignation being accepted. It is a recognized elementary truth, that actions speak louder than words. Hence, it would not be too much to hold that legal recognition is also given more quickly and certainly to the acts of an accused than to his self-serving protestations and qualified testimony given after the act is committed. In the instant case the intent of the accused can properly be determined or inferred from the facts and circumstances of his acts and conduct prior to and following his initial absence, all of which point conclusively to an intent on his part to remain permanently away.

During the course of the testimony of Major McDaniel, in response to a question by the president of the court if there were any objections to the line of questioning of the witness by the judge advocate, the defense counsel replied, "No objection as to the general subject, assuming all questions that follow are legal, lawful questions" (R. 15). Later on, while the witness was still on the stand, the record shows the following to have transpired.

The prosecution offered to stipulate with the defense that the statement given to Major McDaniel by the accused (presumably referring to the statement dated May 17th, marked Inclosure 5, among the allied papers) was the statement of the accused. The defense agreed to the stipulation. This statement was neither offered nor received in evidence although in existence and available for use. Under the best evidence rule, Major McDaniel's testimony was not the best evidence of the contents of this statement, but only a qualified objection was made by the defense in response to the query of the president of the court. This was hardly sufficient to raise the question of the admissibility of the oral testimony. However, the substantial rights of the accused were not injuriously affected by such testimony, in view of defense counsel's willingness to have the written statement admitted by stipulation and the further fact that the accused admitted virtually all of the material facts contained in this statement, "* * * the admission without objection of oral testimony as to a confession which was reduced to writing did not constitute a fatal error" (CM 215351, Nadrowski).

> "An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: It does not appear that the original has been lost, destroyed, or is otherwise unavailable; * * *." (Par. 116 a, M.C.M., 1928.)

After the prosecution rested, the defense counsel moved for a finding of not guilty of the Charge and Specification on the ground that "the intent to desert has not been fully proven beyond a reasonable doubt" (R. 16). In making the motion, defense counsel did not reassert or contend that the oral testimony of Major McDaniel was improper and inadmissible as hearsay evidence or inadmissible for any other reasons, and thus it may be concluded, as provided in paragraph 116 a, Manual for Courts-Martial, 1928, that any other grounds of objection may be regarded as waived.

At the time of the trial the accused was twenty-six years of age. The statement of his service is as follows:

> Appointed Second Lieutenant, Infantry, Officers' Reserve Corps, March 10, 1936. Promoted to First Lieutenant, Infantry, September 13, 1940. Ordered to extended active duty by paragraph 27, Special Orders No. 77, Headquarters Ninth Corps Area, July 20, 1940, for one year, effective August 1, 1940.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized for conviction of desertion, in violation of the 58th Article of War.

(On leave), Judge Advocate.

Chas. B. Besson, Judge Advocate.

Thomas H. Tapp, Judge Advocate.

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

Board of Review
CM 216927

JUN 27 1941

UNITED STATES)	1ST ARMORED DIVISION
)	
v.)	Trial by G. C. M., convened at Fort Knox, Kentucky, May 7, 1941. Dishonorable discharge and confinement for one (1) year and six (6) months. Disciplinary Barracks.
Private JOSEPH ESSEX (6660243), Troop B, 1st Cavalry, alias Private Joseph Troxell.)	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, 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 court found accused guilty of fraudulent enlistment (Specification, Charge I, violation of the 54th Article of War) and of desertion (Specification, Charge II, violation of the 58th Article of War), and sentenced him to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority disapproved the findings of guilty as to the Specification, Charge II, and Charge II, remitted one year of the sentence to confinement, and approved the sentence as thus modified. The maximum punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, for fraudulent enlistment (Specification, Charge I, violation of the 54th Article of War) is confinement at hard labor for one year.

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as adjudges dishonorable discharge, total forfeitures, and confinement at hard labor for one year.

REC'D
JUL 5
J.A.G.O.

J. A. Smith, Judge Advocate.
William H. Rounds, Judge Advocate.
H. H. Schaaf, Judge Advocate.

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

(193)

Board of Review
CM 217051

JUL 7 1941

UNITED STATES	)	PANAMA CANAL DEPARTMENT
v.	)	Trial by G.C.M., convened at Fort Randolph, Canal Zone, May 14, 1941. As to each: Dishonorable discharge and confinement for one (1) year. Fort Jay, New York.
Privates JACK L. BARTON (6986931); and RAY S. BOOTHE (13017840), both Battery G, 72nd Coast Artillery (AA).	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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 found guilty of larceny of a Ford coupe, value about $100. The only evidence as to the value of the car is that of the owner who testified that he paid $100 for the car many months before it was stolen, that he paid a little monthly for it, and had bought new tires and a battery (R. 11, 15). The car was not before the court, although two photographs showing its dismantled condition after the larceny were introduced in evidence.

3. Except as to distinctive articles of Government issue or other chattels which, because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 212983, Dilsworth; CM 213765, Krueger, et al; CM 214367, Kasalajtis; CM 215996, Burton). It does not appear that the owner was qualified as an expert or was otherwise qualified to express an opinion as to the market value of the car. The proof of the purchase price "many months" prior to the taking does not afford any accurate basis of determining the market value at the time of the taking. There is in the evidence sufficient basis for an inference that the car was of some substantial value (CM 212983, Dilsworth).

The evidence is legally sufficient to support only so much of the finding as to value under the Specification as involves a find-

ing of some substantial value not in excess of $20. The maximum confinement authorized by paragraph 104 c, Manual for Courts-Martial, 1928, for larceny of property of value not more than $20 is confinement at hard labor for six months.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding of guilty of larceny by accused, at the time and place and of the ownership alleged, of the car described in the Specification, of some substantial value not in excess of $20; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months.

Justin S. Kilgore, Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas H. Tappey, Judge Advocate.

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

Board of Review
CM 217059

JUL 18 1941

UNITED STATES	FOURTH ARMY
v.	Trial by G.C.M., convened at Camp Haan, California, June 13, 1941. Dismissal and confinement for one (1) year. Disciplinary Barracks.
Second Lieutenant GEORGE C. CLARK (0-348576), 65th Coast Artillery (AA).	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

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

Specification 1: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), did, at Riverside, California on or about March 11th, 1941 with intent to defraud, wrongfully and unlawfully make and utter to the Citizen's National Trust and Savings Bank of Riverside, a certain check, in words and figures as follows, to wit: in the amount of five hundred dollars ($500.00) drawn on the Irving Trust Company, New York City, New York, payable to Lt. George C. Clark, and signed R. E. Clark, and by means thereof, did fraudulently obtain from the Citizen's National Trust and Savings Bank of Riverside credit to his account of five hundred dollars ($500.00) and then or since draw checks against said credit, he the said 2nd Lieutenant George C. Clark, then well knowing that he did not have and not intending that he should have any account with the Irving Trust Company of New York City, New York for the payment of said check.

Specification 2: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), did, at Riverside, California on or about March 12th, 1941 with intent to deceive Major George E. Young officially state that he had received a check for five hundred dollars from his uncle and that he had paid two hundred and thirty dollars for insurance that was due and the rest would settle his obligations or words to that effect, which statement was known by the said 2nd Lieutenant George C. Clark to be untrue in that 2nd Lieutenant George C. Clark had not received such check and that the two hundred thirty dollars and fifty-five cents ($230.55) had been paid to J. R. Westbrook Company for furniture on a new account.

Specification 3: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), did, at Camp Haan, Riverside County, California, on or about March 18th, 1941, with intent to deceive, officially state to Colonel Henry C. Davis Jr., the said 2nd Lieutenant George C. Clark's Regimental Commander, that he, 2nd Lieutenant George C. Clark, had received five hundred dollars from his uncle and that he had paid for insurance that was due, or words to that effect, which statement was known by said 2nd Lieutenant George C. Clark to be untrue in that 2nd Lieutenant George C. Clark had not received any such monies, or credit, or check and that he had not paid any such insurance.

Specification 4: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), did, at Fort Winfield Scott, California, on or about January 15th, 1941, with intent to defraud wrongfully and unlawfully make and utter to the Post Exchange, Fort Winfield Scott, California, a certain check in words and figures as follows, to wit: in the amount of thirty-five dollars ($35.00) drawn on the Bank of America, Riverside Branch, for which he received three checks of twenty dollars ($20.00), ten dollars ($10.00), and five dollars ($5.00) respectively written by the said 2nd Lieutenant George C. Clark on the Bank of California, Los Angeles Branch and returned to the Post Exchange, Fort Winfield Scott with the remark "No account", he the said 2nd Lieutenant George C. Clark then well knowing that he did not have and not intending that he

should have any account with the Bank of America, Riverside Branch, Riverside, California for payment of said check.

Specification 5: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), did, at Fort Winfield Scott, California, on or about January 16th, 1941 with intent to defraud wrongfully and unlawfully make and utter to the Post Exchange, Fort Winfield Scott, a certain check in words and figures as follows, to wit: in the amount of fifteen dollars ($15.00) drawn on the Bank of America, Riverside Branch, and by means thereof, did fraudulently obtain from the Post Exchange, Fort Winfield Scott, fifteen dollars ($15.00), he the said 2nd Lieutenant George C. Clark, then well knowing that he did not have and not intending that he should have any account with the Bank of America, Riverside Branch, for the payment of said check.

Specification 6: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), at Camp Haan, California, on or about February 11th, 1941, did telegraph R. D. Shepherd, Post Exchange Officer, Fort Winfield Scott, San Francisco, California, the following, to wit: "Cashiers check sent by bank Wednesday, February 5. Acknowledgment requested. Clark", or words to that effect, this with intent to deceive said R. D. Shepherd which telegram was known by the said 2nd Lieutenant George C. Clark to be untrue in that no such check had been sent.

Specification 7: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), did, at San Francisco, California, on or about January 11th, 1941, with intent to defraud, wrongfully and unlawfully make and utter to "Hastings", San Francisco, a certain check in words and figures as follows, to wit: in the amount of twenty dollars ($20.00) drawn on the California Bank, the Los Angeles Main Branch, and by means thereof, did fraudulently obtain from "Hastings" twenty dollars ($20.00), he the said George C. Clark then well knowing that he did not have and not intending that he should have any account with the California Bank the Los Angeles Main Branch for payment of said check.

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

Specification: In that 2nd Lieutenant George C. Clark, Sixty-fifth Coast Artillery (AA), did, at Riverside on or about March 11th, 1941 with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: in the amount of five hundred dollars ($500.00) drawn on the Irving Trust Company, New York City, New York, payable to Lt. George C. Clark, and signed R. E. Clark, which said check was a writing of a private nature, which might operate to the prejudice of another.

The accused pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The prosecution introduced no testimony until after the defense presented its last witness.

4. After the accused pleaded guilty to the Charges and Specifications, he stated through counsel that he wished to testify as a witness in his own behalf, not in defense of the Charges, but in extenuation or mitigation thereof. He testified, in substance, as follows:

Accused was commissioned second lieutenant, Officers' Reserve Corps, in September 1936. On July 5, 1940, he applied for extended active duty but was rejected because of physical disqualification (underweight). On August 9, 1940, he submitted to another physical examination, which showed that he had made up the underweight physical defect. The second application for extended active duty was then forwarded through channels and at the same time he was informed by Colonel Hood, his then unit instructor, that if he came into Headquarters of the Southern California Military District and worked there, he would have a better chance to get on active duty. He thereupon volunteered for duty on an inactive status without expense to the Government, anticipating that orders would shortly be issued calling him to active duty. He worked on an inactive status

without pay from the middle of July 1940, until the day before Christmas when an order came through calling him to active duty, effective about December 1, 1940 (R. 10). During that period he had no income and accumulated a great many obligations which he was unable to pay. He was married, had one child two years of age, and his wife was expecting another at the time of the trial. Immediately upon receiving orders to extended active duty and becoming entitled to pay for his services, he was subjected to great pressure by his creditors who demanded payment of these obligations which he had incurred previously. A number of these creditors wrote his commanding officer demanding immediate payment. He also received numerous letters from his creditors threatening to confer with his commanding officer in regard to these bills if payment was not forthcoming at once. After his commanding officer showed him the letters, he tried to work out a plan to liquidate these debts which had accrued during the period he was serving without pay, but was unsuccessful. He had previously tried to borrow money and had been turned down because he had not been in the service long enough. His family, including his uncle in New York, was financially unable to help him in meeting these obligations.

He further testified that when he committed the acts charged he did not at the time have sense enough to realize what he was doing, and what he was potentially throwing away. The obligations which he had incurred and the strain which he was under had placed him in the position where he did not know actually what he was doing. Major George E. Young arranged for a loan of $250 to be made to him by the Citizens Bank of Riverside, California, for the purpose of paying his outstanding bills. This loan was made on March 1, 1941, and was to be repaid by deducting $50 per month from his pay. Subsequently, his wife signed this note and the bank agreed to reduce the monthly sum of repayment to $25. He further testified that he had been under observation for twenty-one days from the 24th day of March to determine his mental condition.

On cross-examination the accused testified that the sum of $250 loaned him by the Citizens Bank in Riverside, California, had been determined as the amount equal to the total obligations, which had come to Colonel Davis' attention, and that it was understood at the time the loan was made to him that the money should be used solely for the payment of those accumulated debts. He then identified a check dated March 4, 1941 (Ex. 1), which was issued three days subsequent to the date of the loan by the bank and payable to Mission

Pontiac Company in the sum of $100, which he had signed, with a notation on the face of the check, "Deposit for down payment to Pontiac". He stated that he had written the check and delivered it to Mission Pontiac Company as initial payment on the purchase of an automobile. This payment was not a part of the plan agreed upon between himself and the bank, although the money used was a portion of the $250 borrowed (R. 14; Ex. 1). He then identified a check (Ex. 2), dated March 8, 1941 (eight days following the arrangement for the loan from the bank), payable to J. R. Westbrook Company, in the sum of $230.55, for purchases made from that concern. That payment was likewise not in accordance with the plan agreed upon between himself and the bank at the time the loan was made. The witness was then shown a photostatic copy of a check dated March 9, 1941, made payable to Lieutenant George C. Clark in the sum of $500, signed R. E. Clark, maker and indorsed on the reverse side, "For deposit, Lieut. George C. Clark" (R. 16). He was asked if this photostatic copy was a correct reproduction of a check which was deposited to his account, to which he replied in the affirmative. The original check was in possession of the accused at the time of the trial, having been delivered to his wife by the bank at the time it was paid (R. 16). He then testified that in repayment of the proceeds of the $500 check, $250 had been paid direct to Colonel Davis, and the remaining $250 had been paid direct to the bank. The final payment was made about April 8, 1941.

Major Berthel Henry Henning, Medical Corps Reserve, chief surgeon, station hospital, testified for the defense that the accused was under his observation at the station hospital to "determine if there was any mental condition, any evidence of insanity". He examined the accused during the period covering the latter part of March 1941, and the early part of April 1941. He was also a member of the board of medical examiners appointed to inquire into the accused's mental condition. The examination of the accused by this board of medical officers on April 14, 1941, resulted in a diagnosis of -

> "Constitutional psychopathic state, characterized by inadequate personality and pathological lying;
>
> "The defendant is not now insane, and knows the difference between right and wrong;
>
> "There is no reasonable ground for believing that the accused is now, or was, on the date of commission of the offense, insane." (Ex. 4.)

On cross-examination Major Henning testified that the term "constitutional psychopathic state" was used in the medical profession to indicate a defect in character rather than in his mental processes.

Major William G. Holden testified (R. 24) that he was battalion commander of the battery of which the accused was a member. He had known accused for about six months and his performance of duties, so far as infrequent observations revealed, had been excellent.

Lieutenant L. F. Verbata (R. 26) testified that he was the commanding officer of Battery A, to which the accused had been assigned, and that his services had been excellent.

Mr. George Barker Clark, father of the accused, testified (R. 28) principally as to the background, education, and environment of the accused, and attributed his present situation to his financial difficulties. He also testified that the name of accused's uncle in New York was Harold Benjamin Clark, and that there was no Robert Clark in the family.

5. At the conclusion of the defense testimony, the prosecution called as a witness Mr. Russell Denney, assistant cashier of the Citizens National Trust and Savings Bank, Riverside, California. He testified, in substance, that he was familiar with the bank account of the accused covering the period from March 1 to March 18, 1941, and identified a statement covering that period of time (Ex. 5). Under the heading of deposits, the witness identified the first item of $181.80 as the deposit of the accused's pay check; the second item of $250 as the deposit of a loan made by the bank to the accused for the purpose of paying off certain outstanding obligations, which were at the time proving embarrassing to him; and the third item of $500 as a check received in the mail drawn on a New York bank which was deposited to the credit of the accused and later transmitted to the Chase National Bank of New York for collection. This check was later returned marked "No such account in the Bank" (R. 36). At the time this last deposit was received, the account of the accused, as indicated by the last column of Exhibit 5, was overdrawn to the extent of $75.40, and that this overdraft occurred on March 10th after the deposit of the $250 bank loan to accused on March 1st.

6. In the course of his testimony the accused made no reference to or mention of the intent to deceive Major Young, as alleged in Specification 2, nor of the intent to deceive Colonel Davis, as alleged in Specification 3, nor of the intent to defraud by making and uttering the check, as alleged in Specification 4, nor of the intent to deceive the post exchange officer, as alleged in Specification 6, nor of the intent to defraud by making and uttering the check, as alleged in Specification 7. The accused did, however, admit that he drew a check for $230.55 to J. R. Westbrook Company for furniture on a new account, which relates to Specification 2. He also admitted all of the essential allegations in each and all of the Specifications above mentioned in his testimony (R. 11, 12) -

> "* * * The acts that I have committed have been committed, I tell you honestly, gentlemen, under strain and stress, to pay up so I could do my job in the army. When I committed these acts, I didn't at the time have enough sense to realize what I was doing, and what I was potentially throwing away, because the obligations that I had accumulated, and the strain that I was under, and people were pressing me, placed me in the position where I did not know actually what I was doing at the time."

7. Specifications 1 to 7, inclusive, Charge I, are laid under the 95th Article of War which denounces "conduct unbecoming an officer and a gentleman", and makes mandatory a sentence of dismissal upon a finding of guilty.

Section 151, page 186, Manual for Courts-Martial, 1928, referring to the conduct denounced by the 95th Article of War and citing Winthrop as authority, states in part -

> "The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms."

In Winthrop's discussion of "conduct unbecoming an officer and a gentleman", in his authoritative work on "Military Law and Precedents", the following passages appear:

> "'Unbecoming,' as here employed, is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but morally unbefitting and unworthy."
>
> * * *
>
> "* * * Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents. * * *
>
> "* * * The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behaviour complained of, or rather his worthiness, morally, to remain in it after and in view of such behaviour, is perhaps the most reliable test of his amenability to trial and punishment under this Article." (Reprint, pp. 711, 712, 713.)

Winthrop quotes General McClellan's General Order 111, Army of the Potomac, 1862, as follows:

> "'These words, ("conduct unbecoming," &c.,) imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self respect.'" (Reprint, p. 712.)

In the opinion of the Board of Review the conduct of which accused was found guilty under Charge I properly falls within the provisions of the 95th Article of War and is appropriate thereto.

8. Except for his present difficulties the accused appears to have an excellent record. Both Major William G. Holden, accused's battalion commander, and Lieutenant L. F. Verbata, his battery commander, had known and observed the accused for about six months, and each testified that the character of his service while under their command was excellent. He appears to have been well educated, had enjoyed good home surroundings, and was reared in a literary atmosphere. While all of the offenses charged were clearly es-

tablished, there is no evidence in the record to indicate that the accused is of the criminal type.

At the time of his trial he had a wife and small child and his wife was expecting another child any day. They are clearly blameless of any connection with the offenses of which the officer was found guilty but will suffer greatly if the forfeitures imposed are enforced. Complete restitution was made to the bank for the money obtained in the sum of $500 on the check fraudulently made by the accused. He voluntarily served without pay for a period of about six months prior to the effective date of his active duty orders.

9. The sentence in this case involves forfeiture of all pay and allowances. Since the accused has made restitution of the funds fraudulently obtained, and inasmuch as the forfeiture would deprive him of all means of meeting his necessary living expenses while awaiting the result of the trial, and the further fact that he voluntarily served without pay for a period of about six months prior to the effective date of his active duty orders, it is believed that this portion of the sentence should be remitted.

10. At the time of trial the accused was twenty-five years of age. The records of The Adjutant General's Office show his service as follows:

> Appointed second lieutenant, Coast Artillery Corps, Officers' Reserve Corps, September 22, 1936. Ordered to extended active duty by paragraph 1, Special Orders No. 288, Headquarters First Military Area, Presidio of San Francisco, California, December 18, 1940, for one year, effective December 28, 1940.

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 the opinion that the record of trial is legally sufficient to support the findings of guilty and of the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory for violation of the 95th Article of War, and is authorized for violation of the 93rd Article of War.

Walter S. Hall Jr., Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas H. Tapley, Judge Advocate.

1st Ind.

War Department, J.A.G.O., AUG 11 1941 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant George C. Clark (0-348576), 65th Coast Artillery (AA), (Officers' Reserve Corps).

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

I invite attention to the attached letter from Lieutenant Clark to the President, in which he requests clemency for the sake of his wife and two sons. Complete restitution has been made of all funds fraudulently obtained.

In view of all of the circumstances of the case, I recommend that the sentence be confirmed, but that the confinement adjudged be remitted, and that the sentence as modified be ordered executed.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence, remitting the confinement, and directing that the sentence as modified be carried into execution.

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

4 Incls -
Incl 1 - Record of trial.
Incl 2 - Let. from Lt. Clark to President.
Incl 3 - Drft. of let. for sig. Sec. of War.
Incl 4 - Form of Executive action.

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

Board of Review
CM 217098

AUG 8 1941

UNITED STATES v. First Lieutenant JACK HAUPTMAN (0-399019), Dental Corps, Medical Detachment, 4th Division Artillery.	4TH DIVISION MOTORIZED Trial by G. C. M., convened at Fort Benning, Georgia, June 10, 1941. Dismissal.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

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

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

Specification: In that 1st Lieutenant Jack Hauptman, Medical Detachment, 4th Division Artillery, did, without proper leave, absent himself from his assigned place of duty at Fort Benning, Georgia, from about April 11, 1941, to about April 14, 1941.

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

Specification 1: In that 1st Lieutenant Jack Hauptman, Medical Detachment, 4th Division Artillery, did, at Fort Benning, Georgia, on or about April 10, 1941, with intent to deceive the Commanding General, 4th Division, enter in an official register in the office of the Adjutant General, 4th Division, a record of his departure on leave of absence as of April 14,

1941, well knowing that he intended to depart from his station at an earlier date.

Specification 2: In that 1st Lieutenant Jack Hauptman, Medical Detachment, 4th Division Artillery, did, at Fort Benning, Georgia, on or about April 24, 1941, with intent to deceive Brigadier General Fred C. Wallace, United States Army, officially state to said Brigadier General Wallace that he, Lieutenant Hauptman, had departed from his station at Fort Benning, Georgia, on April 12, 1941, which statement was known by the said Lieutenant Hauptman to be untrue, in that said Lieutenant Hauptman had in fact departed from his said station prior to April 12, 1941.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications. He was found guilty of Charge I and its Specification; guilty of Specification 1, Charge II, except the word "enter", substituting therefor the words "cause to be entered", of the excepted word, not guilty, and of the substituted words, guilty; and guilty of Specification 2, Charge II, and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were announced in open court. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. With respect to Specification 1 of Charge II, Major Cecil R. Hill, adjutant of the 4th Division Artillery, to which organization accused is attached (R. 9), identified a document which was shown him as the officers' register which every officer is required to sign when he leaves the area or the vicinity (R. 14), and stated that the register is for the benefit of the 4th Division Commanding General's information (R. 15). Page 49, Headquarters 4th Division, Officers' Register, containing an entry bearing the purported signature of accused, was introduced in evidence by the prosecution as Exhibit A (R. 17). The pertinent entry as read to the court is as follows:

"Jack Hauptman, ten day leave, 4/14/41, 12:01 A.M., Authority, Par. 7, S.O. 25, dated, 3/20/41. Headquarters 4th Division Artillery." (R. 17)

It was brought out that the date immediately preceding the above entry is April 12 and immediately following is April 12 (R. 17).

Captain James P. Irvine, 8th Infantry, testified that he signed the register on the next vacant line following the name of accused on Saturday, April 12, and that there were no blank spaces above the witness' name when he signed the document (R. 23-24).

First Lieutenant Joseph Davis, 44th Field Artillery Medical Battalion, testified that he signed out for the accused at the latter's request on Monday morning, April 14 (R. 33), and that he believed the accused left on Friday (R. 33).

First Lieutenant Alfred M. Chilton, Medical Detachment, 20th Field Artillery, testified that he is medical officer attached to the 20th Field Artillery, in charge of the dispensary (R. 20-21); that accused works in the dispensary and is assigned there (R. 21); that accused was not present for duty on Friday, April 11 (R. 21); that witness did not see accused on either April 12 or 13 (R. 21); and that witness did not excuse accused from duty on any of those days (R. 21).

First Lieutenant Donald L. Butterfield, Medical Detachment, 4th Division Artillery, testified that on April 12 he was medical officer of the day for the area (R. 18); that accused was supposed to relieve him (R. 18); that witness was not properly relieved at the end of his tour by accused (R. 18); that he could not locate accused on Sunday morning (April 13) (R. 18); and that he did not see accused on either April 12 or April 13 (R. 19). The witness testified further that he was now in charge of the roster for medical officers of the day and that it is not the practice for officers to switch tours without his consent (R. 19-20).

With respect to the arrangement for taking the officer of the day tour of the accused, First Lieutenant Joseph Davis, 44th Field Artillery Medical Battalion, testified as follows:

> "Q. Have you ever switched tours with Lt. Hauptman?
> A. Yes sir, I think I have.
> Q. Did Lt. Hauptman ask you to take his Officer of the Day tour?
> A. No sir but I told him I would if no one else was assigned to it.
> Q. When you switch tours is it necessary to notify the Officer in charge?

A. No sir, that is between the two officers.
Q. On or about April 12 do you remember to your own knowledge if Lt. Hauptman had a leave approved?
A. I believe he said it was effective April 14." (R. 32)

Major Cecil R. Hill, 4th Division Artillery Adjutant, testified upon cross-examination as follows:

"Q. When an officer goes on leave is he required to sign the official register in person?
A. I haven't seen any orders on that. Times I understand other officers can sign out for officers. However, I'm not sure about that.
Q. To your knowledge there is no order prohibiting it?
A. Not in the 4th Division.
Q. Are there any instructions given to new officers in the proceedure of signing out?
A. I do not know of any.
Q. To your knowledge did Lt. Hauptman receive any instructions of this kind when he arrived there?
A. No sir.
Q. How long has Lt. Hauptman been in the 4th Division?
A. Sometime in February 1941." (R. 15)

With respect to Specification 2 of Charge II, Brigadier General Fred C. Wallace, Commanding General, 4th Division Artillery (R. 9), testified that upon the return of accused from leave about April 24 (R. 10), he had occasion to call him to his office. The testimony of General Wallace is in part as follows:

"A. *** I asked him why he had failed to report to his post as medical officer of the day and he stated that he had left on leave Saturday, the day preceeding. I asked him if he had any authority to leave on Saturday, and sign out as of Monday, and he said that he thought it would be alright if he took the weekend. I told him he didn't have authority from anyone to leave over the weekend and he said he thought it would be alright. I then told him that I couldn't find anyone who had seen him on Friday. He said he was in the area, but had not gone to his office on that day.

Q. General Wallace, before you questioned this officer did you warn him as to his rights?
A. I did.
Q. Will you repeat what day he said he left the Area?
A. He stated that he had left on Saturday and said he was at the Post on Friday and even went further to state that he made some purchases on Friday from the Post Exchange.
Q. General Wallace, did anyone witness or hear this conversation of yours?
A. Captain Troxel." (R. 10)

Upon cross-examination General Wallace testified that the accused appeared nervous when he talked to the witness (R. 11).

Captain Orlando C. Troxel, 4th Division Artillery, aide to General Wallace (R. 11), gave the following testimony:

"Q. On or about April 15 were you present when General Wallace questioned the accused in this case?
A. No, I was not exactly in the office, as my office desk is in the next room out of sight of General Wallace's desk, but I was in position to hear the questioning, which I did.
Q. Could you hear the questions that were asked in this case?
A. Yes, I could.
Q. Will you tell the court just what you heard?
A. General Wallace asked Lt. Hauptman when he left Fort Benning to go on his leave. Lt. Hauptman told him that he had left on Saturday, April 12. The General asked him what time, and he replied sometime during the day. He asked the accused he he performed any duties on that day and Lt. Hauptman said he didn't perform any duties but he was around. General Wallace asked him if he were here on Friday and Lt. Hauptman said he was. General Wallace then asked him if he had gone to the dispensary and he said he had been down there. General Wallace told him that he couldn't find anyone that remembered seeing him. Lt. Hauptman replied that he was around the camp. The General told him that no one had seen him on the Post that day, but he still insisted that he was around but didn't actually perform any duties on that day.

Q. Will you repeat again the day Lt. Hauptman stated to General Wallace that he left camp?
A. Saturday, April 12. I do not remember whether he said April 12, but he said he left Saturday.
Q. Will you repeat again what he said about Friday?
A. He said he was around the Post on Friday but didn't perform any duties.
Q. Did General Wallace remind Lt. Hauptman of his rights before he questioned him?
A. He did and told him he need not answer any questions that he did not care to answer that might be held against him." (R. 11-12)

The date of this occurrence stated in the question to be April 15 (R. 11) is an obvious error since April 15 was the day when accused was reported to General Wallace as having failed to report as medical officer of the day on April 13 (R. 10). The conversation between the accused and General Wallace concerning which Captain Troxel testified obviously was that which took place about April 24 (R. 10).

Major Cecil R. Hill, 4th Division Artillery Adjutant, testified that one day after accused saw the General the accused admitted in conversation with the witness -

> "*** that he went to Columbus on the night of April 10 and spent the night with some friends and then left Columbus on the 11th for Chicago. *** He said he went by rail." (R. 14)

The accused testified that his leave was effective on or about April 14 (R. 35); that he asked Lieutenant Davis to "sign out" for him because accused could not be present on April 14 to sign out personally (R. 38-39); and that he left Fort Benning on Friday morning, April 11 (R. 37). As his leave was effective on or about April 14 (R. 35), he thought he could leave a few days ahead of time and could take the liberty of having Saturday afternoon so he could get home (Chicago) on Sunday morning (R. 35). In answer to a question as to whether it is customary for officers to leave over the week end without permission, accused answered in the affirmative (R. 35). Accused further stated that he learned on Wednesday evening that the second day of the Jewish holidays which he wished to celebrate at home was Saturday and not Sunday, and that if he left the day he planned he would not be at home for the celebration (R. 36). He testified that he made arrangements for Lieutenant Davis to take his tour as officer of the day and had no duties other than the officer of the day tour on that week end (R. 36).

According to the testimony of the accused, he received his commission on October 8, 1940 (R. 34); he was called to active duty January 2, 1941 (R. 34); he had no previous military training (R. 35); and when he was brought into the service he received no instructions as to military customs (R. 35). He stated that during the course of certain informal lectures, "Only once there was made mention to the Articles of War and that part particularly I didn't very well understand." (R. 35) Since that time and before his present offense accused had not had occasion to read the Articles of War or anything pertaining to them (R. 35). Upon cross-examination of the accused the following testimony was brought out:

> "Q. Lt. Hauptman what day did you leave Fort Benning?
> A. Friday morning, April 11.
> Q. In response to a question from General Wallace regarding this what did you reply?
> A. I don't recall because I asked him at the investigation what I did say as I couldn't believe I told him that. But I must have told him it as the General said I did.
> * * * * * *
> Q. Then when General Wallace asked you on what date you left Fort Benning why did you tell him April 12?
> A. I do not know I did if I did tell him that. The General said I did and there was nothing to doubt the Generals word as I said many things that I didn't want to at that time. I have stayed in Camp very much in order to keep out of trouble." (R. 37,38)

Several officers testified for the defense to the general effect that the reputation of the accused as to veracity was good and that the witnesses would like to serve with accused regardless of the outcome of the present trial (R. 25,26,27,31,32,33).

4. The evidence establishes beyond reasonable doubt that, sometime prior to April 11, the accused, intending to be absent on Monday, April 14, the date his authorized leave was effective, asked Lieutenant Davis to "sign out" for him, that is, to make a written entry in the officers' register, as of April 14. The accused testified that he left Fort Benning on Friday, April 11, for Chicago. On Saturday, April 12, Lieutenant Davis, as requested, did sign out for him as of April 14.

The accused had no permission to be absent from Fort Benning from April 11 to April 14 and, in fact, pleaded guilty to absence without leave for this period. The officers' register, in which the false entry was made, is an official document for the information of the Commanding General of the 4th Division to which division the accused is attached. In causing to be made the false entry concerning his departure the accused was guilty of a violation of the 95th Article of War (Winthrop, 1920 Reprint, p. 713), and the action of the court in finding the accused guilty of Specification 1 of Charge II, by appropriate exceptions and substitutions (M.C.M., par. 78c, pp. 64-65), and guilty of Charge II, is entirely warranted by the evidence.

With respect to the offense charged in Specification 2 of Charge II, there can be no question of the guilt of the accused. The evidence is uncontroverted that the accused, having been called to the office of his commanding general for questioning and having been warned of his rights, knowingly and intentionally made false statements to the general as to the date of his departure from Fort Benning. The accused also falsely accounted for his actions on a day when he was not present at the post. The intent to deceive the commanding general is patent since the false statements of the accused were made while he was being formally questioned about the very acts involved in the statements. Such conduct on the part of the accused in an official capacity, in dishonoring the accused as an officer, seriously compromises his character and standing as a gentleman and is in violation of the 95th Article of War (Winthrop, 1920 Reprint, p. 713).

5. There is attached to the record a request for clemency to the end that accused be retained in the service of the United States on the ground that -

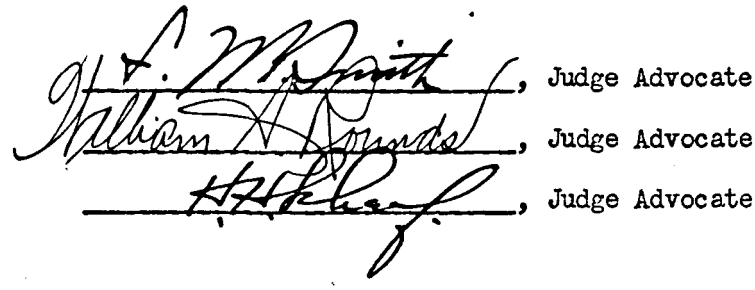
> "2. The circumstances pertaining to and the evidence presented in the case of the above mentioned officer shows a gross lack of knowledge of military custom and procedure due to his limited experience in the Army and to no military experience prior to the beginning of his present tour of active duty."

The request is signed by the president of the court, three other members of the court, the trial judge advocate, and the defense counsel.

6. The charge sheet shows that Hauptman was 26 years of age at the time of the commission of the offenses. War Department records disclose

that he was commissioned a first lieutenant, Dental Reserve, on October 4, 1940, and that he entered on active duty on January 2, 1941.

7. The court was duly constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of the 95th Article of War.



, Judge Advocate.

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

Board of Review
CM 217104

SEP 2 1941

U N I T E D S T A T E S	)	2nd ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Benning, Georgia, June
Second Lieutenant LEWIS	)	7, 1941. Dismissal.
G. BRADLEY (0-346669),	)	
Infantry, 66th Armored	)	
Regiment (Light).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

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

Specification: In that 2nd Lieutenant Lewis G. Bradley, 66th Armored Regiment (Light), did at Columbus, Georgia on or about April 3, 1941, with intent to defraud, make in its entirety, except for signature of 1st Lieutenant Paul M. Morrill, a certain note in the following words and figures, to wit:

$150.00 Columbus, Georgia Apr. 3 1941
FOR VALUE RECEIVED, I, we, or either of us, promise to pay to the order of
The Home Savings Bank of Columbus, Ga.
at the office of The First National Bank of Columbus, Ga., the sum of
One hundred fifty & 0/100 DOLLARS
in lawful money of the United States of America, Payable $ 25.00 on the 1st day of May 1941, and a like amount on the 1st day of each month thereafter, for five months, and $ - on the - day of the - month, until the full amount

of this note, together with any interest that may be due thereon, is paid in full, with interest at the rate of eight per cent per annum from maturity of each installment, and with all costs of collection, including fifteen per cent as attorney's fees, if collected by law or through an attorney at law. Time is of the essence of this note and each of the installment payments, and if one of said installment payments shall fall due and remain unpaid, then the unpaid balance shall, at the option of the holder, become due and payable, and the holder hereof shall proceed without notice to the maker, surety, guarantor, endorser, or other party to this note, to collect, and any failure by the payee to proceed after default of the maker shall not operate as a waiver of said default on the part of the maker, and the said maker, surety, guarantor, endorser, or other party to this note waives demand, protest, and notice of demand, protest and non-payment.

In consideration of the loan evidenced by this note and of the extension of the time of payment of the indebtedness of the undersigned fixed by this note, the undersigned, as well as all securities, endorsers, guarantors, or other parties of this note, jointly and severally transfer, convey, and assign to the payee hereof and to any transferee or holder of this note a sufficient amount of such homestead or exemption as may be allowed to the undersigned or either of them, including such homestead or exemption as may be set apart in bankruptcy, to pay this note in full with all costs of collection; and the undersigned, as well as all sureties, endorsers, or guarantors hereof hereby constitute the payee or holder hereof as the true and lawful attorney in fact of either of them to receive any homestead or exemption set apart for either of them, and do hereby direct the trustee in bankruptcy having possession of such homestead or exemption to deliver to the holder of this note a sufficient amount of property or money allowed and set apart as exempt to pay off the indebtedness evidenced hereby.

Said bank is hereby expressly authorized to retain any general or special deposit, collateral, real or personal security or the proceeds thereof, belonging to either of us now, or hereafter in the possession of it during the time this note remains unpaid and before or after maturity hereof, may apply the same to this or any other debt or liabilities of either of us to said bank due or to become due.

Given under the hand and seal of each party.
NO. 8246 /s/ Lewis G. Bradley, 2nd Lt. 66th AR
DUE 1st /s/ Paul A. Light, 1st Lt., 66th AR
/s/ Paul M. Morrill, 1st Lt., 67th AR
which said note was a writing of a private nature which might operate to the prejudice of another.

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

Specification 1: (Disapproved by reviewing authority.)

Specification 2: (Finding of not guilty.)

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification, and of Specification 1, Charge II, and of Charge II, but not guilty of Specification 2, Charge II. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the findings "with the exception of that portion of the findings as to Specification 1, Charge II", thereby in effect disapproving the finding of guilty of Charge II because not supported by an approved finding of guilty of a Specification thereunder, and approved the sentence. The reviewing authority in his action withheld the order directing execution of the sentence, improvidently stating "Pursuant to Articles of War 48 and 50½". The record was forwarded to the Board of Review where it has been acted upon under the provisions of Article of War 48.

3. The evidence in support of the Specification, Charge I, the only specification of which a finding of guilty was approved, shows that on or about April 3, 1941, the accused was indebted to The Home Savings Bank of Columbus, Georgia, in the amount of $125, represented by a personal note of a like amount which became due about that time. As it was not convenient for the accused to pay the note on its due date, the bank agreed to refinance the indebtedness on a monthly basis. The accused was given a monthly payment note by Mr. W. B. Langdon, Vice President and Treasurer of the bank, "to carry out and get endorsers". A few days later the note was received by the bank through the mail bearing the "three names written in pen and ink" (R. 21, 22). The old note of $125 was canceled and returned by mail to the accused (R. 21). The first monthly payment of $25 due on the new note was due and payable on May 1, 1941. Mr. Langdon could not state whether any payment was made on May 1st (R. 21). He did not know whether the signers of this note were notified when it became delinquent (R. 22), nor did he know, of his own knowledge, who signed the note. The ac-

cused paid the note in full on June 4th and the original note was returned to him (R. 22).

On or about April 3, 1941, the accused requested First Lieutenant Paul M. Morrill to indorse his note to The Home Savings Bank which he agreed to do and did. There was no other signature, not even that of accused, on the note at the time Morrill signed it. There was a space for two signatures and he signed the lower of the two spaces (R. 24). There were no typewritten names on the note at the time it was submitted to him for his signature. The note contained "only three blank lines" (R. 25). When asked if "this" was the type of note he signed and to indicate where he signed the note, he replied it was the same type and that where his name was typewritten was the same place where he signed it (R. 25). The accused had told Lieutenant Morrill that he was going to get two indorsers, one of whom was Lieutenant Jones. Lieutenant Morrill then told accused that if accused was going to get two, he preferred to be the second (R. 25).

A few days prior to May 8th, First Lieutenant Paul A. Light received a notice from The Home Savings Bank to the effect that he was cosigner on a past due note of the accused. Later, the following week, he went to the bank, saw the "note in question" with his name placed thereon without his knowledge or authority and was told the note had been paid. After seeing the note, he waited for a letter from accused and did not get any. He then notified the accused and asked for an explanation. There were three names on the note and his name was second. When he was asked, "Was the note you saw at the bank similar to the one in my hand here?", he replied, "With the exception of the typing of the names, Yes, sir" (R. 26-27). The accused first wired him that he, Lieutenant Light, was not involved. Lieutenant Light testified that he later received a letter from the accused and that -

> "He told me in the letter he was hard pressed for money at the time, and he required the signatures of two other officers on a note, and in order to get the money he placed my name on the note without my knowledge, due to the time involved." (R. 28.)

Lieutenant Light did not recall whether the accused stated in this letter that accused had placed his name or his signature on the note, but when the witness saw the note it contained three signatures. The accused had never requested him to sign a form.

Mr. Langdon, when recalled and questioned as to "the note", which he had certified as a true copy, testified that when accused asked for a copy of the note, he had the stenographer copy the note before it was paid, and that the note which he had certified as a true copy is a true copy of the note which the stenographer copied. He believed the note to be a true copy, but he would not care to "put it to oath" as he relied wholly on the stenographer's work (R. 21).

4. Defense:

Lieutenant Light testified that he had known the accused since the first of September 1940, and was a member of the accused's organization during that period. He was organization commander from April 1st to April 27th. The accused was supply officer, mess officer, assisted with the company work while on duty in his office. He considered the accused's character and the performance of his duties excellent (R. 30).

Lieutenant Morrill testified that he had known the accused for more than fifteen years. The home of each was in Portland, Maine, and he first knew the accused in high school. During this time the character and general esteem of the accused was the very best. He would be willing to go on a note for the accused and had never entertained a doubt that it would not be paid (R. 31).

Captain Lewis A. Hamack testified that he had known the accused since August 19, 1940; that accused's work was rated superior; that accused possesses initiative and willingness to work and does his work in a very fine manner; that he would like to have the accused in his organization right now and would class him in the top bracket (R. 33).

The accused elected to remain silent.

5. There is attached to the record and marked "Exhibit A", a note, certified as a true copy by W. B. Langdon, Vice President and Treasurer, The Home Savings Bank of Columbus, Georgia, dated April 3, 1941, to The Home Savings Bank of Columbus, Georgia, in the sum of $150, and requiring the payment of $25 on the first day of each of the next six months, bearing three typed signatures, Lewis G. Bradley, 2nd Lt. 66th A. R., Paul A. Light, 1st Lt. 66th A. R. (L), and Paul M. Morrill, 1st Lt. 67th Armd Regt. Although it never was formally offered nor received in evidence, the index recites it as introduced at page 21. The record does not support either that recital in the index or the attachment of Exhibit A to the record. There is nothing in the record on page 21 or on any other page, showing any offer or any receipt of that purported copy

in evidence. There is no reference to an "Exhibit A" at any point in the record.

6. In a prosecution for forgery, the instrument alleged to have been forged must be produced at the trial, or its absence satisfactorily accounted for, before evidence can be given to prove the forgery, and, if the instrument is in the hands of the accused, sufficient notice must be given to him to produce it (State v. Martin, 229 Mo. 620, 22 American & English Annotated Cases, 1912 A, p. 908).

> "It is the general rule that on the trial of a prosecution for forgery, if the original instrument alleged to have been forged cannot be produced, secondary evidence of its contents may be received when a proper foundation is laid therefor, by showing that the instrument has been lost, destroyed or is in the possession or under the control of the defendant." (Note to State v. Martin, supra, citing authorities.)

> "[sec. 118] 3. PRODUCTION OF FORGED INSTRUMENT. The production of the forged instrument is an essential part of a case of forgery, and it must be produced in court against accused, or failure to do so must be satisfactorily accounted for before secondary evidence of its contents is admissible by showing that the instrument has been lost or destroyed, or that it is in the hands of accused or his friends, or that it is not within the reach of the process of the court. If the instrument is in the hands of accused sufficient notice must be given to him to produce it; and if this is done and the instrument is not produced secondary evidence of its contents is admissible. The rule is the same if the instrument is beyond the jurisdiction of the court. If the instrument has been destroyed by accused, or by someone without his privity, its tenor may be proved by parol evidence after proof of such destruction or loss has been adduced, even though the indictment does not count on a lost instrument. * * *." (26 C.J. 960.)

> "The grounds for the admission of secondary evidence are that the primary evidence has been lost or destroyed, or is otherwise inaccessible, as where it is beyond the jurisdiction of the court, or where it is not in the possession of the side offering the evidence and its production cannot be compelled. Be-

fore secondary evidence is admissible, however, the competency and genuineness of the primary evidence must be established; and a proper predicate or foundation must be laid by establishing by satisfactory and sufficient proof the fact that the primary evidence cannot be produced." (22 C.J.S. 1197, citing authorities.)

"When the loss of a record or other legal document is once established and no authenticated copy thereof is to be had, its contents may be proved by parol evidence." (Craft v. Commonwealth, 196 Ky. 277, 244 S.W. 696, 697; Wharton's Criminal Evidence, vol. 1, sec. 391.)

7. With respect to the authorities cited above, the prosecution did not introduce in evidence the original note alleged to have been forged.

While the original note was shown to have been returned to the accused upon payment, no foundation was laid for the introduction of secondary evidence of its content by a notice to accused to produce the original note. Although it is apparent that a purported copy of the note was in the possession of the prosecution and that many questions were asked with respect to that copy, it was not in fact actually offered or received in evidence.

Although there was some testimony of Mr. Langdon, Lieutenant Morrill and Lieutenant Light as to the contents of the original note, that testimony referred to an alleged unproven copy which was never introduced in evidence, and there was no other independent testimony legally sufficient to establish the contents of the note alleged in the Specification.

8. In the absence of proof of the forged note by the introduction in evidence of the original instrument, by the introduction in evidence of a copy thereof, or by proof of the contents of the note pointedly and clearly by parol evidence, the record of trial fails to show an essential element in the proof of the offense of the forgery alleged. Such an omission is a fatal defect in the record. In view of that conclusion, it is unnecessary to consider other elements in the proof.

As the forgery specification was the only specification upon which a finding of guilty was approved by the reviewing authority, the record of trial is not legally sufficient to support the sentence.

9. The accused is twenty-six years of age. The records of The Adjutant General's Office show his service as follows:

> Appointed a second lieutenant, Infantry, Officers' Reserve Corps, June 19, 1936. Reappointed in same grade June 19, 1941. Ordered to extended active duty for one year, effective August 19, 1940.

10. The court was legally constituted. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty and to support the sentence.

Lester S. Ward Jr., Judge Advocate.

Chas. B. Gresson, Judge Advocate.

(On leave), Judge Advocate.

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

Board of Review
CM 217172

JUL 15 1941
SEVENTH CORPS AREA

UNITED STATES)	
)	
v.)	Trial by G.C.M., convened at Fort Francis E. Warren, Wyoming, June 11, 1941. Dishonorable discharge and confinement for six (6) months. Fort Francis E. Warren, Wyoming.
Private STEVEN P. ROSENBAUM (6552868), Band, 38th Infantry.)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Steven P. Rosenbaum, Band, 38th Inf., attached Det. 38th Inf., did, at Ft. Douglas, Utah, on or about June 7, 1939, desert the service of the United States and did remain absent in desertion until he surrendered himself at Ft Francis E Warren, Wyoming, on or about April 16, 1941.

The accused pleaded not guilty to the Specification. He was not specifically asked to plead to, nor did he plead to the Charge. He was found guilty of the Charge and the Specification. No evidence of previous conviction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority, "because of a legal irregularity occurring at the trial and not because of a lack of evidence as to accused's intent to

desert", approved only so much of the findings of guilty as involved a finding of guilty of absence without leave for the period alleged, in violation of Article of War 61, approved only so much of the sentence as adjudged dishonorable discharge, total forfeitures, and confinement at hard labor for six months, suspended the execution of the dishonorable discharge, and designated Fort Francis E. Warren, Wyoming, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 238, Headquarters Seventh Corps Area, July 3, 1941.

3. The accused was arraigned on June 11, 1941. The evidence shows that he absented himself without leave at Fort Douglas, Utah, on June 7, 1939, and surrendered himself at Fort Francis E. Warren, Wyoming, on April 16, 1941. There is nothing in the record to indicate that the accused was at any time during that period absent from the jurisdiction of the United States or that he was during that period, by reason of any manifest impediment, not amenable to military justice.

4. Article of War 39 provides, in part, that no person subject to military law shall be liable to be tried or punished by court-martial for desertion in time of peace committed more than three years before his arraignment, nor for absence without leave committed more than two years before arraignment. It provides further that the period of any absence of the accused from the jurisdiction of the United States and any period during which, by reason of some manifest impediment, the accused shall not have been amenable to military justice, shall be excluded in computing the period of limitation.

Paragraph 87 b, Manual for Courts-Martial, 1928, provides, in part, as follows:

> "* * * Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A. W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense."

5. The accused was not arraigned until five days after the expiration of the two-year period of limitation from the date upon which he absented himself without leave.

It follows that the reviewing authority, after he had approved only so much of the findings of guilty of desertion as involved a finding of guilty of absence without leave, was without power to consider such absence as a basis of punishment because punishment for such absence was barred by Article of War 39. As the accused was tried upon this single Specification, the record of trial is not legally sufficient to support the sentence.

6. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the sentence.

Robert P. Kelly Jr, Judge Advocate.

Chas. L. Cresson, Judge Advocate.

Thomas N. Taffy Judge Advocate.

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

Board of Review
CM 217207

JUL 24 1941

U N I T E D S T A T E S	)	FOURTH ARMY
v.	)	Trial by G. C. M., convened at Fort Stevens, Oregon, June 6, 1941. Dishonorable discharge and confinement for two (2) years. Federal Correctional Institution, Englewood, Colorado.
Private MICHAEL B. BARKER, JR. (39300380), Battery E, 249th Coast Artillery.	)	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

2. Accused was found guilty of the larceny of one camera, value about $50, the property of Private Russell Kozuki, 18th Engineers; one exposure meter, value about $15, and one wrist watch, value about $40, the property of Private Yoshio Sugioka, 18th Engineers, these items then being in the custody of Private Fred W. Tidball, Battery E, 249th Coast Artillery (R. 13). These three articles were received in evidence without objection by the defense as Exhibits 1, 2 and 3 (R. 9, 10), and were before the court at the trial. In order to establish the required market value of these articles the prosecution called as a witness Second Lieutenant Lee Charles Rohrbough, 249th Coast Artillery, who is shown by the testimony of record to have been a junior partner in the firm of Charles Rohrbough and Son of Albany, Oregon, with eight years experience in the new and second-hand furniture business, buying, selling and inspecting not only furniture but also jewelry, cameras, gold and guns (R. 26). This witness testified that the present market value of the camera in question is $15 and of the wrist watch $3, but expressly stated, when asked the value of the exposure meter, "I don't feel competent to estimate its value" (R. 27). A little later in his testimony he was asked by the trial judge advocate, "Is it not correct that before you came in this room you had a catalog which showed a retail price of this meter to be $15.50", to which he answered, "I don't know anything about exposure meters." The prosecution then said, "I am not asking you what you know about these things,

I am asking you if you saw an item similar to the exposure meter here and if it was priced at $15.50", to which witness replied, "Yes, sir, I did" (R. 28).

3. It is well established that except as to distinctive articles of Government issue or other chattels, which, because of their character do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 212983, Dilsworth; CM 213765, Krueger, et al.) There is no competent testimony in the record as to the market value of the exposure meter described in the Specification. This article was before the court but the court was not authorized from mere inspection of the same or from a reference to the catalogue showing the retail value of the article to find that it was of more than of some substantial value. To hold that the court could determine its definite market value would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs).

4. The maximum punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, for larceny of property of value of not more than $20 is confinement at hard labor for six months. In the instant case the market value of the camera is properly established by competent evidence as $15, and that of the watch as $3, but the market value of the exposure meter is not established by competent testimony, and its value is not a matter of such fixed and common knowledge as to justify a court taking judicial notice of the retail catalogue value and using that as the basis of an estimate of its present worth. It follows, therefore, that the testimony of record fails to establish the total value of the three articles alleged in the Specification of which the accused was found guilty as more than $20.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding of guilty of larceny by the accused, at the time and place alleged, of one camera, value about $15, the property of Private Russell Kozuki, 18th Engineers; one exposure meter, of some value, and one wrist watch, value about $3, property of Private Yoshio Sugioka, 18th Engineers, these items then being in the custody of Private Fred W. Tidball, Battery E, 249th Coast Artillery; and legally sufficient to support only so much of the sentence as

involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. In view of this holding, the designation of the Federal Correctional Institution, Englewood, Colorado, as the place of confinement becomes inappropriate.

F. W. Smith, Judge Advocate.
William H. Sands, Judge Advocate.
H B Clark, Jr., Judge Advocate.

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

Board of Review
CM 217282

JUL 31 1941
SIXTH CORPS AREA

UNITED STATES	Trial by G.C.M., convened at Camp Grant, Illinois, June 11, 1941. Dismissal.
v.	
First Lieutenant JEROME EDWARD SCANLAN (0-201572), Medical Reserve, Headquarters & Headquarters Company, 32nd Medical Training Battalion, Camp Grant, Illinois.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

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

Specification 1: In that First Lieutenant Jerome E. Scanlan, Medical Corps, did, without proper leave, absent himself from his organization at Camp Grant, Illinois, from about February 27, 1941, to about March 10, 1941.

Specification 2: In that First Lieutenant Jerome E. Scanlan, Medical Corps, did, without proper leave, absent himself from his organization at Camp Grant, Illinois, from about April 8, 1941, to about May 13, 1941.

CHARGE II: Violation of the 85th Article of War.

Specification 1: In that First Lieutenant Jerome E. Scanlan, Medical Corps, was at Camp Grant, Illinois, on or about March 14, 1941, found drunk while on duty as acting Commanding Officer of Company "C", 32nd Med Tr Bn., Camp Grant, Illinois.

Specification 2: In that First Lieutenant Jerome E. Scanlan, Medical Corps, was at Camp Grant, Illinois, on or about March 18, 1941, found drunk while on duty as Company Officer, Company "C", 32nd Med Tr Bn., Camp Grant, Illinois.

Specification 3: In that First Lieutenant Jerome E. Scanlan, Medical Corps, was at Camp Grant, Illinois, on or about April 8, 1941, found drunk while on duty as officer in Hqs., 32nd Med Tr Bn., Camp Grant, Illinois.

3. The evidence in support of the two Specifications of Charge I - to which he pleaded guilty - shows that accused absented himself without leave from his organization on February 27, 1941, and remained absent until he returned on March 10, 1941 (R. 11, 16; Ex. 1). He again absented himself without leave on April 18, 1941, and remained absent until he returned on May 13, 1941 (R. 14, 17; Ex. 2).

4. Charge II: The evidence shows that accused was acting commanding officer of Company C, 32nd Medical Training Battalion, Camp Grant, Illinois, on March 14, 1941 (R. 24, 25, 34). The accused was drunk that morning before breakfast and at about eleven o'clock (R. 31). At about 8:30 a.m., when he was brought before his battalion commander, the accused was drunk (R. 18, 34). He was not in full possession of his mental faculties, was not able to function, his face was red, he smelled of liquor, weaved around a bit, and his speech was thick (R. 21-24, 31). One medical officer testified that he was a good friend of accused, that he tried to get accused to take care of his duty as company commander that day but that accused was intoxicated and unable to do it, that he offered to help accused but accused said, "Scanlan can take care of Scanlan, he'll get along all right" (R. 32).

On March 18, 1941, accused was on duty as platoon leader of Company C, 32nd Medical Training Battalion (R. 25, 34). He was drunk about eleven o'clock in the morning (R. 31-32). At about 1:30 p.m., when his battalion commander and his company commander went to his quarters, they found accused drunk, and took him to the hospital (R. 25, 34). Accused was very unsteady in his quarters, and his speech was blurry. En route to the hospital, accused smelled of alcohol, his face was flushed, and he "drooped" in the car. Ac-

cused did not perform any duties after going to the hospital and did not return to his organization that day (R. 25-29).

On April 18, 1941, accused was assigned to duty at Headquarters, 32nd Medical Training Battalion. He was drunk and unable to perform any duty when his battalion commander saw him in the office at 8 a.m. The battalion commander looked for him half an hour later but was unable to find the accused (R. 34-37).

5. The only witness for the defense was the accused who testified, in substance, as follows (R. 38-46):

He was forty-two years old, had previous service in the World War, had been a member of the Officers' Reserve Corps since 1924, had practiced medicine in North Dakota, and had been ordered to active duty on November 28, 1940. He was married and had four children, ranging in age from four to twelve years.

a. Specification 1, Charge I. Although accused, in his direct examination, made no mention of an absence from February 27th to March 10, 1941, on cross-examination he stated that he did not have permission to be absent during that period, and that he was not absent from the camp on the 27th or the 28th, but was not on duty. In his examination by the court, he testified that he did not say that he was in camp on February 27th; that he had an abscessed tooth and went to the hospital where they said they did not have the equipment that morning and to come back later; that it was so bad he went downtown and had the tooth pulled, and was told to put hot packs on it; that Major Westervelt (his battalion commander) told him "to lay around" the barracks and put on the hot packs as directed. In reply to a question of the court if he was absent without leave from about February 28th to March 10th, accused stated that he was out in the camp on the 3rd; that there wasn't any reason, except that he was "laying" there in the barracks with nothing to do, so he took off and went home. He was assigned to duty from March 3rd to March 10th with a cadre of thirteen men.

b. Specification 2, Charge I. Accused received a wire from his wife that their daughter was sick. His request for ten days' leave to go home was denied by Colonel Martin. When he called his wife on April 8th, he found that his wife was also sick. He was very worried, and without too much thinking about it, he just left. He found that his wife was sick with the flu and that his little daughter

had pneumonia. While at his home, St. Paul, Minnesota, he called Captain Streibig (M.A.C., Hq., 32nd Med. Tr. Bn.) told him the situation and that he was coming back as soon as he could. Within twenty-four hours he himself came down with the flu and was "laid up" about ten days. Then the enormity of the thing began to dawn on him. He hated to go back and, consequently, stayed away that length of time. When he returned to Rockford, he called Captain Streibig who came downtown and placed accused under arrest (R. 38-41). Upon cross-examination, accused stated that he was not present for duty April 8th to May 13, 1941 (R. 44).

c. Charge II. On March 14th he was also officer of the day, was able to take reveille, perform all his duties as officer of the day, and to do that, he could not have been drunk (R. 41).

On March 18th he was giving a lecture at the school in one of the barracks when Major Westervelt and Captain Streibig took him from the school a little after one o'clock, had him get his toilet articles together and took him to the hospital, saying only that it was upon Colonel Martin's order. In the opinion of the accused he was not drunk (R. 41-42).

On the day prior to April 8th, upon Major Westervelt's suggestion, he went with Captain Stevens who was drawing kitchen equipment to see how it was drawn and how to make a requisition. He was to be mess officer of Company D when it was formed and was "there" at eight o'clock on April 8th for that purpose. He had nothing else to do that morning and went over to his barracks to make out a requisition. About nine or nine-thirty, Captain Streibig came through the barracks and told accused that Major Westervelt told him that accused was absent without leave. Accused replied that if he were absent without leave, he supposed there was nothing he could do about it, but did not go back over to Major Westervelt's headquarters (R. 43).

6 a. The pleas of the accused and the evidence clearly support the findings of guilty of the two absences without leave, alleged under Charge I.

b. The evidence fully supports the findings of guilty of being found drunk on duty upon each of the three occasions alleged under Charge II. At least one medical officer testified that accused was drunk upon each occasion. In the second instance, March 18th, two medical officers testified that accused was drunk.

The accused testified that he could not have been drunk on March 14th, because he performed all of his duties, that in his opinion he was not drunk on March 18th, but omitted to make any comment upon his condition as to sobriety on April 8th.

7. The accused is forty-two years of age. The records of The Adjutant General's Office show his service as follows:

> Appoint first lieutenant, Medical, Officers' Reserve Corps, July 1, 1924, reappointed October 26, 1929, February 2, 1935, and February 2, 1940. On active duty (C.C.C.), from May 21, 1935, to October 31, 1935. Ordered to extended active duty for one year, effective November 28, 1940.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st and of the 85th Articles of War.

Arthur Wiles Jr., Judge Advocate.

Chas. B. Bresson, Judge Advocate.

Thomas H. Tapley, Judge Advocate.

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

Board of Review
CM 217283

SEP 2 1941

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G. C. M., convened at Camp Grant, Illinois, June 19, 1941. Dismissal.
First Lieutenant MAURICE M. COLLINGS (0-336870), Medical Corps.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, 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 the following Charges and Specifications:

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

Specification: In that First Lieutenant Maurice M. Collings, Medical Corps, did, without proper leave, absent himself from his organization, Company "A", 30th Medical Training Battalion, Camp Grant, Illinois, from about 9:30 A.M., April 8, 1941, to about 10:30 A.M., April 9, 1941.

CHARGE II: Violation of the 85th Article of War.

Specification: In that First Lieutenant Maurice M. Collings, Medical Corps, was, at Camp Grant, Illinois, on or about May 12, 1941, found drunk while on duty as a platoon leader.

He pleaded guilty to Charge I and its Specification, and not guilty to Charge II and its Specification. He was found guilty of both Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence

were announced in open court. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The accused having pleaded guilty to Charge I and its Specification, the evidence introduced in connection therewith is not summarized.

With respect to Charge II and its Specification, the testimony discloses that on the afternoon of May 12, 1941, the accused was supposed to be on duty in charge of his platoon from 1 to 4:45 o'clock (R. 26). On the afternoon in question Company A, 30th Medical Training Battalion, to which the accused belongs (R. 12), went out on a road march in which exercise the accused was supposed to participate (R. 31). The accused did not appear at this formation nor was he present later when the other platoon officers reported in at the company commander's office at about 4 or 4:15 o'clock (R. 22,27,31). The company commander, Captain George A. Tischler, Medical Corps, Company A, 30th Medical Training Battalion, sent First Lieutenant Curtis H. Hussa, Infantry, Military Police, Section 8, 1608th Corps Area Service Unit, and Captain William Cannicott, Medical Administrative Corps, Company A, 30th Medical Training Battalion, to search for the accused (R. 22,27,31). He was found in his platoon office lying on a cot (R. 27).

Lieutenant Hussa testified that he smelled liquor in the room and upon the breath of accused (R. 27); that accused was not fully in posession of his mental and physical faculties, and was not capable of performing full military duty because mentally deficient, but from what cause witness could not say (R. 28,30). Lieutenant Hussa said to the accused, "Are you coming over to the office, the commanding officer is looking for you", and the accused answered "No" (R. 29-30).

Captain Cannicott testified that he and Lieutenant Hussa found the accused in his room asleep and that they could smell the odor of alcohol on his breath (R. 31), but that no attempt was made to awaken him (R. 32).

Captain George A. Tischler, the commanding officer of the accused's organization, testified that he saw the accused at 4:30 in the afternoon (R. 26) lying on the cot in his office fast asleep (R. 22). The witness tried to arouse him but accused did not respond (R. 22). Witness, a medical officer with six months' active duty and five years' medical practice, has come in contact with intoxicated people in civil and military life. He testified that there was a strong odor of alcohol

on the breath of the accused; that his mental reactions were not those of a normal individual; and that he spoke in "a rolling manner", slurring his words (R. 24). The witness testified repeatedly that at the time he saw the accused the latter was drunk within the meaning of a definition as follows:

> "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness"

(R. 23-25), which definition is that adopted in paragraph 145 of the Manual for Courts-Martial as constituting drunkenness within the meaning of Article of War 85.

No evidence was introduced by the defense.

4. It is established by the testimony of his commanding officer that on the afternoon of May 12, 1941, the accused was "supposed" to be on duty in charge of his platoon from 1 to 4:45 o'clock. That accused actually entered upon that duty may be inferred from the fact that he was found during this period in his office, his platoon office. No suggestion that the accused was present in his office in any capacity inconsistent with a duty status appears in the record. The circumstance that he failed to participate in all of the activities of his organization on the afternoon in question does not alter the fact that he was actually "on duty" when found at about 4:15 or 4:30 o'clock. That the accused was drunk when found in his platoon office at that time is established beyond a reasonable doubt. The action of the court in finding the accused guilty of Charges I and II and their Specifications is entirely warranted by the evidence.

5. The charge sheet shows that Lieutenant Collings was 37 years of age at the time of the commission of the offenses. War Department records disclose that he was commissioned a first lieutenant, Medical-Reserve, on October 5, 1935, and that he was reappointed in the same grade and section on October 5, 1940. He was on active duty with the Civilian Conservation Corps from February 8, 1937, to December 29, 1938. He appears to have been on extended active duty at Camp Grant, Illinois, since February 25, 1941.

6. The court was duly constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial.

In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. The sentence is legal.

S. M. Smith, Judge Advocate.

On Leave, Judge Advocate.

H. B. Clark, Jr., Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 22 1941 - To the Secretary of War.

1. The record of trial and the accompanying papers in the case of First Lieutenant Maurice M. Collings (0-336870), Medical Corps, together with the opinion of the Board of Review, signed by only two of the three members, the third member being on leave at the time the opinion was signed, are transmitted herewith pursuant to Article of War 48 for the action of the President.

2. The opinion of the Board of Review finds that the record of trial is legally sufficient to support the findings as to both Charges and the specifications thereunder and the sentence. I do not concur in this opinion but, for reasons hereinafter set forth, am of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and the Specification thereunder as involves a finding of guilty of being drunk at the time and place alleged, in violation of the 96th Article of War.

3. The evidence shows that on the afternoon of May 12, 1941, the accused was supposed to be on duty in charge of his platoon from 1 to 4:45 o'clock. On that afternoon Company A, 30th Medical Training Battalion, to which organization accused belonged, went on a road march, in which exercise the accused was supposed to participate. The accused did not appear at this formation nor was he present after the march when the other platoon officers reported at the company commander's office at about 4 or 4:15 p.m. The company commander sent two officers to search for accused. He was found by them in his platoon office lying on a cot, not fully in possession of his mental and physical faculties, the smell of liquor on his breath, and not capable of performing full military duty. Upon being asked, "Are you coming over to the office, the commanding officer is looking for you", accused answered, "No". At 4:30 p.m., accused's commanding officer saw him lying on a cot in his office fast asleep. He tried to arouse him but accused did not respond. This witness, a medical officer with six months' experience on active duty and five years' practice of medicine, testified that accused was drunk as measured by the following definition:

> "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness",

which definition is adopted in paragraph 145 of the Manual for Courts-Martial as constituting drunkenness within the meaning of Article of War 85.

4. In the light of this evidence there can be no doubt but that accused was so drunk at the time alleged that he was incapable of performing military duty. However, the record shows that accused did not lead his platoon or participate in the practice march and was not engaged in performing any military duty at the time he was found drunk in his platoon office. The record fails to show beyond a reasonable doubt that accused was on duty and therefore does not support the finding that he was drunk on duty within the meaning of Article of War 85.

5. I recommend that only so much of the findings of guilty as to Charge II and the Specification thereunder be approved as involves a finding that accused was drunk at the time and place alleged, in violation of the 96th Article of War, that the sentence be confirmed but, in view of the circumstances disclosed above, the execution of the sentence be suspended during the pleasure of the President.

6. Inclosed are two drafts of letters, marked A and B, prepared for your signature, transmitting the record to the President for his action, draft A concurring in the recommendations set forth above, and draft B concurring in the opinion of the Board of Review. Also inclosed are two forms of Executive action, likewise marked A and B, draft A to accomplish the confirmation and suspension of the sentence in accord with my views, and draft B to accomplish the confirmation and execution of the sentence in accord with the views of the Board of Review.

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Let. for sig. Sec. War marked A.
Incl.3-Let. for sig. Sec. War marked B.
Incl.4-Form of action marked A.
Incl.5-Form of action marked B.

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

Board of Review
CM 217383

AUG 9 1941

UNITED STATES	)	THIRD CORPS AREA.
	)	
v.	)	Trial by G.C.M., convened at Fort Monroe, Virginia, June 30, 1941. Dismissal and confinement for one (1) year and one (1) day. Penitentiary.
	)	
Captain GEORGE R. NELSON (0-303477), 74th Coast Artillery (AA).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

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

Specification 1: In that Captain GEORGE R. NELSON, 74th Coast Artillery (AA), then First Lieutenant GEORGE R. NELSON, 74th Coast Artillery (AA), did at Fort Monroe, Virginia, on or about December 31, 1940, feloniously embezzle by fraudulently converting to his own use, money of the value of One hundred-fifty dollars ($150.00), the property of Sergeant JAMES C. GREER, Battery D, Seventy-fourth Coast Artillery (AA), intrusted to him by said Sergeant JAMES C. GREER, for deposit with the Finance Officer, Fort Monroe, Virginia.

Specification 2: In that Captain GEORGE R. NELSON, 74th Coast Artillery (AA), did at Fort Monroe, Virginia, on or about March 31, 1941, feloniously embezzle by fraudulently converting to his own use, money of the value of thirty dollars ($30.00)

the property of Pvt 1 cl VERTIS L. McCARTY, Battery F, 74th Coast Artillery (AA), intrusted to him by the said Pvt 1 cl VERTIS L. McCARTY, for deposit with the Finance Officer, Fort Monroe, Virginia.

Specification 3: In that Captain GEORGE R. NELSON, 74th Coast Artillery (AA), did at Fort Monroe, Virginia, during the period between March 24 and April 24, 1941, inclusive, feloniously embezzle by fraudulently converting to his own use coupon books of the value of about One Hundred Forty Six ($146.00) Dollars the property of the Post Exchange, Fort Monroe, Virginia, intrusted to him by the Post Exchange Officer, Fort Monroe, Virginia.

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

Specification: In that Captain GEORGE R. NELSON, 74th Coast Artillery (AA), did at Fort Monroe, Virginia, on or about April 24, 1941, with intent to deceive Colonel SAMUEL F. HAWKINS, 74th Coast Artillery (AA), officially state to the said Colonel SAMUEL F. HAWKINS, "I have the Two-hundred seventy-five dollars in a safety deposit box in Norfolk, Virginia. I took the money to Norfolk for safe keeping until the first of the month and will get it tomorrow morning", which statement was in fact untrue and was known by the said Captain GEORGE R. NELSON, 74th C.A. (AA) to be untrue.

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

Specification 1: In that Captain George R. Nelson, 74th C.A. (AA), did, at Fort Monroe, Virginia, on or about March 31, 1941, feloniously embezzle by fraudulently converting to his own use, thirty five dollars ($35.00) in United States currency, property of the Post Exchange, Fort Monroe, Virginia, which said thirty-five dollars ($35.00) came into his possession as proceeds from the sale of Post Exchange coupon books entrusted to him by The Post Exchange, Fort Monroe, Virginia.

Specification 2: In that Captain George R. Nelson, 74th C.A. (AA), did, at Fort Monroe, Virginia, on or about April 6, 1941, feloniously embezzle by fraudulently converting to his own, use, eighty-five dollars ($85.00) in United States currency, property of The Post Exchange, Fort Monroe, Virginia, which said eighty-five ($85.00) came into his possession as proceeds from the sale of Post Exchange coupon books entrusted to him by The Post Exchange, Fort Monroe, Virginia.

The accused pleaded not guilty to and was found guilty of all Specifications and Charges. No evidence of previous conviction 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 three years. The reviewing authority approved the sentence, but remitted the confinement in excess of one year and one day, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. a. The evidence shows as to Specification 1, Charge I, that Sergeant James C. Greer, Battery D, 74th Coast Artillery, about December 31, 1940, gave to the accused, his battery commander, $150 to be deposited in the Finance Office, Fort Monroe, Virginia, to the credit of Sergeant Greer (R. 6). That money was not deposited in the Finance Office (R. 6, 9). On February 3, 1941, when Sergeant Greer brought money to his then company commander, Captain Hamilton, he did not have his deposit book. When Captain Hamilton asked accused for that deposit book on February 3rd, accused stated the book was in his safe, but the keys had gone to his home in his clothes (R. 7). On March 31st, accused told Sergeant Greer he had the deposit book in the field safe and wrote out a statement that he had deposited $250 (which amount included $100 previously deposited) in the Finance Office to Sergeant Greer's credit (R. 6).

b. The evidence shows as to Specification 2, Charge I, that when Private V. L. McCarty delivered on March 31, 1941, to accused, his battery commander, $30 to be deposited to his credit with the Finance Office, the accused stated the keys to his field safe containing the deposit book were in clothing which he sent home and that he would make the deposit when he received the keys. When the deposit book was returned to McCarty on April 25, 1941, the $30 given accused March 31, 1941, was not entered therein. No deposit

with the Finance Office was made of $30 to credit of McCarty on or after March 31, 1941 (R. 10).

c. The evidence shows as to Specification 3, Charge I, that accused was issued and receipted for Post Exchange coupon books to the value of $254 on March 25th, to the value of $350 on March 31st, and to the value of $200 on April 17, 1941, total value, $804 (R. 12; Exs. B, C, D). Battery commanders were required to settle that indebtedness by April 21st, with cash, individual canteen cards, or returned unsold books (R. 17). The Post Exchange bookkeeper called accused on April 22nd and 23rd but did not reach him. On April 24th, accused handed the bookkeeper canteen cards totaling $488, and unsold books valued at $43, leaving a shortage of $275. Upon being told that the balance of $275 had to be paid at once, the accused handed the bookkeeper his check, which could not be accepted, as a cash settlement of the balance was required. He then asked that the check be held until he could get the money. When the accused telephoned later that the bank was closed and he could not get the money, he was told to see the Post Exchange Officer, Captain Rust. The return the next day of books amounting to $7 reduced the net shortage to $266 (R. 14).

On April 24th accused asked Captain Rust to allow him until ten o'clock the next morning to settle the account, that he could not get the money that day but would go to Norfolk and get it the next morning (R. 16). The account of accused in the amount of $266 is still carried on the Post Exchange books as unpaid (R. 17).

d. Charge II - Colonel Samuel F. Hawkins, Commanding Officer, 74th Coast Artillery, of which accused was a member, discussed with accused on April 24, 1941, the state of accused's account with the Post Exchange. In reply to Colonel Hawkins' question as to the whereabouts of the Post Exchange coupons, accused stated that the money amounting to $275, was in a safety deposit box in Norfolk and that he could get at any time the money which he had placed there for safekeeping. Accused stated that he would go over and get it. As it was too late to go that day, Colonel Hawkins ordered Captain Charles H. Tall, Jr., to go over with accused the next morning to get the money (R. 18-19, 20).

The next day accused and Captain Tall went to Norfolk on the ferry, parked the car, and walked to a point on Main Street near the National Bank of Commerce. Accused then stopped and said that it was no use to go further as the money was not there. Accused explained that he had not told Captain Tall before that the money was not there because he was hoping his family would move out and not be embarrassed (R. 20-21).

e. Additional Charge - On the last day of March, or the first day of April, Second Lieutenant Irving Malcolm, 74th Coast Artillery, turned over to the accused $30 in cash and some unsold books, in payment for Post Exchange coupon books given by accused to him for sale to his cadre of about thirty men (R. 22).

During the month of March or April 1941, First Lieutenant Alfred Segal, 74th Coast Artillery, gave to accused approximately $80 to $85, the proceeds of sale of Post Exchange coupon books sold by Segal, who did not know whether accused drew these books between March 24th and April 24, 1941 (R. 23).

4. The accused testified that he was tremendously over-burdened with debts when he entered the service July 10, 1940, as a first lieutenant. His total pay and allowances of $211 a month was insufficient to meet his obligations. The money borrowed from date of entry into service to December 31, 1940, was borrowed solely for the purpose of paying post bills and obligations he brought into the service (R. 29). His private indebtedness on January 1, 1941, amounted to $2860, but was reduced to $2223 by April 25th, the day he was restricted to quarters.

a. Specifications 1 and 2, Charge I - In January 1941, he borrowed $150 for the purpose of repaying Sergeant Greer's $150 which he had "lain" in safe, by depositing in Finance Office, but was forced to use it to pay threatening creditors. He decided to wait until February 1st and take $150 from his pay, but was forced again to use his pay to make payments to creditors (R. 29). He then obtained a loan of $150 from an aunt, but was again obliged to pay it to creditors. On receipt of his March pay, he placed $150 in the safe attached to Sergeant Greer's card, intending to deposit it next day, but was obliged to pay it to creditors. On February 1st, he told Captain James S. Hamilton, who had assumed command of Battery E, that he would turn over Sergeant Greer's deposit book as soon as he could get into the safe, in order to have the deposit book complete before turning it over. When Private McCarty gave him $30 to deposit on April 1st, he told McCarty that he had misplaced the key to the safe, and would hold it and deposit it when he could get the deposit book (R. 30). Sometime during that month he had to use that money to take care of his furniture account to prevent seizure, and paid the balance to his maid and the laundry. On April 1st he took $150 from his pay and locked it up in his desk, but was obliged to use it for creditors. He then decided to borrow $300 to pay off Sergeant Greer and Private First Class McCarty, but was placed in arrest before he was able to do it. He found McCarty's deposit book about April 25th and gave it

to Lieutenant Segal to give to McCarty (R. 31).

b. Specification 3, Charge I - He was given the first lot of canteen books from the Post Exchange on March 25th, and received the impression that he was to keep them out until finally collected for on the April collection sheet. He drew twice more and on the last drawing the bookkeeper said she would want them for inventory. He thought he could put off settlement until April 30th when he would have his April pay check. On April 24th, he was told, while on a hike, that the colonel wanted an immediate settlement. On the way home he stopped at a bank and arranged for a $275 loan, provided he could get two officers as cosigners. Captain Harold R. Spaans and Captain Robert J. Jones agreed to sign with him, but the bank declined the loan (R. 31). (Captain Spaans (R. 28) and Captain Jones (R. 26) testified that they had agreed to sign the note.) Captain Jones said Hofheimer in Norfolk certainly would make the loan. Accused planned to go there next day and told Captain Rust he would send Captain Rust the money by ten o'clock the next day. Colonel Hawkins insisted that Captain Tall accompany accused to Norfolk the next day, which voided any chance of getting money with Captain Jones' help. He allowed Captain Tall to waste the time going to Norfolk, when he knew that there was no money there, in order to allow his wife and children to leave the post (R. 31).

He had tried in December 1940 to get an officer to take his pay checks and work out the payment of debts, and in February to get a company to undertake it, but was not successful (R. 31). He inherited an acre of land in Iowa worth about $1,000 but had been unable to sell or mortgage it.

> "I realize that the things I have done are wrong, but even today as I write this, as I have in the past, I do not intend to allow any person involved in the above transactions to lose in any way. * * * I have never intended to permanently convert any of these funds to my personal use, as is evidenced by the fact that I made no fraudulent or false entries to cover any of these transactions." (R. 32.)

c. Charge II - When he told Colonel Hawkins he had $275 in Norfolk, he intended to get the $275 through his arrangement with Captain Jones, but was prevented from doing so when Colonel Hawkins

sent Captain Tall to accompany him to Norfolk (R. 33).

d. Upon cross-examination the accused admitted (1) that he received $150 from Sergeant Greer about December 31, 1940, and $30 from Private McCarty on March 31, 1941, for deposit in the Finance Office, neither of which sums had yet been deposited in the Finance Office; (2) that he had failed to pay to the Post Exchange $266 due from the books he had signed for and collected money for from March 24th and April 24, 1941; (3) that he knew at the time he stated to Colonel Hawkins that he had $275 in a bank at Norfolk, that he did not have it there; (4) that the $35 turned over to him by Lieutenant Malcolm March 31, 1941, was the proceeds of coupon books which accused drew between March 24th and April 24, 1941; and (5) that the $85 turned in by Lieutenant Segal was from proceeds of books issued to accused between March 24th and April 24, 1941 (R. 33-34).

Upon redirect examination the accused denied that he converted to his own use the $35 and the $85 received for the books, but that he put it in his desk drawer (R. 34).

5. With respect to Specification 3, Charge I, there is no evidence in the record showing that accused converted to his own use Post Exchange coupon books of a value of $146. The testimony shows that the books were issued to him for the purpose of sale to members of his organization. The total amount so issued raised a charge against him of $804, which amount he could settle with cash, by individual canteen cards (to be collected from soldiers pay), or return of unsold books. There is no proof of any conversion of the coupon books, or that he had done anything with them other than he might lawfully have done under the terms of the issue to him. On the contrary the tender by accused of his check for $275, the net amount not accounted for by cash, canteen cards or returned books, and his request that the account be held open until he could get that amount in money, indicate clearly that he had converted to his own use the cash proceeds of the sale of coupon books - reduced by a credit of books found in the safe - a net shortage of $266 (which included the sums alleged in Specifications 1 and 2, Additional Charge).

This variance between the allegation of embezzlement of the coupon books and the proof of embezzlement of the proceeds thereof must be held a fatal variance. Embezzlement of personal property is an offense separate and distinct from embezzlement of the proceeds

of the property, and a finding of guilty of one under an allegation of the other, constitutes a fatal variance (CM 185034, Pitt; CM 188571, Simmons). An accused cannot legally be found guilty of an offense separate and distinct from that charged (par. 78 c, M.C.M., 1928). The injurious effect of such a variance upon the substantial rights of the accused, within the meaning of the 37th Article of War, is clear.

6. The testimony, including that of accused himself, shows clearly that the accused converted to his own use $150 (Spec. 1, Chg. I), $30 (Spec. 2, Chg. I) entrusted to him for deposit with the Finance Office, Fort Monroe, Virginia, by Sergeant Greer and Private McCarty, respectively, and $35 (Spec. 1, Add. Chg.), and $85 (Spec. 2, Add. Chg.), which came into his possession as proceeds of sale of coupon books by Lieutenant Malcolm and Lieutenant Segal, respectively, notwithstanding the disclaimer by accused of any intent to convert permanently any of the funds to his personal use.

The testimony, including that of accused himself, likewise shows clearly that accused made the false official statement to Colonel Hawkins as alleged (Chg. II), well-knowing that his statement was untrue.

7. The accused is thirty-two years of age. The records of the Office of The Adjutant General show his service as follows:

> Appointed second lieutenant, Infantry, Officers' Reserve Corps, March 14, 1933, reappointed second lieutenant, Coast Artillery, Officers' Reserve Corps, February 14, 1934, appointed first lieutenant, Coast Artillery, Officers' Reserve Corps, July 24, 1936, and appointed captain, Coast Artillery, Officers' Reserve Corps, March 27, 1941. On active duty (C.C.C.) from May 15, 1935, to March 14, 1936, and from May 17, 1936, to June 30, 1938. On active duty (Coast Artillery School) from September 12th to December 9, 1938. Ordered to extended active duty for one year, effective March 28, 1940, and period extended for a second year.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of

Specifications 1 and 2, Charge I, and of Charge I; of Charge II and its Specification; of the Additional Charge and its Specifications 1 and 2; but legally insufficient to support the finding of guilty of Specification 3, Charge II; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, and is authorized upon conviction of a violation of the 93rd Article of War. Confinement in a penitentiary is authorized under Article of War 42 for the offenses involved in Specifications 1 and 2, Charge I, and Specifications 1 and 2, Additional Charge, said offenses being recognized as offenses of a civil nature and so punishable by confinement in a penitentiary for more than one year by section 851 b (sec. 76, title 6) of the Code of the District of Columbia.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., AUG 23 1941 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain George R. Nelson (0-303477), 74th Coast Artillery (AA), (Officers' Reserve Corps).

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

I invite attention to the attached letter from Captain Nelson to the President, in which he requests clemency. He has a wife and two small children. From the record it is apparent that his indebtedness was the cause of his trouble. This indebtedness was an accumulation over a period of years during which he was employed only intermittently. While this serves as no excuse, it gives rise to doubt in this case as to any real criminal intent. From April 25, 1941, to the date of his trial on June 30, 1941, he was in arrest in quarters. Since the latter date he has been in confinement.

In view of all the circumstances of the case, I recommend that the sentence be confirmed, but that the confinement be remitted, and that the sentence as modified be ordered executed.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

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

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

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

Board of Review
CM 217429

AUG 8 1941

UNITED STATES	SEVENTH CORPS AREA
v.	Trial by G. C. M., convened at Fort Meade, South Dakota, July 1, 1941. Dishonorable discharge and confinement for two (2) years. Federal Reformatory, El Reno, Oklahoma.
Private FRANCIS E. BUSCH (6794841), Detachment Quartermaster Corps, Fort Robinson, Nebraska.	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

2. Accused was found guilty, by exceptions and substitutions, of the lesser included offense of absence without leave for one day, April 5-6, 1941, in violation of the 61st Article of War (Charge I), and, by exceptions, of the larceny of one suit case, value $5, one pair of boots, value $10, two pairs riding breeches, value $30, and two military shirts, value $10, all the property of Major Paul G. Kendall, Quartermaster Corps, of the total value of about $55, in violation of the 93d Article of War (Charge III). These stolen articles were identified at the trial by Major Kendall as his property (R. 7-9), were introduced into evidence, and were before the court during the trial as Prosecution's Exhibits 1-7, inclusive. The only evidence in the record of trial as to the value of these articles appears in the testimony of the owner, Major Kendall, who gives as their "approximate" value the prices alleged in the Specification. No testimony as to the present market value of these articles was offered by the prosecution.

3. It is well established that except as to distinctive articles of Government issue or other chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 208002, Gilbert; CM 208481, Ragsdale;

CM 209131, Jacobs; CM 212983, Dilsworth; CM 213765, Krueger, et al.). There is no competent testimony in the record as to the market value of any of the articles described in the Specification of Charge III of which the accused was found guilty. These articles were before the court but the court was not authorized from mere inspection of the same to find that they were more than of some substantial value. To hold that the court could determine their definite market value would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209132, Jacobs).

4. The maximum punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, for larceny of property of value of not more than $20 is confinement at hard labor for six months. In the instant case since the market value of none of the articles was properly established by competent evidence it follows that the total value of all of the articles alleged in the Specification of Charge III of which accused was found guilty cannot legally be found to exceed $20.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Charge III and its Specification as involves a finding of guilty of larceny by accused, at the time and place alleged, of one suit case, one pair of boots, two pairs of riding breeches, and two military shirts, of some value not in excess of $20, and of ownership as alleged, in violation of the 93d Article of War, and of absence without leave for one day, in violation of the 61st Article of War, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months and three days. In view of this holding the designation of the Federal Reformatory, El Reno, Oklahoma, as the place of confinement becomes inappropriate.

A. L. Wenzel, Judge Advocate.

William H. Lounds, Judge Advocate.

H. H. Kelsey, Jr., Judge Advocate.

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

Board of Review
CM 217538

AUG 20 1941

UNITED STATES)	3RD ARMORED DIVISION
)	
v.)	Trial by G. C. M., convened
)	at Camp Polk, Louisiana, July
Second Lieutenant FRANCIS)	21, 1941. Dismissal.
A. KELLY (0-311280),)	
Infantry.)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, 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 61st Article of War.

Specification: In that 2nd Lieutenant Francis A. Kelly, Reconnaissance Company, 32nd Armored Regiment (L), did, without proper leave, absent himself from his organization at Camp Beauregard, La., from about 1:00 PM, June 9, 1941, to about 2:00 PM, June 11, 1941.

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

Specification: In that 2nd Lieutenant Francis A. Kelly, Infantry, 32nd Armored Regiment (L), did, near Leesville, Louisiana, on or about June 20, 1941, with intent to deceive Lieutenant Colonel Charles G. Hutchinson, Cavalry, Provost Marshal, 3rd Armored Division, officially state to the said Lieutenant Colonel Hutchinson that his name

was "Lieutenant Ryder, 36th Infantry (Armored)", or words to that effect, which statement was known by the said Lieutenant Francis A. Kelly to be untrue.

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

Specification 1: In that 2nd Lieutenant Francis A. Kelly, Infantry, 32nd Armored Regiment (L), having been restricted to the limits of Camp Polk, La., did, at Camp Polk, La., on or about June 20, 1941, break said restriction by going to the Miami Club, near Leesville, La.

Specification 2: In that 2nd Lieutenant Francis A. Kelly, Infantry, 32nd Armored Regiment (L), did, near Leesville, La., on or about June 20, 1941, appear in uniform in a well known place of prostitution in the presence of enlisted men, to wit: The Miami Club; this to the prejudice of good order and military discipline.

He pleaded guilty to Additional Charge II and Specification 1 thereunder, and not guilty to the remaining Charges and Specifications. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were announced in open court. The reviewing authority approved the sentence but in his action stated, "Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld." The record was forwarded to the Board of Review where it has been acted upon under the provisions of Article of War 48.

3. With respect to the Specification, Charge I, evidence was introduced showing that on June 9, 1941, accused's organization, Reconnaissance Company, 32nd Armored Regiment, was making ready to move from Camp Beauregard, Louisiana, to Camp Polk, Louisiana. Accused was seen by First Sergeant Charles E. Collins of his company in the orderly tent, Camp Beauregard, at about 9:30 a.m., on that date, after which time he was not seen by Sergeant Collins until the afternoon of June 11, 1941, when he reported at the orderly room, Camp Polk, Louisiana. Having ascertained that accused had been absent without authority between the morning of June 9 and the afternoon of June 11,

Sergeant Collins made an entry on the morning report, which was later initialed by the company commander, showing accused's unauthorized absence, which morning report was introduced in evidence as Prosecution's Exhibit 1 (R. 22-25).

First Lieutenant William B. Lawrence, Jr., who was commanding the Reconnaissance Company, 32nd Armored Regiment, on June 9, by reason of the absence of Captain Kane, the regular company commander, testified that accused was absent from his organization between the dates alleged without his permission, and that he did not see him again until he reported at Camp Polk on the afternoon of June 11 (R. 26-29).

Captain Mathew W. Kane, upon his return to Camp Beauregard at 4:30 p.m., June 9, after having been informed of the absence of accused, made a personal search through the camp to locate him. Failing to find him he made a report of his absence to the regimental commander, and on June 11 he initialed the morning report (Ex. 1) showing the unauthorized absence of accused (R. 31-34).

4. The allegations contained in the Specification, Additional Charge I, and Specifications 1 and 2, Additional Charge II, comprise acts so interrelated as to make it advisable to give them consideration as though they consisted of one continuing transaction. Briefly, the evidence adduced at the trial relating to the above-described Specifications may be summarized as follows:

On June 12, 1941, following accused's unauthorized absence, Lieutenant Colonel Roderick R. Allen, commanding officer of the 32nd Armored Regiment, placed him in arrest in quarters. On June 15 he told accused that he was restricted to the confines of Camp Polk and that "he was to remain on the Post". On the night of June 20 the restriction was still in effect (R. 35-37). Between 11 and 12 o'clock on the night of June 20, at which time accused was still restricted to the post, Lieutenant Colonel Charles G. Hutchinson, Provost Marshal, Headquarters Company Commandant, 3rd Armored Division, and Captain Robert Maust, Headquarters Company, 3rd Armored Division, while making an inspection on the back road between Leesville and Camp Polk, stopped at the Miami Club, "which was at that time a recognized house of prostitution." Standing at the door was a lieutenant whose name it was later learned was Darreff. Looking in the door of the club Colonel Hutchinson saw accused, dressed in uniform. Some twenty enlisted men, also in uniform, and a number of girls attired in "the abbreviated type, shorts" and brassieres, were standing or sitting around the room. He called

accused out and after advising him of his official position asked him his name. Accused replied that he was "Lieutenant Ryder of the 36th Infantry", whereupon Colonel Hutchinson told accused and the lieutenant who was with him to get in their car and get back to their organizations. On the following day, having learned that accused's name was not Ryder, he telephoned Lieutenant Darreff and demanded that he (Darreff) give him the correct name and organization of accused. Having secured this information he immediately advised the accused's commanding officer of the occurrence of the night before. Colonel Hutchinson further testified that there could be no doubt as to the character and reputation of the Miami Club, that it was a

> "supervised place of prostitution ***. The proprietress hired a deputy sheriff to stand aside the door to keep order. She paid a doctor an official fee to come down and examine these girls twice a week. The state police were cognizant of the location and nature of the place, and included it in their round of inspections." (R. 7-13)

Captain Robert Maust, who was with Colonel Hutchinson at the Miami Club on the night of June 20, corroborated his testimony as summarized above in all essential particulars as to the conversation which took place between him (Colonel Hutchinson) and accused, and as to the reputation, nature and business of the club. He also testified that at the time Colonel Hutchinson talked to accused he (Colonel Hutchinson) "was dressed as Provost Marshal and had the Provost Marshal band on his arm." (R. 14-18)

In further corroboration of Colonel Hutchinson's testimony as to the character and reputation of the Miami Club, First Lieutenant Vincent James Tranfaglia, 40th Armored Regiment, testified that in his capacity as assistant athletic and morale officer he had investigated the Miami Club and that it was "very pronouncedly" a house of prostitution. (R. 19-21)

5. Second Lieutenant Dennis J. Darreff, 40th Armored Regiment, was introduced as a witness for the defense, and testified that he left the camp with accused on June 9, 1941, in witness' car; that they went to the Finance Office at Camp Beauregard and then to Camp

Livingston; that later he took the accused to Alexandria where they separated. Accused was depending upon witness for a ride back to camp, but he did not see him after separating from him (R. 38,39). With reference to the occurrence on the night of June 20, he testified that he and accused went to the Miami Club because they had heard so much about it from different people and thought they would like to have a look at it (R. 39-41). Witness had an idea that the women in the place were hostesses, the same as might be found in other such places. He had heard that there were women at the club but not that it was a house of prostitution (R. 44). There were about six National Guard officers in the place and by reason of that fact he thought it was all right to visit there. When he saw two enlisted men with Armored Division patches he thought it was time to go because he and accused were in uniform and he did not want to meet any of his own men there. In about fifteen minutes he got the impression of the type of place it was and said to accused "Let's get out", to which accused answered that he would go when he finished his drink (R. 43).

The accused, at his own request, was sworn as a witness, having been first advised of his rights. He testified that he reported to his company on the morning of the 9th; that the first sergeant told him that his company commander was out on a convoy and he had not seen any of the other company officers. He left the orderly room at about 9:30 when he was told that they were tearing the tents down over at the airport. When he reached the airport his tent was already down and his belongings were in front of it. Lieutenant Darreff drove him over to the Finance Office at the main post. He then went with Lieutenant Darreff to Camp Livingston to act as a witness in an accident Lieutenant Darreff had had with a National Guard truck. Then they went to Alexandria, and as each of them had matters to attend to he told Lieutenant Darreff that he would meet him that evening. He thought that Lieutenant Darreff knew that he would be at the Bently hotel. Lieutenant Darreff having failed to meet him he thought that he could travel by convoy the following morning, so he spent the night in Alexandria and waited to see Lieutenant Darreff the next day. He then thought that he would go to Camp Polk by bus, but when he found that it would get him there about 10 o'clock at night he decided to wait until the next day, June 11. On that day he arrived at Camp Polk at about 12 noon and it took him about an hour and a quarter to find his company. He reported to his company about 2:30 that afternoon (R. 52,53,54). With reference to the occurrence at the Miami Club on June 20, accused testified that he was confined to camp and

if he had not been drinking he "wouldn't have done anything." He had heard remarks concerning the Miami Club and understood that it was one of the better places to go. When he and Lieutenant Darreff arrived at the club it was practically deserted and there were only about three or four officers in the place (R. 54). He ordered a drink and had taken about two sips when Lieutenant Darreff suggested leaving, and witness said "Just as soon as I finish my drink." He was talking to a National Guard officer when Lieutenant Darreff returned, after being outside for about three minutes, and said, "There is a Colonel outside that wants to see you." Witness stepped outside and was called over to the Provost Marshal's car. It was rather dark and he thought the Provost Marshal was a major of the National Guard. He did not notice the brassard and did not hear Colonel Hutchinson say that he was Provost Marshal of the 3rd Armored Division, "He probably said it, but he was talking rapidly." On being asked his name, on the spur of the moment he answered "Lieutenant Ryder", and when asked his organization he replied "36th Infantry" (R. 55).

6. The evidence establishes beyond a reasonable doubt that accused was guilty of all Charges and Specifications. With respect to the offense charged in the Specification of Additional Charge I, the most serious offense with which accused is charged, it is clear that accused, having been informed by Lieutenant Colonel Hutchinson of the fact that he (Colonel Hutchinson) was Provost Marshal, made a false statement as to both his name and organization. Such conduct on the part of the accused seriously compromises his character and standing as a gentleman and is clearly in violation of the 95th Article of War.

7. The charge sheet shows that accused was 30 years of age at the time of the commission of the offenses. War Department records disclose that he was commissioned a second lieutenant, Infantry-Reserve, on August 4, 1933; had active duty with the Civilian Conservation Corps from July 28, 1935, to January 27, 1936; was reappointed a second lieutenant, Infantry-Reserve, on August 4, 1938; and entered on active duty December 8, 1940.

8. The court was legally constituted, and the competent evidence of record in support of the findings and sentence is clear and conclusive. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board

of Review the record of trial is legally sufficient to support the findings and sentence and warrants confirmation of the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War.

L. M. Smith, Judge Advocate.

On Leave, Judge Advocate.

H. H. Schaff, Judge Advocate.

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

Board of Review
CM 217580

AUG 22 1941
SEVENTH CORPS AREA

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Omaha, Nebraska, July
First Lieutenant THOMAS	)	28, 1941. Dismissal.
EDWARD KANE (0-343893),	)	
Medical Corps Reserve.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Thomas Edward Kane, Medical Corps Reserve, while on active duty, did, at Fort Des Moines, Iowa, on or about May 5, 1941, with the intention of evading continued active duty as an officer, wrongfully feign disability, during the course of a required Army physical examination, by voiding urine into which he had previously, with intent to defraud, injected an albuminous substance.

Specification 2: In that First Lieutenant Thomas Edward Kane, Medical Corps Reserve, while on active duty, did, at Fort Des Moines, Iowa, on or about May 5, 1941, with the intention of evading continued active duty as an officer, wrongfully feign disability by falsely stating to First Lieutenant Charles E. Basham, Medical Corps, an authorized Army medical ex-

> aminer, then in the execution of his office, that he, the said First Lieutenant Thomas Edward Kane, was unable to read beyond 20/40 (meaning that he could not, from a distance of twenty (20) feet, read, on the standard Snellen eye examination chart, any line of type smaller than the line commonly designated as "20/40") with any type correction.

The accused entered a plea in bar of trial based upon the facts that his commission as first lieutenant, Medical Reserve Corps, expired June 4, 1941, that the offenses charged took place on May 5, 1941, that the charges were investigated during May and June, and that he was recommissioned as first lieutenant June 26, 1941, but dating back to June 4, 1941. The accused submitted that the issuance of the new commission under those circumstances constituted an implied or a constructive pardon. The plea in bar of trial was not sustained. The accused then pleaded not guilty to, and was found guilty of, all the Specifications and of the Charge. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that the accused was by paragraph 51, Special Orders No. 99, Headquarters Seventh Corps Area, April 13, 1941, ordered to active duty effective May 5, 1941, for a period of one year (R. 7; Ex. A), and pursuant thereto reported to the Station Hospital, Fort Des Moines on May 5, 1941, for physical examination (R. 7). Upon examination of the eyes by First Lieutenant Charles E. Basham, Medical Corps, a member of the Medical Examining Board, the accused, according to his statement, was unable with the aid of glasses to read print on the standard Snellen chart better than 20/40 with either eye . The normal eye reads 20/20. If vision of accused was 20/40 in each eye, he would be disqualified (R. 9, 23). When Lieutenant Basham remarked that there was something peculiar, and that he was going to consult Major Segard, accused stated that he was telling the truth about his vision (R. 10). Major Edwin S. Segard, Medical Corps, an eye specialist, then examined accused for visual acuity and found that he could not read any type smaller than the 20/40 line. Accused assured Major Segard that he could not see the big letter "E" at twenty feet, but only at eight or ten feet. The lenses of accused's glasses were not strong enough to indicate any such defect. Major Segard then examined accused in the dark room with an opthalmoscope and found he did not have the

amount of myopia of which he complained (R. 22). Major Segard then put homatropine in the eyes of accused and did a complete refraction test without any trouble, in which accused read 20/20 very readily with proper glasses. When Major Segard confronted accused with the facts and told him it was not wise to attempt to falsify his visual acuity because it could not be done in the presence of a competent examiner, accused admitted that he had been trying to exaggerate a visual defect (R. 23).

The laboratory technician examined the urine voided by accused in his presence at about 9 a.m., and found that it showed four plus albumin (Ex. B). Captain Albert E. Montgomery, Medical Corps, a member of the Medical Examining Board, saw accused void urine on the afternoon of May 5th and saw the technician make the heat test, in which the test tube of urine boiled white and almost solid, and verified the finding of four plus albumin in that test and also in a test of the morning specimen (R. 30-31). Upon receiving a report of the urine analysis, Lieutenant Basham told accused that it showed four plus albumin. Accused replied that he knew no reason why he should have albumin in his urine, that he was in apparent good health and had no symptoms referable to albuminuria. Accused then voided urine in the presence of Lieutenant Basham, which was also tested in his presence to show four plus albumin (R. 10). Major Segard stated that it was hardly possible for a normal individual to have such an amount in his urine and that he would have to hospitalize accused. The accused then stated it was not necessary to hospitalize him as he had injected some substance into his bladder to produce an albuminuria (R. 24). The accused later stated to Major Segard that on the morning of the examination he had injected hydrocele fluid which he had taken from a patient (R. 26). A single report of four plus albumin would not disqualify, but would if persisted in for five days (R. 26). Upon admission to the hospital, accused in giving his history, stated that he had removed hydrocele fluid from a patient about ten days before and injected it into his bladder before the examination on May 5th (R. 11). Urine voided the next morning showed the same albumin finding, but on the two following mornings, the findings were negative (Ex. B). The accused was found physically qualified on May 7, 1941 (R. 15).

In an investigation by the inspector, Seventh Corps Area, on May 26, 1941, the accused after being warned of his rights under the 24th Article of War, admitted that he had faked his vision test, and had deliberately caused the urinalysis test to show as it did; that he was worried when he received orders to active military duty

upon return from his honeymoon and when he had gone greatly into debt; that he did not realize at the time the seriousness of his action; that he wanted "to stall it off"; that he wished to do a year's active duty and was sorry for what he had done (R. 18-19).

After the officer investigating the charges had warned him of his rights, the accused made a long statement in which he admitted that he felt that he would like to remain in Boone a short while longer, but did not want to resign his commission; that, thinking that he might be put on the inactive list, he decided to feign poor eyesight and contaminate his urine in the hope that on physical examination he might be deferred (R. 33; Ex. C).

Each of the officers of the Medical Corps, Major Segard, Captain Montgomery and Lieutenant Basham, testified upon cross-examination that the professional services of the accused in the hospital, after he was found physically qualified, had been excellent, and each considered him a competent physician (R. 14, 26, 31).

4. Defense:

Nine character witnesses were introduced by the defense, including the Medical Director of Selective Service, Iowa; the Operating Superintendent, Chicago and Northwestern Railroad; the Mayor of Boone; a bank cashier who was also president of the Boone Chamber of Commerce; the Chairman of the Red Cross in Boone; the president of the Boone Junior Chamber of Commerce; two doctors, one Medical Corps officer, and a lawyer. These witnesses reported his general moral character from good to beyond reproach, and his reputation as a physician from satisfactory to so good that it almost aroused professional jealousy (R. 34-47). Dr. Charles M. Wilhelmy, Dean, Creighton University School of Medicine, knew accused as a student, felt that he was a man of very high integrity, of very fine moral character, and of very high ideals, who was very highly thought of by members of the faculty who knew him and by the student body. He could not understand the accused doing the offenses charged unless he had changed radically since leaving school (R. 67-69).

The defense submitted eleven letters and affidavits (R. 71; Exs. 2-12) to the same general effect as the testimony of the character witnesses.

The accused testified that he was born and lived in Boone, Iowa, and was now twenty-eight years old. After graduating from high

school, he attended Boone College, Drake University, and Creighton University in Omaha, where he was graduated in medicine in 1936. He was not a member of the R.O.T.C. unit at Creighton but was commissioned first lieutenant, Medical Reserve Corps, on graduation. That commission expired on June 4, 1941. He served one year as interne at St. Joseph's Hospital, Omaha. He took Civilian Conservation Corps duty during that summer from which he asked relief to take advantage of an educational opportunity at St. Vincent's Hospital, Sioux City, Iowa. In the spring of 1938 he went to Vienna, but after six weeks returned because of unsatisfactory conditions there, began his practice in Boone, which he continued until called into active service. He was an only child, his mother was dead. He was married in April 1941. He and his wife, who had never lived in Boone, resided with and took care of his elderly father. When he reported for duty at Omaha on May 5, 1941, the things contained in his statement to Major Powers, the investigating officer (Ex. C), occurred. After May 8, 1941, he worked in the Post Hospital and served on an induction board. The statement he gave showed why he was so upset about things at that time. When Lieutenant Basham brought home to him that he was engaged in an offense to deceive the Government and that it was a serious matter, he admitted the fakes. He had thought that it would just be considered that he was trying to mislead them and more or less kidding them. He now realizes he made a mistake in thinking it was his privilege to pick the time when he would serve. He never had any desire to evade military service permanently and wishes to serve the Government in this emergency (R. 47-53).

Upon cross-examination and examination by the court, the accused testified that in response to two circulars sent him, he asked to be called not too abruptly. He felt there was a local need for his services as many of the local doctors were over 65 and would not accept night calls. He did not avail himself of the opportunity offered Reserve officers to resign. Upon receipt of order to report two weeks after receipt of notice, he called Colonel Everett in Omaha, asking deferment, but was told he could not be deferred because of need for medical officers. He brought his wife to Omaha on May 5th, because he expected to return to Boone (40 miles) that night and understood that he would have opportunity to close up his practice. He made no attempt to close up business or dismiss his patients because he felt that he might be sent back, that he might be disqualified for "a legitimate or other reason". The hydrocele fluid was secured from a patient about a week before reporting and he had kept it on hand debating whether to use it. He supposed that it was

unethical to deceive others as to his physical condition, and admitted that his state of mind and judgment were very bad, to attempt to deceive the medical authorities as to his physical condition. He had tried to deceive both as to his urine and his eyes, because of the possibility that one of them would not work (R. 53-66).

5. The plea of the accused in bar of trial because of constructive pardon was properly overruled.

The accused was commissioned a first lieutenant, Medical Officers' Reserve Corps, on June 4, 1936, for a period of five years. He entered, May 5, 1941, upon extended active duty for one year under the authority of Public Resolution No. 96, 76th Congress (chap. 689, 3rd Session), approved August 27, 1940. The offenses here charged were committed May 5, 1941. The records of The Adjutant General's Office show that accused was, by letter of May 23, 1941, reappointed first lieutenant effective June 4, 1941. Charges were preferred against him on June 11, 1941, and his trial held and completed on July 28, 1941. It is thus apparent that accused was on extended active duty for a period of one year under the authority of Public Resolution No. 96, but not under charges on June 4, 1941, the date his reappointment became effective.

The War Department for many years has held the view that promotion operates as a constructive pardon only when the officer promoted is under a sentence, and his promotion is inconsistent with the sentence (Dig. Ops. JAG 1912, p. 838). In an opinion dated August 13, 1903 (C 14389), the Acting The Judge Advocate General (General Crowder) summed up his views as follows:

> "(a) The promotion of an officer does not terminate military jurisdiction as to offenses committed prior to promotion.
>
> "(b) The promotion of an officer while under charges, while awaiting trial by court-martial, or while awaiting action on the sentence does not operate as a constructive pardon.
>
> "(c) A promotion of an officer while under sentence operates as a constructive pardon, if such promotion is inconsistent with the continued operation of the sentence; but where the sentence does not deprive the officer of his right to promotion, and the promotion would not be inconsistent with the enforcement of the sentence, it does not have that effect."

In the case of Overcash (CM 145848) (Dig. Ops. JAG 1912-30, sec. 1435 (4) (1921)), the Board held that a plea in bar of trial on the ground that the accused had been promoted since the date of the alleged offense was properly overruled, when the promotion was made as a routine matter in The Adjutant General's Office at a time when many promotions were being made and that office was unaware of the fact that charges were pending against the accused.

In an opinion of April 5, 1937 (Dig. Ops. JAG 1912-30, Supp. VIII, sec. 502 (b)), it was held -

> "Where the only requisites for eligibility for promotion under section 3, act of July 31, 1935 (49 Stat. 506); 10 U. S. C. 552a, are position on the promotion list, length of service, or both, and the only qualification required to be demonstrated is physical fitness, there is no basis for the view that promotion of an officer is a constructive pardon of all offenses committed prior to the date of such promotion. He remains subject to trial for such offenses."

It is apparent from an examination of the 201 file of this officer in The Adjutant General's Office, that his reappointment by letter of May 23, 1941, effective June 4, 1941, was a routine matter and was made without any knowledge of the acts of accused on May 5, 1941, and in fact made prior to June 11, 1941, the date upon which charges were preferred against accused. An earlier appointment, by letter dated April 18, 1941, without eligibility in time of peace for assignment, active duty or promotion, was revoked by the letter of May 23, 1941, after he had furnished a statement of his professional status in civil life.

Jurisdiction under Article of War 2 to try this accused was not lost by the expiration of the period of his appointment. He was ordered to active duty effective May 5, 1941, for a period of one year under the authority of Public Resolution No. 96, 76th Congress, approved August 27, 1940. A member of the Officers' Reserve Corps ordered to active duty for one year under the authority of that Public Resolution, may be lawfully held and required to serve on active duty until the completion of his year of active service, notwithstanding the expiration of his five year period of appointment prior to his completion of the year of active service (JAG 011, May 10, 1941; JAG 210.451, May 20, 1941).

6. It is the opinion of the Board that the opinions cited above with respect to constructive condonation upon promotion, are equally applicable to the reappointment, particularly one made prior to the date charges were preferred, of a Reserve officer while on active duty under the circumstances of this case, and that notwithstanding the expiration of his five year appointment, or of any action connected with his reappointment, jurisdiction remained to try him for the offenses committed while on active duty under his orders effective May 5, 1941.

7. The accused is twenty-eight years of age. The records of The Adjutant General's Office show his service as follows:

> Appointed first lieutenant, Medical, Officers' Reserve Corps, April 29, 1936; reappointed June 4, 1941. On active duty (C.C.C.) from July 8, 1937, to September 22, 1937. Ordered to extended active duty for one year, effective May 5, 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Victor S. Hilf, Judge Advocate.

Chas. L. Bresson, Judge Advocate.

(On leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., SEP 5 1941 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Thomas Edward Kane (0-343893), Medical Corps Reserve, Fort Des Moines, Iowa.

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

I invite attention to the clemency recommendation of four of the eleven members of the court for mitigation of the sentence of dismissal to fine of $50 a month for six months and withholding of promotion in the next higher grade for a period of two years after normal qualification, on the ground that the offenses were apparently committed by accused without a full realization of their military gravity, that he was laboring under a strain that tended to affect normal sound judgment, that he had for three months performed his duties ably and satisfactorily and that the mitigated sentence would well serve the ends of justice.

The Surgeon General has read the opinion of the Board of Review and he has informed me that in his opinion the officer is not fit to hold a commission.

In view of all the circumstances of the case I recommend that the sentence be confirmed and ordered executed.

3. Inclosed herewith are a draft of letter for your signature, transmitting the record to the President for his action, and a form of executive action confirming the sentence and directing that it be carried into execution.

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

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

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

Board of Review
CM 217590

SEP 12 1941

UNITED STATES	)	FORT BRAGG
v.	)	Trial by G. C. M., convened at Fort Bragg, North Carolina, June 26 and 27, 1941. Dismissal and confinement for one (1) year. Disciplinary Barracks.
Second Lieutenant JOHN F. LAMB, JR. (0-383826), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant John F. Lamb, Jr., Second Field Artillery Training Regiment, Field Artillery Replacement Training Center, did, at Fort Bragg, North Carolina, on or about June 4, 1941, willfully, feloniously and unlawfully kill Private Sam Rogers, 47th Infantry, Fort Bragg, by striking him with an automobile.

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

Specification 1: (Finding of not guilty)

Specification 2: In that Second Lieutenant John F. Lamb, Jr., Second Field Artillery Training Regiment, Field Artillery Replacement Training Center, did, at Fort Bragg, North Carolina, on

or about June 4, 1941, willfully and unlawfully operate an automobile while drunk.

He pleaded not guilty to both Charges and the Specifications thereunder. He was found guilty of Charge I and its Specification, and of Specification 2, Charge II, and Charge II, and not guilty of Specification 1, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for one (1) year. The findings and sentence were announced in open court. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under the 48th Article of War.

3. The evidence shows that on the evening of June 4, 1941, accused had dinner at the Officers' Club (R. 101) sometime between 7:45 and 8:30. First Lieutenant Lester B. Williams, Battery D, 2nd Field Artillery Training Regiment, was seated next to him at the dinner, before and after which mixed drinks were served. Lieutenant Williams testified that accused was sober at that time. Accused left before the dinner was over (R. 96-99). Following the dinner there was a dance which was attended by accused and Lieutenant David S. Bitterman, Battery C, 5th Battalion, 2nd Field Artillery Training Regiment. Second Lieutenant Walter A. Rotkis, Battery C, 4th Battalion, 2nd Training Regiment, saw accused and Lieutenant Bitterman at the dance about 9 o'clock that evening, and talked with both of them. At that time their speech was coherent and they were neither staggering nor acting in an abnormal manner. Witness had placed a bottle of liquor in "that car" (presumably accused's car). Witness saw accused take a drink down stairs at the club (R. 99-102). Apparently accused and Lieutenant Bitterman left the dance shortly after 9 p.m., got into accused's car and started in the direction of Fayetteville.

Sometime between 9:30 and 9:45 p.m., a soldier, who was later identified as Sam Rogers of the 47th Infantry (R. 84), approached Captain Raymond P. Kenney, Battery D, 9th Battalion, 3rd Field Artillery Training Regiment, and Captain Robert W. Webb, Battery B, 9th Battalion, 3rd Field Artillery Training Regiment, near the intersection of Highway 87, which leads from Fort Bragg to the Fayetteville and Gruber Road, and asked them to direct him to some unit on the post. Private Rogers was directed by them to take the Firebreak Road, also known as the Gruber Road. At the time Private Rogers accosted Captains Kenney and Webb he gave no evidence of being intoxicated nor was he abnormal in any way. Private Rogers then walked across the east traffic lane of Highway 87 to the parkway in the middle (Pros. Ex. A),

and paused for a moment while some cars passed. He then started to cross the west traffic lane and was struck by a car proceeding south towards Fayetteville. The evidence is conflicting as to just where Private Rogers was standing at the moment of impact, although one witness testified that there was ample room on either side of Rogers for the car to have passed without striking him. The car which struck him was traveling at a rapid rate of speed, estimated by various witnesses at between 40 and 70 miles per hour (R. 19, 35, 40). It is probable from the statements of certain witnesses that the speed was approximately 60 miles per hour (R. 19, 35, 109, 115). The car did not reduce its speed either before or after striking Private Rogers but continued over the hill and out of sight for a distance estimated at anywhere from several hundred yards to a mile from the point at which Private Rogers was struck. His body was found more than a hundred feet from the point where he attempted to cross the highway. There is evidence that at the time of the accident the weather was clear but that the night was dark, and the road was dry (R. 22).

Just after the accident occurred a car driven by Sergeant Frederick J. White, Company G, 134th Medical Regiment, in which Privates Zucker and Woolfsie of the same organization, and two staff sergeants, were also riding, arrived at the scene of the accident. Upon being informed by two convoy guards (R. 45) that the car which had struck the deceased had gone on down the road in the direction of Fayetteville, Sergeant White took Privates Zucker and Woolfsie with him in his car and after going "about a mile" in the direction of Fayetteville he found a car parked on the left side of the road with the left front light out. Examination showed that there was blood on the bumper and that the left side of the parked car was damaged. The accused was sitting on the seat under the steering wheel and Lieutenant David S. Bitterman was seated beside him. Sergeant White asked them what they were doing and they replied "Nothing" (R. 45). Leaving Privates Zucker and Woolfsie at the accused's car, Sergeant White went to the military police gate and got a military policeman. The accused and Lieutenant Bitterman were in "a sort of a stupor" (R. 44-46). There can be no doubt that accused was driving the car at the time of the accident because he stated on June 9 to First Lieutenant Clyde W. Gibson, 21st Infantry, who was investigating the death of Private Rogers, and after having been duly warned as to his rights, that he was driving at from 35 to 45 miles per hour at the moment of the accident (R. 75,77). Photographs were taken before the body of deceased was moved, which were introduced in evidence as Prosecution's Exhibits C and D (R. 43). Shortly after its occurrence Major James W. McNeer, Field Artillery, Provost Marshal, Fort Bragg, and Captain Claridge of the Military Police, arrived at the scene of the accident. They found the body of Private Rogers lying on the west side of Highway 87. Upon examination

they found a strong odor of alcohol on the body which was caused by a broken liquor bottle in the right hip pocket of the deceased (R. 65, 66). Major McNeer paced off the distance from where the deceased was struck to the point where his body was found. The distance was 120 feet (R. 66). Later he measured the distance from the scene of the accident to the point where accused's automobile had stopped on the parkway and found the distance to be one mile, according to witness' speedometer (R. 67). An attempt was made to start accused's car but it would not run on its own power, and had to be pushed or towed to the post garage. Lieutenant Bitterman and accused were taken from the scene of the accident to the Fort Bragg post guardhouse, and from there were taken to the station hospital in order that a blood and urine test might be made to determine the quantity of alcohol that was in accused's system. Major McNeer testified that in his opinion accused was drunk, that he had an odor of alcohol on him, was in a stupor, and could not be aroused even after he had been taken to the guardhouse (R. 67).

Second Lieutenant Roy A. Grizell, Military Police Company, testified that he saw the accused at the guardhouse and that he was distinctly drunk. "He was very very unsteady on his feet, he had no control whatsoever of his senses. His speech wasn't anywhere near coherent, what few words he tried to say" (R. 72). Accused was taken from the guardhouse to the hospital where specimens of blood and urine were taken from him and later analyzed by First Lieutenant Samuel B. Prevo, Medical Corps, who found that the specimens contained two milligrams percent of alcohol "per hundred C.C." He testified that in the average person "that concentration would be beyond the limit of sobriety" (R. 79). An analysis made by Lieutenant Colonel Seymour C. Schwartz, Medical Corps, of deceased's urine on the morning of June 5 showed an alcoholic content of "point five milligrams per C.C. or less". He testified that amount is much less than the amount of alcohol found in the average drunken person (R. 142).

First Lieutenant Harry E. Hagerty, Military Police Detachment, testified that accused was very drunk when he saw him at the guardhouse at 12:20 a.m., and at 1:12 a.m., when he took him to the Officer of the Day, Lieutenant Donovan, "he was unable to walk. Corporal Hopkins picked him up and carried him bodily to the car * * *." (R. 73-74)

First Lieutenant James F. Donovan, Battery C, 6th Battalion, 2nd Training Regiment, testified that he was regimental officer of the day on the night of June 4-5, and that at about 1:10 a.m., June 5, accused was turned over to him to be placed in arrest in quarters. Witness signed a receipt for him at twelve minutes past one. Accused

"didn't talk very coherently, his senses were not particularly normal, his sentences were not full sentences". When witness told him to sit down in a chair and be quiet accused replied, "Don't get tough." In the opinion of witness accused was drunk (R. 142-145).

Evidence was introduced showing that post regulations provided a speed limit of 15 miles per hour at all intersections, and the maximum speed permissible between intersections upon the road on which the accident occurred is 45 miles per hour (R. 70). The prosecution asked the court to take judicial notice of the Post Regulations, Fort Bragg, North Carolina, dated May 17, 1941, calling special attention to the provision that persons operating vehicles on the reservation will conform to the Motor Vehicle Laws of North Carolina relating to the following:

> "Drivers' license, passing and overtaking vehicles, signals, right of way, pedestrians, hit and run, passing school buses, lights, and driving while drunk",

and also to paragraph 4B, page 4, of the same regulations, -

> "Speed and Driving Restrictions. (1) Speed limits on the Post. Passenger cars, 30 miles; trucks 30 miles. Speed limit at road junctions and intersections, all vehicles, fifteen miles." (R. 89-90)

The prosecution introduced in evidence a copy of the traffic regulations and Motor Vehicle Laws of the State of North Carolina, duly certified by the Secretary of State of North Carolina (Ex. N, R. 91).

The identity of deceased and the fact and cause of his death are fully established by the testimony of his acquaintances, witnesses who saw the accident, and medical officers who examined the body.

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

First Lieutenant Lester B. Williams testified that accused was, in his opinion, sober when he saw him at dinner about 8:30 p.m., on June 4, 1941 (R. 97-98).

Second Lieutenant Walter A. Rotkis testified that he saw accused on the evening of June 4, sometime between 9 and 9:30, prior to the accident, and that in his opinion accused was sober at that time. He had seen accused take a drink that night but did not know whether he had taken other drinks (R. 99-103).

An enlisted man, Private Dempsey D. Riggs, testified that he was at the scene of the accident and that in his opinion the accident could have been avoided by either the deceased stepping out of the way of the automobile or by the accused turning to the right side of the road. On cross-examination this witness testified that

he estimated the speed at which the car was traveling at the time of the accident at between 55 and 60 miles per hour; that the deceased walked straight and did not appear to be drunk (R. 105-110).

Private John W. Foriester, Jr., testified that he saw deceased at about the same time he saw the approaching car. He could not say as to whether deceased could have avoided being struck by the automobile (R. 110-114), and that, in his opinion, the car was traveling between 40 and 60 miles per hour, "closer to sixty" (R. 115).

Private Chester A. Houdak, Medical Department, testified that he went with the driver to pick up the body of deceased and helped put the body in the ambulance. He noticed the odor of liquor around the body and that there was a crushed bottle in the hip pocket of deceased (R. 115-116).

Major Willard Goldson, Medical Corps, testified that he saw the body of deceased at about 10:30 p.m., June 4, 1941; that the body was carried to the morgue; that he went over the body to find the external evidence of injuries and could detect no foreign odors; that there was a crushed brown bottle in the deceased's hip pocket, bearing a Government seal on the stopper, but he did not know whether it had contained whiskey or wine (R. 119-121).

Private Edward T. Minton, 4th Training Regiment, testified that he was at the scene of the accident; that deceased attracted his attention because he heard somebody make the remark "that this man here was going to get hit, or liable to be killed." On cross-examination he stated that he did not actually see the accident (R. 123-126).

A medical witness, Captain Abraham M. Sands, testified that nervous shock cannot usually be distinguished from intoxication by others than physicians (R. 128-130), and also that the method used by the U. S. Army (the method used by the French toxicologist, Nicloux) is not very reliable as indicating drunkenness and that color blindness of the person making the test would affect the accuracy of the test (R. 131-132). On cross-examination, however, he stated that while the blood and urine tests would show alcohol in the system if present, it does not always prove drunkenness; that "the presence of alcohol and the physical signs of criteria drunkenness would indicate that"; and that the original report by Bogan states on tests performed on urine that -

> "one milligram per c.c. would indicate that a man was decent * * * Two milligrams per c.c., a man was distinctly drunk.

Three milligrams per c.c., drunk and disorderly. Four milligrams per c.c., dead drunk. This was confirmed in 1930 at the Naval Hospital in New York by Johnson." (R. 134-135)

An explanation of the method used for making the blood and urine tests was made by Lieutenant Colonel Seymour C. Schwartz, Medical Corps. He stated that in the average case he would accept the interpretation which has been placed upon the test by a Committee of the American Medical Association that over 1.5 milligrams usually indicates definite intoxication; that in the hands of a reliable chemist the test itself is accurate in the measurement of the amount of alcohol present in the urine or blood of an individual, but that interpretation of the test is variable, depending upon the individual himself (R. 138).

The following character witnesses, Lieutenant Colonel Elisha K. Kane, Field Artillery, 2nd Training Regiment (R. 149-152); Major Albert B. Powell, 2nd Training Regiment (R. 152-154); Captain Robert M. Ewing, 4th Battalion, 2nd Regiment (R. 154-156); 1st Lieutenant John Curtis, Jr., Field Artillery, 2nd Regiment (R. 156-157); 2nd Lieutenant Frank E. Oliver, 17th Field Artillery (R. 157); 2nd Lieutenant James F. Unger, 17th Field Artillery (R. 157-158); 2nd Lieutenant John L. Cheney, 2nd Regiment (R. 158-159); and Lieutenant Colonel Edgar A. O'Hair, 17th Field Artillery (R. 159-160), each testified as to the good reputation of the accused for sobriety, integrity, honesty and truthfulness; and each stated that the accused's reputation was excellent and that he was popular with his fellow officers. Lieutenant Colonel O'Hair testified that he would especially desire to have accused in his organization (R. 160).

Mr. D. A. Barnes, post garage employee, testified that he repaired the damage done to accused's car and found that as a result of the impact the fan was jammed into the core so that it would not turn; that there was no water in the engine; that the hole in the radiator was caused by the fan blade. On cross-examination he identified a photograph of the damaged car (Ex. E) as the car which he had repaired (R. 163, 164).

The accused having been fully advised of his rights as a witness elected to remain silent.

5. The Board is convinced, after a careful study of the evidence of record, that accused was, at the time and place alleged in the Specification, Charge I, driving his car at a high rate of speed, in violation of the Fort Bragg traffic regulations and the Motor Vehicle Laws of the State of North Carolina, and that he struck and killed Private Sam Rogers as alleged.

With reference to Specification 2, Charge II (operating an automobile while drunk), of which Specification and Charge accused was also convicted, two witnesses testified that at the time they saw accused shortly before the accident occurred he was sober. However, none of the witnesses who saw him immediately after the accident testified that he was sober. On the contrary, the first witness who found him seated in his car, which was parked on the left side of the road at a considerable distance from the scene of the accident, testified that he was in "a sort of a stupor". From that time (9:30 to 10 p.m.) various witnesses who saw accused at intervals up to and including 1:12 a.m., testified that he was drunk.

Medical officers and enlisted men of the Medical Department testified that specimens of accused's blood and urine were analyzed and that the specimens showed a sufficient quantity of alcohol in his system to cause drunkenness. While one medical officer testified in substance that this method of determining drunkenness is not infallible, he added that this type of analysis will show the presence of alcohol in the system, and that where there are physical "signs of criteria drunkenness" the presence of alcohol in the system is confirmatory evidence. Be that as it may, even if the testimony of all the medical witnesses should be entirely disregarded, there still remains abundant testimony by lay witnesses to prove that accused was drunk at the time of the accident and until 1:12 the following morning.

It was urged by the defense that the deceased was guilty of negligence which contributed to the accident, and even suggested that he might have been under the influence of liquor at the time he was killed. This contention is not borne out by the evidence, for witnesses with whom Private Rogers talked immediately before the accident testified that his conversations and actions were entirely normal, and there is evidence that when he reached the road where he met his death he paused for a moment in order that several cars might pass before starting to cross the road. Analysis was made of the urine taken from the body of the deceased which showed an alcoholic content of only .5 milligrams per c.c., which small percentage of alcohol could not, according to the testimony of medical witnesses, cause drunkenness.

Even if the deceased had been guilty of contributory negligence, this would not relieve the accused from his unlawful act. In Maxon v. State (177 Wis. 379, 187 N.W. 753, 21 A.L.R. 1484), the court held that the driving of an automobile at excessive speed by an intoxicated person, contrary to law, will sustain a finding of malice, sufficient, if it results in death, to constitute murder at common law. The court said:

"In a criminal prosecution such as this by the state,

in which a defendant is charged with the taking of a human life, the fact that deceased may have in a measure, by his own carelessness, contributed to the unfortunate result, cannot be recognized as a defense. The reason is plain, owing to the substantial difference between a criminal action prosecuted on behalf of the state and a civil action instituted to recover the damages resulting from the same accident. While, no doubt, the entire circumstances surrounding the killing are proper for the consideration of the jury in determining whether or not the defendant was negligent, yet his criminal negligence, if it exists, cannot be wiped out from the fact that the deceased was also negligent. The wide distinction between the criminal prosecution and the civil action for compensation for the resulting death under Lord Campbell's Act was pointed out in Reg. v. Longbottom in 1849, in 3 Cox's C.C. 439."

6. It having been determined that accused was driving his car at a high rate of speed, in violation of the post traffic regulations of Fort Bragg and of the Motor Vehicle Laws of North Carolina, and that he was drunk at the time Private Rogers was struck and killed by his car, it is now necessary to determine as to whether such an act done under the circumstances described constitutes manslaughter, which is defined by Federal statute as follows:

"Manslaughter; voluntary; involuntary. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

"Voluntary - Upon a sudden quarrel or heat of passion.

"Involuntary - In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (R.S. Sec. 5341; Mar. 4, 1909, c. 321, Sec. 274, 35 Stat. 1143.)". (18 U.S.C. 453)

The definition of manslaughter as stated in the Manual for Courts-Martial and as found in a discussion of the 93rd Article of War, the article under which accused is charged, closely parallels the statute above quoted and is as follows:

"* * * Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.

"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." (Par. 149a, M.C.M.)

In CM 202359, Turner, where the accused was charged with involuntary manslaughter, the Board of Review said:

"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."

7. In view of the foregoing, the Board of Review is of the opinion that the evidence is legally sufficient to support so much of the finding of guilty of the Specification, Charge I, as involves a finding of guilty of involuntary manslaughter, in violation of the 93rd Article of War; and legally sufficient to support the findings of guilty of Charge II and Specification 2 thereunder.

8. War Department records disclose that accused was 23 years of age at the time of the commission of the offenses; that he was commissioned a second lieutenant, Field Artillery Reserve, on August 23, 1939; and entered on active duty on February 5, 1941.

9. The Board has given careful consideration to the youth of accused, his brief service, the evidence and the law applicable to this case, and finds no reason for disturbing the sentence of the court.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of the Specification, Charge I, except the words "willfully, feloniously and"; legally sufficient to support the findings of guilty of Charge I and of Charge II and Specification 2 thereunder; and legally sufficient to support the sentence, and to warrant confirmation thereof.

F. M. Smith, Judge Advocate.

William T. Munds, Judge Advocate.

H. H. Schaad, Jr., Judge Advocate.

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

Board of Review
CM 217636

SEP 10 1941

UNITED STATES	)	PANAMA CANAL DEPARTMENT
v.	)	Trial by G.C.M., convened at Fort Amador, Canal Zone, July 21, 1941. Dismissal.
Lieutenant Colonel ANDREW J. NICHOLS (0-9626), 14th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to Wing Hing Company, Panama City, Republic of Panama, in the sum of Fifty Two Dollars ($52.00) for two camphor chests, which amount became due and payable on or about August 10, 1939, did at Fort William D. Davis, Canal Zone, from about August 10, 1939, to about April 5, 1941, dishonorably fail and neglect to pay said debt.

Specification 2: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to Service Finance Corporation, San Antonio, Texas, in the sum of Seventy-Five Dollars ($75.00) for a partial payment on a loan, which amount became due and payable on or about August 15, 1940, did at Fort William D. Davis, Canal Zone, from August 15, 1940, to about March 4, 1941, dishonorably fail and neglect to pay said debt.

Specification 3: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to Service Finance Corporation, San Antonio, Texas, in the sum of Seventy-Five Dollars ($75.00) for a partial payment on a loan, which amount became due and payable on or about September 15, 1940, did at Fort William D. Davis, Canal Zone, from September 15, 1940, to March 4, 1941, dishonorably fail and neglect to pay said debt.

Specification 4: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to Service Finance Corporation, San Antonio, Texas, in the sum of Seventy-Five Dollars ($75.00) for a partial payment on a loan, which amount became due and payable on or about October 15, 1940, did at Fort William D. Davis, Canal Zone, from October 15, 1940, to about March 4, 1941, dishonorably fail and neglect to pay said debt.

Specification 5: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to Edward M. Young, Grove City, Pennsylvania, in the sum of Four Hundred Dollars ($400.00) for repayment of a loan, which amount became due and payable on or about September 15, 1940, did at Fort William D. Davis, Canal Zone, from about September 15, 1940, to about April 1, 1941, dishonorably fail and neglect to pay said debt.

Specification 6: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to R. H. Hubbell, Erie, Pennsylvania, in the sum of Forty Seven Dollars and Fifty Cents ($47.50) for repayment of a loan, which amount became due and payable prior to December 12, 1940, did at Fort William D. Davis, Canal Zone, from December 12, 1940, to April 10, 1941, dishonorably fail and neglect to pay said debt.

Specification 7: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to the Pennzoil Company, Oil City, Pennsylvania, in the sum of Thirty Dollars and Fifty Cents ($30.50) for purchases made during May and June, 1939, which

amount became due and payable about July 10, 1939, did at Fort William D. Davis, Canal Zone, from about July 10, 1939, to about March 28, 1941, dishonorably fail and neglect to pay said debt.

Specification 8: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, being indebted to Panama Canal in the sum of One Hundred and Sixty-Six Dollars and Seventy-Five Cents ($166.75) for hospital services, which amount became due and payable on or about November 25, 1939, did at Fort William D. Davis, Canal Zone, from about November 25, 1939, to about April 14, 1941, dishonorably fail and neglect to pay said debt.

Specification 9: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, did, at Fort William D. Davis, Canal Zone, on or about March 20, 1941, with intent to deceive the Commanding General, Fort William D. Davis, Canal Zone, officially report in writing that "A payment of $15.00 for January, February, and March was forwarded Mr. Hubbell on February 25, 1941", which report was known by the said Lieutenant Colonel Andrew J. Nichols to be untrue in that payment on this account was not made as reported.

Specification 10: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, did, at Fort William D. Davis, Canal Zone, on or about March 20, 1941, with intent to deceive the Commanding General, Fort William D. Davis, Canal Zone, officially report in writing in an indorsement on a letter from Edward M. Young in words and figures as follows:

"1st Wrapper Ind.

Fort W. D. Davis, C. Z. 20 March 1941. To: The Commanding General, Fort Davis, Canal Zone.

1. A money order for $20.00 was sent this date to replace the February check which apparently has not been received.

2. The March payment was forwarded by regular mail on March 10, 1941.

(Signed) A. J. Nichols
(Typed) A. J. Nichols
Lieut. Colonel, 14th Infantry.";

which official report was known by the said Lieutenant Colonel Andrew J. Nichols to be untrue in that money order was not sent as reported.

Specification 11: In that Lieutenant Colonel Andrew J. Nichols, 14th Infantry, having about June, 1939, become indebted to the Pennzoil Company, Oil City, Pennsylvania, in the sum of Thirty Dollars and Fifty Cents ($30.50), and having failed without due cause to liquidate said indebtedness, and having on or about February 10, 1941, promised in writing to the Commanding Officer, 14th Infantry, that "This account will be settled in full by March 15, 1941," did, without due cause at Fort William D. Davis, Canal Zone, on or about March 15, 1941, dishonorably fail to keep said promise.

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

Specification: In that Lieutenant Colonel Andrew J. Nichols, Fourteenth Infantry, Fort William D. Davis, Canal Zone, being indebted to the First National Bank, Highland Falls, New York, in the sum of Five Hundred and Fifty Dollars ($550.00), for repayment of the balance due on a loan made by said First National Bank, Highland Falls, New York, which amount became due and payable on or about October 10, 1940, did, at Fort William D. Davis, Canal Zone, from October 10, 1940, to about May 14, 1941, dishonorably fail and neglect to pay said debt.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. a. Specification 1 - The evidence shows that the accused bought two camphor chests, total price, $52, from Wing Hing and Company in Panama City on July 3, 1939. The account became due and payable about August 10, 1939. Notwithstanding repeated requests for payment, no portion of this account was paid between that date and April 5, 1941. The account was paid in two payments on May 5 and 31, 1941 (R. 11-15; Exs. 1, 2, 3, 4).

b. Specification 8 - The accused incurred three bills for hospital treatment furnished by the Panama Canal to his wife on August 1-13, 1939, in the sum of $80.25, and again on August 16-25, 1939, in the sum of $62.50, and to his son Jackie on October 18-24, 1939, in the sum of $24, in the aggregate sum of $166.75. The bills covering these services were rendered on August 17, August 29 and October 28, 1939, respectively, and mailed to accused. Those bills became due and payable on November 25, 1939. In January 1940 a tracer on the three bills was sent to accused, but no reply was received nor had the bills been paid up to the date of trial (R. 15-19; Ex. 5).

c. Specifications 2, 3 and 4 - By a note for $449.50, dated November 14, 1939, the accused borrowed from the Service Finance Corporation, San Antonio, Texas. In connection therewith, accused furnished the corporation with twelve "predated" checks drawn on the Chase National Bank, Cristobal Branch, Cristobal, Canal Zone, eight for $25 each, dated the 15th day of each month from December 1939, to July 15, 1940, inclusive, three for $75 each, dated the 15th day of each month from August to October 1940, and one for $24.50, dated November 15, 1940. The checks for $25 were presented and were all paid either in due course or upon representation (Ex. 6).

The check for $75, dated August 15, 1940, was returned, marked "Insufficient Funds", on September 7, 1940. The check for $75, dated September 15, 1940, was returned, marked "Insufficient Funds" on October 8, 1940. The check for $75, dated October 15, 1940, was returned, marked "Insufficient Funds", on November 5, 1940. None of these three checks were paid to the date of the deposition, June 12, 1941. The check for $24.50, dated November 15, 1940, was paid in due course. The three unpaid checks were the subject of letters to accused and to the commanding officer, 14th Infantry, Fort William D. Davis, Canal Zone (Exs. 6, 16, 17).

Upon cross-interrogatories, J. C. Minus, Chairman of the Board of Directors and Manager of the Service Finance Corporation, testified that accused had an account with his firm since April 9,

1934; that the total of all notes borrowed by accused during that time amounted to $2628.50; that accused had paid, including interest and other fees, $2397.77; that accused had paid earlier contracts promptly, but had failed to liquidate the three $75 checks at all, despite urgent requests (Ex. 6).

d. Specifications 5 and 10 - Edward Mehner Young, Grove City, Pennsylvania, received a letter from accused (R. 20), dated August 10, 1940, Fort Davis, Canal Zone, stating that an outlay of cash in sending his wife and children to the "States" because of critical illness of the mother of his wife had left him "on the rocks" and requesting Young to place $500 to the credit of accused in the First National Bank in Erie. Accused stated that he knew of no other person to whom he could make such an unusual request, that he had written to the people in the "States" from whom he usually borrowed, that it would take twenty-five days or so before he could receive cash from that source, and that he would return the $500 to Young by the tenth of September. Young himself borrowed $400 and deposited it in the bank as requested. As Young heard nothing from accused by October 1st, he then wrote accused asking repayment of the money. He wrote a second letter about October 14th, and later a third letter by registered mail, for which he received a receipt card (Ex. 7), signed by accused (R. 35; Ex. 11). On November 14, 1940, Young wrote The Adjutant General, stating that he had met accused when accused was National Guard instructor at Erie, Pennsylvania, and asking assistance in securing repayment of the loan. Upon reference of that letter to the accused, he proposed by his 4th Indorsement, January 4, 1941, to the Commanding General, Fort Davis, to repay that indebtedness by payments of $10 per month from January to July 1941, $20 per month from August to November 1941, and $70 per month from December 1941 to March 1942 (R. 23; Ex. 11). No payment upon the $400 indebtedness was received to the date of deposition, June 17, 1941 (Ex. 7).

When a letter, dated March 10, 1941, from Young to Headquarters, Fort William D. Davis, complaining that he had not received a check for $20 on February 1, 1941, was referred to accused for information, the accused (R. 35) stated in his 1st Wrapper Indorsement of March 20, 1941, to the Commanding General, Fort William D. Davis, that -

> "1. A money order for $20.00 was sent this date to replace the February check which apparently has not been received.

"2. The March payment was forwarded by regular mail on March 10, 1941." (R. 30-31; Ex. 18.)

A letter from Young, dated April 1, 1931, stating that neither the money order nor the check mentioned above had been received, was referred to accused, with the request that the stub of the money order referred to be exhibited to the commanding officer, 14th Infantry. In his 3rd Wrapper Indorsement of April 11, 1941, to the commanding officer, 14th Infantry, accused (R. 35) stated:

"The statements contained in basic letter are correct. Payment on this account was not made as formerly reported." (R. 32; Ex. 19.)

Upon cross-interrogatories, Mr. Young stated that he had been sufficiently intimate with accused to have formed an opinion of his character and did not believe that accused would dishonorably fail to pay the amount of the loan due him (Ex. 7).

e. Specifications 6 and 9 - On December 12, 1940, accused was indebted to Mr. R. H. Hubbell, Erie, Pennsylvania, in the amount of $47.50, the unpaid balance of a $250 loan, dated March 14, 1939, which balance had become due and payable on April 10, 1940. Nothing was paid on that indebtedness from December 12, 1940, to the date of the deposition, June 12, 1941 (Ex. 8).

Mr. Hubbell wrote on February 6, 1941, to accused, requesting payment. Mr. Hubbell's letter of March 3, 1941, to Headquarters, Panama Canal Department, requesting assistance in securing payment (Ex. 8), was referred to accused for a statement of action he intended to take. The accused (R. 35) replied by 3rd Indorsement, dated March 20, 1941, to the Commanding General, Fort Davis, Canal Zone:

"* * * a. A payment of $15.00 for January, February and March was forwarded Mr. Hubbell on February 25, 1941. * * *." (R. 23-24; Ex. 12.)

Mr. Hubbell's second letter of April 1, 1941, to the Headquarters, Panama Canal Department, stating that he did not receive a payment of $15 from accused on February 25, 1941, was referred to accused requesting any proof of that payment. The accused (R. 35) stated in his 4th Indorsement to the commanding officer, 14th Infantry, dated April 11, 1941:

"The statements contained in basic letter are correct. Payment on this account was not made as formerly reported." (R. 24-25; Ex. 13.)

Upon cross-interrogatories, Mr. Hubbell testified that accused had had an account since April 19, 1938; that accused had borrowed a total amount of $500 during that period; and that he did not think accused would dishonorably fail to pay the balance of $49.16 due, but that accused was simply neglectful, as payments were made regularly until accused left Erie (Ex. 8).

f. Specifications 7 and 11 - The Pennzoil Company, Oil City, Pennsylvania, furnished accused at Erie, Pennsylvania, with oil and gasoline on credit to the value of $22.50 in May 1939, and to the value of $8 in June, which total amount of $30.59 was due and payable on July 10, 1939. After numerous attempts to collect, the company, on January 22, 1941, wrote to the Headquarters, Panama Canal Department, requesting assistance in collecting the amount due (R. 21; Ex. 9). Upon reference of that letter to accused (R. 35), he replied by 4th Indorsement, February 10, 1941, to the commanding officer, 14th Infantry, that the account was a just indebtedness, that it was omitted from his list of obligations submitted through oversight and -

"3. This account will be settled in full by March 15, 1941." (R. 25-26; Ex. 14.)

Upon reference to accused of a letter from the company of March 28, 1941, that the account had not been paid, the accused (R. 35) stated in his 4th Indorsement, April 14, 1941, that it was not paid because of lack of funds, since the sale of personal property, the proceeds of which were to be used in paying that obligation, was not consummated as planned (R. 26-27; Ex. 15).

g. Specification, Additional Charge - The First National Bank of Highland Falls, New York, on July 10, 1940, made a loan in the sum of $600 to accused and his wife, Betty C. Nichols. Two payments of $25 each were made on August 20 and September 20, 1940. The unpaid balance on October 10, 1940, was $550. No payments were made on the note from October 10, 1940, to May 14, 1941. The bank radioed accused on November 1, 1940, asking him to renew the note, which was past due since October 10, 1940, and on November 19, 1940, wrote asking him to take care of his obligation. The bank received a wire on December 6, 1940, "Note and check today", but did not receive them. The bank wrote accused on December 26, 1940, January 20 and February 8, 1941, but received no reply. On March 6, 1941, the bank wrote the commanding of-

ficer, 14th Infantry, Fort Davis, asking if accused was on duty there. Colonel G. A. Sanford replied that accused was there and that he would investigate the indebtedness. After a second letter to Colonel Sanford on April 17, 1941, the bank, on May 8, 1941, referred the matter to The Adjutant General for action. Upon receipt, May 14, 1941, of a letter, dated April 30, 1941, from Colonel Sanford, the bank furnished him full information as to the loan (R. 34; Ex. 20).

h. Mr. Jerome Barras, Canal Zone Police Officer, qualified without objection as a handwriting expert, testified that he had compared the signature, "A. J. Nichols", on Exhibit 6, photostat of checks, on Exhibit 11, post office receipt, and on Exhibits 12, 13, 14, 15, 16, 18 and 19, and expressed the opinion that the same individual wrote the name, "A. J. Nichols", appearing on all of those documents (R. 35).

Lieutenant Colonel Anthony J. Touart, 14th Infantry, Post Adjutant, Fort William D. Davis, identified the signature, "A. J. Nichols", on 1st Wrapper Indorsement on E. M. Young's letter, dated March 10, 1941 (Ex. 18), as the signature of accused (R. 31-32).

4. a. Keith Tracy, a Panama Canal pilot, Cristobal, Canal Zone, testified that he had known accused about twelve years; he knew accused well as President of the Pilots' Association of the Panama Canal when the accused organized the anti-sabotage activities on the Atlantic side; that the reputation of accused among the pilots on the Atlantic side was very, very good; and that he would not use the word "dishonorable" in connection with the accused (R. 36-38).

b. E. B. Fontaine, Area Engineer for the Special Engineering Division in the Atlantic Area, Diablo, Canal Zone, testified that he had known and had considerable official relations for eleven months with the accused as liaison officer; that his organization had a very high regard for accused; and that in his opinion the accused is not dishonorable (R. 38-40).

c. The accused stated that he desired to testify about all of the Specifications. He stated that his debts had accumulated over a long period of time. When he was divorced, the court granted alimony of $125 a month, although no children were involved, as well as his furniture and automobile. He remarried the next year and had to furnish the new home. The birth of two children - both at a civilian hospital because Army facilities were not available - and the fact that he was not a good manager, increased his financial difficulties. When the firms to whom he was indebted wrote letters to the Commanding General, Panama Canal Department, he was directed to prepare a list of all in-

debtedness and a budget to liquidate the debts, which consisted of fourteen items approximating $3300. The budget, dated December 10, 1940, allowed him $125 a month for personal expenses and those of his household. In January four overdue post-dated checks, aggregating $136.60, were presented by a finance company, ruining his budget. His January Post Exchange bill was around $250, including a check returned to the Post Exchange marked "Insufficient Funds". Since December 1940, accused had paid out $2,194.80 in attempting to liquidate his indebtedness, which left around $2,105.20 still to be paid. That debt, including the alimony, is being liquidated at the rate of about $325 a month. Accused applied the proceeds of the sale of his car in December in payment of his bills. He sold in November for $60 an electric refrigerator which cost him $365. Upon receipt of the Pennzoil claim of $30.50 - which was not in his budget - he planned to pay it by the sale of a camera which an officer promised to buy on March 1st for $35. That promise was the basis of his statement that the Pennzoil bill would be paid. That sale of the camera failed to materialize (R. 41-45).

Upon examination by the court, accused testified that the hospital services for his family were rendered by Panama Canal civilian hospitals. His present pay is $438.33 a month. The alimony of $125 and living expenses of around $160, left him approximately $183 a month for liquidation of indebtedness. In July 1939, he did not realize that he was contracting more debts than he could pay. There were other debts than those shown in the charges. The budget included payments upon the debts shown in the charges but the only payment made on any of those debts from December to March was $50 paid to Hubbell in December. There was interest in the budget on the debt to the Highland Falls bank. He failed to acknowledge communications from that bank because there were no funds to make payments on that debt. Two checks drawn on the First National Bank of Erie, Pennsylvania, came back in December and were charged to his Post Exchange account. He did not tell his regimental commander that he had failed to sell the camera but did tell him in January the budget payments were not being kept up. As of December 1940, he had outstanding post-dated checks, totaling $108, in the hands of W. D. Dean & Company of San Antonio, a total of $716.60 in the hands of the Baltuga Investment Company, and a total of $239 in the hands of the Service Finance Company, San Antonio, aggregating approximately $1,154. It was necessary to give post-dated checks to borrow from those companies. He had a bank account in the Chase National, Canal Zone, and an allotment in the First National Bank of Erie to take care of alimony and to repay on a note to that bank at the rate of $75 a month. He has paid the alimony regularly and monthly, and has made no effort to have the payment of alimony postponed (R. 45-50).

5. Under Specifications 1 to 8, inclusive, of the Charge, and the Specification, Additional Charge, the accused was charged with dishonorable failure and neglect to pay certain debts, in violation of Article of War 95. The evidence with respect to these Specifications shows that the debts were due substantially as alleged, and that the accused failed as alleged to pay them. Unless, however, the circumstances of the contracting amount to dishonorable conduct, or unless the failure and neglect to pay the debts involves some evasion or indifference to his just obligations, there appears to be no offense cognizable by the Articles of War. If he made reasonably diligent efforts to pay his just debts but was financially unable to do so, the customs of the military service relieve his insolvent acts from the taint of criminality (CM 207212, Thompson).

The Board of Review has held -

"Dishonorable neglect to pay debts is a violation of A.W. 95. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. Where the nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit, or specific promises of payment, it may properly be deemed to constitute an offense. Where the specification alleged that accused, as an officer, failed and neglected to pay debts, and 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 can not be sustained. C. M. 121207 (1918)." (Dig. Ops. JAG 1912-30, sec. 413.)

"Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Where the non-payment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit or specific promises of payment, it may be properly deemed to constitute an offense." (CM 121152, Robertson; Dig. Ops. JAG 1912-30, sec. 1494.)

"The record shows no false representations by the accused, nor a failure to pay, characterized by deceit, evasion, or dishonorable conduct. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Inas-

> much as this specification does not allege or the evidence prove any circumstances amounting to dishonorable conduct in the non-payment of this debt, the finding of guilty of specification 4, charge II, cannot be supported." (CM 123090, Hansbrough; Dig. Ops. JAG 1912-30, sec. 1494.)

In listing instances of punishment for dishonorable neglect to discharge pecuniary obligations, Winthrop, in his Military Law and Precedents (reprint, p. 715), states:

> "In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, etc., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law."

With respect to Specifications 1, 2, 3, 4, 6, 7, and 8 of the Charge, and the Specification, Additional Charge, the Board of Review is not convinced from the evidence in the case that the failure of the accused promptly to meet his obligations was attributable to an evasive or dishonorable motive, or to an indifference to his legal obligations. Accused permitted himself to become involved in debt beyond his ability to pay. During the period, however, from December 1939, to the date of trial, accused made substantial disbursements to his creditors. It does not appear from the income he received that he could have maintained himself and his family and have paid substantially more than he did to his creditors under the budget which he prepared and submitted to his commanding officer. While it is true that some of the debts were long overdue and that accused did not always reply to demands for payment, there is nothing of substantial weight to indicate that he finally intended to avoid his obligations, or that he did not make reasonable efforts to discharge them. In such a case, it is believed that his acts were not proved beyond reasonable doubt to have been dishonorable within the meaning of the 95th Article of War or discreditable within the meaning of the 96th Article of War.

In view of the foregoing, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4, 6, 7 and 8 of the Charge, and of the Additional Charge and its Specification.

6. With respect to Specification 5 of the Charge, accused is charged with dishonorable failure and neglect from September 15, 1940, to April 1, 1941, to repay a loan of $400 from Edward M. Young, Grove City, Pennsylvania, whom accused had known while on duty with the National Guard. While there is no testimony in the record as to the truth of the cause of the need for the loan stated by accused in his letter of August 10, 1940, to Young - that the outlay of cash in sending his wife and children to the States because of the critical illness of her mother had left him "on the rocks" - the whole record indicates that statement in the letter was an adroit plea for sympathy to insure the grant of the loan. Notwithstanding the promise of the accused in that letter to repay the loan by the 10th of September, he utterly failed even to reply to Young's three letters requesting payment or to take any step looking toward repayment until his 4th Indorsement of January 4, 1941, on Young's letter, dated November 14, 1940, to The Adjutant General, in which Young asked assistance in the collection of the loan. Accused there stated that he planned specific monthly payments beginning January 1941. No payment was, however, received by Young to the date of his deposition, June 17, 1941.

In the opinion of the Board of Review, the entire course of conduct of accused in connection with the securing, and the entire failure to repay this loan from a friend - who himself borrowed the money in order to make the loan - is so characterized by deceit, evasion and false promises in a noncommercial transaction as to constitute dishonorable failure and neglect on the part of accused to pay that debt.

In view of the foregoing, the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Specification 5 of the Charge.

7. With respect to Specification 11 of the Charge, the accused is charged with dishonorably failing to keep his promise, made to his commanding officer, that the Pennzoil Company indebtedness of $30.50 would be settled in full by March 15, 1941. The accused testified that this bill was not included in his budget and that he made that statement relying upon the promise of a brother officer to buy ac-

cused's camera for $35, but that the sale failed to materialize. In the opinion of the Board of Review, the failure under these circumstances to make good his statement that the bill would be paid by March 15, 1941, was not dishonorable.

The Board of Review is, accordingly, of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 11 of the Charge.

8. Specifications 9 and 10 of the Charge allege false official statements by accused with intent to deceive the Commanding General, Fort Davis: the first that a payment of $15 for January, February and March was forwarded to Mr. Hubbell on February 25, 1941; and the second that a money order for $20 and the March payment had been forwarded to Mr. Young. Each of the above statements were made by accused over his own signature. A later statement as to each was made by accused over his own signature that the complaints of Mr. Young and Mr. Hubbell, respectively, were correct and that payment on the respective accounts had not been made as formerly reported.

The making of a false official statement to a commanding or superior officer is conduct unbecoming an officer and a gentleman (Winthrop, Mil. Law and Precedents, reprint, p. 713).

The Board of Review is, therefore, of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 9 and 10 of the Charge.

9. The accused is forty-four years of age. The Army Register shows his service as follows:

> Pvt. and pvt. 1 cl. C. A. C. and Q. M. C. 6 Nov. 15 to 12 Oct. 17; 2 lt. of Inf. 9 Oct. 17; accepted 13 Oct. 17; 1 lt. 9 Oct. 17; capt. 29 Jan. 21; (a) 1 lt. (Nov. 18,22); capt. 31 Aug. 27; maj. 1 Dec. 36; lt. col. 9 Oct. 40.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty

of Specifications 1, 2, 3, 4, 6, 7, 8 and 11, of the Charge, and of the Additional Charge and its Specification, but is legally sufficient to support the findings of guilty of the Charge and Specifications 5, 9 and 10, and the sentence, and warrants confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of the 95th Article of War.

Victor S. Hicks Jr., Judge Advocate.

Chas. B. Besson, Judge Advocate.

Thomas N. Tappe, Judge Advocate.

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

Board of Review
CM 217681

OCT 7 1941

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
v.	)	Trial by G. C. M., convened at Fort Benning, Georgia, July 25, 26, 1941. Dismissal.
Second Lieutenant EARL WALKER (O-333930), Ordnance Department.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, 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 the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Earl Walker, 17th Ordnance Battalion, did, during the period May 1 to May 10, 1941, on a convoy trip from Fort Benning, Georgia, to Rock Island Arsenal, Rock Island, Illinois, wrongfully and wilfully withhold from convoy personnel, payment of $34.00 for monetary travel allowance for rations and quarters, which sum of money had been intrusted to him for that purpose.

Specification 2: (Finding of not guilty)

He pleaded not guilty to the Charge and both Specifications. He was found not guilty of Specification 2, guilty of Specification 1, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were not announced in open court. The reviewing authority approved the sentence and forwarded the record of trial for action under "Articles of War 48 and 50½". The record of trial should have been forwarded for action only under Article of War 48.

3. The evidence for the prosecution shows that pursuant to paragraph 3, Special Orders No. 100, Headquarters 2nd Armored Division, Fort Benning, Georgia, April 29, 1941, the accused, Second Lieutenant Earl Walker, and thirty-four enlisted men left their station at 4 a.m., May 1, 1941, and proceeded by Government motor transportation from Fort Benning, Georgia, to Rock Island Arsenal, Rock Island, Illinois, for the purpose of securing spare parts. Upon completion of this temporary duty they were directed to return to their proper station, Fort Benning, Georgia.

By paragraph 4 of the same order the accused was appointed Class "A" Agent Finance Officer to the Finance Officer, Fort Benning, Georgia, for the payment of monetary travel allowance for rations and quarters of the enlisted men named in paragraph 3 of the order, which funds were given to him before his departure.

Accused received this order on April 29 or 30. He had submitted his pay voucher for the month of April but had not received his pay prior to his departure. His failure to collect his pay left him short of personal funds. At about noon each day accused paid his men $2.25 for their "commuted rations" and $1.50 for lodgings, or $3.75 per day to each man. About May 3, when the convoy had reached the vicinity of Lincoln, Illinois, accused assembled the men to give them the day's allowance, and stated that his personal funds were exhausted and asked if he might deduct fifty cents per man from their allowance. On May 8, at Henderson, Kentucky, a similar situation arose and accused made another deduction of fifty cents per man. The men voiced their approval in the first instance and apparently no one indicated any objection when the second deduction was made. "Most of the men remarked at the time that they realized I wasn't getting any money and that we were all in the service, and it was nothing but just."

After the return of the party to Fort Benning all of the men who were on the convoy, except those belonging to the 66th Armored Regiment, were paid a dollar each by accused. Several of the soldiers belonging to the 66th Armored Regiment testified that accused sent for them and offered to pay them a dollar each, but their company commander, Captain John D. Halton, had told them, or they thought he had told them, not to accept any money from accused, but to remember what was said to them and report to him. Accused admitted making the two deductions but said that he intended to reimburse the men on the next pay day, but before the end of the month Major Gruver mentioned the matter to him, whereupon he borrowed the money at once and got it to

the men the quickest way he could. He told the men he was paying them the dollar he borrowed from them on the trip and that he thanked them very much. These men accepted the money and departed, but the men from the 66th Armored Regiment refused payment and said, as has been stated above, that their captain had told them not to accept payment. One of this group said that their captain had asked him to sign a written statement but that he did not want to sign any statement. Accused told the whole group that if they were asked to sign a statement by their company commander, "why to make the statement, sign it and tell the truth". (R. 11-21)

The evidence related above is abstracted from the testimony of Lieutenant Colonel Oscar W. Koch, Inspector General's Department, Division Inspector. Colonel Koch while testifying used, for the purpose of refreshing his memory, a copy of his report to the Commanding General, 2nd Armored Division, in the special investigation of irregularities attributed to Second Lieutenant Earl Walker, which report is dated June 9, 1941, and is attached to the record of trial, marked Ex. A and Incl. 1 and Ex. C. This testimony is in the main corroborated by the testimony of various enlisted men who were on the convoy.

Staff Sergeant Waino H. Koski, Service Company, 67th Armored Regiment, testified that it was his understanding that the deductions would be returned to the men when accused received his check and that, as a matter of fact, after the return of the party he and the men who were with him, with the exception of one man, who apparently was not available at the moment, were called down to the office and paid one dollar each. Witness also received one dollar for the absent man (R. 25).

Staff Sergeant Arthur H. Travers, Company A, 17th Ordnance, testified that upon two occasions while the convoy was on the road accused deducted fifty cents from the allowance of each man. When asked to state the circumstances under which these deductions were made, he replied:

> "He asked every man there if they had any objection to a deduction of fifty cents. He was broke and didn't get his check, and he would like to take some money and asked if we had any objection. No one seemed to have any objection. *** We considered it a loan. He did not say he would pay it back, but we understood he would pay it back."

Later (witness did not remember the date) accused paid him the one dollar deducted. (R. 27)

Sergeant Carl Taylor, Company A, 751st Tank Battalion, testified that two deductions of fifty cents per man were made by accused from their rations and quarters allowance; that he considered it "charity", but accused did not say that he would not pay it back, and in fact did return the dollar deducted about a week after they had returned to their station; that "no one had any objections" to the deductions. (R. 28-30)

Private Marshall M. Burrs, Service Company, 66th Armored Regiment, testified that accused made deductions, saying that he had no money and asked "if it would be all right to take out fifty cents and we said yes." Later, after they had returned to Fort Benning, he wanted to pay it back "but Captain Halton said we should not take it." (R. 32-33)

Private Gerald R. Curtiss, Service Company, 66th Armored Regiment, testified that on two occasions accused said that he had no rations money and deducted fifty cents from the allowance. He did not know whether accused ever stated that this was a loan and would be paid back. Witness was out dispatch riding and did not know whether accused ever stated after returning to Fort Benning that this was a loan and was to be paid back, but he understood that some of the boys were told not to accept payment. (R. 34-35)

Private Jake Keith, 82nd Reconnaissance Battalion, testified that accused stated upon two occasions that he was in need of money because he had not been paid and was taking fifty cents of witness' allowance. Witness did not think much about it as to whether the deduction was a loan or a straight deduction for which he would not receive any repayment. However, the dollar was paid to him when he returned to Fort Benning. (R. 36-37)

Private Robert Haga, Headquarters Company, 68th Armored Regiment, testified that accused stated upon two occasions while on convoy that he was short on rations and if "we didn't mind" he would deduct fifty cents from soldiers' allowance, to which they replied that they had no objection. "He said he was short of money and talked as though we would get it back when we got back." Upon his return to Fort Benning the dollar was refunded by accused. Witness did not remember the exact date refund was made, but in answer to the specific question, "Was

it before or after you were called to the investigation that you received the refund", he answered, "It was before." Witness was also asked if any of the other soldiers had been called on this investigation before him, to which he replied, "Not that I know of, sir." (R. 37-41)

4. A number of character witnesses were introduced by the defense. It was stipulated that if Major Earl Gruver were present he would testify:

> "I have known Lieutenant Walker over two years, during thirteen months of which, he has served under my command. His work at all times has been highly satisfactory and never had cause to doubt his integrity." (R. 41)

Captain F. C. Crabb, Jr., 17th Ordnance Battalion, testified that accused is a member of his command. His duties have to do with supply and fiscal matters and he performed them very efficiently. When asked, "Do you desire Lieutenant Walker to continue in his present capacity", he replied, "I certainly do." (R. 41-42)

Captain John P. Sherden, 17th Ordnance Battalion, testified that accused has been supply officer and S-4 in his organization for the past four or five months; that there are sometimes very large amounts of money "tied up in that"; that the manner in which his work was performed was superior. Witness had never heard of any discrepancies in the funds; that the handling of such funds would imply trust upon the part of the commanding officer. He would gladly have accused continue in his present capacity. (R. 43-44)

Accused, having been advised of his rights as a witness, elected to remain silent. It should be noted, however, that the testimony of Colonel Koch was based largely upon statements made to him by accused at the time he made his investigation.

Lieutenant Colonel Oscar W. Koch was recalled by the court and testified that he conducted his investigation with reference to the irregularities attributed to accused from June 4 to June 9; that he found that some of the men had been paid a dollar before the investigation; that at the investigation Captain John D. Halton denied that he had issued instructions that the soldiers of his company were not to accept money if accused offered to pay them. Colonel Koch further testified that to his knowledge the first intimation accused had of the investigation was when he called him as a witness on June 6. (R. 44-50)

Private Curtiss was recalled by the court and further testified that he did not get his money because he was out on the road as a dispatcher when the boys were called and besides he understood that Captain Halton told them (presumably the men of his organization) not to take it. Witness read and signed the statement he had made to the officer investigating the case (a part of a document attached to the record marked A and dated May 27, 1941). (R. 50)

Captain John D. Halton was recalled by the court and testified that he did not tell his men not to accept payment from accused, but told them to report to the accused, listen carefully to what he said and report to him all that was said. The men reported to him that the refund was offered to them by accused but that they did not accept it because they thought witness had told them not to accept the money. (R. 54-57)

Private Clarence Jellison, Service Company, 66th Armored Regiment, a witness for the defense, testified that upon his return to Fort Benning he was told to report to Lieutenant Walker. Witness did not accept the dollar offered him by accused because,

> "Shortly before the other men were to go over to see Lieutenant Walker we were called into the office by Captain Halton and he told us to go over and listen to what he had to say but not to accept money, <u>and told us the second time not to accept the money</u>. As we were going over to Lieutenant Walker, one of the men made a statement that he was going to accept the money. <u>I mentioned the fact that he had better not, for the simple reason we had been warned not to</u>." (Underscoring supplied)

When he arrived at the office Lieutenant Walker had a list "with our names on it" and a few men from the 67th and 68th. Witness saw several of these men reimbursed by accused. When asked why he did not sign the letter (document marked "A"), he answered:

> "Because I was afraid the whole thing was a misunderstanding that we might have been in error and perhaps we misunderstood his intention of paying it back and I didn't want to put into bad anyone I wasn't positively sure about and I am sure the other fellows felt the same way." (R. 57-60)

This letter, marked "A", in which eight members of Service Company, 66th Armored Regiment, made a statement, was referred to a number of times during the course of the trial but was not formally introduced into the evidence of record and accepted by the court as an exhibit until the record reached page 62.

5. The preponderance of evidence, and it is believed the best evidence of record, indicates that the facts in this case are in the main just as was stated by the accused to Colonel Koch when he conducted his investigation. The accused was ordered on short notice to make a ten-day journey before he received his pay and apparently before he had an opportunity to secure funds with which to defray his personal expenses. Having been an enlisted man until only a comparatively short time before he was ordered to make this trip, and knowing that soldiers are always ready and willing to lend their money to a companion when the need arises, it is probable that he started on the convoy with the thought in mind that if he needed additional funds he would have no difficulty in borrowing. Had he served as a commissioned officer for a longer time he would doubtless have recognized the impropriety of an officer borrowing from enlisted men and would have made other arrangements. There is absolutely no evidence showing that a single man made the slightest objection on either occasion when accused asked if he might make a deduction, nor is there anything in the record to indicate that accused had any other idea than to repay the men at a later time. Most of the men who testified stated that they considered the deduction as a loan and none of them even suggested that they regarded it, in the parlance of soldiers, as a "shake-down". It is shown by the evidence that every man was reimbursed except those belonging to Service Company, 66th Armored Regiment, and there is abundant evidence that they would have been paid but for the fact that their captain had told them, or they thought he had told them, not to accept any reimbursement from accused.

Captain Halton of the Service Company denied that he had told his men not to accept payment, but all of the men in his company were under the impression that he had so instructed them, and one of them, Private Jellison, said that they were twice told by their captain not to accept money by way of reimbursement from accused. This same soldier, as has been stated above, refused to sign a certain letter reflecting upon accused because he feared the whole thing was a misunderstanding and he did not want to do accused an injustice.

The court, after making its findings and sentencing accused to be dismissed the service, made the following recommendation:

"Under provisions of Paragraph 81 of the Manual for Courts-Martial, the court submits to the reviewing authority the following brief of recommendations and reasons upon which such recommendations are based:

"1. In awarding a sentence of dismissal, the court proceeded upon the principle that although there are indicated definite extenuating circumstances, the right to mitigate or remit punishment for an offense upon which an accused has been found guilty is the perogative of the reviewing authority, and not that of the court.

"2. Careful consideration of all evidence by the court leaves no alternative other than a finding of guilty of Specification 1 and finding of guilty upon the Charge. A considerable mass of evidence has been presented to the court which is of an extenuating nature and which tends to indicate that this officer finding himself in a position where he had no funds of his own, out of which to defray the expenses of the convoy trip upon which he was engaged, resorted to this method outlined in the specification and in the evidence.

"3. Considerable doubt existed in the minds of the court as a whole, as to whether the accused adopted this procedure with intent to defraud, although the irregularities of his conduct is beyond question. The previous good character of the accused as shown in evidence indicates a reasonable doubt as to the intent of the accused to defraud the enlisted men concerned. The court therefore unanimously recommends to the reviewing authority clemency in this case.

"4. It is considered by the court that an adequate reprimand in this case would be punishment more commensurate to the circumstances than dismissal awarded by the court.

(Signed)	Eustis L. Hubbard	(Signed)	James V. Hagan
(Typed)	EUSTIS HUBBARD, O-3894, Lt. Col. 67th A.R.(M)	(Typed)	JAMES V. HAGAN, O-18970 Captain, 17th Engineers Bn.(A)
(Signed)	Ralph Talbot	(Signed)	Paul L. Phelan
(Typed)	RALPH TALBOT, O-19226 Captain, 41st Infantry (A)	(Typed)	PAUL L. PHELAN, O-257811 Captain, 67th Armd.Regt.(M)
(Signed)	William E. Grubbs	(Signed)	John Huckins
(Typed)	WILLIAM E. GRUBBS O-18146 14th Field Artillery (Armd)."	(Typed)	JOHN HUCKINS, O-251486, Captain, 82nd.Recon.Bn.(A)

The Staff Judge Advocate in his review (p. 3) says:

> "I am of the opinion that a substantial and reasonable doubt exists whether the intention of the accused was to permanently deprive these soldiers of their money or merely, in some fashion, to avail himself of necessary funds to make the trip in question, and to return them later to the rightful owners."

He also recommends a commutation of the sentence.

It is a well established principle of the law that the accused is entitled to the benefit of the doubt. In the Manual for Courts-Martial this rule is stated as follows:

> "In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof ***." (M.C.M., par. 78, p. 62)

The following is the rule stated by Winthrop with reference to the doctrine of reasonable doubt:

> "Reasonable Doubt. In a civil action the plaintiff needs in general but to make out a prima facie case, or to offer evidence materially preponderating over that of the defendant, to give him the verdict or judgment. But the quantity of the proof required (on the part of the prosecution) is considerably greater upon criminal trials, where there exists always in favor of the accused the presumption of innocence - a presumption from which results the familiar rule of criminal evidence that, to authorize a conviction, the guilt of the accused must be established beyond a reasonable doubt ***." (Winthrop's Military Law and Precedents (2d Ed.), p. 315)

The gravamen of the offense charged is that accused wrongfully and willfully withheld from convoy personnel certain moneys which had been entrusted to him for the purpose of paying travel and rations allowance to the men while en route. The reasonable interpretation to be placed on this language is that the withholding was without the consent of the men concerned and with the intention upon the part of the accused to permanently deprive them of money which was rightfully theirs. The offense charged is not borrowing from enlisted men but is more analogous to that of embezzlement than any other. The Manual for Courts-

Martial defines embezzlement as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268.)
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship.
>
> "Property includes not only things possessing intrinsic value, but also bank notes and other forms of paper money and commercial paper and other writings which represent value. See the last sentence of A.W. 94 for certain cases of embezzlement chargeable under A.W. 93.
>
> "Proof.-(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; <u>and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent</u>." (M.C.M., 1928, p. 173) (Underscoring supplied)

There may have been some doubt in the minds of the court as to the exact nature of the offense for which they tried the accused, but there can be no doubt that the reviewing authority believed that the offense charged was peculation, or embezzlement, for he said in his action, "No officer who has peculated with public funds to the slightest degree is suitable for continuance in the military service ***."

Since the court, according to the statement signed by every member, had "a reasonable doubt as to the intent of the accused to defraud the enlisted men concerned", then clearly it was the duty of the court to give the accused the benefit of this reasonable doubt and to acquit him of the Specification and the Charge.

In CM 198202, <u>Valentine</u>, where the charge was violation of Article of War 95, accused was found guilty and sentenced to be dismissed the service. Later six members of the court recommended clemency and suggested as a proper punishment restriction to the post and a certain forfeiture of pay for a comparatively short time. In remarking upon this case, in which the record of trial was found not legally sufficient

to support the findings of guilty and the sentence, the Board of Review said:

> "*** The conclusion of the court indicated by its findings must be considered together with the clemency request signed by five of the eleven members of the court, in which they recommend commutation of the sentence to restriction to his post and forfeiture of pay because 'the sentence is mandatory under the article of war concerned', because of lack of intent on the part of accused and because he 'became entangled in the letter of the law rather than in a deliberate violation thereof', and for other stated reasons. These remarks show clearly that the court did not understand the meaning and purpose of the 95th Article of War. If practically half of the members of the court believed that the accused should not be dismissed but should receive a slight punishment and continue as a commissioned officer, obviously they did not believe his conduct was unbecoming an officer and gentleman, which means, according to the authorities quoted in paragraph 3, that his conduct was such as to stamp him as morally unfit to hold a commission and one with whom his brother officers cannot associate without loss of self-respect. This is the test which must be applied to determine the correctness of the conviction under this article ***." (Underscoring supplied)

In the Valentine case the court, having found accused guilty of a violation of the 95th Article of War, had no alternative as to the sentence, for no sentence less than dismissal is permissible where there is a conviction under this Article of War.

In the instant case we have a different situation, for accused was convicted of a violation of the 96th Article of War and the court had authority, within certain limits, to impose any punishment it might choose. If then the court believed, as is stated in paragraph 4 of its recommendation, "that an adequate reprimand in this case would be punishment more commensurate to the circumstances than dismissal awarded by the court", it greatly erred in its duty when it sentenced accused to be dismissed the service.

6. The charge sheet shows that accused was 30 years of age at the time of the commission of the offense. War Department records disclose that he had 11 years' prior enlisted service in the grades

of private, corporal and sergeant. He was appointed a second lieutenant, Infantry Reserve, on June 27, 1935; was reappointed in the same grade and section on June 27, 1940; was transferred to the Ordnance Reserve on November 1, 1940; and entered on active duty on November 12, 1940.

7. The court was legally constituted. For the reasons stated above the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

S. M. Smith, Judge Advocate.

Dissent, Judge Advocate.

Charles H. Van Duzer, Jr., Judge Advocate.

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

Board of Review
CM 217681

OCT 7 1941

UNITED STATES	2ND ARMORED DIVISION
v.	Trial by G. C. M., convened at Fort Benning, Georgia, July 25, 26, 1941. Dismissal.
Second Lieutenant EARL WALKER (O-333930), Ordnance Department.	

DISSENTING OPINION by ROUNDS, Judge Advocate.

1. The Board of Review has examined the record of trial in the case of the officer named above.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Earl Walker, 17th Ordnance Battalion, did, during the period May 1 to May 10, 1941, on a convoy trip from Fort Benning, Georgia, to Rock Island Arsenal, Rock Island, Illinois, wrongfully and wilfully withhold from convoy personnel, payment of $34.00 for monetary travel allowance for rations and quarters, which sum of money had been intrusted to him for that purpose.

Specification 2: (Finding of not guilty)

He pleaded not guilty to the Charge and both Specifications. He was found not guilty of Specification 2, guilty of Specification 1, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were not announced in open court. The reviewing authority approved the sentence and forwarded the record of trial for action under "Articles of War 48 and 50½". The record of trial should have been forwarded for action only under Article of War 48.

3. The primary question presented by the record in this case requiring consideration is whether the evidence is legally sufficient to support the findings of guilty. The digest of the testimony at the trial as set forth in the majority opinion of the board is complete and accurate and need not be repeated here.

4. Accused, by virtue of his office as commanding officer of a detachment of soldiers dispatched on official business to a post some distance from his and their own station, had lawfully intrusted into his care, custody and possession as a Class "A" Agent Finance Officer certain monies of the United States, derived from appropriations by Congress, and furnished and intended for a specific purpose in the military service, namely, daily payment to each enlisted man of his command of his authorized commutation of rations and quarters allowance. In his official capacity as detachment commander and Agent Finance Officer accused was both responsible and accountable for this fund and, because of the fiduciary relationship existing between himself and the Government with respect thereto, it was a trust fund of which he was the trustee. During the journey accused ran short of personal funds and found himself unable to meet the usual and ordinary expenses incident to travel. He explained his predicament to the soldiers under him and received their express or tacit consent to use a part of this commutation fund in his custody and possession to alleviate his straitened circumstances. He subtracted therefrom the sum of $34.00 at the rate of fifty cents per day from each soldier on two different days. He promised the soldiers that he would repay them on his return to their and his station and he did so, although certain of them refused to accept repayment on advice of their company commander. The money which accused thus acquired he applied to his own use and benefit although he was clothed with no lawful authority to retain it as salary, pay or emolument of any kind. The fund in question, from which accused withdrew the money for his personal use, had not yet been paid to the soldiers when they purported to consent to his use thereof. It was still property of the United States in the form of an undistributed trust fund in his custody, and as such the soldiers for whom it was intended and who consented to its use had, as yet, no legal rights therein which they could transfer to accused. The evidence of record fails to warrant the conclusion that accused first paid these soldiers, thereby discharging his trust with respect thereto and thereafter borrowed the money in question from the enlisted men. The return to each soldier later of the amount which accused had assessed against the fund as that soldier's contribution is of no probative value except as an admission that accused was responsible for it. It tends neither to negative nor to excuse the offense charged.

"Under a charge of embezzling his company fund, an officer was, by exceptions and substitutions, found guilty of unlawfully converting the sums charged by borrowing the same. Held, That the accused had no right or authority to borrow from himself or to convert to his own use the trust funds in his possession and that his act in so doing constituted the offense of embezzlement, even though there was the intention on his part to return the sums converted or borrowed. C. M. 167487 (1925)." (Seventh paragraph, sec. 1563, page 774, Dig. Ops. J.A.G., 1912-1930)

The gist of the offense here alleged is the willful and wrongful withholding from the enlisted men (convoy personnel) of money (Government funds) intrusted to Lieutenant Walker for payment, to each soldier in the detachment, of his daily allowance for rations and quarters. This offense, in substance, amounts to a breach of trust under the 96th Article of War. No legal proof of specific intent is required. In this type of offense proof of the act alone is sufficient to establish guilt. (Par. 126, M.C.M.) Intent follows as a matter of legal inference from the commission of the act itself.

The penal statute under which this offense is laid, the 96th Article of War, does not require that the validity of conviction of an offense thereunder rest upon proof of specific intent. It is competent for Congress to prohibit the doing of a particular act and to provide a penalty for violation of such prohibition. In such cases the intention with which the act is done, or the lack of criminal intent in the premises is immaterial, unless such intent is made an essential ingredient of the offense by the statute itself. (Ellis v. United States (1907), 206 U. S. 246; Armour Packing Company v. United States (1907), 153 Fed. 1) Moreover, the Specification in this case alleges no specific intent. It is well settled law that where the statute forbids doing of a certain thing and is silent concerning the intent with which it is done, a person doing the act forbidden is guilty of the crime charged, even though he had no wrong intent beyond that which is involved in doing the act prohibited. (State v. Zichfeld (1896), 23 Nev. 307, 46 Pac. 802)

In the instant case it is possible to argue that accused may have acted without culpability through ignorance of the law, but such ignorance does not excuse the violation, nor does the fact that no harm resulted from the violation of accused's trust constitute a defense. There is no doubt that the "withholding" by accused was deliberate. Accused's

apparent motive - to acquire money to pay his travel expenses - is understandable but this fact may be considered, if at all, only in extenuation. He committed this offense willfully and knowingly. These words are equivalents. (Fry v. Hubner, 57 Pac. (Ore.) 420) Willfully means not merely voluntary but with a bad purpose. (Tilton v. United States, 96 U. S. 699) The bad purpose in this case is the taking and use by accused of the Government money in his possession as a trustee.

5. I therefore conclude that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification 1, and to support the sentence. The sentence to dismissal is unduly severe. I concur with the unanimous clemency recommendation of the court that it be commuted by the President to a reprimand.

William H. Sounds, Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 22 1941 , - To the Secretary of War.

1. The record of trial and accompanying papers in the case of Second Lieutenant Earl Walker (0-333930), Ordnance Department, together with the opinion thereon of the Board of Review, signed by only two of the three members, the third member being unable to concur in the views expressed in the opinion, are transmitted herewith pursuant to Article of War 48.

2. The opinion of the Board of Review finds that the record of trial is legally insufficient to support the findings and sentence. I do not concur in this opinion but, for reasons hereinafter set forth, am of the opinion that the record of trial is legally sufficient and that the sentence should be confirmed and commuted.

3. The evidence for the prosecution shows that pursuant to paragraph 3, Special Orders No. 100, Headquarters 2nd Armored Division, Fort Benning, Georgia, April 29, 1941, the accused, Second Lieutenant Earl Walker, and thirty-four enlisted men left their station at 4 a.m., May 1, 1941, and proceeded by Government motor transportation from Fort Benning, Georgia, to Rock Island Arsenal, Rock Island, Illinois, for the purpose of securing spare parts. Upon completion of this temporary duty they were directed to return to their proper station, Fort Benning, Georgia.

By paragraph 4 of the same order the accused was appointed Class "A" Agent Finance Officer to the Finance Officer, Fort Benning, Georgia, for the payment of monetary travel allowance for rations and quarters of the enlisted men named in paragraph 3 of the order, which funds were given to him before his departure.

Accused received this order on April 29 or 30. He had submitted his pay voucher for the month of April but had not received his pay prior to his departure. His failure to collect his pay left him short of personal funds. At about noon each day accused paid his men $2.25 for their "commuted rations" and $1.50 for lodgings, or $3.75 per day to each man. About May 3, when the convoy had reached the vicinity of Lincoln, Illinois, accused assembled the men to give them the day's allowance, and stated that his personal funds were

exhausted and asked if he might deduct fifty cents per man from their allowance. On May 8, at Henderson, Kentucky, a similar situation arose and accused made another deduction of fifty cents per man. The men voiced their approval in the first instance and apparently no one indicated any objection when the second deduction was made. At least one member of the convoy, Staff Sergeant Koski, failed to give his consent on either occasion as he was not present at the time the deduction was discussed with the convoy personnel by the accused. (R. 24, 25)

After the return of the detachment to Fort Benning all of the men who were on the convoy, except those belonging to the 66th Armored Regiment, were paid a dollar each by accused. Several of the soldiers belonging to the 66th Armored Regiment testified that accused sent for them and offered to pay them a dollar each, but their company commander, Captain John D. Halton, had told them, or they thought he had told them, not to accept any money from accused, but to remember what was said to them and report to him. Accused admitted making the two deductions but said that he intended to reimburse the men on the next pay day, but before the end of the month Major Gruver mentioned the matter to him, whereupon he borrowed the money at once and got it to the men "the quickest way he could." He told the men he was paying them the dollar he borrowed from them on the trip and that he thanked them very much. These men accepted the money and departed, but the men from the 66th Armored Regiment refused payment and said, as has been stated above, that their captain had told them not to accept payment. One of this group said that their captain had asked him to sign a written statement but that he did not want to sign any statement. Accused told the whole group that if they were asked to sign a statement by their company commander, "why to make the statement, sign it and tell the truth." (R. 11-21)

The evidence related above is abstracted from the testimony of Lieutenant Colonel Oscar W. Koch, Inspector General's Department, Division Inspector. Colonel Koch while testifying used, for the purpose of refreshing his memory, a copy of his report to the Commanding General, 2nd Armored Division, in the special investigation of irregularities attributed to Second Lieutenant Earl Walker, which report is dated June 9, 1941, and is attached to the record of trial,

marked Ex. A and Incl. 1 and Ex. C. This testimony is in the main corroborated by the testimony of various enlisted men who were on the convoy.

Accused, having been advised of his rights as a witness, elected to remain silent.

4. The primary question presented by this record is whether or not the evidence is legally sufficient to support the findings of guilty. Accused, by virtue of his office as commanding officer of a detachment of soldiers engaged on official business, had been lawfully intrusted with the care, custody and possession of certain monies of the United States, derived from appropriations by Congress, and designated as a Class "A" Agent Finance Officer for the specific purpose of making daily payment to each enlisted man of his command of the latter's authorized commutation of rations and quarters allowance. Under the circumstances accused was both responsible and accountable for this fund and because of the fiduciary relationship existing between himself and the Government with respect to it, it was a trust fund of which he was the trustee. Finding himself short of personal funds to meet his traveling expenses during the journey, he asked and received the express or implied consent of the soldiers under him to use part of this commutation fund, then and there in his custody and possession, for his own purposes. Accordingly he subtracted from the fund the sum of $34, at the rate of fifty cents per day from each soldier on two different dates. It appears to be established by the evidence that on the occasions when he withheld the sum of fifty cents from each soldier's commutation allowance that the funds had not in fact been paid or even tendered to the men. He did, however, promise them that he would repay them on his return to their station, and he did so, although certain of them, acting on the advice of their company commander, refused to accept the tendered repayment.

The money which he thus acquired he applied to his own use and benefit, although he was without authority either in law or custom of the service to retain it as salary, pay or as an emolument of any kind. The fund in his possession was still the property of the United States in the form of an undistributed trust fund, and as such the soldiers for whom it was intended had no legal rights therein which they could transfer to the accused. This obviously voluntary and intentional conduct on the part of accused is prejudicial to good order and military discipline. The return by the accused to each soldier of the amount withheld tends neither to negative nor to excuse the offense charged.

He had no right or authority to borrow from himself or to convert to his own use the trust funds in his possession, and his act in so doing constitutes a breach of trust under the 96th Article of War, even though there was an intention on his part to return the funds converted or borrowed. (CM 167487 (1925); par. 7, sec. 1563, p. 774, Dig. Ops. J.A.G., 1912-1930) No legal proof of specific intent is required. In this type of offense proof of the act alone is sufficient to extablish guilt (par. 126, M.C.M.). Intent follows as a matter of legal inference from the commission of the act itself. The Specification in this case alleges no specific intent. It is well established that where the statute forbids the doing of a certain thing and is silent concerning the intent with which it is done, a person doing the act forbidden is guilty of the crime charged, even though he had no wrong intent beyond that which is involved in doing the act prohibited. (State v. Zichfeld (1896), 23 Nev. 307, 46 Pac. 802)

Although it hardly seems probable that accused, with a military background and experience covering a period of about eleven years, could be ignorant of the law governing the use of Government funds, it may be possible that such was the case, but such ignorance is not an excuse for a criminal act, although this rule is partially relaxed by courts-martial in trials for purely military offenses of soldiers recently enlisted. Whatever his motive may have been, it may only be regarded as an extenuating circumstance and cannot amount to a defense. The further fact that no harm resulted from the violation of accused's trust by reason of his subsequent restitution likewise constitutes no defense. There is no doubt whatever but that the withholding by accused was deliberate and that he committed the act alleged willfully and knowingly.

5. The reviewing authority states in his action: "No officer who has peculated with public funds to the slightest degree is suitable for continuance in the military service." The accused was not tried for peculation and the reviewing authority erred in using this expression in his action. The offense with which accused was charged more nearly approximates that of borrowing from enlisted men than any other.

6. I recommend that the action of the reviewing authority approving the sentence be confirmed, but I concur in the unanimous clemency recommendation by the trial court that the sentence be commuted to a reprimand.

7. Inclosed are two drafts of letters, marked A and B, prepared for your signature, transmitting the record to the President for his action, draft A concurring in the recommendations set forth above, and draft B concurring in the majority opinion of the Board of Review. Also inclosed are two forms of Executive action, likewise marked A and B, draft A to accomplish the confirmation and commutation of the sentence in accord with my views, and draft B to disapprove the sentence in accord with the majority opinion of the Board of Review.

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

6 Incls.
Incl.1-Record of trial.
Incl.2-Dissenting opin. of third member of Bd. of Rev.
Incl.3-Draft of let. for sig. Sec. War marked A.
Incl.4-Draft of let. for sig. Sec. War marked B.
Incl.5-Draft of action marked A.
Incl.6-Draft of action marked B.

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

Board of Review
CM 217788

AUG 25 1941

UNITED STATES	)	2nd INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sam Houston, Texas, July
Private HAROLD W. ALLEN	)	18, 1941. Dishonorable dis-
(6958281), Company A,	)	charge and confinement for
2nd Engineer Battalion.	)	one and one-half ($1\frac{1}{2}$) years.
		Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, 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 single offense of which the reviewing authority approved the conviction of accused was desertion at the time and place alleged (January 15, 1941, at Fort Sam Houston, Texas), terminated on the date alleged (March 7, 1941) in a manner not shown, in violation of Article of War 58. The reviewing authority approved a sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years.

3. The maximum punishment authorized for desertion terminated in a manner not shown cannot exceed that fixed for desertion under similar circumstances terminated by surrender (CM 161011; CM 161013; Dig. Ops. JAG 1912-30, sec. 1507 (2)). The absence involved in the approved finding in this case began on January 15, 1941, and terminated on March 7, 1941, a period of less than sixty days. The maximum punishment authorized for desertion terminated by surrender after an absence of not more than sixty days, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year (par. 104 c, M.C.M., 1928).

4. For the reasons stated, the Board of Review holds the

record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

_____ Judge Advocate.

_____ Judge Advocate.

_____(On leave)_____, Judge Advocate.

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

SPJGN
CM 217842

17 SEP 1943

UNITED STATES	)	FIRST CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bliss, Texas, 29, 30 and
Master Sergeant JACOB H.	)	31 July 1941. Dishonorable
SIERER (6240731), Company	)	discharge (suspended) and
A, 1st Quartermaster	)	confinement for five (5) months.
Training Regiment.	)	Fort Bliss, Texas.

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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

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

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

Specification 1: In that Master Sergeant Jacob H. Sierer, Company "A", 1st Quartermaster Training Regiment, then Technical Sergeant, Troop "F", 16th Quartermaster Squadron, did, at Fort Bliss, Texas, during the period from November 11, 1939 to about November 25, 1939, wrongfully cause to be made for his own personal use in the Quartermaster Motor Repair Shop, Fort Bliss, Texas, eight small tables, described by certain witnesses as "coffee tables", two tables, described by certain witnesses as "card tables", and one table, so described by certain witnesses as a "ping pong table", wrongfully using materials and labor for this purpose to the approximate value and cost in excess of $20.00 but less than $50.00, the said materials and labor having been furnished and intended for use in the military service of the United States.

Specification 2: In that Master Sergeant Jacob H. Sierer, Company "A" 1st Quartermaster Training Regiment, then Technical Sergeant, Troop "F", 16th Quartermaster Squadron, did, at Fort Bliss, Texas, during the period from September 10, 1939,

to on or about October 15, 1939, wrongfully cause certain repairs and certain new paint work to be made to his privately owned Chevrolet Sedan, M 1937, at the Quartermaster Motor Repair Shop, Fort Bliss, Texas, using materials to the value of about $21.62, and labor to the cost of about $28.80, the said materials and labor having been furnished for use in the military service of the United States.

Specification 3: (Finding of not guilty).

CHARGE II: Violation of the 94th Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specification 3, Charge I; not guilty of Charge II and both Specifications thereunder; guilty of Specification 1, Charge I, except the words "and one table, so described by certain witnesses as a 'ping pong table'", and except the words "to the approximate value and cost in excess of $20.00 but less than $50.00", substituting therefor the words, "to the approximate value and cost of less than $20.00", of the excepted words not guilty, of the substituted words guilty; guilty of Specification 2, Charge I, except the words, "to the value of about $21.62, and labor to the cost of about $28.80, the said materials and labor having been furnished for use in the military service of the United States", substituting therefor the words, "and labor to the cost and value of less than $50.00, the said labor having been furnished for use in the military service of the United States", of the excepted words not guilty, of the substituted words guilty; and guilty of Charge I. He was sentenced to be reduced to the grade of private, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence but remitted one month of the confinement imposed, suspended the dishonorable discharge and designated Fort Bliss, Texas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 214, Headquarters First Cavalry Division 27 August 1941.

3. The record disclosed that the accused was convicted 31 July 1941 for offenses alleged to have been committed between 10 September 1939 and 25 November 1939 and in violation of AW 96. Data as to service as read to the court, as well as the evidence of character appearing upon prior dis-

charges of the accused, shows that he was honorably discharged the service 6 November 1940. At the time of his trial he was serving an enlistment which had commenced 7 November 1940.

The law appears to be well settled in such a case, to the effect that the court was without jurisdiction (M.C.M., 1928, par. 10). The Judge Advocate General has held that the same need not be taken advantage of by plea from the defense in CM 199117 (1932) (Op. J.A.G. 1912-40, sec. 369 (4), page 182) where

> "an accused was charged with fraudulently conspiring to defraud the Government of cigarettes, furnished and intended for the military service, in violation of AW 96. He was found guilty. The evidence shows that the offense was committed in a former enlistment. Held, that it is well settled that a court-martial is without jurisdiction to try an enlisted man for an offense, other than one denounced by AW 94, committed in a prior enlistment at the expiration of which he was discharged. Therefore, the court did not have jurisdiction and the plea of guilty was ineffective to confer jurisdiction."

4. It appears, from the want of jurisdiction thus affirmatively shown, that both findings and sentence are void, ab initio. According to allied papers, submitted with the record, the accused has served his sentence of confinement, upon the termination of which the unexecuted portion of his sentence, including the dishonorable discharge, was remitted.

5. The accused is 36 years of age. War Department records show that he was temporarily appointed second lieutenant, A.U.S. 1 August 1942; temporarily promoted to first lieutenant, 9 April 1943.

6. For the reasons stated, the Board of Review is of the opinion that the record is legally insufficient to support the findings and the sentence; and that the case should be submitted to the Secretary of War with The Judge Advocate General's recommendation that all of the accused's rights affected thereby be restored.

Chas B Bresson, Judge Advocate

Abner E. Lifsconb, Judge Advocate

Benjamin R. Cooper, Judge Advocate

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

Board of Review
CM 217868

UNITED STATES	)	FOURTH ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Haan, California, August
Captain WILLIAM S. SCHIEDINGER	)	1, 1941. Dismissal.
(0-255376), 217th Coast Artil-	)	
lery (AA).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 83rd Article of War.

Specification: In that Captain William S. Schiedinger, 217th Coast Artillery (AA), did, at Camp Haan, California, during the period from about May 10, 1941, to about May 25, 1941, through negligent failure to exercise proper care and supervision as a Battery Commander, suffer certain subsistance stores, of the value of about $88.50, property of the United States issued for military use in his command, to be lost by being taken and carried away by unauthorized persons.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as involves dismissal from the service, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that the accused was in command of Battery A, 217th Coast Artillery (AA), and that Staff Sergeant Otto A. Koenigs and Technical Sergeant Leo A. Rieder were members of Battery A, 217th Coast Artillery (R. 7, 16, 23, 34, 81). On at least five occasions, between May 9 and May 25, 1941, Sergeants Koenigs and Rieder removed certain articles of subsistence stores from the Mess Hall of Battery A (R. 10, 12, 36). These items had been set aside for them by Private Aloysious J. Hansen, then Mess Sergeant of that organization, as being surplus items not required by the battery, and the items so removed were similar to those listed and set forth in Exhibit A (R. 12-14). The items removed from the Mess Hall included a sack of flour, a sack of sugar, of approximately 100 pounds each, a number of boxes of raisins, a number of cans of evaporated milk, perhaps six cases of 48 cans each, and a number of No. 10 cans of various kinds of fruits and vegetables (R. 13-14, 51-52). The value of the items was about $88.50 (R. 14, 43). Sergeants Koenigs and Rieder thought at the time that they had permission to remove them. They had told First Lieutenant Virgil R. Chirhart that they were getting some things from the Mess Hall, including canned foods (R. 11-12, 24-25, 31, 50, 54), but Lieutenant Chirhart had told them they could not have anything that was to be used for rations the following day, or anything that came in on that particular day for use the next day. The only things they could have were those which were left over, that would, ordinarily, if they had been cooked, go into the garbage can (R. 12, 27, 39). On the afternoon of May 24th, following a session with the accused in regard to certain demotions and reratings in the battery, Sergeant Koenigs told the accused that he had talked to Lieutenant Chirhart about overages in the Mess Hall, and wanted to be sure it was all right before any more were taken (R. 16-17). The accused thereupon said, "What do you mean?" (R. 17). At the time this witness told the accused that he had gotten quite a few things from the Mess Hall and began to enumerate the items, Sergeant Rieder entered the discussion and mentioned other items. After the discussion was finished, the accused told them it was all right (R. 16-17, 39). On the evening of May 24th, about nine o'clock, these two sergeants returned to Camp Haan, went to the Battery Mess Hall, and in the presence of Sergeant Hansen, began placing certain items of subsistence stores in Sergeant Rieder's car (R. 17, 38, 40, 42). Two or three men, who had been rerated or demoted on that afternoon, with one other man in the battery who wanted the Mess Sergeant's job, rushed into the Mess Hall and made a great commotion (R. 18, 40). These men were told to see the Captain the following morning and the matter would be straightened out (R. 17-18, 40). Later they returned to camp a second time for the purpose of seeing the accused and as-

certaining whether anything was wrong about the affair. Not finding accused, a note was sent to him by a bus driver, requesting that he come to camp.

The accused arrived about 2:30 on the morning of May 25th and wanted to know what the trouble was. He was told that three men had approached the automobile of Sergeant Rieder at the side door of the Mess Hall while they were carrying things out and placing them in the car (R. 18, 40). Being told the names of these three men the accused remarked, "Jesus Christ, if it had only been somebody else" (R. 19). Accused then sent for the Mess Sergeant and the Charge of Quarters. When these soldiers arrived the accused asked what they knew about the event that had taken place or whom they had seen. The accused was then asked what could be done about the items which had been removed, and if they could be brought back to camp. At first he said, "Yes". He was sitting on his chair, appeared in a highly nervous state, and was sweating profusely. Then in a few minutes he said, "No, you will have to get rid of them. * * * I don't believe you would be able to get into the Camp, to get through the M.P.'s. through the gate" (R. 20). He said they would have to dispose of these subsistence stores if it required taking them forty or fifty miles away from home. He did not indicate they should be brought back to camp (R. 47). The only time these two witnesses had permission from the accused to take subsistence stores from the battery, was the permission they received on the afternoon of May 24, 1941 (R. 11-12, 17, 33, 37, 39). All items removed prior to that time were removed on authority of Lieutenant Chirhart (R. 11-12, 24-25, 31, 50, 54). Sergeant Koenigs had never spoken to the accused, nor had the accused ever spoken to him, with regard to the removal of any of these articles prior to the afternoon of May 24th. On that occasion he told accused he had taken quite a few things, mentioned some canned milk and dry rations, but did not remember whether he mentioned sugar (R.33). The only time Sergeant Rieder had obtained permission from accused to remove any items was the afternoon of May 24, 1941, at which time he was in the tent of accused when there was a discussion of matters concerning the battery. At that time Sergeant Koenigs mentioned to the accused that they had been receiving things from the Mess Hall, such as excess supplies that would have otherwise, if they were opened, have been thrown away (R. 39). Specific items, including canned goods, odds and ends, powdered sugar, brown sugar, raisins, coconut, and several other items were mentioned, and accused at that time approved of it, and said that he would so inform the Mess Sergeant (R. 39-40). Private Hansen, the then Mess Sergeant, was present at the Mess Hall on each occasion when these articles were removed (R. 38). The wit-

ness Rieder had been given things out of the Mess Hall by previous Mess Sergeants prior to Private Hansen's appointment on May 1st (R. 49-50).

Private Hansen became Mess Sergeant of Battery A, 217th Coast Artillery, May 1, 1941, and served in that capacity until May 24th, when he was arrested along with Sergeants Koenigs and Rieder for removing certain subsistence stores from the Battery Mess Hall (R. 56-57). During the period between May 10 and May 24, 1941, he knew that numerous items of food supplies were removed from the Mess Hall by Sergeants Koenigs and Rieder, and on one occasion, about May 12th, he told accused certain items (not specified) were being taken therefrom. He could not say whether accused understood him, as accused made no answer to the remark (R. 58, 61). He thought it was all right to permit the removal of these items at the time they were removed, but there is some doubt in his mind about it now (R. 59). He testified that accused came in the Mess Hall three times a week to see if anything was wrong, but that he was quite busy and could not come in every day.

4. Upon cross-examination, and upon examination by the court, Sergeant Koenigs, who had previously testified that he had received permission to remove only items that had been cooked or would have been thrown into the garbage, said he considered a 100 pound sack of sugar and cases of canned milk of such a character and nature that if they had been cooked they would have been thrown into the garbage (R. 27-28). Sergeant Koenigs did not believe the accused had any idea of the extent of the items which he and Sergeant Rieder had removed (R. 30-31).

Upon cross-examination, and upon examination by the court, Sergeant Rieder testified that although he had received permission from Lieutenant Chirhart to take only excess supplies that would otherwise, if opened, have been thrown into the garbage, he nevertheless took numerous items, such as a 100 pound sack of sugar, one sack of flour, canned milk and some No. 10 cans of fruits and vegetables in the original unopened cans. He was asked in view of his previous testimony whether he considered the sack of 100 pounds of sugar in that category. He replied, he did not know, as he was not Mess Sergeant. To the same question as to the No. 10 cans of fruit and vegetables, he said he could not answer. Again as to the canned milk, his answer was that there was quite a bit of sour milk at different times. To the question of whether he thought the milk in the original cans and cartons was sour at the time he removed them from the Mess Hall and transported them to his home, his answer was in

the negative (R. 52). When asked by a member of the court whether he, at any time, during the period from May 9th to May 24th, had left the area of the Mess Hall with the subsistence stores about which he had testified, feeling that he had the knowledge and consent of the accused to remove them, he replied, "Well, sir, I never thought about that part of it at all. In the first place, the only permission that I had was Lieut. Chirhart's. I did not know whether the Captain knew about it at that time" (R. 53-54). This witness thought the exclamation made by the accused on the morning of May 25th when he is alleged to have said "if it had been any three men but those three", or words to that effect, had reference to three soldiers who were trouble-makers, had been called on the carpet several times, and one or two of them demoted. These three men had it in for him and Sergeant Koenigs (R. 54-55). The only items which were taken from the Battery Mess Hall and placed in Sergeant Rieder's car on the evening of May 24th, were a sack of sugar, two cases of milk, and several No. 10 cans of fruits and vegetables (R. 30). All of the items which they removed were later returned to military control (R. 14, 43, 64-65).

The prosecution and defense stipulated that if Captain Richard Battle (C.A.), Provost Marshal, Camp Haan, California, were present in court and sworn, he would testify that on May 26, 1941, a quantity of subsistence stores, of the value of $88.50, which had been removed from Battery A, were turned over to him, and that he assisted in preparing the list of items appearing on Exhibit A. Exhibit A was thereupon admitted in evidence for the purpose of showing the various items removed from the battery and the value of each article (R. 63-64).

It was further stipulated that if Staff Sergeant Frederic B. Toomoth, Quartermaster Detachment, Camp Haan, California, were present in court and sworn, he would testify that he was Commissary Steward of Camp Haan, and had assisted in the preparation of the list of subsistence stores as shown on Exhibit A; that he had obtained from his commissary price list the unit prices of the items and made the extensions thereof, based upon the quantity, arriving at the total value as indicated in the right-hand column of Exhibit A (R. 64-65).

5. The evidence for the defense shows -

a. Lieutenant Colonel Roy L. Scott was Regimental Commander of the 217th Coast Artillery (AA), of which accused was a member. He thought Captain Schiedinger had been unjustly accused; that he was a good officer and he would not hesitate to place him in charge of A or any other battery which he commanded (R. 70-72).

b. Lieutenant Colonel Clayton D. Chrysler was Battalion Commander of the 217th Coast Artillery (AA), of which the accused was a member. In his opinion the accused was a hard-working, satisfactory officer, and if he had the opportunity, he would ask for the accused's reassignment to his battalion (R. 73-75).

c. Major Frank L. McDaniels, 217th Coast Artillery (AA), had known the accused for several years, regarded him as a fine officer, and would be willing to have him assigned to his battalion as battery officer (R. 75-77).

d. Captain Carl E. Erickson was commander of Battery F, 217th Coast Artillery (AA), and had known the accused for eighteen years. He was a neighbor of accused, living not more than six blocks away. He had the greatest respect for the character of accused. The reputation of accused in the community was excellent. In his opinion the accused was a good officer. At one time Captain Erickson was in charge of Battery Officers' School, of which accused was an instructor, and in which the accused performed a lot of work and performed it well (R. 78-79).

e. The accused testified he had been a commissioned officer in the National Guard since 1927, and he had been the commanding officer of Battery A, 217th Coast Artillery (AA), since July 1, 1940. During the period from April 15 to May 15, 1941, there was only one officer on duty in the battery beside himself (R. 80-84). His duties were many and varied. He specifically denied giving Sergeant Koenigs permission to remove any subsistence stores from the Mess Hall on any occasion except on the afternoon of Saturday, the 24th of May, when he authorized him to take certain items of cooked food which was left over from the mess. Sergeant Koenigs was given permission to remove such articles because his family was arriving early the next morning, and before this authority was given, Sergeant Koenigs had remarked to him that there was some excess food in the kitchen. This was the only time he had given Sergeant Koenigs or anyone else permission to take any subsistence stores from the mess hall. He first learned that supplies, other than left-overs from the cooked meals, had been taken when he returned to camp on Monday morning, May 26th, and saw the property in the Quartermaster's Warehouse, which Captain Battle had under lock and key (R. 86-87). The only items which Sergeants Koenigs and Rieder had mentioned were dried beans and a few left-overs from the prepared meal, which were not used, would probably have been stored in the ice box, might spoil, and would have to be disposed of in the garbage. Reference was made only to prepared articles or items

that were not consumed (R. 92). When he met these men at 2:30 on the morning of May 25th, they did not indicate the amount involved in the list of items which they discussed. Left-over rice, dried beans, and hash, or whatever it was they had for mess, including a few vegetables, was the only reference that was made to any specific items (R. 92). In response to the question, "What did you tell them to do with it?", accused answered, "In view of the fact that it was, from their statements, items that were perishable, I advised that possibly it would be best to dispose of it". No mention was made of getting a truck to bring the items back to camp (R. 93). The only time the Mess Sergeant ever discussed the question of disposing of excess food was about the fifth day after the battery went on field rations, at which time the Mess Sergeant said there was an excess amount of bread going to waste and spoiling in the pantry. The bread became mouldy and was finally disposed of in the garbage because the men could not use it. He had received instructions from the regimental commander to hold any excess items for emergency in case the battery should be moved at a later date, and as a result an excess amount of subsistence stores had accumulated (R. 92). He had been in the habit of inspecting the mess hall at least once a day and at no time during this period did it appear that anything was wrong (R. 85).

Accused checked the battery from time to time with respect to the condition of the mess hall and occasionally had his meals with the battery and the food was apparently satisfactory (R. 90). Occasionally he checked with the Mess Officer to see what the menus were, and to ascertain whether the men were being properly supplied with food and how it was being handled and served. He looked into the pantry several times during the week (R. 91-92). He had delegated to Lieutenant Chirhart the responsibility of running the mess. This officer had been a member of the military service for a good many years and realized what his responsibilities were in that connection (R. 93).

6. At the conclusion of the prosecution's evidence, counsel for defense moved for a finding of not guilty on the ground that the prosecution had failed to submit sufficient evidence to warrant a finding of guilty, which motion was considered by the court and denied (R. 65-68).

7. The accused is charged with suffering through neglect certain subsistence stores of the value of about $88.50, the property of the United States, to be <u>lost</u>, in violation of the 83rd Article of War.

There is no dispute as to the fact that the articles set forth in Exhibit A were the property of the United States, furnished and intended for use in the military service, and that these articles were removed, at the time and place alleged, from the mess hall of the battery of which the accused was in command, and transported beyond the limits of the military reservation. There is likewise no conflict in the testimony that all of the articles set forth in Exhibit A were restored to Government control on May 26, 1941, in the same condition as before their removal. It is also clear that most of the items which were removed from the mess hall were removed by and with the consent and authority of another officer, to wit, First Lieutenant Virgil R. Chirhart. The only items, which the witnesses for the prosecution testified were removed by and with the knowledge, consent, and authority of the accused, were those items removed on the evening of May 24, 1941, which consisted of one 100 pound sack of sugar, one sack of flour, two cases of milk and several No. 10 cans of fruits and vegetables. Thus the evidence does not support the charge with respect to the larger portion of articles which the accused is alleged to have suffered to be lost. The number of items removed is, however, immaterial, since proof of suffering through neglect the loss of any one or more of the items would sustain a conviction.

It was incumbent upon the prosecution to prove by competent evidence that one or more of the articles described was suffered to be <u>lost</u> through the negligence of the accused. This was not done. It affirmatively appears that all of the items enumerated in Exhibit A were returned to military control in the same condition as they were when they were removed from the mess hall. It must then follow that the proof supports, if any, an offense, altogether different and distinct from that charged.

8. Under the heading, Analysis of Proof, of the 83rd Article of War, Manual for Courts-Martial, 1921, page 393, the following language is to be found:

> "The article embraces eight offenses, indicated by the following diagram:
>
> | | | | | |
> |---|---|---|---|---|
> | Any person subject to military law who | Willfully or Through neglect | Suffers to be | (Lost, (Spoiled, (Damaged, (or (Wrongfully (disposed of | (Any military (property be- (longing to (the United (States." |

It would thus appear that an accused may willfully suffer any of the four offenses to be committed, or, may through neglect suffer any of the four offenses to be committed, but that each is a separate and distinct offense.

> "LOST. The past participle of 'lose'; also a participial adjective. Every use of the word implies an inability to retain, or to recover, or an involuntary deprivation of, the thing which is said to be 'lost'". (38 Corpus Juris, 243; Webster's New International Dictionary.)

In the opinion of the Board the evidence does not support the finding of guilty of suffering through neglect the loss of Government property as charged.

9. Since an accused can only be found guilty of an offense with which he is charged, or a lesser included offense, it becomes necessary to consider whether the evidence supports a lesser included offense of that charged. The property was not lost, spoiled or damaged. Thus, if the evidence supports any offense appearing in the foregoing diagram laid under the 83rd Article of War, it is that of suffering through neglect the wrongful disposition of Government property.

> "'Wrongful' is a more comprehensive term than the 'negligence.' * * * [The words] 'wrongful act' * * * embrace all acts, other than those constituting mere negligence * * *." (Vol. 45, Words & Phrases, Permanent Edition, p. 624.)

> "* * * An 'act' or 'wrongful act' denotes affirmative action or performance, and an expression of will or purpose as distinguished from 'omission' or 'wrongful omission,' which denotes a negative and inaction." (Vol. 45, Words & Phrases, Permanent Edition, p. 627.)

The Judge Advocate General has held -

> "The specification, Charge II, alleges that the accused wrongfully disposed of a revolver issued for use in the military service. He pleaded not guilty to wrongfully disposing of this revolver, but guilty of losing it through neglect, of which latter offense he was convicted. It is the opinion of this office

that the findings as to this specification and charge must be set aside for the reason that losing through neglect a revolver, is not an offense lesser and included in the offense of wrongfully disposing of that article. The allegation that an accused, by a positive, affirmative act, wrongfully disposed of a revolver, clearly does not include the purely negative offense of losing this property by neglect. From this it follows that the latter offense is not lesser and included in the former." (CM 139209, Carnell.)

The Judge Advocate General has also held -

"* * * To wrongfully dispose of property in a manner not stated is a separate and distinct offense from wrongfully selling said property. The substituted words, 'dispose of', might mean any one of many acts, either lawful or unlawful. This term has been variously defined as synonomous with arrange, to find a place or use for, to have the control or ordering of, to dispose of troops, pawn, barter, give away, burn, destroy, to determine the fate of, and many other meanings. The words 'dispose of' have been held not to be synonomous with 'sell', but to contemplate a use different from the latter word, a mortgage being such a use. (Platt & Ewing v. Pac. R. Co., 99 U.S., 48) The expression 'to dispose of' is very broad and signifies more than to sell. Selling is but one mode of disposing of property. (Phelps v. Harris, 101 U.S., 380; Hill v. Sumner, 132 U.S., 123; Noyes v. Lane, 1 S. Dak., 125.) Standing by themselves without qualification these words have no legal signification. It is the opinion of this office, therefore, that the findings of the court that the accused did not wrongfully sell the property described amounts to an acquittal of the accused of the offense charged, and that the court did not find the accused guilty of the offense charged or of a lesser included offense. (C.M. No. 138334, Haynes, May 26, 1920.) Authority to find guilty of a lesser included offense does not justify the conviction of the accused of an offense entirely separate and distinct in its nature. C.M. No. 107490, O'Rourke; C.M. No. 135412, Girard." (CM 138679, Frisbie.)

In a case in which the accused was tried upon a specification laid under the 84th Article of War alleging that he unlawfully sold a pair of boots issued for use in the military service and in which the court by exception and substitution found him not guilty of having unlawfully sold the boots in question but guilty of having unlawfully disposed of them, the Board of Review held that -

> "The offense of which the accused was thus found guilty is not an offense lesser than and included in the offense charged, but is a separate and distinct offense. C.M. 138679, Frisbie; 143500, Avala." (CM 201596, Sigler.)

10. The same reasoning, as set forth in the foregoing holdings, apply conversely in the instant case, in which event an accused might through neglect suffer the wrongful disposition of Government property, without suffering a loss through neglect. Hence not all of the elements of the offense of suffering a wrongful disposition are included within the elements of the offense of suffering a loss through neglect.

The Board of Review is, therefore, of the opinion that if the evidence supported a finding of guilty of the offense of suffering through neglect the wrongful disposition of the property described, such an offense is not a lesser included offense of that charged.

11. Although the order appointing the court and the record (p. 2) indicate that Lieutenant Colonel Linton Y. Hartman was the senior officer, the Army Directory (April 20, 1941) shows Lieutenant Colonel Rodney C. Jones, who authenticated the record as President, to be the senior officer.

12. At the time of trial the accused was thirty-nine years of age. The Office of The Adjutant General, under date of October 8, 1941, states his service as follows:

> The records of this office show that by reason of Federal recognition on May 26, 1927, as Second Lieutenant, Infantry, Minnesota National Guard, William Siegfried Schiedinger was appointed Second Lieutenant, Infantry Reserve, August 10, 1928, and accepted September 20, 1928. By reason of Federal recognition on July 7, 1932, as First Lieutenant, Infantry, Minnesota National Guard, he was appointed First Lieutenant, Infantry Reserve, August 2, 1932, and accepted August 19, 1932, thereby terminating automatically his prior commission. He was appointed First

Lieutenant, Infantry, National Guard of the United States, April 4, 1934, and accepted July 14, 1934, thereby terminating automatically his prior commission. By reason of Federal recognition on April 17, 1940, as Captain, Infantry, Minnesota National Guard, he was appointed Captain, Infantry, National Guard of the United States, June 15, 1940, and accepted July 6, 1940, thereby terminating automatically his prior commission.

The records further show that by reason of Federal recognition on December 24, 1940, as Captain, Coast Artillery, Minnesota National Guard, he was appointed Captain, Coast Artillery Corps, National Guard of the United States, February 10, 1941, and accepted on that same date, thereby terminating automatically his prior commission, and has continued in that status to date. There is no record of his having performed active duty under his Reserve commission. He entered upon active duty February 10, 1941, pursuant to the order of the President.

13. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty and to support the sentence.

Curtis S. Hall, Jr., Judge Advocate.

Charles L. Mason, Judge Advocate.

Thomas M. Webb, Judge Advocate.

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

Board of Review
CM 217904

SEP 1 1941

UNITED STATES)	FOURTH ARMY
)	
v.)	Trial by G.C.M., convened at
)	Fort Worden, Washington, August
Private CLAUDE I. DUTRA)	15, 1941. Dishonorable discharge
19013094), Headquarters)	and confinement for two (2) years.
Battery, 14th Coast)	Disciplinary Barracks.
Artillery.)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, 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 on the following Charges and Specifications:

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

Specification 1: In that Private Claude I. Dutra, Headquarters Battery, 14th Coast Artillery, did, at Fort Worden, Washington, on or about April 5, 1941, wrongfully, unlawfully, and without authority, take, steal and carry away a letter addressed to one Private Herbert Israelstam, Battery D, 14th Coast Artillery, containing a check dated April 4, 1941, drawn on the American National Bank and Trust Company of Chicago, payable to the order of Herbert Israelstam in the sum of Ten dollars ($10.00), the property of the said Private Herbert Israelstam.

Specification 2: In that Private Claude I. Dutra, Headquarters Battery, 14th Coast Artillery, did, at Fort Worden, Washington, with intent to defraud, falsely utter a certain check in the following words and figures, to wit:

Chicago April 4, 1941 No. 4725

AMERICAN NATIONAL BANK AND TRUST COMPANY
of Chicago

2-77
7

Pay to the order of Herbert Israelstam $10.00

TEN and No/100 Dollars

(Signed) Harry E. Israelstam

(Face of Check)

Herbert Israelstam
Robert Johnson

(Back of Check)

by wrongfully and unlawfully signing the names "Herbert Israelstam" and "Robert Johnson" as indorsements thereon, thereby fraudulently obtaining from the Palms Cafe at Port Townsend payment of Ten dollars ($10.00), which said check was a writing of a private nature which might operate to the prejudice of another, Private Claude I. Dutra then and there well knowing that the indorsements on the said check were fraudulent and forged.

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

Specification: In that Private Claude I. Dutra, Headquarters Battery, 14th Coast Artillery, did, at Port Townsend, Washington, on or about April 5th, 1941, wilfully, unlawfully, feloniously, and with the intent to defraud, utter and pass, as genuine, a certain check for the payment of Ten dollars ($10.00), being a writing of a private nature, which might operate to the prejudice of another, and in words and figures as follows, to wit:

Chicago April 4, 1941 No. 4725

2-77
7

AMERICAN NATIONAL BANK AND TRUST COMPANY

Pay to the order of Herbert Israelstam $10.00

TEN and No/100 Dollars

(Signed) Harry E. Israelstam

(Face of Check)

Herbert Israelstam
Robert Johnson

(Back of Check)

Private Claude I. Dutra, then and there well knowing that the indorsements on the said check were falsely uttered and forged.

Accused pleaded not guilty to, and was found guilty of, all the Charges and Specifications. Evidence of one previous conviction was improperly introduced as the offense was committed subsequent to the date of the offense here alleged. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for four years. The reviewing authority approved the sentence but reduced the period of confinement to two years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that Harry E. Israelstam of Chicago, Illinois, mailed about April 4, 1941, to his son, Private Herbert Israelstam, Battery D, 14th Company, Fort Worden, Washington, a letter containing his check, No. 4725, drawn on the American National Bank and Trust Company of Chicago, for $10 and dated April 4, 1941 (Exs. 1, 2). Private Israelstam did not receive that letter or check nor did he indorse or authorize any person to indorse the check for him (R. 11, 12). Mr. Israelstam later returned that check to the bank, because he recognized that the indorsement was not the signature

of his son (Exs. 1, 2). The proprietor of the Palms Cafe, Port Townsend, cashed this check for accused, assuming accused to be the legal owner of the check (Ex. 3), on April 5, 1941 (Ex. 5).

On the day following April 5, 1941, a soldier in the presence of the accused asked Corporal Paul S. McKinney, the head mail orderly at Fort Worden, if McKinney had been in the mail room the preceding night as he had seen a light there. The accused then stated that he was there looking through the name file for the distribution of mail.

As a result of a comparison of the handwriting of several persons who had access to the mail room with the indorsements on the check, the accused was interrogated (R. 18). In his confession signed and sworn to on June 17, 1941, the accused stated, after he recited that he had been warned, that he need make no statement and that the statement would be used against him, that on Saturday, April 5th, he found in the hallway of Harbor Defense Headquarters, Fort Worden, a letter torn open a couple inches on one end; that he finished opening the letter and took out a check dated April 4, 1941, on the American National Bank and Trust Company of Chicago for $10, payable to Herbert Israelstam; that he burned the envelope which was addressed to the same person; that he signed the indorsement "Herbert Israelstam" and "Robert Johnson" on the check and cashed it on the same day at the Palms Cafe, Port Townsend, and used the money; and that he was assistant janitor at Harbor Defense Headquarters from the middle of March until arrested on April 21, 1941 (R. 21; Ex. 5).

First Lieutenant Thomas L. Chambers, Military Intelligence, who was accepted by the defense, "as being reasonably accurate" in making handwriting comparisons (R. 20), testified that the person who wrote "Robert Johnson" on the check also wrote that name upon the two sheets of paper (Ex. 4) furnished him as a sample (R. 20-21), which sample was shown to have been written by the accused (R. 16).

4. a. Specification 1, Charge I, alleges larceny of a letter containing a certain check in the sum of $10, the property of Private Herbert Israelstam, in violation of Article of War 96.

The Specification inartistically but in substance alleges the larceny of the letter and of the $10 check. The proof shows the larceny of both. The record is legally sufficient to support the finding of guilty of the Specification (CM 214801, Ruddy; State v. Sakowski, 191 Mo. 651, 90 S.W. 435).

This offense was improperly laid under Article of War 96, but set forth language applicable to a violation of Article of War 93 which is sustained by the proof. Under Article of War 37 the error does not constitute ground for invalidating the proceedings, or for disapproving the findings (CM 118656; Dig. Ops. JAG 1912-30, sec. 1525).

b. Specification 2, Charge I, and the Specification, Charge II, each allege the uttering of the stolen check. Specification 2, Charge I, alleges that the check was uttered at Fort Worden, Washington, but fails to allege the date upon which it was uttered. The Specification, Charge II, alleges that the check was uttered at Port Townsend, Washington (two miles from Fort Worden), on or about April 5, 1941.

The only evidence offered with respect to any uttering shows that the stolen check was uttered by accused at the Palms Cafe, Port Townsend, on April 5, 1941.

The court has found accused guilty of uttering the stolen check under two specifications, supported by proof of only a single uttering on April 5, 1941, the first (Spec. 2, Chg. I), in violation of Article of War 96, and the second (the Spec., Chg. II), in violation of Article of War 93. The proof fully supports the uttering by the accused of this check at Port Townsend on April 5, 1941, knowing that the first two indorsements were forged.

With respect to the Specification, Charge II, the uttering of a forged instrument is not an offense in violation of Article of War 93. This offense was erroneously laid under Article of War 93, but was set forth in language applicable to Article of War 96. The Specification is sufficient under the latter article, and the fact that the offense was laid under the wrong article is immaterial (CM 138357; Dig. Ops. JAG 1912-30, sec. 1471 (1)).

The Board of Review is, accordingly, of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 2, Charge I, but legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings of guilty, in violation of Article of War 96.

5. The reviewing authority approved the sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for

four years, but reduced the period of confinement to two years.

It is apparent from the record of trial, from the sentence to confinement for four years adjudged, from the review of the staff judge advocate and from the approval by the reviewing authority of confinement for two years, that both the court and the reviewing authority considered that Specification 2, Charge I, alleged the offense of forgery, whereas in fact it alleged only an uttering, although in slightly different language from the allegation of uttering in the Specification, Charge II.

The maximum punishment under Specification 1, Charge I - larceny of $10 - is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for six months. There is no maximum punishment prescribed under Specification 2, Charge I, or under the Specification, Charge II, for the offense of uttering a check for $10. The nearest analogous offense for which a maximum penalty is prescribed is that of obtaining money under false pretenses, for which the maximum authorized confinement is six months when the amount obtained is $20 or less. As the finding of guilty, however, both of Specification 2, Charge I, and of the Specification, Charge II, is based upon proof of a single offense of uttering, the sentence may be imposed only with respect to one of those two specifications.

The Board of Review is, accordingly, of the opinion that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I, and of Charge I, to support only so much of the findings of guilty of Charge II and its Specification as involves findings of guilty, in vio-

lation of Article of War 96, and to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

_____, Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas M. Tapp, Judge Advocate.

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

Board of Review
CM 217931

SEP 30 1941

UNITED STATES	)	30TH DIVISION
v.	)	Trial by G. C. M., convened at Fort Jackson, South Carolina, July 15, 1941.
First Lieutenant EDWIN E. JENKINS, Jr. (0-383787), 118th Field Artillery.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, 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 61st Article of War.
(Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

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

Specification 1: In that 1st Lieutenant Edwin E. Jenkins, Jr., 118th Field Artillery, did, at Columbia, S. C., on April 19, 1941, with intent to defraud, wrongfully and unlawfully make and utter to the Hotel Columbia, a certain check in words and figures as follows, to wit:

To the C & S National Bank, of Columbia, S. C.
Dated April 19, 1941.
City Branch CUSTOMER'S CHECK
Pay to the Order of Cash $20.00
Twenty and no dollars Signed E. E. Jenkins, Jr.
1st Lt. 118th F.A.

and by means thereof, did fraudulently obtain from the Hotel Columbia, twenty dollars ($20.00) in cash; he the

said E. E. Jenkins, then well knowing that he did not have, and not intending that he should have sufficient funds in the C & S National Bank, of Columbia, S. C., for payment of said check.

Specification 2: In that 1st Lieutenant Edwin E. Jenkins, Jr., 118th Field Artillery, did, at Columbia, S. C., on April 21, 1941, with intent to defraud, wrongfully and unlawfully make and utter to the J. Drake Edens Quality Food Stores, a certain check in words and figures as follows, to wit:

THE CITIZENS AND SOUTHERN NATIONAL BANK No_____
of South Carolina
Columbia office Columbia, S. C., April 21, 1941.
Pay to the Order of Cash $10.00
Ten and no dollars E. E. Jenkins, Jr., 1st Lt., 118th F.A.

and by means thereof, did fraudulently obtain from the J. Drake Edens Quality Food Stores, ten dollars ($10.00) in cash; he the said E. E. Jenkins, then well knowing that he did not have, and not intending that he should have sufficient funds in the C & S National Bank, of Columbia, S.C., for payment of said check.

Specification 3: In that 1st Lieutenant Edwin E. Jenkins, Jr., 118th Field Artillery, did, at Columbia, S. C., on April 21, 1941, with intent to defraud, wrongfully and unlawfully make and utter to the Hayes Liquor Store, a certain check in words and figures as follows, to wit:

CITIZENS AND SOUTHERN NATIONAL BANK No_____
of South Carolina
Columbia office Columbia, S. C., April 21, 1941.
Pay to the Order of Cash $10.00
Ten and no dollars E. E. Jenkins, Jr. 1st Lt., 118th F.A.

and by means thereof, did fraudulently obtain from the Hayes Liquor Store, ten dollars ($10.00), part in merchandise, and part in cash, he the said E. E. Jenkins, then well knowing that he did not have, and not intending that he should have sufficient funds in the C & S National Bank, of Columbia, S. C., for payment of said check.

Specification 4: (Finding of not guilty)

Specification 5: (Finding of not guilty)

CHARGE III: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE IV: Violation of the 94th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that 1st Lt. Edwin E. Jenkins, Jr., 118th Field Artillery, did, on or about November 14, 1940, then a 2nd Lieutenant, at or near Saluda, S. C., being then lawfully married to Vera Elizabeth Jenkins, nee Ulmer, feloniously marry one Myrtice O. Gunter, the said Vera E. Jenkins, his lawful wife, being then alive.

He pleaded guilty to Charge I and its Specification, and not guilty to the remaining Charges and Specifications. He was found guilty of Charge I and its Specification, of Charge II and Specifications 1, 2 and 3 thereunder, and of the Additional Charge and its Specification; and not guilty of Specifications 4 and 5, Charge II, of Charge III and its Specification, and of Charge IV and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service "and to forfeit all pay and allowances to become due." The findings and sentence were announced in open court. The reviewing authority disapproved the findings of guilty of Charge I and its Specification, approved only so much of the sentence as provided for dismissal, and forwarded the record for action under the 48th Article of War.

3. The evidence for the prosecution as to the Charges and Specifications of which accused was found guilty may be summarized as follows:

Mr. F. M. Altman, room clerk, Hotel Columbia, Columbia, South Carolina, testified as to Specification 1, Charge II, that on April 19,

1941, he cashed a check for accused in the amount of $20. This check was given by accused to "take up" two of his checks in the amount of $10 each, which he had previously cashed at the Columbia Hotel and which were returned marked "Insufficient Funds". (R. 26-27) The check was sent to the bank in due course and was later returned to him marked "Insufficient Funds". The check in question was introduced in evidence, identified by witness, and is attached to the record marked Prosecution's Exhibit 7. Upon cross-examination witness testified that the check was "redeemed" to him three or four weeks later by a lady who said she was accused's sister (R. 25), and that he signed a receipt for same, which was introduced as Defense Exhibit 2 and is attached to the record.

Mr. Ray F. Readett, manager of J. Drake Edens Super Markets, Columbia, South Carolina, testified as to Specification 2, Charge II, that on April 21, 1941, he cashed a check for accused for the sum of $10; he deposited the check in the bank to the store account, and a few days later it was returned "by the home office". Witness knows the check had been submitted to the bank because "We deposit direct but checks are returned by the home office". (R. 21) The check was received in evidence and is attached to the record marked Prosecution's Exhibit 5. The check in question is indorsed for deposit by J. Drake Edens, together with the stamped indorsement of the drawee bank, The Citizens and Southern National Bank of South Carolina, Columbia, S. C. There is attached thereto a printed slip, "check is returned by the drawee bank for the reason checked". The reason checked is "Insufficient Funds". The check was later paid by a lady who claimed to be a sister of accused. (R. 21) Witness executed a receipt for same which was introduced in evidence and is attached to the record marked Defense Exhibit 1. (R. 20-22)

Mr. Charles T. Hayes, a retail liquor dealer of Columbia, South Carolina, testified as to Specification 3, Charge II, that on April 21, 1941, he cashed a check for accused for $10. He deposited the check at the South Carolina National Bank (the full title of the drawee bank is The Citizens and Southern National Bank of South Carolina) and later it was returned to him marked "Insufficient Funds". The check was introduced in evidence and is attached to the record marked Prosecution's Exhibit 6. "Several weeks after the check came back" (R. 23) a young lady who said she was a sister of accused paid witness the amount of the check and he gave her a receipt for same dated May 8. (R. 22-24)

Mr. Stillwell Train, assistant cashier, Citizens and Southern National Bank, Columbia, South Carolina, testified that the checks,

Exhibits 5 (Edens Market check) and 6 (Hayes liquor store check) were presented to his bank for payment, the former just after April 21, and the latter on April 25 (R. 27), and that payment was declined by reason of the fact that accused did not have sufficient funds in the bank to cover them. (R. 27) Reference was then apparently made by the witness to the check for $20 cashed by the Columbia Hotel, dated April 19, 1941. Witness testified that accused had made no credit arrangements with the bank whereby it was to be paid. (R. 27) About the time these checks were cashed and came through the bank accused was paying off a $600 note due the bank at the rate of $150 per month. (R. 28)

> "It was specifically agreed that the bank had authority to charge the payment to his account on the first of each month and as we made the charge a copy of the debit slip was mailed to Lt. Jenkins." (R. 29)

In other words, the bank deducted the monthly payment by simply charging it against his account. (R. 29) Witness further testified that on April 20 and 21 accused had a balance of 78¢ in the bank, and that on April 22 and 23 he was overdrawn by 22¢. On cross-examination witness testified that if accused called to ask whether he had a balance in the bank he had no knowledge of it. (R. 27-31)

As to the Additional Charge and its Specification, it was stipulated in writing that accused was married to Miss Vera Elizabeth Ulmer on October 31, 1936; that on November 14, 1940, he married Myrtice Opal Gunter, and that at the time of the second marriage the first marriage was undissolved, and further "that I was married to Mrs. Vera Ulmer Jenkins, Jr., then living at Savannah, Ga., at the time of my marriage to Myrtice O. Gunter on November 14, 1940." This stipulation, signed by accused and approved by both his defense counsel, was accepted in evidence and is attached to the record marked Prosecution's Exhibit 1. (R. 13,14). It was also stipulated and agreed that certified copies of the following legal documents be introduced in evidence:

a. A marriage license issued to Edwin E. Jenkins, Jr., and Miss Vera Elizabeth Ulmer on October 27, 1936, and the certificate of marriage thereon signed by Walter H. Blanks, Pastor, on October 31, 1936.

b. A marriage license issued to E. E. Jenkins and Opal Gunter in the County of Saluda, State of South Carolina, on November 14, 1940,

and the certificate of marriage thereon signed by B. D. Wyse, Judge of Probate, Saluda County, South Carolina.

c. The complaint of Myrtice O. Gunter filed in the Richland County Court, State of South Carolina, in which the plaintiff alleges that at the time and prior to her marriage to accused she was informed by him that he was a single man, free from the bonds of wedlock and capable of entering into a contract of matrimony with the plaintiff; that after living with accused for several weeks she was informed by him and others that he had entered into a contract of matrimony in Savannah, Georgia, on October 31, 1936, from which marriage and union he had never been divorced or otherwise released; wherefore, the plaintiff prayed that the contract of matrimony be annulled and declared void. Attached to this complaint is an order signed by A. W. Holman, County Judge, declaring the marriage had between Myrtice O. Gunter and Edwin E. Jenkins on November 14, 1940, null and void, and directing the Judge of Probate for Saluda County to mark the marriage license issued by him to the above parties on November 14, 1940, canceled by reason of fraud.

All of these documents were read into the record without objection upon the part of accused and are attached to the record.(R. 14-20)

4. It does not appear of record that accused was advised of his rights as a witness in his own behalf, but he did make an unsworn statement, which is as follows:

> "I am 21 years old and am married. My wife and baby were in here a few minutes ago. You gentlemen saw him. I have been married almost five years. My baby is two years old and prior to the time I came into the Army I was employed as a butcher for about one year. Prior to the time I came into the Army I have never been in any trouble. I have never been in court. I was an enlisted man in the National Guard for six years. During that time I have a perfect record in the Guard. On induction into the regular service I was a N.G.U.S. Officer. I became an active Second Lieutenant and was assigned to the 118th. Field Artillery. Due to a shortage of officers in my regiment there was only two officers in my battery at the time and quite a number of times I had to stay in camp sometimes three and four week-ends without going home. On February the 14th. I received a promotion as a First Lieutenant and up until April the 22nd. I had not had any leave whatsoever. I applied for a seven day furlough to

start 22 April, 1941 and it was refused. Just before, prior to the time of my leaving I had an account with the Citizens and Southern National Bank in Columbia. I had been issuing checks on that bank for sometime. I never had a check returned, never had any trouble of any kind. The bank deducted $150.00 from my check each month. I borrowed this $600.00 to pay some bills I had. I did not keep a complete record of the checks I wrote and sometime between April the 10th. and April the 15th. I called the book-keeper and explained the situation to him and asked him to give me the balance and he told me the balance was $233.00 and I asked him if the $150.00 had been deducted for the note and he told me that it had been deducted. I wrote that down and I proceeded to issue checks on the basis of having $233.00 in the bank. When I went off and was gone for five days I found out that some of these checks had come back. When I wrote these checks I believed that I had the funds in the bank to cover them and as soon as I found out that they had come back I got in touch with my father and just as soon as he could get here he came up and paid everything. When I was inducted into the Army I lived in Savannah, Georgia. My wife did not come up here with me. She stayed in Savannah and due to the fact that there were not sufficient officers in the battery to warrant my going home every week-end or every other week-end, just like every other officer I got to having an occasional date with a young lady in Columbia. Prior to this time I never drank any whiskey at all. One night during November I went out to go on a little party and I took a number of drinks. Sometime during the course of the afternoon or night we were married. The next day I found out what had happened and I explained the situation to her and told her I could not marry her. I told her that we would have to have it annulled and that I would take care of the expense. We did not live together and we agreed to the annullment and I told her just as soon as I could get the money I would pay for it. Just as soon as I got the money we went to a lawyer and had the marriage annulled and I have not gone with her since. We did not live together." (R. 38-40)

5. The evidence as to all of the Charges and Specifications of which accused was convicted is clear and conclusive.

In his unsworn statement accused admitted that he contracted a bigamous marriage on November 14, 1940, but inferred that he was so drunk at the time he did not know what was going on. He did not deny that he issued the checks which were later returned by the bank to the several payees by reason of the fact that accused did not have a sufficient balance in the bank to cover them, but stated that someone at the bank had told him that he had a balance of $233 in the bank at the time he issued the checks in question. There is no verification of accused's unsworn statements to be found in the record, and it is evident that the court chose, as was its right, not to believe him.

6. All of the Specifications of which accused was found guilty are laid under the 95th Article of War. This Article of War denounces "conduct unbecoming an officer and a gentleman." Perhaps the most comprehensive and at the same time succinct definition of such conduct to be found in the many commentaries on military law is that given by Colonel Winthrop, which is as follows:

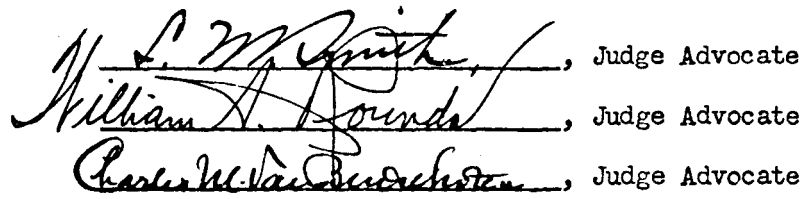
> "*** Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behaviour in an unofficial or private capacity, which, in dishonoring or disgracing the individual 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's Military Law and Precedents, page 713)

In the light of the evidence adduced before the court and measuring the conduct of accused by the high but just standard fixed by Colonel Winthrop's definition, there can be no doubt but that the court was fully warranted in its findings.

7. The charge sheet give's accused's age at the time of the commission of the offenses as 21 years, and accused, in his unsworn testimony before the court, also stated his age to be 21 years. However, examination of his 201 file shows that he has, on different occasions, given the date of his birth both as August 16, 1916, and August 16, 1919. He was commissioned a second lieutenant, Field Artillery Reserve, on August 9, 1939; entered on active duty on September 16, 1940; and was promoted to first lieutenant, Field Artillery Reserve, on February 14, 1941. He had about four and one-half years service in the National Guard

prior to his commission.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of violation of the 95th Article of War.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WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 217945

OCT 28 1941

UNITED STATES)	29th INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, June 30 and July 1, 1941. Dismissal.
)	
First Lieutenant WILLIAM J. TEPSIC (0-359328), Service Battery, 1st Battalion, 176th Field Artillery.)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, 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 94th Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

Specification 5: (Finding of not guilty.)

Specification 6: (Finding of not guilty.)

Specification 7: (Finding of not guilty.)

Specification 8: (Finding of not guilty.)

Specification 9: (Finding of not guilty.)

Specification 10: IN THAT 1st Lt. William J. Tepsic did, at Fort George G. Meade, Md., on or about May 10, 1941, knowingly and willfully apply to his own use and benefit approximately 12 gallons of gasoline of the value of about $.65, property of the United States furnished and intended for the military service thereof.

Specification 11: (Finding of not guilty.)

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

Specification 5: (Finding of not guilty.)

Specification 6: (Finding of not guilty.)

Specification 7: (Finding of not guilty.)

Specification 8: (Finding of not guilty.)

Specification 9: (Finding of not guilty.)

Specification 10: IN THAT 1st Lt. William J. Tepsic did at Fort George G. Meade, Md., on or about May 10, 1941, knowingly and willfully apply to his own use and benefit approximately 12 gallons of gasoline of the value of about $.65, property of the United States furnished and intended for the military service thereof, the aforesaid being conduct unbecoming an officer and a gentleman.

Specification 11: (Finding of not guilty.)

The accused pleaded not guilty to all Charges and Specifications. At the close of the case of the prosecution, a motion of defense for a finding of not guilty on all Charges and Specifications was denied. He was found not guilty of Specifications 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11, Charge I, and not guilty of Specifications 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11, Charge II. He was found guilty of Specification 10, Charge I, and of Charge I, and guilty of Specification 10, Charge II, and of Charge II. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Both Specifications of which accused was found guilty - one in violation of Article of War 94, and the second in violation of Article of War 95 - are based upon a single allegation of knowingly and willfully applying to his own use and benefit at Fort Meade, Maryland, on or about May 10, 1941, approximately twelve gallons of gasoline of the value of $.65, property of the United States, furnished and intended for the military service thereof.

The evidence in support of those Specifications shows that accused was Battalion Motor Officer, 1st Battalion, 176th Field Artillery, and Battery Motor Officer of the Battalion Service Battery, at Fort Meade, Maryland (R. 118-119). In the Service Battery, Master Sergeant William L. Tillery was in charge of the garage and maintenance (R. 11-12); Sergeant Robert C. Skillinger was motor sergeant (R. 119); Sergeant Kenneth Gould was supply sergeant (R. 87); Corporal Joseph B. Strang was in charge of supplies at the gas station (R. 48); and Private First Class Theodore V. Oltmann worked in the garage as a mechanic (R. 80). Some time after the regiment reached Fort Meade in February, accused approached Master Sergeant Tillery on the subject of gasoline and suggested that gasoline be put in the cars of accused, Sergeant Skillinger, and Sergeant Tillery (R. 13, 64). Each week accused would ask Sergeant Tillery, if he had put gas in the car of accused, if he had gotten the gas, or if the car of accused had been serviced. Sergeant Tillery gave direct orders to his men to put gas in car of accused (R. 13-14). When the question of how they were to get away with it came up, accused first suggested that they take the meter off the pump, but as that could not be done, accused told Sergeant Tillery to use the system of changing the gas records, by recording a larger amount of gasoline than actually delivered to a truck, draw off the extra amount in a drum so that the meter reading would correspond with the pump (R. 14). Thereafter, the drums would be taken out of the post and transfer made to the private car. Sergeant Tillery's three men,

Sergeants Gould and Skillinger, and Private Oltmann, would go out with the cars (R. 15). The transfers were always made on Saturdays (R. 17). On at least three occasions from date of arrival at Camp Meade to May 17, 1941, gasoline was drawn from the pump into ten-gallon drums, and the records changed at the end of the day to make up the difference (R. 18). The accused was present when the records were changed on the first day on which a record was changed (R. 19, 27, 52).

A record of Headquarters Battery, 1st Battalion, 176th Field Artillery, the automotive operations sheet of truck U.S.A. No. W-213891, shows the issue of eight gallons of gas on May 10, 1941 (R. 58; Ex. 1). That record was made by Sergeant Yakshe from the driver's original ticket of that day, which ticket had been destroyed (R. 59-60) with a five months' accumulation of trip tickets because of lack of room to keep them (R. 61-62). When gas was issued for a truck, Corporal Strang usually wrote it down on the issue slip and the driver signed for it (R. 56).

The records of the 1st Battalion Service Station of daily issue of gasoline and oils on "5/9/41", "5/10/41", and "5/12/41" (Ex. 3) were kept by Corporal Strang who himself made the figures thereon in his own handwriting, except the figures "13" showing the number of gallons of gasoline issued on May 10, 1941, to 1st Headquarters Battery vehicle No. 213891 (R. 48-49). That figure "13" was not the original figure but a smaller figure was erased and the figure "13" inserted by Sergeant Tillery, but not because of any error in the record (R. 26-28). The accused suggested that the built-up surplus be charged off so much to each vehicle (R. 45). Sergeant Tillery told Corporal Strang if any changes were made in the records, he, Sergeant Tillery, would make them (R. 51).

From the date the 176th Field Artillery arrived at Fort Meade to May 17th, gasoline was drawn from the 1st Battalion pumps, put in drums, and taken away from Fort Meade on three occasions (R. 18). During that period Government gasoline had been transferred from drums into the car of accused on at least three occasions (R. 66, 88-89, 92). At some time after the first occasion, Sergeant Tillery told accused that they were doing a risky business and that sooner or later it would "blow up". The accused replied, in substance, that he would back them up if anything happened (R. 68). The accused had passed on to Sergeant Tillery an order that no gasoline was to be put into drums without the order of an officer (R. 43).

On May 10, 1941, Private Oltmann saw gasoline pumped out of the tank at the battalion gas station into three drums which he drove out in the command car (R. 81-82). About midmorning, May 10, 1941, Sergeant Skillinger drove out each of the three private cars of accused, and Sergeants Tillery and Skillinger following Private Oltmann about six or seven miles from the post to the rendezvous (R. 66, 82), on a lane off a secondary road leading from the concrete road to Jessups (R. 70). About thirty gallons of gasoline out of three full ten-gallon drums was then put into the three cars by Sergeant Skillinger and Private Oltmann (R. 78, 82), of which one full drum, approximately ten gallons, was put into the car of accused (R. 66-67).

On Saturday, May 17, 1941, the accused brought the keys of his car to Sergeant Tillery, who told his men in the presence of accused to get the drums, put the gas in the drums, and take the car of accused out and put gas in it (R. 16-17). Sergeant Gould drove the command car, with three drums of gas on the back seat which to the best of his knowledge came from the 1st Battalion pumps, out on the road to place where arrested, to gas car of accused, or any other car which came out (R. 87-88). Sergeant Skillinger drove out his own car and then the car of accused (R. 68-69) for which Sergeant Tillery had given him the keys (R. 67). On that day George Bolm of the Anne Arundel County Police, went in response to a call to a spot near the Ridge Road, found Sergeant Gould sitting in an Army truck, took him into the police car and moved a short distance away. Sergeant Skillinger then came up in a Packard car with Pennsylvania tags. Mr. Bolm took the men and the car and turned them over to Military Police Headquarters at Fort Meade. At least one of the drums in the Government car was full (R. 69 , 86). Gasoline was transferred to the car of Sergeant Skillinger at the rendezvous but not to the car of accused (R. 91).

The accused came to the barracks about noon, May 17, 1941, and asked Sergeant Tillery where the men were with his car. Accused then got another car and started looking for his car (R. 20). The accused came later to Sergeant Skillinger's room in the barracks where Sergeants Tillery and Gould, and Private Oltmann were also present (R. 20, 69, 82). The accused talked with them as to what had happened that morning and how they were apprehended (R. 83). He told them to figure out for themselves which one would take the blame (R. 67), that whatever story they picked had better be a good one (R. 20); and that "you four had better get your stories straight, I'm out of this", and left (R. 82).

On the following Monday, when the accused returned from Pittsburgh, he asked Sergeant Tillery not to say anything if called to Military Police Headquarters. Sergeant Tillery replied that he did not know what he would say until he arrived there, but that he was not going to lie about it. Accused then said just to keep quiet and not say anything (R. 21). Later in the day, accused in the office of the garage told Sergeants Tillery, Skillinger, Gould and Private Oltmann that they should all get together, decide who would be the guilty one "to take the rap", and the rest of the men get behind him and back him up (R. 21, 90). Accused told Sergeant Skillinger it was up to him to take the blame, that accused would pay for the car which Skillinger had just bought, would make good his pay as sergeant and would guarantee he would be made a sergeant again in thirty days (R. 21, 69, 90). Sergeant Gould and Private Oltmann could not take the blame because neither owned a car (R. 21-22). Accused said he would take the blame, but did not do so. Accused later talked with Sergeant Tillery alone and kept insisting that there was a way out, and that he would not admit that he was guilty (R. 23).

4. Defense:

a. The accused testified, in pertinent part, substantially that as Motor Officer of the 1st Battalion, 176th Field Artillery (since January 1, 1941) (R. 118), it was his duty to see that the motor equipment was in operating shape and conduct classes in motor instruction. He issued instructions to the motor officers of batteries of the 1st Battalion and to Corporal Strang, gasoline supply operator of the Service Battery, 1st Battalion, that gasoline should be issued to Government motor vehicles, and that gasoline would be put into ten-gallon drums only upon written order of an officer of the 1st Battalion (R. 119). He also gave definite instructions to Sergeant Tillery not to place gasoline from the pumps in ten-gallon drums. There had not been to his knowledge any infraction of that rule either by the operator of the pump, or by the noncommissioned officers of his battery (R. 120). He never authorized Sergeant Tillery to use gasoline from the pumps for private vehicles, nor to make any change on the issue records of the Service Battery gas station. Government gasoline had not, to his knowledge, been put in his own car in April and May 1941. The tank of his car holds about fifteen gallons and he averages fourteen miles to the gallon. He made purchases of gasoline on credit from Gulf Oil stations; fourteen gallons on April 11, twelve gallons on April 21, five gallons on April 23, and five gallons on May 14, 1941. His June bill may show other purchases in May from Gulf Oil Company (R. 121-123). He also pur-

chased gasoline in Pittsburgh (R. 124). He made no purchases en route on trip to Pittsburgh (R. 126). On May 10th week-end when his wife and Lieutenant Deer's wife came down, he and Lieutenant Deer drove his car a maximum of sixty-eight miles. That included a trip to Ellicott City from 6:50 to 8 p.m., for which he signed out on the regimental register (R. 127). On the morning of May 12th he ran out of gas in front of regimental headquarters and gave Private Tipton $1 to replenish the gas (R. 128).

Every Saturday morning he had the routine of making a complete check of all motor vehicle and truck "parts". On Saturday, May 17th, when he planned a trip to Pittsburgh, at 11:55 a.m., he could not find his car on the officers' line. He asked Sergeant Tillery at the garage if Tillery had the car keys for which Tillery had asked that morning. Sergeant Tillery replied that he did not know anything, that he thought that Sergeant Skillinger had the car, but knew nothing else. Accused started on foot to officers' barracks where Colonel Bolick told him that if he wanted his car it was down at the 29th Military Police Company. Accused found the car there in front of the building, with its windows down and no one around it. The orderly inside the building knew nothing about the car and secured no result in a few attempts to find out (R. 128). Accused then wrote a note where he was taking the car and that he would be back Monday to find out why it was there. As he passed the barracks with his passengers, Colonel Bolick and Captain Rollins, he stopped to find out why his car was at the 29th Military Police Company. Upon opening the door to Sergeant Skillinger's quarters, he found Sergeants Tillery, Skillinger and Gould and Private Oltmann. They merely said that "the cops caught us". Sergeant Skillinger finally told him that he had the car of accused and was going to put gas in it, for which accused immediately reprimanded him. Accused then "told all four of them to get their stories together, to get them right", that he was going to Pittsburgh and coming back Sunday night and wanted to see all four of them Monday morning (R. 129).

Accused found on Monday morning that Sergeants Skillinger and Gould had gone to the 29th Military Police Company to sign some statement they had made Saturday afternoon. He tackled Sergeant Tillery who evaded all the questions asked of him. Later about 8:30 that morning, in response to a call, accused went down to the Military Police Company and talked to Colonel Moisan and Captain Faulkner. Accused could not make any answer to the number of questions they asked him because he did not know the story himself. He signed that statement to

the effect that he knew nothing about the whole thing. To their question why did he try to run out on the thing and leave for Pittsburgh, accused told them he was still under the impression that he was not involved, inasmuch as he had not issued any orders to put Government gas in his car. Monday afternoon, when he got the men together to try to find out definitely what happened, it was the same old story of "passing the buck", so accused told them "they had better get together and get their stories right", as accused expected a call from the colonel of his regiment. That evening, accused stopped in the chaplain's office, and told him about the boys (R. 129). On Tuesday afternoon, after he thought someone else had forgotten about the whole thing, in view of a remark of Colonel Curtis to that effect, he called the four boys into the office. He told them someone in there was guilty and he was going to find the guilty party. He asked a number of questions of each of them, but they were stubborn so that they arrived at nothing. On Wednesday morning about eleven o'clock, he was notified by Colonel Curtis that he was under arrest and confined to quarters (R. 130).

The accused categorically denied the truth of the charges that he had stolen the gasoline, that he had knowingly and willfully applied the gasoline to his own use and benefit, or that he had knowingly and willfully misappropriated the gasoline on the dates alleged (R. 130-131).

b. Upon cross-examination and upon examination by the court, the accused testified that he learned for the first time on May 17th that the boys had gone out to transfer gas into his car. Accused kept a fairly close watch on the amount of gasoline in his car. He found on the week-end of May 3-4th that it had more than he thought and ascertained later that Lieutenant Deer had put some in (R. 131-132).

Very early on the morning of May 17th, Sergeant Tillery asked accused for the keys to the car. He did not ask why Tillery wanted the car, nor did Tillery say what he wanted to do with it(R. 145). Several weeks before accused had asked Tillery to check, sometime after recall, the valves of his car because one was clicking slightly, about a fifteen minute job (R. 141, 143, 146). Accused made his vehicle inspections with no assistants (R. 153). Sergeant Skillinger's duties on Saturday mornings were in the garage and he was not expected at the inspection of the Service Battery (R. 152). As he was told he could pick up his car at Military Police Headquarters, he thought the Military Police Company was not going

to worry about it until Monday morning. No one but an orderly was there when he found his car there (R. 142). He used another of his several sets of keys to drive the car off (R. 144). After learning a few things by asking them questions, he reprimanded the four of them on Saturday in Sergeant Skillinger's room (R. 151). He made no official report of the matter, but on Saturday he did tell his battalion commander, Colonel Bolick, who was with him (R. 148). In his statement to military police on May 19, 1941, he said that Government gasoline had never, to his knowledge, been put in his car. He had run out of gas on Monday, May 12th, and another man gassed his car on May 4th (R. 134). The mileage on his car on April 13th was some miles over 12,700 and at present (July 1, 1941) was some miles over 14,900 (R. 137-138). He purchased gasoline at the Howland Texaco station in five gallon lots. His car was used a lot and by some other officers (R. 138). He was definite that he did not have a surplus of gas on week-end of May 10-11, 1941 (R. 139). He was surprised to hear that the military police had his car on May 15th (17) and was curious why they had it (R. 140).

Accused had never used Government gas in his car since induction into Federal service and had no knowledge that Sergeants Tillery or Skillinger had ever used Government gas in their private cars (R. 153). Corporal Strang alone had authority to alter records to correspond with meter reading. Sergeant Tillery was not so authorized. Accused denied everything that these men in the motor park had stated about the transactions. He had no reason to think that they would try to frame him. Prior to this time, there had been no enmities, arguments, or bad blood between accused and the enlisted men of the motor corps (R. 156).

c. Lieutenant Colonel C. P. Bolick, Commanding Officer, 1st Battalion, 176th Field Artillery, had ridden on four trips to Pittsburgh and on numerous other occasions in Packard car belonging to accused (R. 31). He bought gas, probably five gallons, for the car on April 5, 1941, on trip to Baltimore, because the tank was practically empty (R. 32), and on other occasions (R. 35). Gas was bought for the car on each trip to Pittsburgh. The passengers in the car split the expenses of the car in return for the furnishing of the car by accused (R. 33). At about noon, Saturday, May 17th, he called to accused, saying that the car of accused was down at the military police and that accused could get it if he went down right away. On trip to Pittsburgh that day, gas was bought at Frederick because the tank was practically empty (R. 34).

d. On a date not shown "in the last month or so", Private R. W. Heidkamp, Service Battery, 1st Battalion, 176th Field Artillery, overheard a conversation between Sergeants Tillery, Skillinger and Gould, and Private Oltmann that they were going to stick together. He did not hear the name of accused mentioned (R. 102).

e. Accused issued definite instructions at meetings of the motor officers of the batteries of the 1st Battalion, at which Sergeant Tillery and another sergeant from the Service Battery were present, that no gas from the 1st Battalion pumps was to be put in ten-gallon drums except for authorized purposes (R. 107-110).

f. The accused bought gasoline at Howland's service station in Laurel. The sales were for cash and the proprietor was unable to state definitely the number of times a week, or the dates of the purchases (R. 116).

g. Second Lieutenant J. A. Deer, Headquarters Battery, 1st Battalion, 176th Field Artillery, confirmed testimony of accused that Deer bought gasoline for the car of accused on trip to Baltimore on the week-end of May 3-4, 1941 (R. 110-111).

h. Private J. W. Topton, Headquarters Battery, 2nd Battalion, 176th Field Artillery, corroborated testimony of accused that accused gave him $1 to give to Sergeant Tillery to get gasoline, "about two months ago" (R. 117).

5. Prosecution in rebuttal:

Lieutenant Colonel Philip K. Moisan, Commanding Officer, Special Troops, and Headquarters Commandant, 29th Division, on Monday morning, May 19, 1941, first saw accused when accused came into the office of Special Troops upon his request, in the investigation of an occurrence on Saturday, May 17th, when at about 11:30 a.m., a Packard car with Pennsylvania tags was brought and placed directly in front of the headquarters. When Colonel Moisan and Captain Faulkner left at 12:30 p.m., for lunch at the Officers' Mess, fifty yards away, after interviewing Sergeants Gould and Skillinger, he directed Captain Faulkner to lock the car and keep the keys. One orderly was then on duty in Headquarters, Special Troops, but no instructions were left regarding the car. After lunch the car was not there. Upon calling Headquarters, 176th Field Artillery, he ascertained that accused and Colonel Bolick had left for Pittsburgh (R. 158-159). Accused came on Monday

Field Artillery at Fort Meade and May 17, 1941, gasoline was drawn from the pump into ten-gallon drums, transferred to car of accused, and the records changed at the end of the day to make up the difference; that on May 10, 1941, eight gallons of gasoline were issued to truck No. W-213891, and the records of the 1st Battalion service station changed by Sergeant Tillery, by erasing a smaller figure and inserting the figure "13" to show the issue of five excess gallons to that truck; that when Tillery told accused they were doing a risky business which might "blow up", accused replied that he would back them up; that on the morning of Saturday, May 17, 1941, when accused planned to drive that afternoon to Pittsburgh, accused gave to Sergeant Tillery, upon Tillery's request, the keys to his car without any question by accused as to the purpose for which the keys were wanted, and Tillery told his men, while the accused was there, to get the drums, put gas in them, take the car of the accused out and put gas in it; that the car of accused was then taken out to the rendezvous where Anne Arundel County police apprehended Sergeant Gould in a truck containing three drums, of which at least one was full and then apprehended Sergeant Skillinger as he drove up in the car of accused; that at noon after finding his locked car at Military Police Headquarters, and before driving to Pittsburgh, accused stopped at the barracks where he found four men, Sergeants Tillery, Skillinger and Gould, and Private Oltmann, all members of accused's battery, and after some conversation told them to figure out for themselves which one would take the blame, that whatever story they picked had better be a good one, and that "you four had better get your stories straight, I'm out of this", and left.

In the opinion of the Board, the transfer of the gasoline to his car on May 10, 1941, was with the full knowledge of accused, and the circumstances stated above demonstrate convincingly, notwithstanding the denials of accused, that the accused knowingly and willfully applied to his own use and benefit approximately ten - alleged as twelve - gallons of gasoline, property of the United States, furnished and intended for the military service thereof, the single offense alleged in the two Specifications, in violation of the 94th and 95th Articles of War respectively.

7. The allegation of the single offense under both the 94th and the 95th Articles of War is not good practice and not to be commended. A single punishment only should be adjudged and that with respect to the offense in its most serious aspect.

The willful application by an officer to his own use and benefit of property of the United States, furnished and intended for

morning to the Headquarters, Special Troops, at the request of Colonel Moisan. Accused was fully warned as to his rights, asked why and how his car was some six miles off in the woods, off the beaten road with a Government car containing drums in the immediate vicinity, and was told that Sergeants Skillinger and Gould had stated that they were there under the specific orders of Sergeant Tillery, and had been doing this on a number of Saturdays before. Accused then stated that his car was there contrary to any instructions that he had given and that he knew nothing about it (R. 160). The accused seemed rather well satisfied that he had done nothing wrong in using other keys to take a locked car from Military Police Headquarters. Colonel Moisan then phoned to Headquarters, 176th Field Artillery, because he wanted to interview accused on Saturday rather than on Monday (R. 161).

6. The proof that approximately ten gallons of Government gasoline were placed in the car of accused on Saturday, May 10, 1941, is clear and convincing. The evidence shows that on that day three ten-gallon drums were filled with gasoline drawn from the 1st Battalion pumps, taken in a command car to a rendezvous on a lane about six miles from Fort Meade and transferred into three private cars, of accused and of Sergeants Tillery and Skillinger, all driven to the rendezvous by Sergeant Skillinger, and that approximately ten gallons were placed in the tank of the car of accused.

The accused categorically denied the truth of all of the charges, including the charges of which he was found guilty, that he had knowingly and willfully applied Government gasoline to his own use as alleged. Upon cross-examination he stated that he learned for the first time on May 17th that the "boys" had gone out to transfer gas into his car; denied that he had ever used Government gasoline in his car since induction into the Federal service; and denied everything that the men in the motor park had stated about these transactions.

The fact that the gasoline was transferred to his car on May 10, 1941, with his knowledge and consent, is shown by the circumstances that accused, after arrival at Fort Meade, suggested to Sergeant Tillery that gasoline be put in the cars of accused and of Sergeants Tillery and Skillinger ; that accused suggested to Tillery the method of covering up the gasoline put in the cars, and was present on the first occasion that the records were changed; that on at least three occasions - no dates shown - between the arrival of the 176th

the military service, is conduct unbecoming an officer and a gentleman (Winthrop, Military Law and Precedents, reprint, p. 713).

8. One of the eight members of the court recommends clemency to the extent of suspension of the sentence of dismissal on the ground that the offense was not serious enough to warrant so severe a sentence and that the accused had performed his duties in the past in a highly satisfactory and successful manner.

In view of all of the circumstances surrounding the single offense of which accused was convicted, the Board of Review does not concur in that recommendation.

9. The accused is twenty-nine years old. The records of the Office of The Adjutant General show his service as follows:

> Federally recognized as 2nd Lieutenant, Field Artillery, Pennsylvania National Guard, and appointed to that grade in the National Guard of the United States, to date from July 6, 1937; Federally recognized as 1st Lieutenant, Field Artillery, Pennsylvania National Guard, and appointed to that grade in the National Guard of the United States to date from July 1, 1940; entered upon active duty February 3, 1941, pursuant to the order of the President, dated January 14, 1941.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War and is authorized upon conviction of the 94th Article of War.

Lester S. Field Jr., Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas N. Tappy, Judge Advocate.

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

Board of Review
CM 218143

OCT 4 1941

UNITED STATES	)	II ARMY CORPS
v.	)	Trial by G. C. M., convened at Fort George G. Meade, Maryland, September 6, 1941. Dishonorable discharge and confinement for one (1) year. Federal Correctional Institution, Danbury, Connecticut.
Private First Class ROCCO PANETTA (33000002), Company A, 93rd Infantry, Antitank Battalion.	)	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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

2. Accused was tried on a single charge, violation of the 93rd Article of War, and one Specification thereunder, alleging larceny. He pleaded not guilty to, and was found guilty of, the Charge and its Specification, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the Federal Correctional Institution, Danbury, Connecticut, as the place of confinement, and forwarded the record of trial for action under the provisions of Article of War 50½.

3. Accused was found guilty of the larceny of a Hamilton wrist watch, value about $40, property of Private First Class Steve P. Sytar. Private Sytar testified that he had purchased the watch in question from another soldier the day before it was stolen, June 18, 1941, at an agreed price of $40, $20 of which he paid down on the day he bought the watch, $10 on the day following his discovery that the watch had been stolen, and the final $10 on the following pay day (R. 9). Sergeant John A. Bednarczyk, who sold Private Sytar the watch, testified that he had ordered this watch specially from the Selinger Jewelry store in Washington, D. C., in December (1940) and took delivery on it around pay day in February, 1941 (R. 31), and that he paid $57.50 for it (R. 25).

Mr. Charles H. Heller, a salesman for the Selinger Jewelry store, who made the transaction, testified by deposition that the selling price of the watch in question was $57.50, but that an allowance of $5 for an old watch made the selling price of the watch $52.50 to Sergeant Bednarczyk (Pros. Ex. 9). Mr. Albert Goldberg, a pawnbroker and storekeeper, whose place of business is at 434 Ninth Street, Washington, D.C., testified that on June 18, 1941, the accused pawned a Hamilton wrist watch in his place of business under the name of John Hellman for $10. The model, the movement and the case number on this watch, as well as other marks of identification, disclose that it was the same watch which Private Sytar had purchased from Sergeant Bednarczyk (R. 58,59, 61,62). Accused redeemed this pledge on July 1, 1941 (R. 67,70).

The testimony cited above is the only evidence in the record of trial as to the value of this watch, and the watch itself was neither introduced into evidence nor was it even present before the court during the trial. No testimony whatever was offered by either side as to the present market value of this watch.

3. It is well established that except as to distinctive articles of Government issue or other chattels which, because of their character, do not have readily determinable market values, the value of personal property to be considered in determining the punishment authorized for larceny is market value (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs; CM 212983, Dilsworth; CM 213765, Krueger, et al.). There is no competent testimony in the record as to the market value of the article described in the Specification of which the accused was found guilty. To hold that the court could determine its definite market value would be to attribute to the members of the court technical and expert trade knowlege which it cannot legally be assumed they possessed (CM 208002, Gilbert; CM 208481, Ragsdale; CM 209131, Jacobs).

4. The maximum punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, for the larceny of property of value of not more than $20 is confinement at hard labor for six months. In the instant case the market value of the watch is not established by competent testimony, but since the character of the property clearly appears in evidence the court, from its own experience, may infer that it has some value (M.C.M., par. 149g, p. 173). It therefore follows that for the purposes of punishment the value of the watch in question cannot legally be found to exceed $20.

5. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding of guilty of larceny by the accused, at the time and place alleged, of one Hamilton wrist watch, case #948572, movement #J-113544, of some value not in excess of $20, and of ownership as alleged, in violation of the 93rd Article of War, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. In view of this holding the designation of the Federal Correctional Institution at Danbury, Connecticut, as the place of confinement becomes inappropriate.

F. M. Smith, Judge Advocate.
William H. Sounds, Judge Advocate.
Charles M. Van Buskirk, Judge Advocate.

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

Board of Review
CM 218150

NOV 7 1941

UNITED STATES)	CAMP WHEELER, GEORGIA
)	
v.)	Trial by G.C.M. convened at
)	Camp Wheeler, Georgia, August
Private EVERETT H. HINMAN)	6, 1941. Confinement for fif-
(6665178), Company D,)	teen (15) days and forfeiture
13th Training Battalion)	two-thirds pay for like period.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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

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

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

Specification: In that Private EVERETT H. HINMAN, Company D, 13th Training Battalion then Corporal, Company D, 13th Training Battalion did, without proper leave, absent himself from his organization at Company D, 13th Training Battalion, Camp Wheeler, Georgia, from about May 12, 1941 to about May 17, 1941.

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

Specification: In that Private EVERETT H. HINMAN, Company D, 13th Training Battalion Camp Wheeler, Georgia, then Corporal, Company D, 13th Training Battalion did, at Camp Wheeler, Georgia, on or about May 12, 1941, feloniously take, steal, and carry away one Automobile, value about $350.00, the property of Private 1cl JOHN W. SIGN, Company C, 13th Training Battalion, Camp Wheeler, Georgia.

He pleaded not guilty to all the Specifications and Charges and was found guilty of the Specification and Charge I and not guilty of the Specification and Charge II. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor at such place as the reviewing authority may direct for fifteen (15) days, and to forfeit two-thirds of his pay for a like period. The reviewing authority approved the sentence, ordered it executed, and designated Camp Wheeler, Georgia, as the place of confinement.

3. The record of trial (R. 3) discloses that although the members of the court, the personnel of the prosecution and the court reporter were "reminded that they were still under oath," none of them were sworn in their various designated capacities for the trial of this particular case, as required (A.W. 38) by the mandatory provisions of paragraph 95 Manual for Courts-Martial, which reads in pertinent part as follows:

> "The prescribed oaths must be administered <u>in and for each case</u> and to each member, trial judge advocate, assistant trial judge advocate, reporter, and interpreter before he functions in the case as such. * * *" (Underscoring supplied.)

This procedural requirement is based upon the 19th Article of War which provides in pertinent part as follows:

> "The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: * * *
>
> "When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: * * *"

Since none of the members of the court nor the personnel of the prosecution who participated in the trial findings and sentence in this case had been sworn, the court was not legally constituted and its proceedings are null and void (CM 145973; CM 150348; CM 135049; sec. 1351 (2), 1352, 1360 (2) and 1414 (3) Dig. Ops. JAG, 1912-1930).

4. For the reasons stated above the Board of Review is of the opinion that the failure to swear the members of the court and the personnel of the prosecution constitutes a fatal jurisdictional error, and further that since the execution of the sentence is based upon proceedings which are null and void, the forfeitures and confinement approved and ordered executed in pursuance thereof were without lawful authority and are of no legal effect.

C. M. Smith, Judge Advocate.

William H. Sands, Judge Advocate.

Charles M. VanDerdoten, Judge Advocate.

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

Board of Review
CM 218157

UNITED STATES	)	1st CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bliss, Texas, August 26,
Private JACK J. BEADLE	)	1941. Dishonorable discharge
(18018701), Troop G, 8th	)	and confinement for six (6)
Cavalry.	)	months. Fort Bliss, Texas.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

2. The accused pleaded guilty to and was found guilty of, the Specifications and Charges alleged. He was sentenced to dishonorable discharge, forfeiture of pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, and designated Fort Bliss, Texas, as the place of confinement.

3. The only question requiring consideration is whether the court which tried this case was legally constituted, and involves the single question whether Captain J. R. Hunnicutt, M.A.C., who sat as a member of the court, was legally detailed thereon at the time of the trial.

4. The charges in this case were, by 1st Indorsement, Headquarters 1st Cavalry Division, August 4, 1941, referred for trial to First Lieutenant F. R. King, 8th Cavalry, Trial Judge Advocate,

general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division, Fort Bliss, Texas, August 2, 1941.

By letter dated August 16, 1941, the charges referred to Lieutenant King for trial by the general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division, were transferred to Lieutenant King as trial judge advocate of the general court-martial appointed by paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941.

Paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941, appointing the court, did not detail Captain Hunnicutt as a member thereof. The court appointed by that order met at Fort Bliss, Texas, August 26, 1941, at 1:35 p.m., and proceeded to the trial of Private Jack J. Beadle (18018701), Troop G, 8th Cavalry (R. 2). The record of trial shows (R. 2) as present "Captain J. R. Hunnicutt, Med. Adm. Corps". No member of the court was challenged or excused (R. 3). The court adjourned at 2:30 p.m., on the same day (R. 9).

Paragraph 1, Special Orders No. 192, Headquarters 1st Cavalry Division, Camp at Reeves, Louisiana, dated August 19, 1941, reads as follows:

> "1. Captain J. R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Martial appointed to meet at Fort Bliss, Texas, by paragraph 1, Special Orders No. 185, this headquarters, dated August 2, 1941, vice, Captain WARD A. TREVERTON, O-280655, Ordnance Department, Post Headquarters, hereby relieved."

Paragraph 1, Special Orders No. 204, Headquarters 1st Cavalry Division, Camp at Flora, Louisiana, September 3, 1941, reads as follows:

> "1. Par 1, SO 192, Hq 1st Cav Div, 19 Aug 1941, is amended to read as follows:
>
> "'Captain J. R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Marshal appointed to meet at Fort Bliss, Texas, by paragraph 2, Special Orders No. 189, this headquarters, dated 13 August 1941, vice Captain WARD A. TREVERTON, O-280655, Ord Dept, Post Headquarters, hereby relieved.'"

5. Paragraph 1, Special Orders No. 204, dated September 3, 1941, amending paragraph 1, Special Orders No. 192, dated August 19, 1941, effectively detailed Captain Hunnicutt as a member of the court appointed by paragraph 2, Special Orders No. 189, dated August 13, 1941, as of the date of that order, September 3, 1941. That paragraph however, had no legal effect upon the status of Captain Hunnicutt upon the date of trial of this case, August 26, 1941. It failed entirely to give him the status nunc pro tunc of a detailed member of the court appointed by paragraph 2, Special Orders No. 189, dated August 13, 1941, and authorized to sit as a member of that court in the trial of this case on August 26, 1941.

6. The Judge Advocate General has held:

Where an officer who was not detailed thereon sat as a member of the court, the proceedings were thereby invalidated (CM 131672, Corradi; Dig. Ops. JAG 1912-30, sec. 1351).

In a case in which a member who was not detailed sat as a member of the court the Board of Review held:

> "When the court met there were six regularly detailed members and Lieutenant Forrest, who was not detailed a member, present (R. 3). Two of the regularly detailed members were excused and withdrew (R. 4). The court as thus constituted was without jurisdiction because an officer who was not detailed as a member, Lieutenant Forrest, participated in its proceedings and thereby rendered them null and void.* * *.
>
> * * *
>
> "* * *The officers who sat and acted as a court in this case were without jurisdiction, for the reason that, since one of them participated in a part of the trial without being legally detailed as a member, and in the remainder of the trial without being sworn after being detailed, the supposed court was not legally constituted.
>
> "The attempted trial is void because the tribunal before which it was held was not legally constituted.
>
> "C.M.No. 106409, Haust, Dec. 3, 1917.
>
> "C.M.No. 127892, Martin, April 7, 1919.
>
> "C.M.No. 135049, Hunnicutt, November 26, 1919.
>
> "Since the attempted trial was void the accused may hereafter be tried the same as if these proceedings

had not been held.

"Par. 149 (3) (b), M.C.M., 1921.

"C.M. No. 106409, Haust, December 3, 1917.

"C.M. No. 134857, Peacock, December 13, 1919."

(CM 152563, Stone.)

7. In the opinion of the Board of Review, Captain Hunnicutt, who participated in the proceedings, was not on the date of the trial of this accused, August 26, 1941, a legally detailed member of the court which tried this case.

8. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings and sentence.

Justus S. Reed, Jr., Judge Advocate.

Chas. L. Sesson, Judge Advocate.

Thomas H. Taffe, Judge Advocate.

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

Board of Review
CM 218158

NOV 7 1941

UNITED STATES	)	1st CAVALRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bliss, Texas, August 29,
Private RALPH F. STEWARD,	)	1941. Dishonorable discharge
Jr. (6296120), Troop G,	)	and confinement for six (6)
7th Cavalry.	)	months. Fort Bliss, Texas.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

2. The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence, ordered it executed, but suspended the dishonorable discharge, and designated Fort Bliss, Texas, as the place of confinement.

3. The only question requiring consideration is whether the court which tried this case was legally constituted, and involves the single question whether Captain J. R. Hunnicutt, M.A.C., who sat as a member of the court, was legally detailed thereon at the time of the trial.

4. The charges in this case were, by 1st Indorsement, Headquarters 1st Cavalry Division, August 15, 1941, referred for trial to First Lieutenant F. R. King, 8th Cavalry, Trial Judge Advocate, general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division, Fort Bliss, Texas, August 2, 1941.

By letter dated August 16, 1941, the charges referred to Lieutenant King for trial by the general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division, were transferred to Lieutenant King as trial judge advocate of the general court-martial appointed by paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941.

Paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941, appointing the court, did not detail Captain Hunnicutt as a member thereof. The court appointed by that order met at Fort Bliss, Texas, August 29, 1941, at 2:55 p.m., and proceeded to the trial of Private Ralph F. Steward, Jr. (6296120), Troop G, 7th Cavalry (R. 2). The record of trial shows (R. 2) as present "Captain J. R. Hunnicutt, Med. Adm. Corps". No member of the court was challenged or excused (R. 3). The court adjourned at 4:25 p.m., on the same day (R. 24).

Paragraph 1, Special Orders No. 192, Headquarters 1st Cavalry Division, Camp at Reeves, Louisiana, dated August 19, 1941, reads as follows:

> "1. Captain J.R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Martial appointed to meet at Fort Bliss, Texas, by paragraph 1, Special Orders No. 185, this headquarters, dated August 2, 1941, vice, Captain WARD A. TREVERTON, O-280655, Ordnance Department, Post Headquarters, hereby relieved."

Paragraph 1, Special Orders No. 204, Headquarters 1st Cavalry Division, Camp at Flora, Louisiana, September 3, 1941, reads as follows:

> "1. Par 1, SO 192, HQ 1st Cav Div, 19 Aug 1941, is amended to read as follows:
>
> "'Captain J.R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Martial appointed to meet at Fort Bliss, Texas, by paragraph 2, Special Orders No. 189, this headquarters, dated 13 August 1941, vice Captain WARD A. TREVERTON, O-280655, Ord Dept, Post Headquarters, hereby relieved.'"

5. Paragraph 1, Special Orders No. 204, dated September 3, 1941, amending paragraph 1, Special Orders No. 192, dated August 19, 1941, effectively detailed Captain Hunnicutt as a member of the court appointed by paragraph 2, Special Orders 189, dated August 13, 1941, as of the date of that order, September 3, 1941. That paragraph, however, had no legal effect upon the status of Captain Hunnicutt upon the date of trial of this case, August 29, 1941. It failed entirely to give him the status nunc pro tunc of a detailed member of the court appointed by paragraph 2, Special Orders No. 189, dated August 13, 1941, and authorized to sit as a member of that court in the trial of this case on August 29, 1941.

6. The Judge Advocate General has held:

Where an officer who was not detailed thereon sat as a member of the court, the proceedings were thereby invalidated (CM 131672, Corradi; Dig. Ops. JAG 1912-30, sec. 1351).

In a case in which a member who was not detailed sat as a member of the court the Board of Review held:

> "When the court met there were six regularly detailed members and Lieutenant Forrest, who was not detailed a member, present (R. 3). Two of the regularly detailed members were excused and withdrew (R. 4). The court as thus constituted was without jurisdiction because an officer who was not detailed as a member, Lieutenant Forrest, participated in its proceedings and thereby rendered them null and void. * * *
>
> * * *
>
> "* * * The officers who sat and acted as a court in this case were without jurisdiction, for the reason that, since one of them participated in a part of the trial without being legally detailed as a member, and in the remainder of the trial without being sworn after being detailed, the supposed court was not legally constituted.
>
> "The attempted trial is void because the tribunal before which it was held was not legally constituted.
>
> "C.M.No. 106409, Haust, Dec. 3, 1917.
>
> "C.M.No. 127892, Martin, April 7, 1919.
>
> "C.M.No. 135049, Hunnicutt, November 26, 1919.
>
> "Since the attempted trial was void the accused may hereafter be tried the same as if these proceedings had not been held.

"Par. 149 (3), M.C.M., 1921.
"C.M.No. 106409, Haust, December 3, 1917.
"C.M.No. 134857, Peacock, December 13, 1919."
(CM 152563, Stone.)

7. In the opinion of the Board of Review, Captain Hunnicutt who participated in the proceedings, was not on the date of the trial of this accused, August 29, 1941, a legally detailed member of the court which tried this case.

8. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings and sentence.

Arthur S. Pickett, Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas N. Jaffy, Judge Advocate.

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

Board of Review
CM 218159

NOV 7 1941

UNITED STATES	)	1st CAVALRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Bliss, Texas, August 29, 1941. Confinement for three (3) years. Disciplinary Barracks.
Private JAMES A. THORNAL (14043832), 60th Coast Artillery (AA), Philippine, Department, attached to Casual Detachment, Fort McDowell, California.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocate.

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

2. The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and to confinement at hard labor for three years. The reviewing authority approved only so much of the sentence as involved confinement at hard labor for three years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and ordered the execution of the sentence as modified.

3. The only question requiring consideration is whether the court which tried this case was legally constituted, and involves the single question whether Captain J. R. Hunnicutt, M.A.C., who sat as a member of the court, was legally detailed thereon at the time of the trial.

4. The charges in this case were, by 1st Indorsement, Headquarters 1st Cavalry Division, August 28, 1941, referred for trial to First Lieutenant F. R. King, 8th Cavalry, Trial Judge Advocate, general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division, Fort Bliss, Texas, August 2, 1941.

By letter dated August 28, 1941, the charges referred to Lieutenant King for trial by the general court-martial appointed by paragraph 1, Special Orders No. 185, Headquarters 1st Cavalry Division August 2, 1941, were transferred to Lieutenant King as trial judge advocate of the general court-martial appointed by paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941.

Paragraph 2, Special Orders No. 189, Headquarters 1st Cavalry Division, Camp at DeQuincy, Louisiana, dated August 13, 1941, appointing the court, did not detail Captain Hunnicutt as a member thereof. The court appointed by that order met at Fort Bliss, Texas, August 29, 1941, at 1:35 p.m., and proceeded to the trial of Private James A. Thornal (14043832), 60th Coast Artillery (AA), Philippine Department, attached to Casual Detachment, Fort McDowell, California (R. 2). The record of trial shows (R. 2) as present "Captain J. R. Hunnicutt, Med. Adm. Corps". No member of the court was challenged or excused (R. 3). The court adjourned at 2:40 p.m., on the same day (R. 19).

Paragraph 1, Special Orders No. 192, Headquarters 1st Cavalry Division, Camp at Reeves, Louisiana, dated August 19, 1941, reads as follows:

> "1. Captain J.R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Martial appointed to meet at Fort Bliss, Texas, by paragraph 1, Special Orders No. 185, this headquarters, dated August 2, 1941, vice, Captain WARD A. TREVERTON, O-280655, Ordnance Department, Post Headquarters, hereby relieved."

Paragraph 1, Special Orders No. 204, Headquarters 1st Cavalry Division, Camp at Flora, Louisiana, September 3, 1941, reads as follows:

> "1. Par 1, SO 192, Hq 1st Cav Div, 19 Aug 1941, is amended to read as follows:
>
> "'Captain J.R. HUNNICUTT, O-232973, MAC, is detailed as a member of the General Court-Martial appointed to meet at Fort Bliss, Texas, by paragraph 2, Special Orders No. 189, this headquarters, dated 13 August 1941, vice Captain WARD A. TREVERTON, O-280655, Ord Dept, Post Headquarters, hereby relieved.'"

5. Paragraph 1, Special Orders No. 204, dated September 3, 1941, amending paragraph 1, Special Orders No. 192, dated August 19, 1941, effectively detailed Captain Hunnicutt as a member of the court appointed by paragraph 2, Special Orders 189, dated August 13, 1941, as of the date of that order, September 3, 1941. That paragraph, however, had no legal effect upon the status of Captain Hunnicutt upon the date of trial of this case, August 29, 1941. It failed entirely to give him the status nunc pro tunc of a detailed member of the court appointed by paragraph 2, Special Orders No. 189, dated August 13, 1941, and authorized to sit as a member of that court in the trial of this case on August 29, 1941.

6. The Judge Advocate General has held:

Where an officer who was not detailed thereon sat as a member of the court, the proceedings were thereby invalidated (CM 131672, Corradi; Dig. Ops. JAG 1912-30, sec. 1351).

In a case in which a member who was not detailed sat as a member of the court the Board of Review held:

"When the court met there were six regularly detailed members and Lieutenant Forrest, who was not detailed a member, present (R. 3). Two of the regularly detailed members were excused and withdrew (R. 4). The court as thus constituted was without jurisdiction because an officer who was not detailed as a member, Lieutenant Forrest, participated in its proceedings and thereby rendered them null and void.* * *.

* * *

"* * *The officers who sat and acted as a court in this case were without jurisdiction, for the reason that, since one of them participated in a part of the trial without being legally detailed as a member, and in the remainder of the trial without being sworn after being detailed, the supposed court was not legally constituted.

"The attempted trial is void because the tribunal before which it was held was not legally constituted.
"C.M.No. 106409, Haust, Dec. 3, 1917.
"C.M.No. 127892, Martin, April 7, 1919.
"C.M.No. 135049, Hunnicutt, November 26, 1919.

"Since the attempted trial was void the accused may hereafter be tried the same as if these proceedings had not been held.

"Par. 149 (3) (b), M.C.M., 1921.

"C.M.No. 106409, Haust, December 3, 1917.

"C.M.No. 134857, Peacock, December 13, 1919."

(CM 152563, Stone.)

7. In the opinion of the Board of Review, Captain Hunnicutt, who participated in the proceedings, was not on the date of the trial of this accused, August 29, 1941, a legally detailed member of the court which tried this case.

8. The Board of Review is, therefore, of the opinion that the record of trial is not 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 218166

OCT 7 1941

UNITED STATES	)	1ST ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, August 18, 1941. Dishonorable discharge and confinement for three (3) years. Reformatory.
Private EDWARD D. HOSLER (15010805), Headquarters & Headquarters Company, Armored Force.	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, 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 pleaded not guilty to and was found guilty of five Specifications: (1) of wrongful and unlawful conversion to his own use a letter containing $21 in cash; (2) of wrongful and unlawful conversion to his own use of money order for $5 contained in a letter; and (4, 11 and 12) on July 22, 1941, of wrongfully and in violation of his trust taking from the message center and opening a letter addressed to another soldier; all in violation of Article of War 96. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the findings and sentence, but remitted seven years of the confinement imposed, designated the "United States Reformatory," Chillicothe, Ohio, as the place of confinement and forwarded the record of trial under Article of War 50½.

3. The evidence supports the findings of guilty of the five Specifications and of the Charge. The only question requiring consideration is the legality of the sentence approved, and of the designated place of confinement.

The first two Specifications allege the wrongful conversion of a letter containing $21 in cash, and a money order for $5, respectively. There is no maximum penalty prescribed in the table of maximum punishments (par. 104c, M.C.M., 1928) for that offense. The most closely related offense is that of embezzlement, for which the maximum penalty is dishonorable discharge, total forfeitures and confinement for six months as to property of a value of $20 or less, and dishonorable discharge, total forfeitures and confinement for one year as to property of a value of $50 or less and more than $20. The aggregate maximum authorized punishment under Specifications 1 and 2 is, therefore, dishonorable discharge, total forfeitures and confinement for one year and six months.

4. Specifications 4, 11 and 12 each allege the wrongful taking from the message center and the opening in violation of his trust, of a letter addressed to another soldier. The three offenses were alleged to have been committed upon the same day and there is no proof that three separate offenses were in fact committed. There is no proof that there was more than a single taking. It follows that only a single punishment should be imposed under the findings of guilty of the three offenses alleged. There is no maximum punishment prescribed for that offense in the table of maximum punishments (par. 104c, M.C.M., 1928), nor is there any closely related offense for which a maximum punishment is prescribed in the table of maximum punishments. In the opinion of the Board of Review, additional confinement for six months is a proper punishment for that offense.

Confinement in a Federal reformatory is not authorized unless confinement in a penitentiary is authorized under Article of War 42, upon conviction for an act or omission recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the continental United States, excepting section 289 Penal Code of the United States (18 U.S.C. 468), or by law of the District of Columbia. No one of the offenses of which accused was here convicted is so punishable by confinement in a penitentiary.

5. For the reasons above stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at

hard labor for two years.

Curtis J. Hill Jr. Judge Advocate.

Chas. L. Sessons Judge Advocate.

Thomas N. Tappey Judge Advocate.

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DATE	BORROWER'S NAME	EXT.